

PROTECTING THE PROPERTY OF THE MENTALLY ILL: THE JUDICIAL SOLUTION IN NINETEENTH CENTURY LUNACY LAW*

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INTRODUCTION

Mental illness is a growing burden on modern society and the economy.¹ Balancing the degree of formal protection imposed on the property and person of the mentally ill against that of personal control, responsibility and independence is a challenge inherent in conceiving and implementing an effective legal framework for the care of this sector of society. Contemporary legal provision and perception in this respect evolved from the legal and administrative frameworks established during the nineteenth century as a result of the rapid and considerable increase in mental illness during that period. The number of individuals recognised by the law as lunatics, the contemporary legal and accepted term for those individuals who had become of unsound mind but for whom there was at least the possibility of recovery,² rose dramatically in the nineteenth century. Official statistics show that in 1845 the number stood at 25,000 with the figure rising to 77,000, by 1883, and to 124,000 by 1908.³ The reasons for this increase were complex and various.⁴ Not only was the population as a whole rapidly increasing, doubling between 1837 and 1901,⁵ it was ageing. The increased life expectancy resulted in a much greater proportion of elderly individuals, many with problems of deteriorating mental faculties that were, for legal purposes, classified as unsoundness of mind. The intensity of industrial and commercial advancement experienced in the nineteenth century changed both working practices and living conditions. Long hours in physically challenging employment conditions, using substances that would only later be regulated once their effect on the nervous system had been understood, and living in often squalid and crowded conditions of extreme poverty with no amenities, contributed to levels of stress and mental illness. Furthermore, the changing demographics resulting from the rapid economic development of the early nineteenth century, notably the migration of labour from the countryside to urban centres, resulted

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¹ See NHS Information Centre, Mental Health and Community, *Mental Health Bulletin: Fourth Report from Mental Health Minimum Dataset and Annual Returns 2010* (NHS 2011); Mental Health Foundation, *The Fundamental Facts*, (Mental Health Foundation, 2007).

² Anthony Highmore, *A Treatise on the Law of Idiocy and Lunacy*, (London, 1807, repr. New York, 1979, pp.1-14); H.M.R. Pope, *A Treatise on the Law and Practice of Lunacy*, 2nd edn, (Sweet and Maxwell, London, 1890) pp. 10-21.

³ Report of the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers 1908* (4202) xxix 159 at para 646, p. 400

⁴ See Andrew Scull, *The Most Solitary of Afflictions: Madness and Society in Britain 1700-1900* (Yale University Press, New Haven and London 1993) pp. 334-74; D. J. Mellett, *The Prerogative of Asyludom* (Garland Publishing Inc., New York and London 1982) pp. 47-85.

⁵ From nearly 14 million in 1837 to over 30 million in 1901 (England and Wales): B.R. Mitchell and P. Deane, *Abstract of British Historical Statistics*, (Cambridge University Press, 1962) pp. 6-7.

in the breakdown of networks of family support, which were consequently not available to mitigate either the effects of the social and economic changes on individuals, nor the burden on the state to care for afflicted individuals.⁶

The response to this severe social problem was the orthodox one the Victorian state adopted with respect to all such challenges. Public health, education, working conditions and poverty were just some instances where the forces of the state were mobilised to effect wide-ranging and often radical social reforms.⁷ Only the intervention of the state could address the enormity of the lunacy problem. Adopting the Benthamite model of identification of the social evil, followed by intensive official empirical investigation, reforming legislation and its implementation by an organ of varying degrees of independence from the executive, lunacy was brought fully within the ambit of state regulation in 1845. The legislation addressed essentially the certification, detention and protection of the persons of the insane, irrespective of their property. It aimed to end abuse, ensure that individuals were admitted only to licensed premises on the correct orders and certificates,⁸ and to provide institutionalised care for pauper lunatics in public county asylums.⁹ The permanent bureaucratic organ of regulation was the Lunacy Commission,¹⁰ with the responsibility of regulating the detention of lunatics and supervising their care. In line with other contemporary policies of centralisation, the Lunacy Commission was an independent, advisory and reporting authority, with the implementing bodies being the local magistrates.

Social and humanitarian needs ensured this administrative framework was directed to the protection of the insane poor, because the very great majority of lunatics were categorised as pauper lunatics. When the total number of lunatics stood at some 71,000 in 1880, 90% were paupers maintained at the public expense, with the remaining 10% being maintained from their own resources.¹¹ And yet, while an increase in the number of the insane was a tragic unforeseen and unwelcome consequence of the industrial revolution, a desired outcome of rapid economic development was an immense growth in national wealth.¹² Furthermore the distribution of this wealth adopted a new pattern. It was less polarised, permeating the social classes to a greater

⁶ See generally Derek Fraser, *The Evolution of the British Welfare State*, 3rd edn. (Palgrave: Macmillan, 2003).

⁷ See generally A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*, 2nd edn, (London: Macmillan and Co., 1940); David Roberts, 'Jeremy Bentham and the Victorian Administrative State' 2 *Victorian Studies* 193-210 (1959); William C. Lubenow, *The Politics of Government Growth* (Newton Abbot: David and Charles, 1971).

⁸ An Act for the Regulation of the Care and Treatment of Lunatics 1845 (8 & 9 Vict. c. 100).

⁹ Lunatics Act 1845 (8 & 9 Vict. c.126). See J.K. Walton, 'Casting out and bringing back in Victorian England: pauper lunatics 1840-70' in W.F. Bynum, Roy Porter and Michael Shepherd (eds) *The Anatomy of Madness: Essays in the History of Psychiatry*, 3 vols., (Tavistock Publications, London, 1985) vol. 2, pp.132-146.

¹⁰ See generally, D. J. Mellett, 'Bureaucracy and Mental Illness: the Commissioners in Lunacy 1845-90', 25 *Medical History* (1981) 221-50.

¹¹ C. Lockhart Robertson, *Lunacy in England: England's Irren-Wesen*, (LSE Selected Pamphlets: 1880) p. 1.

¹² M. J. Daunton, *Progress and Poverty* (Oxford University Press, 1995) pp. 125-45; Martin Daunton, 'Society and economic life' in *The Nineteenth Century*, Short Oxford history of the British Isles, Colin Matthew (ed), (Oxford University Press, 2000) pp. 41-82.

degree than ever before and responsible for the creation of a new propertied middle class.¹³ The interaction of these two social and economic phenomena inevitably resulted in the significant increase in the mentally ill of small property.

The extent of property ownership of individual lunatics was clearly as varied as in the rest of the population. All strata of society included unfortunate individuals who had, from a variety of causes not then fully understood by medical science, lost their sanity as it was then conceived. From the middle of the nineteenth century the great majority of the lunatic population consisted of the mentally ill received into institutionalised care as a result of reception orders made on the certificates of medical practitioners and a justice of the peace, popularly known as 'certified' lunatics. Not all of these were paupers in the strict legal sense being in receipt of parish relief. It was rather that their insanity made it impossible for them to continue to earn their living and so could not afford treatment in a private asylum. The fact that an individual was in immediate need of this kind of treatment and could not afford it, sufficed to bring that person within the meaning of pauper for the purposes of the lunacy legislation.¹⁴ Others were not wealthy but were able to pay for care in a private asylum or the private wing of a state pauper asylum. The Annual Reports of state asylums and the records of private asylums reveal a significant proportion of professional individuals, skilled craftsmen, shopkeepers, farmers, clergymen, army and naval officers, and their wives or widows, among their patients.¹⁵ Official reports suggest that such individuals often possessed small estates, of perhaps £500 or £1000 in capital value, yielding between £50 and £100 income a year, or incomes up to about £200 pa.¹⁶ Although as individuals they were rarely wealthy, collectively they were worth some £1 million per annum, produced by a capital sum of several millions.¹⁷

It had always been understood that the property of the mentally ill needed to be protected. Where it was not possible for the mentally ill to be maintained by advances from friends or relatives,¹⁸ a course that difficulties of capacity and title made desirable, the patient's property would be managed by his family as well as they could, though such management was inevitably difficult, irregular and haphazard. In practice, in most cases, the lunatic's family and friends managed the property genuinely for the patient's

¹³ See generally M. J. Daunton, *Progress and Poverty* (Oxford University Press, 1995) pp. 198-201; Norman McCord, *British History 1815-1906*, Short Oxford history of the Modern World, J. M. Roberts (ed) (Oxford University Press, 1991) pp. 98-107).

¹⁴ Lunacy Act 1890 (53 Vict. c.5) s.18; Minutes of Evidence before the Select Committee on Lunacy Law, *House of Commons Parliamentary Papers* 1877 (373) xiii 1, qq. 7723-27; 7809 per Dr Maury Deas, Medical Superintendent of a county public asylum.

¹⁵ See for example the annual reports of the Surrey Lunatic Asylum between 1843 and 1850: London Metropolitan Archives [hereafter LMA] H46/SP/A/02/001-2. See too Minutes of Evidence before the Select Committee on Lunacy Law, *House of Commons Parliamentary Papers* (1877) (373) xiii 1, qq. 7943, 7973 per Richard Adams, superintendent of the Cornwall Asylum at Bodmin.

¹⁶ Minutes of Evidence before the Select Committee on Lunacy Law, *House of Commons Parliamentary Papers* (1877) (373) xiii 1, qq. 5773-4 per William Parkinson, Master of the Workhouse at Bermondsey.

¹⁷ Further Report of the Commissioners in Lunacy, *House of Commons Parliamentary Papers* 1847-8 (858) xxxii 371 at 438.

¹⁸ Minutes of Evidence before the Select Committee on Lunacy Law, *House of Commons Parliamentary Papers* (1877) (373) xiii 1, q. 10837 per Charles Wilde, Registrar in Lunacy.

benefit, did not defraud him and used the property properly to ensure he was looked after and his estate was preserved. However there were no sanctions if this obligation, which was no more than a moral duty, was abused. Abuse ranged from expenditure which was not strictly for the benefit of the lunatic, to downright fraud and theft, a practice that was easy where ready cash and disposable chattels were concerned. Instances of misappropriation were numerous. For example, it was well known that many lunatics were given very small allowances by their families, even though there was plenty of available income, so that the heir and next of kin would benefit from a larger inheritance. Property was equally vulnerable to dissipation through management that was honest but incompetent. It was also understood that the law should protect lunatics from squandering their property either through their own lack of judgment or through their exploitation by third parties. The evidence suggests that such unilateral squandering of money was relatively rare, mainly because members of the individual's family were generally sufficiently interested to interfere at an early stage to prevent it.¹⁹ The greater danger was the unscrupulous abuse of the mentally ill by third parties, by 'designing persons who plundered' them.²⁰ Undoubtedly, and most importantly, the ownership of substantial property provided a strong motive for improper detention as a lunatic by the family and pecuniary misappropriation,²¹ and a strong argument for special supervision.

The connection of these two factors - the need for legal safeguards to protect the property of the mentally ill from abuse, and the growth in the numbers of mentally ill individuals with small properties - created a significant challenge to the nineteenth century legal order in lunacy. The aim of this article is to explore how this challenge was met, which solution was adopted to address the problem of small estates and, in so doing, to assess the extent to which the Victorian legislature and judicature demonstrated a real commitment to ensuring the protection of the smaller properties of the increasing numbers of middle and working class mentally ill. It examines how, if at all, the mentally ill with small estates were able to establish themselves in the turbulent regime of lunacy law administered by two parallel and distinct systems rife with jurisdictional tensions. It discusses whether the paternal and esoteric jurisdiction of the Lord Chancellor in lunacy was appropriate to the new social and economic conditions and whether it was accessible to patients of small property. It queries how far the creation of a bureaucratic structure for the management of lunacy addressed the issue of property ownership and explores the interaction between the state's regulation of lunacy and the jurisdiction of the judicial authorities in this respect at a time when fundamental principles of jurisdiction in this field of social and legal development were being formulated. By identifying the conflicts and tensions, and examining the imperatives

¹⁹ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4215) xxxv 83 q. 2984 per T.H. Fischer, Master in Lunacy.

²⁰ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4215) xxxv 83 q. 2985 per T.H. Fischer, Master in Lunacy.

²¹ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 q. 29599 per Sir James Crichton-Browne, Lord Chancellor's Visitor in Lunacy. See too Roy Porter, *Mind Forged Manacles* (Athlone Press, London, 1987) pp. 112-14; 148-55.

that drove the development of the law to their resolution, this article reveals a new perspective on the attitude of the judiciary towards the movement for state intervention in lunacy in nineteenth century England.

THE JURISDICTION OF THE LORD CHANCELLOR

So evident was the danger of pecuniary misappropriation, and so obvious the need to protect lunatics' property, that a specialised legal regime developed to do so. It was ancient and was derived from the royal prerogative.²² As *parens patriae* the king had the right and duty to care for those incapable of looking after themselves, and since lunatics, like children, were inherently vulnerable, they clearly required the protection of the law.²³ The king delegated this jurisdiction, whose origins Sir Henry Theobald admitted were 'lost in the mists of antiquity',²⁴ to the Lord Chancellor personally.²⁵ From 1842, as a result of the reforms of Lord Lyndhurst,²⁶ this jurisdiction was exercised in a department quite separate from the Court of Chancery, known variously as the Lunacy Department, Office, or Court. This administrative distinction reflected the nature of the jurisdiction itself, which was accepted as quite separate from that of Chancery.²⁷ Though nowhere stated, the jurisdiction came to concentrate almost exclusively on the property of persons of unsound mind.²⁸ It was declared in a statute of 1324 entitled *De Prerogativa Regis*, which stated that the lands of lunatics 'shall be safely kept without Waste and Destruction, and that they and their Household shall live and be maintained competently with the Profits of the same, and the Residue besides their Sustenance shall

²² See F. W. Maitland, 'The "Praerogativa Regis"', 6 *English Historical Review* 367-72 (1891); H.S. Theobald, *The Law Relating to Lunacy* (London, Stevens & Sons, 1924) pp. 1-9.

²³ The jurisdiction was clearly founded on necessity. See *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20 *per* Lord Eldon.

²⁴ Sir Henry Theobald was Master in Lunacy from 1907-22: H. S. Theobald, *The Law Relating to Lunacy* (London, Stevens & Sons, 1924) p. iii. He suggests that it was taken from the feudal lords by Edward I, either by consent or by a statute no longer extant (*ibid* p.1). For the early history of lunacy jurisdiction see W.S. Holdsworth, *A History of English Law*, vol. 1 (Methuen & Co, London, 1903) pp. 261-63; Sir F. Pollock and F. W. Maitland, *The History of English Law*, 2nd edition, 2 vols. (Cambridge: Cambridge University Press, 1898 reissued 1968), vol. i p. 481. See too Sallyanne Payton, 'The Concept of the Person in the *Parens Patriae* Jurisdiction over Previously Competent Persons', 17 *Journal of Medicine and Philosophy* 605-645 (1992).

