THE LEGAL ATTITUDE TOWARD
MENTAL ABNORMALITY

A Comparative Analysis
Of The Historical And Modern
Criminal Law Tests Of Responsibility
With Respect To Insanity, In England, Scotland
And The United States Of America

VOLUME I

By
Samuel Polsky
B.A.(Penn.) LL.B.(Harv.)
Counsellor At Law, U.S.A.

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Ph.D.
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THE LEGAL ATTITUDE TOWARD
MENTAL ABNORMALITY

VOLUME I
CONTENTS

Chapter I : Introduction.  page 17

PART ONE

Historical Development In English Common Law.  32

Chapter II : Early English Institutional Writers.  34
Chapter III : Rise of English Legal Analysis.  52
Chapter IV : English Case Law: Pre-McNaghten.  83

PART TWO

Comparative Historical Development In Scottish Common Law.  134

Chapter V : First Scottish Aspects.  136
Chapter VI : The Scottish Developmental Period.  159
Chapter VII : Scotland's Early Modern Phase.  225
CONTENTS
(Continued)
Vol. II

PART THREE

Comparative Analysis Of the Modern Period:
England, Scotland And The United States

Chapter VIII : The McNaghten Rules 287
Chapter IX : The Basic Concepts:
McNaghten Variations 355
Chapter X : The Problem Area:
Legal Alternatives 462

APPENDIX

A : Psychopathic States: A Note On A
   Special Medico-Legal Problem 545
B : Bibliography: Books 566
C : Bibliography: Periodicals 607
D : Addenda 643
SECTIONAL TABLE OF CONTENTS
# Sectional Table of Contents

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>Introduction.</td>
<td>17</td>
</tr>
<tr>
<td>II</td>
<td>Early English Institutional Writers.</td>
<td>34</td>
</tr>
<tr>
<td></td>
<td>Bracton (13th Century)</td>
<td>36</td>
</tr>
<tr>
<td></td>
<td>The Brute Theory</td>
<td>37</td>
</tr>
<tr>
<td></td>
<td>Britton (Late 13th Century)</td>
<td>41</td>
</tr>
<tr>
<td></td>
<td>Early Classifications And The Statute De Prorogativa Regis (14th Century)</td>
<td>42</td>
</tr>
<tr>
<td></td>
<td>Sir Thomas Littleton (15th Century)</td>
<td>43</td>
</tr>
<tr>
<td></td>
<td>The Cognitive Concept</td>
<td>44</td>
</tr>
<tr>
<td></td>
<td>Sir Anthony Fitzherbert (16th Century)</td>
<td>46</td>
</tr>
<tr>
<td></td>
<td>Changing Emphasis</td>
<td>47</td>
</tr>
<tr>
<td></td>
<td>The Twenty Pence Test</td>
<td>48</td>
</tr>
<tr>
<td></td>
<td>Conclusions</td>
<td>49</td>
</tr>
</tbody>
</table>
SECTIONAL TABLE
OF CONTENTS
(CONTINUED)

Chapter III : Rise of English Legal Analysis. 52

Legal Analysis And The First Psychiatric Revolution 54
Sir Edward Coke (17th Century) 56
Non Compos Mentis 57
The First Stage Of Legal Analysis 59
Sir Matthew Hale (17th Century) 61
The Second Stage Of Legal Analysis 62
Partial Insanity 64
Monomania 67
Lunacy 68
The Fourteen Years Of Age Test 70
The Infant Analogy 71
Serjeant William Hawkins (Late 17th & Early 18th Centuries) 73
Emergence Of The Knowledge Test 73
Sir William Blackstone (18th Century) 75
Procedural Elements 76
Conclusions 80
<table>
<thead>
<tr>
<th>Chapter IV</th>
<th>English Case Law: Pre-McNaghten.</th>
<th>83</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Contemporaneous Medical Opinion</td>
<td>85</td>
</tr>
<tr>
<td></td>
<td>Precedent And Changing Content</td>
<td>91</td>
</tr>
<tr>
<td></td>
<td>Beverley's Case (1603)</td>
<td>92</td>
</tr>
<tr>
<td></td>
<td>Arnold's Case (1724)</td>
<td>94</td>
</tr>
<tr>
<td></td>
<td>The Wild Beast Test</td>
<td>94</td>
</tr>
<tr>
<td></td>
<td>A New Evaluation</td>
<td>96</td>
</tr>
<tr>
<td></td>
<td>Earl Ferrer's Case (1760)</td>
<td>98</td>
</tr>
<tr>
<td></td>
<td>Moral Knowledge:And The Nature Of The Act</td>
<td>99</td>
</tr>
<tr>
<td></td>
<td>Hadfield's Case (1800)</td>
<td>102</td>
</tr>
<tr>
<td></td>
<td>Erskine's Delusion Test</td>
<td>103</td>
</tr>
<tr>
<td></td>
<td>Erskine's Qualified Knowledge Test</td>
<td>105</td>
</tr>
<tr>
<td></td>
<td>Criminal Lunatics Act (1800)</td>
<td>108</td>
</tr>
<tr>
<td></td>
<td>Bellingham's Case (1812)</td>
<td>112</td>
</tr>
<tr>
<td></td>
<td>Retrogression In Substantive Law</td>
<td>113</td>
</tr>
<tr>
<td></td>
<td>Parker's Case And Bowler's Case: Mental Defect</td>
<td>117</td>
</tr>
<tr>
<td></td>
<td>Offord's Case (1831)</td>
<td>119</td>
</tr>
<tr>
<td></td>
<td>Oxford's Case (1840)</td>
<td>122</td>
</tr>
<tr>
<td></td>
<td>Irresistible Impulse</td>
<td>122</td>
</tr>
<tr>
<td></td>
<td>Table No. 1</td>
<td>127</td>
</tr>
<tr>
<td></td>
<td>Conclusions</td>
<td>129</td>
</tr>
</tbody>
</table>
SECTIONAL TABLE OF CONTENTS (CONTINUED)