²⁵ The jurisdiction was transferred to the Court of Wards and Liveries when that court was created in 1540 by 32 Hen VIII c. 46 and remained there until 1660 when the Act 12 Car II c. 24 transferred exercise of the royal prerogative over idiots and lunatics to the Lord Chancellor. By the middle of the nineteenth century the jurisdiction could be exercised by anyone for the time being entrusted by virtue of the sign manual, and by the dawn of the twentieth century, nine judges were exercising the jurisdiction - the Lord Chancellor, the Master of the Rolls, five Lords Justices and two Masters. See H. M. R. Pope, *A Treatise on the Law and Practice of Lunacy* (Sweet & Maxwell, London, 2nd edn. 1890) pp. 21-29.

²⁶ See J. B. Atlay, *The Victorian Chancellors* 2 vols., vol. 1 p. 140 (London: Smith, Elder & Co., 1906)

²⁷ See the statement of James LJ where he famously observed that '[U]nsoundness of mind gives the Court of Chancery no jurisdiction whatever': *Beall v. Smith* (1873) LR 9 Ch App 85 at 92.

²⁸ The early law shows that it was not limited to property: see Lord Coke in *Beverley's Case* (1603) 4 Co Rep 123b at 126a-b.

be kept to their Use, to be delivered unto them when they come to right Mind.²⁹ As a lunatic was, by definition, presumed to be capable of recovery, the statute made it clear that the king could take nothing for himself from the lunatic's land. He could never be more than a trustee, to protect the lunatic's real property and account to him for all the profits of the estate on his recovery or, if he did not recover, to his heirs on his death.³⁰

The inherent jurisdiction of the Lord Chancellor over the property of lunatics was, in legal theory, unlimited and incapable of definition.³¹ Its scope was discussed in a case on wardship in 1828, where Lord Redesdale drew the analogy between the jurisdiction over infants and that over the mentally incompetent and observed that it went 'as far as is necessary for protection and education'.³² What was clear was that the jurisdiction was to be exercised for the benefit of the individual. The Lord Chancellor had to administer the property so as to keep it safe, to protect it from risk and hazard, and in the interests of the lunatic who owned it.³³ The court aimed to represent the lunatic himself as far as possible, to 'supply the place in society and the state which his withdrawal has rendered void'.³⁴ The court was his 'mind and soul' and in its practice it acted as a 'prudent and occasionally selfish man of the world'; it was 'tentative and unadventurous, open-handed, to avoid probable loss; sparing, to make possible gain; supremely concerned for his own comfort, and disregarding of the interests and expectations of others'.³⁵

Throughout the nineteenth century this jurisdiction was made more explicit through its declaration in statute, a clarification which was beneficial to the lunatics and their legal advisers in the administration of their estates in lunacy. The Infants' Property Act 1830³⁶ permitted the property of lunatics to be sold or charged to pay debts, discharge incumbrances and pay for the costs of obtaining a commission in lunacy, and the Property of Lunatics Act 1852 extended the the Lord Chancellor's power to any estate or interest of the lunatic in land or stock, in reversion or remainder or expectancy, in order to authorise the payment of any expenditure made or debt incurred for the maintenance or otherwise for the benefit of the lunatic, and payment of his expenses of maintenance.³⁷ The statutory articulation of the Lord Chancellor's powers over lunatics' property continued in the following year, when the Lunacy Regulation Act 1853 was devoted almost entirely to the subject. It gave the Lord Chancellor the widest powers to manage a lunatic's estate and to go beyond mere powers of management in that the court was given the power to sell or mortgage the

²⁹ 17 Edw II c. 10 (1324). This short Act is called the Lands of Lunatics Act in the *Chronological Table of Statutes*.

³⁰ *Frances' Case* (1537) Moore K.B. 4; *Prodgers v Frazier* (1684) 3 Mod 43. The legal position of idiots, who by law were presumed to have been born with a mental disability and be incapable of recovery, was quite different: see the Lands of Idiots Act, 17 Edw II c. 9 (1324).

³¹ *Wellesley v Wellesley* (1828) 2 Bli NS 124 at 142-3 *per* Lord Manners.

³² *Wellesley v Wellesley* (1828) 2 Bli NS 124 at 136 *per* Lord Redesdale.

³³ *Oxenden v Lord Compton* (1793) 2 Ves Jun 69 at 73 *per* Lord Loughborough LC.

³⁴ H. M. R. Pope, *A Treatise on the Law and Practice of Lunacy*, 2nd edn, (Sweet and Maxwell, London, 1890) p.158.

³⁵ H. M. R. Pope, *A Treatise on the Law and Practice of Lunacy*, 2nd edn, (Sweet and Maxwell, London, 1890) p.158.

³⁶ 11 Geo. IV & 1 Will. IV c. 65.

³⁷ Property of Lunatics Act 1852 (15 & 16 Vict c. 48) s. 1.

corpus of the lunatic's estate in land or stock, whatever the nature of the interest, in order to raise money to be applied towards the payment of his debts, the discharge of any incumbrance on his estate, the expense of his current and future maintenance and the expenses of the inquisition.³⁸ The Act permitted, with the sanction of the Lord Chancellor, the conveyance of land in the performance of a contract, of partnership property, the sale, partition or exchange of land in which the lunatic had an undivided share, the sale of land for building purposes, the assignment of business premises, the disposition of an undesirable lease, and the granting of building and other leases.³⁹ The full extent of the Lord Chancellor's powers to manage and administer the property of lunatics was explicit in the Lunacy Act 1890.⁴⁰

The law's exclusive focus on the protection of lunatics' property rather than the condition of their lunacy or the protection of their person was significant and clearly revealed the priorities and values of both medieval and modern legislators. In their terms, however, the statutory provisions did not limit the Lord Chancellor's protection to any size of estate. Indeed, *De Prerogativa Regis* was widely worded to include all lunatics with any amount of property, the wealthy and modest. In all circumstances, the Crown had a legal duty to protect the property of a lunatic. But what came to be a material factor in terms of the size of a lunatic's estate was the availability of the Lord Chancellor's protection under his inherent jurisdiction only to those lunatics 'so found', a limitation which lasted until 1908. A lunatic 'so found' was one who had been judged of unsound mind so as to be incapable of governing himself and his affairs⁴¹ by a trial known as an inquisition, the writ for which issued from the Chancery.⁴² Lunatics 'so found' were accordingly generally known as 'Chancery lunatics'. The inquisition process began with a petition to the Lord Chancellor made by a friend or relative of the alleged lunatic, accompanied by the findings of qualified medical practitioners and details as to the lunatic's circumstances and property. The petition was heard by the judge in chambers, and if there was a prima facie case, he would order an inquiry to be held by officers of the lunacy court with a jury. This inquisition was held in the lunatic's home or his asylum, often in his presence, and frequently with the attendance of counsel, but it was an open court at which the public was entitled to attend.⁴³ If the inquisition found that the patient was of unsound mind and incapable of managing his affairs, the court would ascertain the extent of his or her property and the income arising from it, identify the heir and next of kin and ensure the protection of the person and property.⁴⁴ All this, including the history and nature of the lunacy, had to be reported

³⁸ Lunacy Regulation Act 1853 (16 & 17 c.70) s.116.

³⁹ Lunacy Regulation Act 1853 (16 & 17 c.70) ss. 122-134.

⁴⁰ 53 Vict. c. 5 ss. 116-143.

⁴¹ Danby P. Fry, *The Lunacy Acts* (London, Knight and Co., 1864) pp. 5-6.

⁴² Sir William Blackstone, *Commentaries on the Laws of England*, 1783 edition printed for W. Strahan and T. Cadell, London and D. Prince, Oxford, 4 vols., (New York: Garland Publishing Inc., 1978), vol. iii at p. 427.

⁴³ Minutes of Evidence before the Select Committee on Lunatics, *House of Commons Parliamentary Papers* (1859, session 1) (204) iii 75 qq. 968; 972 per Francis Barlow, Master in Lunacy.

⁴⁴ For this second stage in the process, see Minutes of Evidence before the Select Committee on Lunatics, *House of Commons Parliamentary Papers* (1859, session 1) (204) iii 75 qq. 999-1009. At the end of the nineteenth century the procedure for the judicial inquisition as to lunacy was found in the Lunacy Act 1890 (53 Vict. c. 5) ss. 90-107.

formally to the Lord Chancellor for his approval. If the lunacy was not contested, he would simply countersign the report.⁴⁵

The effect of a finding of lunacy by inquisition on the individual's property was profound⁴⁶ and the protection it afforded, with one exception,⁴⁷ was highly effective. Although the court was not the owner of the lunatic's estate, merely its guardian or trustee, from the moment of the finding the lunatic so found would be unable to make a valid disposition of his property. He was 'deprived...of the power of squandering his property'.⁴⁸ It was the judicial authority which took a complete and informed control of the lunatic's property. The court was the 'protector'⁴⁹ and 'guardian'⁵⁰ of the lunatic's property and it made every arrangement relating to it. While an allowance was given to maintain the lunatic, and any surplus paid into the court and invested in Consols and accumulated to his credit, the day to day management of his property was in the hands of the 'committee of the estate' who was a single individual, often a relative,⁵¹ appointed by the court. The committee of the estate was the public expression of the court's protection of the lunatic's property, because his powers were strictly limited. The lunatic's property did not vest in him, and he was in the position of a mere bailiff, with power only to act as 'the legal hand to pay and receive all money',⁵² and he could do nothing with the corpus of the property without the order of the court. Every transaction including every payment, sale, lease or repair was executed by the committee in the

⁴⁵ For a fully documented inquisition and subsequent proceedings, see LMA ACC/1156/071.

⁴⁶ The consequences went far beyond the individual's property. His very status was altered: he could be detained on the instruction of the committee of his person; he could not execute a valid deed even during a lucid interval, and he could not contract a valid marriage without the consent of the Lord Chancellor. He was, in all but name, a ward of court. See generally Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 qq. 28409-10, 28489, 28556-7 *per* Cozens-Hardy LJ.

⁴⁷ The exception was the maintenance allowance. The committee of the person was given the sum for maintenance, but once he had given the court a receipt for that sum, there was no control at all over how he spent it and he had no duty to account for the way he used it. Statistics showed that in a great many cases the income of the lunatic far exceeded the amount allowed to his committee for his maintenance and that of his dependants, and in many cases cited by contemporaries the amount for maintenance was half, or even a quarter, of the total income: Richard Saumarez, *An Address on the Laws of Lunacy for the Consideration of the Legislature* (J. Ridgway, London, 1854) pp. 4-6 and the anecdotal evidence at p. 9. This constituted one aspect of the Chancery lunatic's property that the legal regime failed to protect: Minutes of Evidence before the Select Committee on Lunatics, *House of Commons Parliamentary Papers* (1859, session 1) (204) iii 75 qq. 1168-85; qq. 1214-32 *per* Francis Barlow, Master in Lunacy.

⁴⁸ *Parliamentary Debates* series 3, vol. 126, 2 May 1853 (HL) col. 903. Control was restored to the patient only when and if he regained his sanity and the commission was formally superseded by the issue of the writ *supersedeas*.

⁴⁹ Minutes of Evidence before the Select Committee on Lunatics, *House of Commons Parliamentary Papers* (1859, session 1) (204) iii 75 q. 1186.

⁵⁰ Minutes of Evidence before the Select Committee on Lunacy Law, *House of Commons Parliamentary Papers* 1877 (373) xiii 1, q. 11077 *per* Francis Barlow, Master in Lunacy.

⁵¹ A committee of the person would be appointed to take responsibility for the lunatic's personal care.

⁵² Minutes of Evidence before the Select Committee on Lunatics, *House of Commons Parliamentary Papers* (1859, session 1) (204) iii 75 q. 1147.

name of the lunatic but not before it had been expressly and formally authorised by the judge following the submission of evidence that the transaction was appropriate. For example, in one case where a railway was proposed near the lunatic's home, the committee of the estate saw a business opportunity to sell some of the lunatic's land for building leases. He had to put his proposal to the court, and had to support it fully with affidavits from himself and from experts such as surveyors and valuers to ensure that the lunatic's interests were fully safeguarded.⁵³ Similarly, when the same committee proposed to sell some of the lunatic's residential properties in London on his behalf, a surveyor experienced in the valuation of property in the area was employed to ensure the sale price represented the full value of the property.⁵⁴ The committee of the estate was indeed 'a mere machine in the hands of the court'.⁵⁵ This pattern of court inquiry and authorisation reveal the minute and detailed nature of judicial protection as well as its essential rigour.

Since the principle which guided the court in its control of the lunatic's property was that if he recovered, he would find his estate exactly as it was before he became insane, the court was very conservative and careful in what it would and would not allow. Unless it was a matter of urgency and necessity, it would not permit a substantial change in the estate, would not allow more for repairs than the tenant for life would reasonably be expected to lay out, and would never in practice allow real property to be converted into personalty, or vice versa; indeed, care was taken to ensure that the property of the lunatic retained its character as realty or personalty.⁵⁶ Furthermore, the courts construed the powers of the committee of the estate restrictively. For example, the Lands Clauses Consolidation Act directed that in all its provisions the committee should stand in the place of the lunatic and then gave the committee the power to sell the corpus of the property. The court, however, decided that the committee could not act at all under these clauses without first seeking the authorisation of the court.⁵⁷

The complete deprivation of personal control over the management of property resulting from the status of Chancery lunatic meant that those individuals who were placed under the care and protection of the Lord Chancellor were generally those who were believed by their physicians to have no hope of recovery following some two or three years in a lunatic state, since only at that point would long term arrangements for the management of the patient's property become necessary.⁵⁸ Only if there were very pressing matters, such as bills to be paid which could not be met by family or friends, would an inquisition be applied for immediately, but this was exceptional.⁵⁹

⁵³ LMA ACC/1156/041.

⁵⁴ LMA ACC/1156/56.

⁵⁵ Arthur J. Johnes, *Suggestions for a Reform of the Court of Chancery*, (Saunders & Benning, London, 1834) p. 130.

⁵⁶ Minutes of Evidence before the Select Committee on Lunatics, *House of Commons Parliamentary Papers* (1859, session 1) (204) iii 75 qq. 1160, 1241-43.

⁵⁷ Minutes of Evidence before the Select Committee on Lunatics, *House of Commons Parliamentary Papers* (1859, session 1) (204) iii 75 qq. 1165-66.

⁵⁸ Minutes of Evidence before the Select Committee on Lunatics, *House of Commons Parliamentary Papers* (1859, session 1) (204) iii 75 qq. 1113-14. See too the medical affidavits in the case of John Mitchison, lunatic, of Sunbury in Middlesex: LMA ACC/1156/071.

⁵⁹ Minutes of Evidence before the Select Committee on Lunacy Law, *House of Commons Parliamentary Papers* 1877 (373) xiii 1, q. 9432 per Charles Phillips, Commissioner in Lunacy.

INACCESSIBILITY OF THE PROCESS

The entire inquisition process, and the highly effective supervision of the lunatic's estate thereafter, was inaccessible to the great majority of the mentally ill, from every perspective. First, the law itself was so complex and bulky,⁶⁰ so technical and so dominated by internal practices of the lunacy court that only practitioners specialising in the field understood it. Solicitors with a general practice and members of the public, even those with a special interest in the subject, were frequently baffled by the obscurity of the legal regime and found it difficult to work out the powers and jurisdiction of the various authorities involved in the regulation and management of the insane.⁶¹ For example, when the Secretary of the Lunacy Law Amendment Society was questioned by the Dillwyn Committee in 1877, it was clear that he had a very imperfect understanding of the law or practice of lunacy, particularly in relation to the jurisdiction of the Lord Chancellor.⁶² The lack of reporting of the lunacy judges' decisions not only intensified this inaccessibility but also undermined any uniformity of decisions and practice.⁶³

Secondly, and more significantly, the procedures were extremely costly. In the first years of the nineteenth century the cost of a commission in lunacy was enormous. The expense was excessive because the officers appointed by the court to ascertain the lunacy were paid by fees rather than salaries. In the country they were paid £20 a day, while in London they received double that.⁶⁴ It was common to use three officers, and as the inquiry as to lunacy often lasted a number of days or even weeks, the cost in fees alone was generally in the hundreds of pounds.⁶⁵ Furthermore, each member of the jury received a guinea a day, and as the solicitors were paid according to the time the commission took, it was in their interests to prolong the proceedings as much as they could. And finally, a flagrant but common abuse adding to the costs was the practice of all the parties involved meeting to dine at the end of every day, at the expense of the lunatic.⁶⁶

When the proceedings were transferred to the masters in Chancery after the verdict as to lunacy, then petitions, orders and reports were necessary whenever anything needed to be done with the property, with supporting affidavit evidence and

⁶⁰ By 1868 there were over forty Acts relating to the insane.

⁶¹ Minutes of Evidence before the Select Committee on Lunacy Law, *House of Commons Parliamentary Papers* (1877) (373) xiii 1, q. 10973 *per* Francis Barlow, Senior Master in Lunacy.

⁶² Minutes of Evidence before the Select Committee on Lunacy Law, *House of Commons Parliamentary Papers* (1877) (373) xiii 1, qq. 6923-7019 *per* James Billington, Secretary of the Lunacy Law Amendment Society. The distinction between the Lunacy Commissioners and the Chancery Visitors was unclear to the public: Minutes of Evidence before the Select Committee on Lunacy Law, *House of Commons Parliamentary Papers* (1877) (373) xiii 1, q. 7548 *per* Dr George Blandford, physician.

⁶³ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 q. 29985 *per* Thomas Fischer, Master in Lunacy.

⁶⁴ *The Times* 31 March 1852.

⁶⁵ *The Times* 31 March 1852.

⁶⁶ *The Times* 31 March 1852.

the joining of all the next of kin represented by their own solicitors at every stage, and even the poorest and simplest cases. The system was lengthy, cumbrous and expensive in every case of inquisition, partly as a result of the court fees, but primarily because of the professional charges of solicitors and counsel, which proved the greatest burden on middle class lunatics. Professional fees for the preparation of the extensive documentation of every step of each property transaction were very high, the cost being quadrupled at least by the status of one of parties as a lunatic.⁶⁷ Any estate including land would necessarily be more expensive to manage. The appointment of agents to collect rents, repairs, the cutting of timber, replanting, draining, fencing, ensuring water supplies and so on were all questions which had to be addressed and would require directions from the master and the formal permission of the court.⁶⁸ To obtain these, professional assistance was required. Where litigation was necessary the costs would rise astronomically. One instance was the case of the fifth Earl of Sefton, who was found lunatic by inquisition after a steeplechasing fall in which he suffered severe brain damage.⁶⁹ Litigation was needed to establish whether the court had jurisdiction to order the alienation of part of the earl's estate in view of the prohibition contained in the statute *De Prerogativa Regis*.⁷⁰ The considerable expenses involved in every aspect of bringing a lunatic's property under the control of the Lord Chancellor in lunacy was borne by the estate of the lunatic.

So expensive was the inquisition process and the protection it entailed, that it was in practice used primarily by wealthy individuals who had the means to pay for it and a sufficiently large fortune to warrant it. Chancery lunatics, therefore, formed a small proportion of the lunatic population. In 1876 there were 57,407 pauper lunatics and nearly 8,000 private patients. Of these about 1000 were Chancery lunatics under the direct supervision of the Lord Chancellor.⁷¹ The exact value of the property possessed by lunatics was not known, but the official returns showed that in 1847 the aggregate yearly income of the 542 patients found insane by inquisition amounted to £280,000, most of which was used for their benefit or that of their families.⁷² The Earl of Sefton was a typical Chancery lunatic, having extensive estates in the north of England, including the two estates forming the subject of the litigation in 1898 which were themselves valued at some £800,000 each and together bringing in net rentals of over £50,000 a year. The administration of his estate in lunacy lasted only four years until his premature death. Another typical Chancery lunatic was John Mitchison, the son of a silk merchant who was found lunatic by inquisition in 1864.⁷³ His estate, worth some £85,000 and including a number of houses in London as well as stock, was administered by the court for some

⁶⁷ See for example the volume of papers associated with the sale of two houses belonging to a Chancery lunatic in 1880: LMA ACC/1156/56.

⁶⁸ See for example the court's supervision of the sale of a lunatic's property which was in a dangerous state of repair: LMA ACC/1156/56.

⁶⁹ The National Archives [hereafter TNA] C 211/63/31.

⁷⁰ *Re Earl of Sefton* [1898] 2 Ch 378.

⁷¹ Minutes of Evidence before the Select Committee on Lunacy Law, *House of Commons Parliamentary Papers* (1877) (373) xiii 1, qq. 75-78 *per* Charles Perceval, Secretary to the Lunacy Commissioners.

⁷² Further Report of the Commissioners in Lunacy to the Lord Chancellor, *House of Commons Parliamentary Papers* (1847-8) (858) xxxii 371 at 435-7.

⁷³ LMA ACC/1156/071.

35 years until his death in 1899.⁷⁴ The evidence shows that it was not only the wealthy who used the inquisition process. The middle classes used it to some extent, and indeed one court official observed that '[t]he Chancery lunatics are not a rich class'.⁷⁵ Of the 514 Chancery lunatics in the return to Parliament of 28 February 1853, 216 had incomes of less than £200 a year, nearly 200 had incomes ranging from £200 to £1000 pa, and some 65 had incomes of over £1,000 pa.⁷⁶ In 1859, out of 600 estates in the lunacy court, there were 140 where the incomes were less than £100, and another 140 where it was between £100 and £200.⁷⁷ However, such patients used the inquisition process for want of any alternative legal protection, and it was often at the expense of their entire small fortunes. The great majority did not seek the protection of the judicial authority in lunacy, even when it was necessary.

PROCEDURAL REFORMS

The practical denial of the judicial protective regime to the mentally ill possessing small estates was vigorously criticised. Demands for reform were predicated on the principle that where any lunatic owned property, large or small, it was the duty of the Lord Chancellor to take possession of it for the benefit of the patient. Inevitably, therefore, calls for reforms focussed on the deficiencies in the inquisition system within the judicial process. It was clear that the principal complaint was the excessive delay and cost of the inquisition proceeding. One commentator observed in 1834 that 'there is no abuse of the Court of Chancery more glaring than the enormous expenses by which it...wastes the estates of insane persons'.⁷⁸

The urgent and evident need to make the inquisition process cheaper and simpler resulted in a programme of piecemeal reforming legislation over the following fifty years. In 1833 it was enacted that the commission in lunacy could be addressed to any one officer appointed by the court rather than the usual three,⁷⁹ and a statute of 1842 effected a major improvement when it empowered the Lord Chancellor to replace these ad hoc appointees with two permanent salaried officers, later known as masters in lunacy.⁸⁰ They would be responsible for conducting all the inquiries relating to the lunacy and the property and would take full and informed control of the lunatic's estate.

⁷⁴ LMA ACC/1156/076.

⁷⁵ Minutes of Evidence before the Select Committee on Lunacy Law, *House of Commons Parliamentary Papers* 1877 (373) xiii 1, q. 879 per Dr Lockhart Robertson, Chancery Visitor.

⁷⁶ *House of Commons Parliamentary Papers* (1852-3) (323) lxxviii 331.

⁷⁷ Minutes of Evidence before the Select Committee on Lunatics, *House of Commons Parliamentary Papers* (1859, session 1) (204) iii 75 q. 1190.

⁷⁸ Arthur J. Johnes, *Suggestions for a Reform of the Court of Chancery* (Saunders & Benning, London 1834) p.130.

⁷⁹ Commissioners of Lunacy Act 1833 (3 & 4 Will IV c.36) s. 1. See too *The Times* 31 March 1852.

⁸⁰ Lunacy Act 1842 (5 & 6 Vict. c. 84) s. 1. They were originally called Commissioners in Lunacy, but were renamed Masters in Lunacy by 8 & 9 Vict c. 100 s. 2 (1845), to avoid confusion with the new bureaucratic body, the Lunacy Commissioners.

The most significant and effective procedural reforms were introduced by Lord St Leonards,⁸¹ who, along with Lord Lyndhurst, was one of the most active and visionary reformers of the lunacy laws and a Lord Chancellor who took his lunacy jurisdiction very seriously. He aimed to reduce the formalities, delays and thereby the 'vast expense', not least in professional costs,⁸² necessary in the inquisition process.⁸³ He did so through four specific reforms in the Lunacy Regulation Act 1853.⁸⁴ It was introduced by. First, the Act introduced a general commission authorising the masters to proceed in every case of alleged lunacy, instead of the separate commissions necessary before the Act.⁸⁵ Secondly, it empowered the master to conduct the inquisition without summoning a jury.⁸⁶ The master would decide whether the alleged lunatic was of unsound mind or not, and his certificate would have the same authority as the finding of a jury.⁸⁷ Thirdly, and also with the object of reducing all unnecessary expense, it authorised the masters to inquire and report in respect of the managing, repairing or letting of the patient's estate without the need for an order of reference.⁸⁸ The authority of the Lord Chancellor was carefully preserved though, because the parties were empowered to appeal against any order made by the master. Finally, the Act made important reforms to the fees system, and in so doing unequivocally favoured small estates. It provided that the expense of administering the estates of lunatics under the authority of the Lord Chancellor should be defrayed partly by fees and partly by means of a percentage levied on the lunatic's net annual income. This percentage was 'graduated in an equitable manner as between the richer and poorer estates.'⁸⁹ Incomes under £1000 paid a maximum of £40 in any one year, and incomes under £100 a year paid nothing⁹⁰ and thus received the services of the court free, a concession to the poorer lunatic that came to be regarded as unfair to other lunatics and the state, though was justified on the grounds of charity.⁹¹ The Act also abolished the old fees and replaced them with a fee of £2 for each order of the Lord Chancellor, and £1 for each report or

⁸¹See too 'Lord Derby's Policy as to Law Reform', 16 *Law Review and Quarterly Journal of British and Foreign Jurisprudence* 1-32 at 11 (1852).

⁸² See *Parliamentary Debates*, ser. 3, vol. 126, 3 May 1853 (HL) cols. 1025-27.

⁸³ See generally T.C.S Keely, 'One Hundred Years of Lunacy Administration' 8 *Cambridge Law Journal* 195-200 (1942-44).

⁸⁴ Lunacy Regulation Act 1853 (16 & 17 c.70). See generally 'Lunacy', 16 *Law Review & Quarterly Journal of British & Foreign Jurisprudence* 190-201 (1852).

⁸⁵ Lunacy Regulation Act 1853 (16 & 17 c.70) s. 39.

⁸⁶ Lunacy Regulation Act 1853 (16 & 17 c.70) s. 42. A jury would be summoned if the alleged lunatic requested one or the court thought it desirable: *ibid.* ss. 41;43.

⁸⁷ Lunacy Regulation Act 1853 (16 & 17 c.70) s. 44. Inquisitions became increasingly rare in the early twentieth century: Between 1914 and 1923 there were in all only 11 inquisitions, none of which was held with a jury: Report of the Royal Commission on Lunacy and Mental Disorder, *House of Commons Parliamentary Papers* (1926) (2700) xiii 373 at 415.

⁸⁸ Lunacy Regulation Act 1853 (16 & 17 c.70) s. 69.

⁸⁹ Lunacy Regulation Act 1853 (16 & 17 c.70) s. 26.

⁹⁰ See an example of a refund of the lunacy percentage charged by mistake on a small income: TNA T1/11283.

⁹¹ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 qq. 29483; 29488-89 *per* William Ambrose, Master in Lunacy; q. 30117 *per* Thomas Fischer, Master in Lunacy.

certificate of the masters.⁹² But where a lunatic's property was less than £700 in capital value, or where his income was £50 pa or less, the Lord Chancellor had the discretion to exempt the estate from both the fees and the percentage.⁹³

The wider reforms in legal process that characterised the last quarter of the nineteenth century, culminating in the Judicature Acts 1873-5, 'left Lunacy in a backwater, outside the stream of progress',⁹⁴ but the efforts of Lord Selborne and Lord Halsbury, following a recommendation by Sir George Jessel in 1883 that lunacy practice be assimilated to the new improved Chancery practice, eventually bore fruit and the law of lunacy was remodelled in modern form in the Lunacy Act 1890.⁹⁵ Procedurally, a major improvement was effected when in 1891 the masters were made judges of first instance in lunacy with power to make orders themselves, obviating the costly need for multiple reports to the Lord Chancellor, and indeed enabling them to do in their own right what the lunacy court invariably did on their recommendation, a reform that in fact would simply mirror the practice in the Court of Chancery itself. Reformers had been calling for this for years,⁹⁶ but it was only effected when it was realised that the work given to the masters under the Lunacy Act 1890 was so extensive that it could not be done by the judges in lunacy alone. The amending Act passed fifteen months later allowed the work of the judge in lunacy under the Act 'as to administration and management'⁹⁷ to be undertaken by the masters in lunacy.⁹⁸ The latter were, in effect, made judges.⁹⁹

The reforms to the inquisition procedures were directed towards all Chancery lunatics, and not towards small estates in particular, but they undoubtedly helped the latter to bear the costs of an inquisition and thereby permitted greater access to judicial protection. They were welcomed as a significant improvement in the law for the regulation of the property of lunatics¹⁰⁰ and were said to have 'given satisfaction to all

⁹² Lunacy Regulation Act 1853 (16 & 17 c.70) s. 29. In 1859 some £8000 a year in lunatics' fees was being paid into the General Suitors Fund of the court.