Chapter V : First Scottish Aspects. 136
Reg. Maj. As Precept 139
Reg. Maj., A.P.S., And Frag. Col. 142
Three Sixteenth Century Cases (Neilsoun, Lauder and Guyld) 147
Comparisons And Speculations 151
Table No. 2 158

Chapter VI : The Scottish Developmental Period. 159
Sir George Mackenzie 161
Areas Of Agreement With Predecessors 162
Punishment: Rule And Rationale 165
Abnormality: Time, Type and Presumptions 169
Definitions Of Idiotry And The Ten Finger Test 174
The Standard Of Absolute Furiosity 175
The Rule Of Proportions: Precursor Of Diminished Responsibility 179
Drunkenness 184
Two Seventeenth Century Cases (Johnston, and Chislie) 185
Three Early Eighteenth Century Cases (Sommerville, Thompson, and Spence) 189
Erskine 196
Idiotry And The Absolute Standard 198
## Sectional Table of Contents (Continued)

### Chapter VI: The Scottish Developmental Period. (Continued)

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Cognitive Concept In Curiosity</td>
<td>200</td>
</tr>
<tr>
<td>Effect On The Rule Of Proportions</td>
<td>202</td>
</tr>
<tr>
<td>Three Late Eighteenth Century Cases (Crockat, Blair, and Coalston)</td>
<td>204</td>
</tr>
<tr>
<td>Comparisons And Conclusions</td>
<td>213</td>
</tr>
</tbody>
</table>