⁹³ Lunacy Regulation Act 1853 (16 & 17 c.70) s. 32.

⁹⁴ H. S. Theobald, *The Law Relating to Lunacy* (London, Stevens & Sons, 1924) p. 77.

⁹⁵ H. S. Theobald, *The Law Relating to Lunacy* (London, Stevens & Sons, 1924) pp. 80-81.

⁹⁶ The reforms of 1853 stopped short of giving the Master the authority to make an order himself. Had that been effected, the costs of the inquisition procedure would have been reduced considerably, but the view was taken that the Masters should be kept under the court's control in order to ensure that they remained 'active and diligent in the discharge of their duties': Minutes of Evidence before the Select Committee on Lunatics, *House of Commons Parliamentary Papers* (1859, session 1) (204) iii 75 q. 1316 *per* Charles Wilde, Registrar in Lunacy. See too See Minutes of Evidence before the Select Committee on Lunacy Law, *House of Commons Parliamentary Papers* 1877 (373) xiii 1, qq. 11154-55 *per* Joseph Elmer, Report Clerk of Masters in Lunacy; Minutes of Evidence before the Select Committee on Lunatics, *House of Commons Parliamentary Papers* (1859, session 1) (204) iii 75 q. 1190.

⁹⁷ Interpreted to mean the administration and management of property.

⁹⁸ Lunacy Act Amendment Act 1891(54 & 55 Vict. c .65) s. 27(1).

⁹⁹ The Masters' orders took effect unless annulled or varied by the judges. A number of orders could only be made by the judges in lunacy, namely those for the inquisition and *supersedeas*, as well as vesting orders and orders requiring Chancery jurisdiction under the Lands Clauses Consolidation Acts, Settled Estates Act 1877 and Settled Land Acts 1882-90.

¹⁰⁰ *Parliamentary Debates*, ser. 3, vol. 126, 6 May 1853 (HL) col. 1221 *per* the Earl of Shaftesbury.

persons in the profession.¹⁰¹ By reducing the formalities at every step of the process the costs were lessened considerably. The number of petitions, orders and reports required were halved, and since the whole process was more expeditious the fees of the sheriff, jury, counsel, solicitors and witnesses were all significantly lower than before. In the ten years following the introduction of the reformed system in 1842, the length of the commissions - and therefore their cost - was reduced from weeks to days. Between 40 and 50 commissions took place each year, and of these only 19 took more than a day, and only five took more than two days,¹⁰² and it was thought that the expense of an inquisition had been reduced by one third. By 1859 only three of the 70 cases a year at that time were held before a jury.¹⁰³ In the early 1860s the expense of the inquisition itself, the appointment of the committee and the fixing of maintenance in the case of a small estate of £1,400 amounted to £216, of which £55 were court fees, and again for a small estate of £800, the cost was £183 of which £58 were court fees.¹⁰⁴ In the case of the smallest estates the expenses were reduced to about £75, including the court fees, and sometimes as low as £40.¹⁰⁵ Although a contested inquisition could still cost some £10,000 at the end of the century due to the expenses of counsel and expert witnesses,¹⁰⁶ an uncontested case could cost as little as £15.¹⁰⁷ Although these costs were undeniably less than at the beginning of the nineteenth century, they were still material and for very small estates amounted to 'a grievous hardship'.¹⁰⁸ What was lacking was any substantive reform to the lunacy law providing a specific regime directed to protect small estates.

SUBSTANTIVE REFORMS FOR SMALL ESTATES

The Lord Chancellor in Chancery had no jurisdiction over lunatics not so found by inquisition and so could do nothing to assist lunatics of small estate who could not afford the costs of the process. However desirable it was that he should possess such jurisdiction, it could only be conferred by the legislature, and any attempt to do so

¹⁰¹*The Times* 31 March 1852

¹⁰² 'Lunacy', 16 *Law Review & Quarterly Journal of British & Foreign Jurisprudence* 190-201 at 192 (1852).

¹⁰³ Minutes of Evidence before the Select Committee on Lunatics, *House of Commons Parliamentary Papers* (1859, session 1) (204) iii 75 q. 946 per Charles Wilde, Registrar in Lunacy.

¹⁰⁴ Minutes of Evidence before the Select Committee on Lunatics, *House of Commons Parliamentary Papers* (1859, session 1) (204) iii 75 q. 1310 per Charles Wilde, Registrar in Lunacy.

¹⁰⁵ Minutes of Evidence before the Select Committee on Lunatics, *House of Commons Parliamentary Papers* (1859, session 1) (204) iii 75 qq. 1310-13 per Charles Wilde, Registrar in Lunacy.

¹⁰⁶ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 q. 292924 per W. H. Winterbotham, Official Solicitor.

¹⁰⁷ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 qq. 29292-98 per W. H. Winterbotham, Official Solicitor; see too Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4215) xxxv 83 q. 3003 per T. H. Fischer, Master in Lunacy.

¹⁰⁸ 'Lunacy', 16 *Law Review & Quarterly Journal of British & Foreign Jurisprudence* 190-201 at 197 (1852)

without such authority was regarded as 'an irregularity'.¹⁰⁹ The judicial consensus was that he could only intervene to order the maintenance of a person of unsound mind in the context of the administration of a trust.¹¹⁰

The legislature, however, did not respond with any substantive reforms for the benefit of small estates until more than a decade later, and then in a very limited way. Although the primary duty of the bureaucratic organ, the Lunacy Commissioners, was to ensure the care of the persons of lunatics in approved institutions, in 1845 they were given the authority to take action if they had reason to believe that the property of a person detained as a lunatic was not being properly protected, or the income arising from it was not being used for the patient's maintenance.¹¹¹ They would learn of such abuse through information from family or friends, or from the lunatic himself in the course of the Commissioners' official visits. The Commissioners could, in such circumstances, make inquiries and report the abuse to the Lord Chancellor. Although the power could be useful in relation to Chancery lunatics provided with an insufficient allowance,¹¹² given the primary role of the Commissioners in regulating pauper lunatics, this provision was implicitly directed towards the protection of the property of poor and middle class lunatics. Where any certified lunatic had been the subject of a report, or had been detained for the past twelve months, the Lord Chancellor could direct one of the masters to examine the lunatic in question, and if he was satisfied as to his lunacy the Lord Chancellor could appoint a receiver of the estate.¹¹³ This receiver was to have the same powers as the receiver of the estate of a lunatic so found. Receivers were often appointed in inquisition cases in addition to a committee of the estate, for example if the committee did not have the time or expertise to manage the property or where no person was willing to act as committee.¹¹⁴ The Act also empowered the Lord Chancellor to make orders for the application of the lunatic's income for his maintenance and made provision for the investment of surplus 'for the use of such Lunatic as to the Lord Chancellor should from Time to Time in each Case seem fit'.¹¹⁵ The jurisdiction of the Lord Chancellor over the property of these quasi-Chancery lunatics lasted only as long as the lunatic was confined under certification, and then for the maximum of six months at the court's discretion. The receivership provision was amended in 1852 to address

¹⁰⁹ *Re Ridgway* (1828) 5 Russ 152 at 153 *per* Lord Lyndhurst LC; See too *Bishop of Exeter v. Ward* (1833) 2 Myl & K 54; H. M. R. Pope, *A Treatise on the Law and Practice of Lunacy* (Sweet & Maxwell, London, 1877) p. 210.

¹¹⁰ *Re Bligh* (1879) 12 Ch 364 at 365 *per* James and Cotton LJ. See too *Vane v. Vane* (1876) 2 Ch. D 124.

¹¹¹ An Act for the Regulation of the Care and Treatment of Lunatics 1845 (8 & 9 Vict. c. 100) s. 94.

¹¹² See Minutes of Evidence before the Select Committee on Lunatics, *House of Commons Parliamentary Papers* (1860) (495) xxii 349 at qq. 415-6 *per* Lord Shaftesbury. But note that despite the statutory provision, in practice the Lunacy Commissioners were unable independently to get any information about the property of a Chancery lunatic, and had to rely on the Masters for that information: Minutes of Evidence before the Select Committee on Lunatics, *House of Commons Parliamentary Papers* (1859, session 1) (204) iii 75 qq. 1086-88.

¹¹³ An Act for the Regulation of the Care and Treatment of Lunatics 1845 (8 & 9 Vict. c.100) s. 95. Note that he was also empowered to appoint a guardian of the person, corresponding to the committee of the person where a lunatic was so found by inquisition.

¹¹⁴ Charles Phillips, *The Law Concerning Idiots, Lunatics and Persons of Unsound Mind* (London: James Wildy, 1858) p. 284.

¹¹⁵ An Act for the Regulation of the Care and Treatment of Lunatics 1845 (8 & 9 Vict. c. 100) s. 95.

doubts which had arisen as to whether the Act authorised the receipt of dividends on government or bank stock or annuities standing in the lunatic's name, confirming that the receiver had this power, and giving full indemnity to the Bank of England and other companies for acts done.¹¹⁶ Furthermore, the receiver was given the power to make repairs and improvements to the lunatic's land.¹¹⁷ In 1853 the master's inquiry as to lunacy following a report authorised by the 1845 Act was discontinued on the basis that proceedings under a commission ensured much greater protection of property and that the 1853 legislation would ensure that process was cheaper.¹¹⁸ The Lunacy Commissioners' report was to have the effect of an ordinary petition for an inquisition supported by evidence.¹¹⁹

Sometimes the Lunacy Commissioners felt that the exercise of these powers was unnecessary, and they took instead an undertaking from the lunatic's next of kin that they would supply the patient with 'all the comforts and luxuries he is capable of appreciating'¹²⁰ but they used their reporting powers in a large number of cases. Not only did this affirm that they perceived their duty as one to ensure that the income of certified lunatics was properly applied for the patients' benefit,¹²¹ it suggested that they had found a significant number of instances of abuse of lunatics' property.¹²² In 1846 they reported that they had 'repeatedly made inquiries'¹²³ and by 1847 reports were regularly being made, many of which led directly to proceedings before the masters in lunacy to ensure effective protection.¹²⁴ For example, the brother of a patient in a county lunatic asylum wrote to the Lunacy Commissioners telling them that his brother had a little property and that there was no one to look after it. As it was clear that the patient was unlikely to recover soon, the Commissioners reported the case to the Lord Chancellor, a step which amounted to an application for an inquisition. The Lord Chancellor sent his own officer to see the patient, and when he confirmed the insanity an inquisition was ordered. Despite strong medical evidence that he was insane, the jury found he was not, but he had to pay the costs amounting to some £600 himself.¹²⁵

¹¹⁶ Property of Lunatics Act 1852 (15 & 16 Vict. c. 48) ss. 4, 5.

¹¹⁷ Property of Lunatics Act 1852 (15 & 16 Vict. c. 48) s. 6.

¹¹⁸ Lunacy Regulation Act 1853 (16 & 17 c.70) ss. 52, 53. See Danby P. Fry *Lunacy Law* (Knight & Co., London 1890) pp. 18-19.

¹¹⁹ Lunacy Regulation Act 1853 (16 & 17 c. 70) s. 54.

¹²⁰ Twenty-fourth Annual Report of the Commissioners in Lunacy, *House of Commons Parliamentary Papers* (1870) *House of Commons Parliamentary Papers* (1870) (340) xxxiv 1 at 65.

¹²¹ See a letter from the Lunacy Commissioners to the brother of a certified lunatic: TNA MH/51/64.

¹²² Further Report of the Commissioners in Lunacy, *House of Commons Parliamentary Papers* 1847 (858) xxxii 371 at 406-7.

¹²³ Report of the Lunacy Commissioners to the Lord Chancellor, *House of Commons Parliamentary Papers* (1846) (471) xxxiii 339 at 340. See for example the case of Mrs Lowe in Hanwell Asylum: Minutes of Evidence before the Select Committee on Lunacy Law, *House of Commons Parliamentary Papers* 1877 (373) xiii 1, q. 4423 per John White, solicitor.

¹²⁴ Under the Act for the Regulation of the Care and Treatment of Lunatics 1845 (8 & 9 Vict. c. 100) s. 95. See the official return to Parliament in 1862, confirming the use of the provision by patients with modest incomes: *House of Commons Parliamentary Papers* (1862) (509) xlv 547.

¹²⁵ Minutes of Evidence before the Select Committee on Lunacy Law, *House of Commons Parliamentary Papers* 1877 (373) xiii 1, qq. 9384-9409 per Charles Phillips, Commissioner in Lunacy.

Although the power of the Lunacy Commissioners did not catch all cases of abuse of property, it was sufficiently effective for it to be maintained in all the lunacy legislation including the major consolidating Act of 1890,¹²⁶ under which the matter raised by the Lunacy Commissioners would be referred by the Lord Chancellor to the Official Solicitor, instructing him either to appoint himself as receiver or to make further inquiries.¹²⁷ However cases dwindled to often no more than one a year¹²⁸ when alternative simpler, faster and cheaper processes became available. Indeed, communication between the masters and the Lunacy Commissioners was, by 1906, 'very rare'.¹²⁹

The reporting provisions were only impliedly for middle class and poorer lunatics, in that they were aimed at lunatics who had been detained under certificates and reception orders. While the process ensured, as never before, that abuses of such lunatics' property were brought to official cognisance, and the proceedings were undoubtedly cheaper than by the traditional full inquisition because there was no need to pay for the issue of the commission, that cost was only a small proportion of the whole, and beyond that the patient simply entered the existing judicial process of inquisition, which was left as expensive, slow and formal as before. It was, consequently, of limited assistance to poorer lunatics and as such was subject to widespread criticism. Only two years after this new provision was first enacted, the Lunacy Commissioners criticised both its substance and its operation.¹³⁰ They said that 'where the funds are small, and the parties in humble circumstances' the protective regime was practically unavailable.¹³¹ They gave as an example a person 'in the lower walks of life' who became insane after having, 'by industry and economy,' saved a small sum and invested it in government stock in his own name. The sum might yield sufficient income, perhaps £20 a year, with which his wife and family could support him either in a private asylum or at home, depending on the nature and extent of his insanity. However the dividends could not be made available for the support of the lunatic or his family¹³² because it was doubtful whether the Lord Chancellor had the power to compel a transfer of stock by the Bank of England. Furthermore, it seemed that the 1845 Act enabled the Lord Chancellor to deal only with the income of the lunatic's

See too Seventeenth Report of the Lunacy Commissioners, *House of Commons Parliamentary Papers* (1863) (331) xx 437.

¹²⁶ Lunacy Act 1890 (53 Vict. c. 5) s.100. See too *ibid* s. 50.

¹²⁷ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 qq. 29121-24; 29198 *per* W.H. Winterbotham, Official Solicitor.

¹²⁸ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 qq. 30274-75 *per* Thomas Fischer, Master in Lunacy.

¹²⁹ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 q. 30277 *per* Thomas Fischer, Master in Lunacy.

¹³⁰ Further Report of the Commissioners in Lunacy, *House of Commons Parliamentary Papers* 1847 (858) xxxii 371 at 406.

¹³¹ Further Report of the Commissioners in Lunacy, *House of Commons Parliamentary Papers* 1847 (858) xxxii 371 at 406.

¹³² Further Report of the Commissioners in Lunacy, *House of Commons Parliamentary Papers* 1847 (858) xxxii 371 at 406.

estate, and not the corpus. The Lunacy Commissioners suggested that it would have been useful had the power to receive dividends been given by statute to the master in lunacy, or some other officer, for the benefit of the lunatic and his family.¹³³ In the three years following the passing of the 1845 Act, the Lunacy Commissioners reported on some thirty cases of suspected abuse of lunatics' property. In two cases the Lord Chancellor's powers were found to be insufficient, and commissions were later issued, with the considerable expense that entailed.¹³⁴

The inadequacy of the law's provision for the protection of smaller estates of lunatics detained under reception orders was also forcibly criticised by the Law Amendment Society¹³⁵ which called for three specific reforms: to empower the Lord Chancellor to apply the corpus of the lunatic's property to the payment of costs or other suitable purpose; to resolve the difficulties existing in compelling the Bank of England to transfer stock or pay dividends; and to extend and clarify the powers of the receiver, notably with respect to the lunatic's real estate. The Society proposed that these improvements could be achieved by vesting all the property of the lunatic in an official committee, 'to be administered for his benefit by the masters in lunacy, or by some local jurisdiction in the provinces.'¹³⁶ This would protect the property from well-meaning mismanagement, waste, fraud and theft. It would ensure that allowances would be made to maintain both the lunatic and any dependants, that the patient's lands and buildings would be properly managed, repairs effected, debts collected and money securely invested, all for the benefit of the lunatic and his heirs. This, argued the Society, was not a reform but, rather, a restitution of the law as they were merely calling for the revival of the principle embodied in the statute *De Prerogativa Regis*.¹³⁷ The scope of the statute had become limited by the expense of the inquisition process, but the correct position in legal theory was that where any lunatic had any property, large or small, the Crown - represented by the Lord Chancellor - would take possession of it for the lunatic's benefit.

The next reforming provision for the protection of small estates, however, adopted a more orthodox approach and yet one which was both novel and subsequently to prove of immense significance because it provided for a summary process expressly for dealing with small estates. The Lunacy Regulation Act 1853 provided that where the net amount of a lunatic's property was less than £500, and it appeared to the Lord Chancellor to be expedient in view of the lunatic's circumstances and situation that the property should be made available for maintenance, he had the power to order that it be sold and the proceeds transferred to a relative of the lunatic or some other proper person

¹³³ Further Report of the Commissioners in Lunacy, *House of Commons Parliamentary Papers* 1847 (858) xxxii 371 at 407.

¹³⁴ 'Reports of the Society for Promoting the Amendment of the Law', 9 *Law Review & Quarterly Journal of British & Foreign Jurisprudence* 313-336 (1848-49) at 320-1n.

¹³⁵ 9 *Law Review & Quarterly Journal of British & Foreign Jurisprudence* 313-336 (1848-49). See too Committee of the Alleged Lunatics' Friends' Society, *The Laws of Lunacy and their Crimes, as they Affect all Classes of Society*, (London, Charles and Tiver, 1859); Nicholas Hervey 'Advocacy or Folly: the Alleged Lunatics' Friend Society, 1845-63' 30 *Medical History* 245-75 (1986).

¹³⁶ 'Reports of the Society for Promoting the Amendment of the Law', 9 *Law Review & Quarterly Journal of British & Foreign Jurisprudence* 313-336 (1848-49) at 321.

¹³⁷ 'Reports of the Society for Promoting the Amendment of the Law', 9 *Law Review & Quarterly Journal of British & Foreign Jurisprudence* 313-336 (1848-49) at 321.

for that purpose, rather than appointing a committee for the continuing management of the estate.¹³⁸ The object was to make the property available for the lunatic's maintenance in a simpler, cheaper and more direct way. This reform was of limited assistance in that it applied only to lunatics so found, it remained prohibitively expensive and excessively formal for those lunatics with small principal sums or annuities, or small interests in land.

It was, however, a reform of lasting and essential importance in that it was subsequently developed and extended in 1862 to form what was the first step in protecting the small estates of lunatics not so found by inquisition. The object was to apply the property for the benefit of the lunatic 'in a summary and inexpensive Manner',¹³⁹ and to that end it provided that where a person was established as a lunatic, whether under the jurisdiction of the Lord Chancellor or the regulation of the Lunacy Commissioners, and his property did not exceed £1000 in value or yielded an income of up to £50 a year,¹⁴⁰ the Lord Chancellor could make an order to make the property available for the lunatic's benefit or maintenance. Significantly, no inquiry under a commission of lunacy would be required.¹⁴¹ And in order to give effect to this, it empowered the Lord Chancellor to sell or mortgage the land or any other property of the lunatic for his benefit. The proceeds were to be paid to a relative or other proper person under the direction of the Lord Chancellor to receive and apply the money.¹⁴²

This reform was of immense significance for small estates, partly because it unequivocally addressed property of that nature and provided a summary process for ensuring its judicial protection outside the inquisition process, but also because it separated the custody of the person from the protection of property. The lunatic would remain in his asylum under the original reception order and certificates and thereby under the supervision of the Lunacy Commissioners, while the Lord Chancellor would make a summary order providing for his proper maintenance. As the Lord Chancellor had the same powers as if the lunatic had been so found by inquisition, the Act in effect created a quasi-Chancery lunatic under a special jurisdiction to provide for maintenance,¹⁴³ with no judicial control over the lunatic's person. As a special jurisdiction as to maintenance with a summary process ensuring the protection of property alone by the judicial authority,¹⁴⁴ this reform was subsequently recognised as 'a step in the right direction'¹⁴⁵ and 'tentative' reform.¹⁴⁶ Although there were some doubts

¹³⁸ Lunacy Regulation Act 1853 (16 & 17 Vict. c. 70) s.120.

¹³⁹ Lunacy Regulation Act 1862 (25 & 26 Vict. c. 86) s.12.

¹⁴⁰ The limit was raised in 1882 to £2000 capital or £100 a year in income: Lunacy Regulation Amendment Act 1882 (45 & 46 Vict. c. 82) s. 3.

¹⁴¹ *Harvey v. Trenchard* (1864) 34 Beav 240; H. M. R. Pope, *A Treatise on the Law and Practice of Lunacy* (Sweet & Maxwell, London, 1877) p. 215; A. Wood Renton, *The Law of and Practice in Lunacy*, (W.M.Green & Sons, Edinburgh; Stevens & Haynes, London: 1897) pp. 394-7.

¹⁴² Lunacy Regulation Act 1862 (25 & 26 Vict. c. 86) s. 13.

¹⁴³ The Act also extended the powers of charging the lunatic's property to pay for his maintenance, debts and costs: Lunacy Regulation Act 1862 (25 & 26 Vict. c. 86) s. 16.

¹⁴⁴ Minutes of Evidence before the Select Committee on Lunacy Law, *House of Commons Parliamentary Papers* 1877 (373) xiii 1, qq. 10704-21 at 10721, per Charles Wilde, Registrar in Lunacy; TNA MH 51/54. For the procedures, see H. M. R. Pope, *A Treatise on the Law and Practice of Lunacy* (Sweet & Maxwell, London, 1877) pp. 212-3; 471-2.

¹⁴⁵ H. S. Theobald, *The Law Relating to Lunacy* (London, Stevens & Sons, 1924) p. 76.

as to the effectiveness of the court's control of the receiver,¹⁴⁷ the provision was widely used and as such was hugely beneficial to small estates in simple cases.¹⁴⁸

Despite these reforms, spanning some fifty years, a commentator complained in 1880 that the law had still been unable or unwilling to construct a cheap and quick method of ensuring that the property of lunatics came under the protection of the Lord Chancellor.¹⁴⁹ Certainly the Lunacy Commissioners themselves believed that there still remained a large number of insane persons 'whose little savings have no protection whatever under the Lunacy law' because they did not reach the minimum amounts required for protection under the Act of 1862.¹⁵⁰ There were still complaints as to the technicality, delay and expense of the inquisition process in the late nineteenth century,¹⁵¹ but in 1889 introduced some long needed and important amendments to the law were introduced,¹⁵² principally concerning the precautions relating to the establishment of lunacy by requiring the authority of a judge, magistrate or justice of the peace for the reception of lunatics into asylums,¹⁵³ but also making new provision with respect to property. First, it provided that in the case of lunatics so found by inquisition, an order could be made for the commitment of the estate alone, and not of the person, if it were found that although the lunatic was of unsound mind and could not manage his affairs, he could manage himself and was not a danger to himself or anyone else.¹⁵⁴ Secondly, it permitted the judge to make an order relating to the property of any lunatic not so found by inquisition, and to that of a person incapable of managing his affairs through mental infirmity resulting from disease or age.¹⁵⁵ Any person approved by the judge could exercise the same powers as the committee of the estate would in the case of a lunatic so found by inquisition. And thirdly, it authorised the County Court judge to make orders as to the property of a lunatic under £200 in value.¹⁵⁶ This last provision, unequivocally directed towards increasing the protection of small estates, addressed the situation where the lunatic had no friend or relative willing to manage his property and was entirely new. The judge could sell the lunatic's real or personal property and would direct how the money should be applied for the lunatic's benefit, or indeed in

¹⁴⁶ Earl of Halsbury, *The Laws of England*, 3rd edn. (Butterworth & Co., London, 1960) vol. 29 p. 565.

¹⁴⁷ H. S. Theobald, *The Law Relating to Lunacy* (London, Stevens & Sons, 1924) p. 76.

¹⁴⁸ H. M. R. Pope, *A Treatise on the Law and Practice of Lunacy* (Sweet & Maxwell, London, 1877) p. 215.

¹⁴⁹ C. Lockhart Robertson, *Lunacy in England: England's Irren-Wesen*, (LSE Selected Pamphlets: 1880) p. 17.

¹⁵⁰ Twenty-fourth Annual Report of the Commissioners in Lunacy, *House of Commons Parliamentary Papers* (1870) *House of Commons Parliamentary Papers* (1870) (340) xxxiv 1 at 63.

¹⁵¹ T. Raleigh, 'The Lunacy Laws', 1 *Law Quarterly Review* 150-161 at 155 (1885).

¹⁵² Lunacy Acts Amendment Act (52 & 53 Vict c. 41).

¹⁵³ It was over this provision that the Earl of Shaftesbury wished to resign: see Geoffrey B.A.M. Finlayson, *The Seventh Earl of Shaftesbury* (Eyre Methuen, London, 1981) pp. 592-3.

¹⁵⁴ 52 & 53 Vict c. 41 s. 48.

¹⁵⁵ 52 & 53 Vict c. 41 s. 52.

¹⁵⁶ 52 & 53 Vict c. 41 s. 54; Lunacy Act 1890 (53 Vict. c.5) s. 132.

reimbursing the parish for the cost of his care. The court could invest it on behalf of the lunatic. It was, however, very rarely exercised.¹⁵⁷

The law of lunacy was consolidated and amended in 1890, in a major statute that was to form the core of the legal regime in lunacy for the next seventy years.¹⁵⁸ The extensive powers of the Lord Chancellor over lunatics' property, which had increasingly been given statutory expression throughout the nineteenth century and were comprehensive, were gathered together to form a substantial portion of the Act¹⁵⁹ and were made applicable in a summary way to six categories of individual.¹⁶⁰ Chancery lunatics formed the first and smallest category.¹⁶¹ Despite continued problems of expense and technicality regarding the inquisition process, its declining use, and calls for its abolition,¹⁶² it was retained. It was useful in the case of all large estates and where, for example, it was necessary or desirable to appoint a committee of the person, to prevent a marriage,¹⁶³ to limit the right to contract, or where the patient lived or owned property abroad.¹⁶⁴ The largest category was lunatics under reception orders founded on medical certification,¹⁶⁵ though the emphasis in that class was on the detention of the person rather than the protection of property, and a lack of capacity in relation to property was not automatically assumed. Individuals who were neither detained nor found lunatic by inquisition, but were unable to manage their property due to mental infirmity resulting from disease or old age constituted a new and wide class in which the individuals concerned were not regarded as lunatic.¹⁶⁶ In this growing category¹⁶⁷ it was

¹⁵⁷ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 qq. 28465-6; 28521 *per* Cozens-Hardy LJ.

¹⁵⁸ Lunacy Act 1890 (53 Vict. c. 5).

¹⁵⁹ Lunacy Act 1890 (53 Vict. c. 5) ss. 116-143.

¹⁶⁰ Lunacy Act 1890 (53 Vict. c. 5) s. 116(1) paras (a)-(f) .

¹⁶¹ Lunacy Act 1890 (53 Vict. c. 5) s. 116(1) (a).

¹⁶² T. Raleigh, 'The Lunacy Laws', 1 *Law Quarterly Review* 150-161 at 160 (1885).

¹⁶³ Marriage of Lunatics Act 1741 (15 Geo II c. 30). A Master in Lunacy observed in 1908 that there were cases where it was necessary to have an inquisition 'to protect the man from the evil-minded who would plunder him of his property, or from the very few creatures that there are, called women, who would marry such a creature for the purpose of getting his property, and only for that purpose': Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4215) xxxv 83 q. 2952 *per* T.H. Fischer, Master in Lunacy.

¹⁶⁴ Report of the Royal Commission on Lunacy and Mental Disorder, *House of Commons Parliamentary Papers* (1926) (2700) xiii 373 at 415; Royal Commission on the Law Relating to Mental Illness and Mental Deficiency, *House of Commons Parliamentary Papers* (1956-57) (169) xvi 1 at 98.

¹⁶⁵ Lunacy Act 1890 (53 Vict. c. 5) s. 116(1) (c).

¹⁶⁶ Lunacy Act 1890 (53 Vict. c. 5) s. 116(1) (d). This provision was apparently drafted by Lord Selborne, in light of Lord Cardwell's inability to manage his own affairs and a reluctance to have him declared a lunatic: Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4215) xxxv 83 q. 2921 *per* T.H. Fischer, Master in Lunacy; Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 qq. 28486-7 *per* Cozens-Hardy LJ. The Act thereby refined the categories of mental illness, recognising that there existed a mental defect outside the traditional ones of idiocy, lunacy and unsoundness of mind.

only their property that came under the control and protection of the court, through the appointment of a receiver, not their person.

All categories included some mentally ill individuals with small estates, but a further category was introduced expressly and solely to provide for patients of very limited means,¹⁶⁸ based on the summary processes of earlier provisions in the Acts of 1853 and 1862. Where a person was of unsound mind¹⁶⁹ and incapable of managing his affairs, and his property did not exceed £2000 in value or a yearly income of £100, his estate would be managed by a receiver under the authority of the lunacy court. The provision was liberally construed by the courts,¹⁷⁰ and it was a very popular form of protection that was 'greatly appreciated by owners of small property'¹⁷¹ because it gave robust protection of their small estates without the loss of status inherent in an inquisition and the loss of liberty that came with certification.¹⁷² The statutory powers addressing the management of property could be exercised by any person as the judge should direct,¹⁷³ and such person was to be subject to the jurisdiction of the judge just as if he were the committee of the estate of a lunatic so found by inquisition.¹⁷⁴ This person was popularly called a receiver, but he was in fact a quasi-committee. The appointment of a receiver was of central importance to the protection of small estates. The receiver was usually a member of the lunatic's family acting out of kindness,¹⁷⁵ but if no one was available to act, then the Official Solicitor could and did take on the receivership. The receiver was usually limited to the receipt of income, with capital sums being brought into court in the name of the Paymaster and title deeds of property kept by a bank, only

¹⁶⁷ It was widely used by the beginning of the twentieth century: Report of the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4202) xxxix 159 at para. 758 (p. 443).

¹⁶⁸ Lunacy Act 1890 (53 Vict. c. 5) s. 116(1)(e). The other categories were criminal lunatics (s. 116(1)(f)) and those under pre-1890 procedures (s. 116(1)(b)). Those in categories (c), (d) and (e) were far more numerous than under categories (a), (b) and (f). For the numbers within each category in 1908, see Report of the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4202) xxxix 159 at para. 761 (p. 444).

¹⁶⁹ His unsoundness of mind needed to be proved by affidavit before the Master or the Lunacy Commissioners.

¹⁷⁰ The sums were to be regarded as the net value and net income after deducting debts and expenses for past maintenance: *Re Adams* (1864) 9 LT NS 626; *Re Faircloth* (1879) 13 Ch D 307; H. M. R. Pope, *A Treatise on the Law and Practice of Lunacy*, 2nd edn, (Sweet and Maxwell, London, 1890) pp. 226-7.

¹⁷¹ Report of the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4202) xxxix 159 at para. 762 (p. 444). See too TNA LCO/10/13.

¹⁷² Otherwise no detention was required, the 'power of the purse' being deemed sufficient, but if it was necessary then it had to be effected by a reception order or inquisition: Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4215) xxxv 83 qq. 2897, 3089 per T.H. Fischer, Master in Lunacy.

¹⁷³ Lunacy Act 1890 (53 Vict. c. 5) s. 116(2).

¹⁷⁴ Lunacy Act 1890 (53 Vict. c. 5) s. 116 (3); Lunacy Act 1908 (8 Edw VII c. 47) s.1.

¹⁷⁵ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 q. 30122 per Thomas Fischer, Master in Lunacy.

to be interfered with by the order of the master.¹⁷⁶ The receiver was told how much to use for maintenance of lunatic and support of his family, and thereafter kept as close a control over the patient's property as a committee would in the case of a Chancery lunatic. If, for example, an item for the lunatic's comfort could not be provided out of maintenance, the receiver's authority had to be sought, however trifling the item.¹⁷⁷

The process whereby the mentally ill could acquire this protection for their property under the Act was simple and inexpensive, and equally as effective as an inquisition but with considerably less formality and expense. A personal application for receivership would cost under 4 shillings, although that would rise to as high as £40 if a solicitor were employed.¹⁷⁸ For very small properties of less than £700 in value or £50 yearly income the fees of the master's office were remitted¹⁷⁹ and the procedure could be undertaken with no professional advice as it consisted simply of a letter to the master containing details of the lunatic and his property, and naming the receiver. But where even minimal professional assistance was necessary, the expense was recognised as a deterrent to the poorer lunatic with a very small capital sum, a small interest in land, or tiny pension, perhaps with no relative to manage the property, in seeking the protection of the court.¹⁸⁰ Overall, however, the new receivership process was so cheap, easy and effective that it was widely used. Records of the Lord Chancellor's department following the Lunacy Act 1890 show that a great many lunatics then coming under his charge had small incomes. Some were as low as £25 a year, most were in the region of £300 a year, and very few were higher than £1000.¹⁸¹ So popular was it, that it was said to have 'driven the old inquisitions out of the market',¹⁸² and indeed the number of inquisitions diminished sharply. In 1905 there were about forty a year,¹⁸³ falling to eleven between 1914 and 1923,¹⁸⁴ and when there were only between 200 and 300 Chancery lunatics in

¹⁷⁶ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4215) xxxv 83 q. 2997 per T.H. Fischer, Master in Lunacy.

¹⁷⁷ See for example, the purchase of a second hand fur coat for a patient: TNA J 92/3.

¹⁷⁸ Report of the Royal Commission on Lunacy and Mental Disorder, *House of Commons Parliamentary Papers* (1926) (2700) xiii 373 at 530-31. In 1908 the average cost of an application was between £15 and £80: Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 qq. 29295-6 per W. H. Winterbotham, Official Solicitor though the figure would double if counsel had to be instructed.

¹⁷⁹ Report of the Royal Commission on Lunacy and Mental Disorder, *House of Commons Parliamentary Papers* (1926) (2700) xiii 373 at 530.

¹⁸⁰ Report of the Royal Commission on Lunacy and Mental Disorder, *House of Commons Parliamentary Papers* (1926) (2700) xiii 373 at 530.

¹⁸¹ TNA LCO 10/12; TNA LCO 10/13.

¹⁸² Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4215) xxxv 83 q. 3006 per T.H. Fischer, Master in Lunacy.

¹⁸³ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4215) xxxv 83 q. 2956 per T.H. Fischer, Master in Lunacy.

¹⁸⁴ Report of the Royal Commission on Lunacy and Mental Disorder, *House of Commons Parliamentary Papers* (1926) (2700) xiii 373 at 415.

total in 1922, it was described as 'moribund.'¹⁸⁵ It was thought that the last inquisition took place in 1959.¹⁸⁶

The evidence shows that the Victorian legislature responded actively and positively, if slowly, to the challenge of protecting the increasing number of lunatics of small estate. The first reforms undoubtedly assisted the very wealthy and the more affluent middle classes by reducing the expense of the inquisition, but the amending and consolidating legislation of 1889 to 1891 made the care and control of the court available to all mentally ill patients, whatever the size of their property, and in effect removed the distinction between all categories of the mentally ill with respect to the quality of legal protection they enjoyed for their property. When the property of the mentally ill was given the protection of the law outside the formal inquisition process, and that protection was affordable and robust, adequate legal protection for the middle class and poorer lunatic population had been achieved. And these reforms enacted for the benefit of the mentally ill with small estates were of wider and yet more profound importance. It was the resolution of the challenge posed by small estates that resulted in the destruction of the association between property ownership and detention of the person, an unfortunate relationship that had dominated the lunacy law. The orthodox paradigm categorised the mentally ill according to their property ownership. This relationship was a product of the social system of the nineteenth century to ensure the special protection of the estates of the propertied classes and served to reinforce social attitudes to the effect that different classes of the insane required different treatments. For much of the nineteenth century it was significantly easier for a pauper¹⁸⁷ to be detained as a lunatic than a person with property, since a pauper required the agreement of a Justice of the Peace on the basis of unsworn evidence and just one medical practitioner, whereas for a private patient, sworn evidence and two medical certificates were required. Furthermore, in the case of a pauper the certificates constituted a direction to receive the patient, whereas in the case of a private patient they constituted a request to do so. Chancery lunatics were designated lunatic on the petition of a friend or relative and the subsequent inquisition and could be detained on the order of his committee of the person. And thereafter Chancery lunatics, private patients and pauper patients were dealt with in significantly different ways, due entirely to the extent of the property they owned. The status of the lunatic was thus determined through his property ownership and not through his medical condition. The Lunacy Act 1890 was a seminal piece of legislation in lunacy law in that it took the first step towards breaking the nexus between property and detention in the case of the mentally ill, enabling the management of an individual's property to be removed from him without depriving him of his personal liberty.¹⁸⁸ The Act reflected advancements in medical science as to the nature and

¹⁸⁵ H. S. Theobald, *The Law Relating to Lunacy* (London, Stevens & Sons, 1924) p. 80.

¹⁸⁶ Raymond Jennings, 'Jurisdiction in Lunacy' 23 *Modern Law Review* 421-424 at 422 n. (1960).

¹⁸⁷ Patients not found of unsound mind by inquisition, nor within the reception orders for private patients, were dealt with summarily under the pauper process, namely orders not made on petition. For the different methods for detaining a person as a lunatic after the Lunacy Act 1890, see Daniel Chamier, *Lunacy Law*, (Effingham Wilson & Co., 1892) pp. 16-27.

¹⁸⁸ Minutes of Evidence before the Select Committee on Lunacy Law, *House of Commons Parliamentary Papers* 1877 (373) xiii 1, q. 1166 per Dr Lockhart Robertson, Chancery Visitor

degrees of mental illness¹⁸⁹ which undermined the law's traditional categorisation and its intimate relationship to property ownership. The protection of all mentally ill patients' property came to be regarded as an issue of care affecting their well-being rather than being central to the determination of their status.¹⁹⁰

THE JUDICIAL SOLUTION

This extensive and effective recasting of the legal regime protecting the property of the mentally ill maintained as its essential and central framework the Lord Chancellor's procedures and jurisdiction in the lunacy court. The inquisition process was indeed made cheaper and simpler, but remained a court process and was retained despite all its continuing problems. The Lunacy Commissioners' power to report on the suspected abuse of property did no more than to provide a simpler and cheaper process whereby the judicial authority was alerted as to the abuse. When the matter subsequently became one of receivership, both under that power and in the 1890 Act, that was a process as much under the control of the court as the inquisition process was. The judicial solution to the challenge of the growth in the number of lunatics of small estate was unequivocally adopted and implemented in the lunacy code of the nineteenth century.

That the judicial solution should be adopted was never seriously questioned, and the evidence reveals a clear, continuous and fundamental refusal to conceive of any means of protection other than through the judicial authority in the form of the lunacy court. It was almost universally accepted that a court of law, and specifically the lunacy court, could not be bettered as the organ of protection of property. This view was consistently maintained. In 1860 Lord Shaftesbury, chairman of the Lunacy Commission since 1845, acknowledged that the lunacy court's masters were 'the superintendents of property',¹⁹¹ and in 1877, when the amalgamation of certain aspects of the work of the commissioners and the court was proposed, it was never doubted that the best possible protection for a lunatic's property, and the only appropriate one, was the Lord Chancellor in his court.¹⁹² In 1906 a lunacy master said the court did the best it could with small estates and made them go as long possible for the benefit of the patient.¹⁹³ And although in 1908 the transfer of the lunacy jurisdiction to the Chancery Division of the High Court was proposed, it was not a jurisdictional change with respect to the property of the insane, merely an internal reorganisation within the judicial

¹⁸⁹ See too Report of the Royal Commission on Lunacy and Mental Disorder, *House of Commons Parliamentary Papers* (1926) (2700) xiii 373 at 402.

¹⁹⁰ For example in Report of the Royal Commission on Lunacy and Mental Disorder, *House of Commons Parliamentary Papers* (1926) (2700) xiii 373 at 511-13.

¹⁹¹ Minutes of Evidence before the Select Committee on Lunatics, *House of Commons Parliamentary Papers* (1860) (495) xxii 349 at 415.

¹⁹² Minutes of Evidence before the Select Committee on Lunacy Law, *House of Commons Parliamentary Papers* 1877 (373) xiii 1, qq. 9462-65 *per* Charles Phillips, Commissioner in Lunacy.

¹⁹³ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 q. 30278 *per* Thomas Fischer, Master in Lunacy.

framework.¹⁹⁴ The conviction that jurisdiction over lunatics' property, large and small, should be kept in the hands of the regular courts, which were accustomed to the work and could address it efficiently and expeditiously, was unshaken.¹⁹⁵ The notion of judicial protection through a specialised court of law was dominant, and none other was seriously envisaged despite the former's problems of expense, delay, inaccessibility. It was accepted as the proper and most effective mode of protection. Trenchant and deserved though the criticism of the lunacy court's processes was, the consensus was that the principal deficiencies in the process had been addressed and that substance of the protection afforded once the process was complete was excellent and provided the best protection possible. It was said that its protection of lunatics would 'always redound to its honour',¹⁹⁶ and contemporary commentators referred to its 'its pitying paternal jurisdiction'¹⁹⁷ and the 'excellent keeping' it afforded the affairs of lunatics.¹⁹⁸

The retention and reinforcement of the lunacy court as the only organ for the protection of the property of the mentally ill is a striking feature in the legal history of insanity, because the court was one whose very existence was in danger. The threat lay in the hostile political climate in which it operated during the crucial formative years of the legal regime from 1845 to 1890. This hostility arose from the potency of two ideological movements which dominated nineteenth century law-making: state intervention and the rationalisation of the legal system.

It has been seen¹⁹⁹ that the orthodox response of the Victorian state to major social issues was to impose powerful central government control by establishing a new statutory bureaucratic body to implement a programme of reforming regulatory legislation, and that this model had been adopted in numerous fields of social concern, including lunacy. In most cases, the jurisdiction of the regular courts was to some degree undermined and elements of it redirected to the bureaucratic organ with its simple, cheap and accessible procedures dealing with small cases, whether they were adversarial or investigative.²⁰⁰ And this was so even where property rights were involved.²⁰¹ This new and widespread practice of using bureaucratic organs or officers to undertake duties which had hitherto been the responsibility of the regular courts of law constituted an obvious and very real threat to the inherent jurisdiction of judges of the lunacy court, a threat of which they were inevitably aware. The Lunacy Commission was indisputably a centralised board of control, and its introduction marked a clear shift of power from an exclusively judicial control of lunacy to an executive control,

¹⁹⁴ Report of the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4202) xxxix 159 at para. 805, p. 461.

¹⁹⁵ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 q. 28464 per Cozens-Hardy LJ.

¹⁹⁶ 10 *Law Quarterly Review* 12 (1894) at 12.

¹⁹⁷ 14 *Law Quarterly Review* 226 (1898) at 226.

¹⁹⁸ 15 *Law Quarterly Review* 4 (1899) at 4.

¹⁹⁹ See above, p. 2

²⁰⁰ See generally, Chantal Stebbings, *Legal Foundations of Statutory Tribunals in Nineteenth Century England* (Cambridge University Press, 2006).

²⁰¹ Chantal Stebbings, 'State Intervention and Private Property Rights in Victorian England' in Hudson (ed.), *New Perspectives on Family Law, Human Rights and the Home* (Cavendish Publishing, 2003), pp. 217-37.

embodied in the emergence of this new and powerful bureaucratic organ with responsibility for the vast majority of lunatics.

The lunacy court was also vulnerable to the movement for the reform of the law and legal process which had as its central objective a uniform, efficient and rational legal system. That movement included two features of particular significance to the lunacy court: an unambiguous commitment to abolishing all specialist jurisdictions in independent courts²⁰² and a determination to reform the procedures in all the regular courts to ensure speed and simplicity.²⁰³

The lunacy court clearly exercised a specialist jurisdiction, and was accordingly vulnerable to the orthodox view that specialist jurisdictions undermined the organisation, order, classification and efficiency that characterised a rational legal system. The Judicature Commissioners in the latter years of the nineteenth century wanted to address the overlapping, conflicting, uncertain or anachronistic specialist jurisdictions which made a litigant's life a misery and to propose reforms which would ensure the speedy, economical and satisfactory dispatch of judicial business. They sought a more organised, uniform and consistent system. While the hostility towards special jurisdictions was directed primarily at local courts, there was a pervasive and official anxiety that specialisation could be taken too far within the regular court system. This led the Royal Commission on the Care and Control of the Feeble Minded in 1908 to recommend that in the interests of increased efficiency and economy the lunacy jurisdiction exercised by the lunacy court be transferred to the Chancery Division of the High Court, and that the office of master in lunacy be abolished.²⁰⁴ The arguments were persuasive and cogent. Not only was the workload of the Chancery Division decreasing, and that of the lunacy court increasing,²⁰⁵ the work of the latter in caring for the mentally ill was closely analogous to the former's work in caring for infants, and the superior processes and practices in the Chancery Division meant that it carried out its duties in this respect with far more speed and efficiency than the lunacy judges and officials.²⁰⁶ This was due to the Chancery judge enjoying a large staff under his control, a control that the judge in lunacy did not possess over the masters in lunacy,²⁰⁷ and the practice of

²⁰² Second Report of the Judicature Commissioners, *House of Commons Parliamentary Papers* (1872) (631) xx 217.

²⁰³ First Report of the Judicature Commissioners, *House of Commons Parliamentary Papers* (1868-69) (4130) xxv 1.

²⁰⁴ Report of the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4202) xxxix 159 at para. 805, p. 461; Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 q. 28373, per Cozens-Hardy LJ.

²⁰⁵ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 q. 29248 per W. H. Winterbotham, Official Solicitor

²⁰⁶ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 q. 28374 per Cozens-Hardy LJ.

²⁰⁷ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 q. 28375 per Cozens-Hardy LJ.

judicial sittings during the vacations.²⁰⁸ Furthermore, it was absurd for the increasing amount of trustee work, where a trustee became lunatic and legal arrangements such as the appointment of new trustees and the execution of vesting orders needed to be made, to be conducted by the lunacy court, as it was properly a matter for the Chancery Division.²⁰⁹

The movement for the reform of court procedures was equally hostile to the lunacy court. The provision of cheap, fast and effective justice was a political imperative for the Lord Derby's Conservative ministry²¹⁰ when popular demand for law reform reached its height in the middle years of the nineteenth century, and one to which Lord St Leonards was strongly committed, both in general and specifically in relation to lunacy. As a result, procedures in all the courts of law were being examined, notably that in the Court of Chancery where the delays and expense were notorious. The technicality, cost and extreme slowness of Chancery procedures were the subject of widespread informed and popular criticism, not least through the accurate portrayal of the suit of *Jarndyce v. Jarndyce* in Charles Dickens' *Bleak House* in 1853. Contemporary commentators complained of 'the deformities of our vaunted Jurisprudence', the 'tragedy of a Chancery Suit' and a process that was 'incongruous, tortuous, and mischievous'.²¹¹ Procedures in the lunacy court were, if anything, even worse in these respects. The processes were archaic, technical, opaque and slow and suited mainly to the wealthy. And when Chancery processes were used in the post-inquisition stage, they were ill-suited in that they were designed to deal primarily with hostile litigant parties and to implement clear rights or processes, whereas in lunacy there was no litigation in the usual sense of the term, and the law was paternal and protective. A commentator in 1854 described the Court of Chancery as 'a sink of iniquity, which stinks in public opinion, and cannot be too soon superseded by some more simple and wholesome process for the protection of Chancery lunatics'.²¹² Despite being a separate department from 1842, the supervision of lunacy by the Lord Chancellor, the use of Chancery processes in the administration of estates subsequent to the inquisition, and the widespread use of the term 'Chancery lunatic' to describe lunatics so found by inquisition, strongly linked the lunacy court with the Court of Chancery in the public mind. The former was clearly tainted by the faults of the latter and was, accordingly, vulnerable.

In this interventionist and reformist context, the adoption of an exclusively judicial solution to the challenge of lunatics' small estates was a singular achievement,

²⁰⁸ The lunacy department had no vacation sittings: Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 qq. 28378-82 *per* Cozens-Hardy LJ.

²⁰⁹ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 q. 28374 *per* Cozens-Hardy LJ.

²¹⁰ 'Lord Derby's Policy as to Law Reform', 16 *Law Review and Quarterly Journal of British and Foreign Jurisprudence* 1-32 (1852).

²¹¹ 'The First Report of the Chancery Commissioners', 16 *Law Review and Quarterly Journal of British and Foreign Jurisprudence* 115-140 at p.115 (1852); First Report of the Chancery Commissioners, *House of Commons Parliamentary Papers* (1852) (1437) xxi 1.

²¹² Richard Saumarez, *An Address on the Laws of Lunacy for the Consideration of the Legislature* (J. Ridgway, London, 1854) p. 16.

but the survival of the lunacy court as its specific instrument was remarkable. Not only did that court ensure that the lunacy jurisdiction was retained in the hands of a judicial authority, it also managed to keep its identity as a completely discrete department of the Court of Chancery in virtually all lunacy matters to administer it. It successfully overcame the legal system's hostility to specialist jurisdictions and its determination to introduce uniform procedures, affirmed the need for judicial regulation of lunatics' property and justified the single-minded exclusion of any additional or alternative organ of management and protection. That it retained its position as the proper and sole organ for the protection of the property of the mentally ill was due to the independence, resilience, astuteness and determination of the nineteenth century lunacy court .

The judges and masters of the lunacy court were 'strenuously of opinion that their isolated position should remain unimpaired' and that the 'judicial machinery should not be touched.'²¹³ They understood that the need to assert themselves was imperative if they were to survive, and that only the distinctiveness and importance of their traditional role in the protection of property could prevent their court being subsumed either into the Chancery Division or in the bureaucratic regime of lunacy regulation. Perceiving their very survival as lying in the exclusive protection of property, they refused to compromise and steadfastly maintained their jurisdiction. They did so by making powerful and persuasive arguments for their supremacy in property matters to both the government and the public, and by being highly proactive in safeguarding their inherent jurisdiction.

The lunacy court undoubtedly possessed intrinsic advantages which it promoted strongly in legal and political circles and which it pointedly emphasised in parliamentary debate, official inquiries and the press. It was clear that it possessed the necessary organisation and machinery to ensure that the property of the mentally ill, whatever its size, was protected so that it was used only for their care and preserved for their recovery, with all expenditure accounted for. Although the court had been left behind in the major restructuring of the legal system in the 1870s, and its procedures had not been fully reformed, there had been some improvements to meet popular demands, notably the simplification of the inquisition process and the introduction of receivership. The enactment of these genuinely beneficial reforms signified that the judges in lunacy were open to criticism and willing to co-operate with the new climate of law reform. The court also enjoyed the significant advantage in pragmatic and cost-conscious government circles of being self-supporting, as it was financed entirely by fees and the lunacy percentage. It also showed itself willing to keep the management even of small estates, even though they were undoubtedly troublesome to supervise, especially where they consisted of small businesses which had to be managed or wound up, or where an estate was in disorder and litigation was necessary to sort it out.²¹⁴

That it was a court of specialist jurisdiction was largely impossible to contest, but the judges of the lunacy court defended themselves robustly on the grounds of a need

²¹³ Report of the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4202) xxxix 159 at para. 782, p. 451.

²¹⁴ Minutes of Evidence before the Select Committee on Lunatics, *House of Commons Parliamentary Papers* (1859, session 1) (204) iii 75 q. 1276 *per* Francis Barlow, Master in Lunacy; Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 q. 29303 *per* W. H. Winterbotham, Official Solicitor.

for specialist expertise in such a substantively technical and esoteric branch of the law. They argued that the complexity of the lunacy law was such that a specialist court was necessary to administer it, a perception that the inaccessibility of the law reinforced. They convincingly maintained that a specialist jurisdiction dedicated to the protection of the insane, with unrivalled expertise and understanding of a difficult condition and its consequences, was essential to successful protection of the property of the mentally ill. This was a powerful argument, sufficiently so for the lunacy court successfully to elude the contemporary official opposition to specialist jurisdictions. Even when the Royal Commission of 1908 recommended the transfer of the lunacy jurisdiction to the Chancery Division,²¹⁵ a repeated objection was that lunacy was such a specialised branch of law that it should be kept in a dedicated department, as a lack of expertise and experience would cause more delay and expense; indeed it would result in less efficiency not more.²¹⁶ For the same reason the County Court was rejected as a major recipient of the lunacy jurisdiction.²¹⁷ When the lunacy court agreed to the transfer of limited functions to the Chancery Division of the High Court,²¹⁸ it was a pragmatic concession which did not undermine the main thrust of the judicial response to the perceived threats to their jurisdiction.

A tangible threat came from the potentially encroaching Lunacy Commission. The possibility of tension and conflict between the two institutions, described as 'diametrically opposed'²¹⁹ though working in the same field of activity, was clear. And yet the lunacy court was able to maintain its position in relation to the bureaucratic body and avoid being undermined by it, primarily and precisely by using the different objectives, functions and cultures²²⁰ of the two institutions to its advantage and thereby diffusing any potential conflict on the question of property. With resilience and determination, the lunacy court demonstrated its unrivalled suitability for the protection of property. A measure of its success is that despite the history of provision for the mentally ill in the modern era being one of increased legislative regulation effected through organs of central government, and notwithstanding the Lunacy Commissioners' undoubted independence, knowledge and experience, they were never seriously considered as a suitable alternative to the court for the protection of property. When in 1860 the Select Committee on Lunatics discussed the transfer to the Lunacy Commissioners of responsibility for Chancery lunatics, it was only their cure, treatment and general supervision that were considered. There was no question of transferring any

²¹⁵ Report of the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4202) xxxix 159 at para. 805 (p. 461).

²¹⁶ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 qq. 29445-47 per William Ambrose, Master in Lunacy.

²¹⁷ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 qq. 30100, 30109 per Thomas Fischer, Master in Lunacy. Many commentators also believed the County Court was already overburdened with work.

²¹⁸ Namely vesting orders where lunatics were involved.

²¹⁹ Report of the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4202) xxxix 159 at para. 782, p. 451.

²²⁰ D. J. Mellett, 'Bureaucracy and Mental Illness: the Commissioners in Lunacy 1845-90', 25 *Medical History* 221-50 (1981).

jurisdiction over lunatics' property from the judicial to the bureaucratic authority. When the Lunacy Commissioners were replaced by the Board of Control in 1913 as the authority of central government in lunacy regulation,²²¹ no changes of principle were made in relation to the protection of lunatics' property: the judicial solution remained the only one.

The reasons why the Lunacy Commissioners were never considered as suitable for the protection of the property of the mentally ill were several. The commission was created as an advisory body, without executive functions. The commissioners inspected, commented, recommended, revealed abuses and spread good practice, but from their inception they were denied any powers to protect the property of lunatics not so found by inquisition. They themselves accepted the perception of the court as the proper protector of lunatics' property, and their own chairman said that they should not 'trench upon [the court's] rights' as such.²²² They admitted their lack of experience and knowledge of the administration of property,²²³ and the widely accepted view was that to give the commissioners the power to deal with lunatics' property would lead to confusion and tend against economy.²²⁴ It was also clear that the commissioners had extensive duties with no spare capacity for any new responsibilities. Indeed, in the first decade of the twentieth century it was officially acknowledged that their work had become too extensive for the six commissioners, and that the traditional model of central control and local supervision of asylums was failing, leading to a recommendation for a complete reorganisation. The commission's constitution, its members' own diffidence, and the tacit acceptance by the court that the commission was better equipped to protect the persons of certified lunatics in state asylums, combined to avoid any undue impact of state intervention on the exercise of the lunacy court's jurisdiction. The two frameworks for the regulation of lunatics interacted smoothly to the satisfaction of both parties in relation to property matters. In maintaining its role as protector of the property of incapacitated individuals in the face of the lunacy commission, the court's determination resonated with contemporary public concerns. It supported the popular distrust of the intervention of the state into the private affairs of individuals, most notably with questions of private property.²²⁵

Beyond astutely engaging with the political imperatives of law reform and state intervention as far as it could, the lunacy court asserted its position by proactively and strongly defending its own inherent jurisdiction, which had always been perceived principally in terms of property. The judges' awareness of their vulnerability, and the steps they took to address it, are clearly demonstrated by the landmark decision in *Re*

²²¹ Mental Deficiency Act 1913 (3 & 4 Geo V c. 28) ss. 21, 22. This had been recommended in 1908: Report of the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4202) xxxix 159 at para. 806 (p. 462).

²²² Minutes of Evidence before the Select Committee on Lunatics, *House of Commons Parliamentary Papers* (1860) (495) xxii 349 at q. 415 *per* the Earl of Shaftesbury.

²²³ Minutes of Evidence before the Select Committee on Lunacy Law, *House of Commons Parliamentary Papers* 1877 (373) xiii 1, qq. 9463-65 *per* Charles Phillips, Commissioner in Lunacy.

²²⁴ Minutes of Evidence taken before the Royal Commission on the Care and Control of the Feeble-Minded, *House of Commons Parliamentary Papers* (1908) (4218) xxxvii 455 q. 28464 *per* Cozens-Hardy LJ.

²²⁵ See generally, Chantal Stebbings, *Legal Foundations of Statutory Tribunals in Nineteenth Century England* (Cambridge University Press, 2006) pp. 91-93.

Earl of Sefton in 1898 in which a lunatic sought permission to alienate a very small portion of his estate in order to safeguard the whole, much larger, portion.²²⁶ The court there directly addressed the juxtaposition and interrelationship of the two strands of jurisdiction, inherent and statutory, and affirmed its position primarily by adopting a flexible approach to its interpretation of the statutory lunacy code. Instead of adopting the traditional strict English approach to statutory interpretation, it preferred a liberal approach and looked to the overall purpose of the legislation. A strict construction of the statute *De Prerogativa Regis*, which was a prohibiting enactment, would have been fatal to the lunatic's claim. Instead the court adopted an unprecedented wide interpretation of the 1324 statute to ensure that its own ancient inherent jurisdiction was not inhibited, and a very narrow construction of the Lunacy Act 1890 to show that it did not apply in its terms to the situation then before it. In so doing the court held that the Lunacy Act 1890 was merely declaratory of the ancient jurisdiction, that it was not exhaustive, and that it did not limit the inherent jurisdiction of the court. It was an enabling Act, and was not restrictive, and did not supersede the inherent jurisdiction. The court thereby unambiguously affirmed the existence, scope and vigour of the court's ancient inherent delegated jurisdiction in lunacy, derived from the royal prerogative, of which only parts had been given statutory expression. It existed apart from the express legislative powers, and it was not limited or curtailed by those express powers. This finding was possible precisely because the scope of the court's inherent jurisdiction had never been defined. As Lord Lindley MR observed, its limits 'fortunately have never been so accurately laid down as to bind the court to the very narrow limits to which the words [of an Act²²⁷], unless very general indeed, would confine its jurisdiction'.²²⁸ This adoption of a strikingly liberal approach to the interpretation of an ancient disabling statute, the strict interpretation of modern enabling statutes, and the affirmation of an inherent jurisdiction in lunacy that was limited only by the need to exercise it for the benefit of the lunatic, constituted an unambiguous and effective response to the perceived threat to the Lord Chancellor of losing his lunacy jurisdiction to the state apparatus.²²⁹

The lunacy court was astute in its self-promotion. In demonstrating the wide scope and depth of its inherent jurisdiction it showed that where the statutory jurisdiction was inadequate in some way, as actually occurred in the *Sefton* case itself, the inherent jurisdiction could be called into play, and so 'by hook or by crook almost any transaction which is for the patient's benefit can be sanctioned'.²³⁰ The court portrayed its inherent jurisdiction as the real friend of the lunatic, the regime that enabled transactions to be effected for his benefit, and the court as the natural and most effective protector of a lunatic's property, and indeed that in the field of property holding, the Lord Chancellor's protection was unsurpassed. In so doing, the court implicitly recognised the debate within lunacy law regarding the absence of any legal protection for the property of poorer lunatics, and reinforced an awareness that a

²²⁶ *Re Earl of Sefton* [1898] 2 Ch 378.

²²⁷ Words included in 67 LJ Ch 518 at 523.

²²⁸ (1898) 78 LT 765 at 768 (Lindley MR).

²²⁹ See generally W.R. Cornish and G de N. Clark, *Law and Society in England 1750-1950* (Sweet & Maxwell, London, 1989) pp. 69-71.

²³⁰ Raymond Jennings, 'Jurisdiction in Lunacy' 23 *Modern Law Review* 421-424 at 422 n. (1960).

significant growth in the number of individuals officially recognised as insane demanded clear and robust provision for the safeguarding of their property.

CONCLUSION

The modern legal framework for the protection of the property of the mentally ill was created in the Victorian period, when the arguments for adopting and reinforcing the judicial solution were accepted, implemented and embedded in the modern legal framework. The challenge to the legal order was considerable; the easy and obvious solution was a bureaucratic one, but the one that was adopted, retained and reinforced was the judicial one. And, furthermore, established in the form of a specialised court of law. The evidence shows that the ancient jurisdiction of the Lord Chancellor in lunacy, while accessible to patients of small property in theory but not in practice, was in principle a highly effective organ of protection if the will to reform its procedural defects was present. The Victorian legislature responded, and over fifty years effected a gradual reform of the established inquisition process for the protection of all lunatics' property and introduced some substantive reforms specifically directed to small estates.

The development of a regime for the protection of small estates of the mentally ill was the product of a number of factors which came together with an unprecedented intensity in the nineteenth century. They included the need for state intervention; the reforming agenda of the Victorian legislators in relation to the law, legal process and legal system; judicial conservatism; a complex branch of law dominated by practice; an archaic specialised jurisdiction; a new statutory jurisdiction; advances in medical science; the fundamental incapacity of the subjects of the law unable to articulate their needs and demands; and, finally, a law which put the significance of individual wealth central to the consequences of lunacy. The interrelation of these factors created a momentum of its own, and revealed a number of imperatives, influences and attitudes, but the catalyst which produced a positive dynamic leading to a reformed legal regime for the protection of the property of the mentally ill was the determination of the lunacy court jealously to guard its jurisdiction over property and to ensure it was not violated either by the state apparatus or by another judicial body. Together they combined to resist any contrary forces and create a strong and accessible protection for small estates.

It has been seen that the substantive reforms for the protection of small estates were few and slow in coming. The evidence suggests four main reasons for this hesitancy. First, the commitment to resolving the specific problem of the smaller properties of the middle and working class mentally ill was subsumed by the overall movement to ensure that the judicial solution was the one adopted for the protection of all property. Secondly, the legislature had more pressing concerns to address in relation to lunacy, primarily to ensure that the population of pauper lunatics was protected from physical abuse and properly cared for and to do so by introducing a raft of legislation and the creation of a new bureaucratic body. A writer on lunacy in 1892 observed that he would not deal with matters relating to the property of a lunatic as they were 'not within the scope of a popular treatise'.²³¹ And thirdly, while the public concern was

²³¹ Daniel Chamier, *Wilson's Legal Handy Book on the Lunacy Law*, (Effingham Wilson & Co., 1892) p. 49.

indubitably with issues of personal liberty, it was directed to the liberty of the person rather than freedom to deal with property. And so throughout the nineteenth century, the principal informed criticism of the lunacy laws was primarily in relation to the possibility of wrongful detention of sane individuals who were sane as a result of the manipulation of the law by unscrupulous relatives and the law's inherent inadequacy in this respect.²³² This imperative was regarded as of prime importance, and accordingly dominated over any concern for lunatic's property.

Fourthly, the reforms were slow because, as a class, the mentally ill were a weak constituency. Due to their medical incapacity every aspect of the law and its administration was determined by others in the perceived best interests of those subjected to it, with no articulation of their needs by the users themselves. As such, it was a supremely paternalistic branch of the law, and one which was highly susceptible to current social attitudes and medical theories. While the judicial protection of property was accessible to the very wealthy Chancery lunatics, and their friends and families were generally in a position to articulate and press for any desirable legal reforms, and pauper lunatics were championed by the humanitarian and evangelical forces within Victorian society and politics,²³³ the middle class lunatics of small property had no obvious lobby to ensure their particular position was not ignored.

While these four factors undoubtedly hindered the speed of reform and the adoption of the judicial solution, they did not prevent it, partly because the issue of the protection of property was relevant to them all: it concerned lunatics who were paupers for the purposes of lunacy law but were not destitute; it was an aspect of personal freedom in the wider sense; and it undoubtedly directly affected wealthier lunatics who were subject to an unacceptably expensive system of protection. And, furthermore, the paternalistic ethos underlying the place of the mentally ill within English law strongly promoted a judicial solution to the legal protection of their small estates, primarily due to natural parallels drawn with the Court of Chancery's protective jurisdiction over infants. To adopt the judicial solution of the lunacy court reflected a long standing and intense paternalism, an ethos which reached its height in the early twentieth century when the desirability of judicial control of the property of 'prodigals' was debated, and the line between bad judgment and lunacy became increasingly narrow.

The factor which could have entirely prevented the adoption of the judicial solution, namely the powerful ideology of state intervention, ultimately proved neither a viable competitor nor a material obstacle, but in 1845 it constituted a major threat in principle to the very existence of the lunacy court and a robust response and constant vigilance as to the erosion of its jurisdiction were required. The exclusion of the lunacy

²³² Richard Saumarez, *An Address on the Laws of Lunacy for the Consideration of the Legislature* (J. Ridgway, London, 1854) pp. 1-2. Report of the Royal Commission on Lunacy and Mental Disorder, *House of Commons Parliamentary Papers* (1926) (2700) xiii 373 at 401-5; Evidence of James Billington, Secretary of the Lunacy Law Amendment Society in Minutes of Evidence before the Select Committee on Lunacy Law, *House of Commons Parliamentary Papers* 1877 (373) xiii 1, qq. 6899-7191. See too Peter McCandless, 'Dangerous to Themselves and Others: the Victorian Debate over the Prevention of Wrongful Confinement' 23 *The Journal of British Studies* 84-104 (1983). See too 'Reports of the Society for Promoting the Amendment of the Law', 9 *Law Review & Quarterly Journal of British & Foreign Jurisprudence* 313-336 at 318-19 (1848-49).

²³³ See generally Kathleen Jones, *Lunacy, Law and Conscience 1744-1845* (Routledge & Kegan Paul Ltd, London, 1955) pp. 66-68.

commissioners from any material involvement with lunatics' property and the recognition of the Lord Chancellor in the bureaucratic framework as the appointer of the commissioners and the formal recipient of their reports, served to diffuse any potential tensions and conflicts between the executive and judicial authority. As a result the interaction between the state's regulation of lunacy and the jurisdiction of the judicial authorities in relation to the property of the mentally ill was easy, at a time when fundamental principles of jurisdiction in this field of social and legal development were being formulated. The evidence provides an insight into the judicial system's response to state intervention in the field of lunacy. It shows the judges were aware of the threat that state intervention could bring to even ancient established jurisdictions. It does not, however, show the judges to be a force that aimed to hinder centralisation in the nineteenth century, rather that they were pragmatic and saw they had to work with the bureaucratic authority. The judiciary's vested interests certainly marked the relationship, and the Lord Chancellor, judges and masters were clearly protecting their jurisdiction.

Judicial attitudes were undoubtedly a material factor in determining the final shape of the legal regime in lunacy: the lunacy court's refusal to contemplate any solution other than the judicial one and to maintain the inquisition when its abolition would have resulted in a simpler, more accessible and less anachronistic system,²³⁴ could be construed as judicial conservatism. That would suggest the mentally ill may have suffered as a result of what could be perceived as judicial manoeuvring driven by the vested interests of the judges, either denying them effective protection or delaying its introduction. The response of the judges, however, could equally be described as judicial determination to maintain an ancient jurisdiction in the firm belief that it offered the best possible protection to the mentally ill, that it constituted an effective response to the needs of poor and middle class patients, and recognised the public confidence in this solution.

Finally, the legal framework of lunacy law in relation to the protection of the property of the mentally ill is far more than an arid official aspect of the history of the care of the mentally ill of lunacy. The attention of nineteenth century reformers and governments was directed to the pressing question of the management of pauper lunatics, and modern scholarship has concentrated on that discourse and its institutional implementation and social impact.²³⁵ There has been a tendency to perceive the legal framework of property protection as relevant only to the small class of wealthy lunatics and as such of less importance to the dominant theme of state intervention in mental health. However this study has shown that in the nineteenth century the legal

²³⁴Theobald regarded the maintenance of the inquisition in 1845 and again in 1890 as missed opportunities: Sir Henry Theobald, *The Law Relating to Lunacy*, (London: Stevens and Sons, 1924) pp. 71, 80.

²³⁵ See for example Peter Bartlett, *The Poor Law of Lunacy* (Leicester University Press, London and Washington 1999); Joseph Melling and Bill Forsythe (eds), *Insanity, Institutions and Society 1800-1914* (Routledge, London and New York, 1999); Andrew Scull, *The Most Solitary of Afflictions: Madness and Society in Britain 1700-1900* (Yale University Press, New Haven and London 1993); Leonard D. Smith, *Cure, Comfort and Safe Custody* (Leicester University Press, London and New York 1999); Joseph Melling and Bill Forsythe, *The Politics of Madness* (Routledge, London and New York 2006). See too Clive Unsworth, 'Law and Lunacy in Psychiatry's "Golden Age"', 13 *Oxford Journal of Legal Studies* 479-507.

framework for the protection of property was a significant element within the political and popular debate on the question of lunacy, and as a construct in its own right with its own tensions and dynamics, it was an important formative factor in shaping the policy with respect to the care of the mentally ill. The recognition that special compulsory powers were necessary to protect the property of patients when they could not manage their own affairs,²³⁶ that this protection should be easily accessible to the mentally ill with small properties, and that it should be implemented by a specialist court of law, prevailed with remarkable consistency throughout the nineteenth century and to the present day.²³⁷ The fundamental structure and authority of robust and highly accessible judicial protection with minimal or no jurisdiction over the person forms the core and imperative of today's legal framework for the care of the property of the mentally ill.²³⁸

²³⁶ Royal Commission on the Law Relating to Mental Illness and Mental Deficiency, *House of Commons Parliamentary Papers* (1956-57) (169) xvi 1 at para. 136, p. 49.

²³⁷ It was still the view in the 1930s: see the preface to Gerald E. Mills and Ronald W. Poyser, *Lunacy Practice* (London, Butterworth & Co., 1934) p. v. See too Mental Health Acts 1959, 1983.

²³⁸ See Lord Mackay of Clashfern, *Halsbury's Laws of England*, (LexisNexis Butterworths, 2005), vol. 30(2) paras 672-764.