### Chapter VII: Scotland's Early Modern Phase.

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kinloch's Trial (1795)</td>
<td>228</td>
</tr>
<tr>
<td>The Emergent Knowledge Test In Scots Law</td>
<td>229</td>
</tr>
<tr>
<td>Prosecution</td>
<td>230</td>
</tr>
<tr>
<td>Defence</td>
<td>234</td>
</tr>
<tr>
<td>Medical Opinion</td>
<td>240</td>
</tr>
<tr>
<td>Judicial Opinion</td>
<td>243</td>
</tr>
<tr>
<td>Legal Consequences Of Verdict</td>
<td>251</td>
</tr>
<tr>
<td>Baron David Hume</td>
<td>254</td>
</tr>
<tr>
<td>Hume's Knowledge Test</td>
<td>255</td>
</tr>
<tr>
<td>Presumptions</td>
<td>260</td>
</tr>
<tr>
<td>Judgment, Diminished Punishment And Social Protection</td>
<td>262</td>
</tr>
<tr>
<td>Select Scots Case Results</td>
<td>264</td>
</tr>
<tr>
<td>Burnett</td>
<td>268</td>
</tr>
<tr>
<td>Section</td>
<td>Page</td>
</tr>
<tr>
<td>--------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Chapter VII: Scotland's Early Modern Phase. (Continued)</td>
<td></td>
</tr>
<tr>
<td>Alison</td>
<td>269</td>
</tr>
<tr>
<td>Comparisons And Conclusions</td>
<td>273</td>
</tr>
<tr>
<td>Table No. 3</td>
<td>283</td>
</tr>
<tr>
<td>Chapter VIII: The McNaghten Rules.</td>
<td>287</td>
</tr>
<tr>
<td>The McNaghten Trial (1843)</td>
<td>289</td>
</tr>
<tr>
<td>Questions And Answers: The McNaghten Rules</td>
<td>293</td>
</tr>
<tr>
<td>Effect On The Rules: Chief Justice Tindal's Charge And The Particularized Knowledge Test</td>
<td>301</td>
</tr>
<tr>
<td>Effect On The Rules: Prosecution's Knowledge Test</td>
<td>302</td>
</tr>
<tr>
<td>Table No. 4</td>
<td>307</td>
</tr>
<tr>
<td>Table No. 5</td>
<td>310</td>
</tr>
<tr>
<td>Effect On The Rules: Defence - Delusion And Irresistible Impulse</td>
<td>312</td>
</tr>
<tr>
<td>Effect Of Medical Opinion: Moral Insanity, Monomania, Delusions And Irresistible Impulse</td>
<td>319</td>
</tr>
<tr>
<td>Scottish Legal Influence: Effect On The Rules</td>
<td>329</td>
</tr>
<tr>
<td>Table No. 6</td>
<td>334</td>
</tr>
<tr>
<td>Table No. 7</td>
<td>336</td>
</tr>
<tr>
<td>Table No. 8</td>
<td>338</td>
</tr>
<tr>
<td>Conclusions: Evaluation, Scope And Authority</td>
<td>340</td>
</tr>
<tr>
<td>Chapter IX : The Basic Concepts: McNaghten Variations.</td>
<td>355</td>
</tr>
<tr>
<td>--------------------------------------------------------</td>
<td>-----</td>
</tr>
<tr>
<td>England And The McNaghten Rules</td>
<td>358</td>
</tr>
<tr>
<td>England And The Objective Moral Standard</td>
<td>361</td>
</tr>
<tr>
<td>England And The Physical Interpretation Of Quality</td>
<td>364</td>
</tr>
<tr>
<td>England: Time Of The Act And Temporary Insanity</td>
<td>366</td>
</tr>
<tr>
<td>England: Partial Insanity And Delusion</td>
<td>370</td>
</tr>
<tr>
<td>The United States And The McNaghten Rules</td>
<td>377</td>
</tr>
<tr>
<td>American Variations Of the Prerequisite Mental Condition</td>
<td>378</td>
</tr>
<tr>
<td>American Variations With Respect To Particularity In The McNaghten Rules</td>
<td>382</td>
</tr>
<tr>
<td>American Variations Of The Knowledge Test: The Double Category And Sub-Classes</td>
<td>390</td>
</tr>
<tr>
<td>American Variations Of The Knowledge Test: The Single Category And Sub-Classes</td>
<td>401</td>
</tr>
<tr>
<td>American Interpretation Of Wrong</td>
<td>414</td>
</tr>
<tr>
<td>American Interpretation Of Delusion</td>
<td>420</td>
</tr>
<tr>
<td>The New Hampshire Rule As Fundamental Concept</td>
<td>429</td>
</tr>
<tr>
<td>American Summation</td>
<td>431</td>
</tr>
<tr>
<td>Scotland And The McNaghten Rules</td>
<td>431</td>
</tr>
<tr>
<td>Scotland's Exculpatory Standard At Trial</td>
<td>435</td>
</tr>
</tbody>
</table>
# Sectional Table of Contents (Continued)

Chapter IX: The Basic Concepts: McNaghten Variations (Continued)

Scotland And Insanity In Bar Of Trial 444
Conclusions And Recommendations 450

Chapter X: The Problem Area: Legal Alternatives 462

England: Early Rejections Of Irresistible Impulse 465
England: Early Acceptances Of Irresistible Impulse 467
England: The Present Attitude Toward Irresistible Impulse 468
England: Other Attempts At Solution 476
America: Jurisdictions Accepting Irresistible Impulse 480
America: Jurisdictions Denying Irresistible Impulse 497
America: Inconsistent Denials of Irresistible Impulse 498
America: Doctrine Of Diminished Grade Of Offence Rejected 508
America: Doctrine Of Diminished Grade Of Offence Accepted 511
Scotland: The Doctrine Of Diminished Responsibility 515
Conclusions And Recommendations 524
Table No. 9 537
Table No. 10 543
LIST OF TABLES
| TABLE NO. 1: | Oxford's Case And The McNaghten Rules | 127 |
| TABLE NO. 2: | Comparison Of Standards Of Phraseology: England (13th to 16th Centuries) And Scotland (16th Century) | 158 |
| TABLE NO. 3: | Early Concepts Of Delusion In Scotland And England | 283 |
| TABLE NO. 4: | Comparison Of Phraseology Between The Solicitor-General's Address (McNaghten's Trial) And The McNaghten Rules | 307 |
| TABLE NO. 5: | General Comparisons: Oxford's Case, McNaghten's Trial And The McNaghten Rules | 310 |
| TABLE NO. 6: | Extract From Hume's Commentaries | 334 |
| TABLE NO. 7: | McNaghten Rules (Answer To Questions No. 2 & No. 3) | 336 |
| TABLE NO. 8: | Comparison Of Phraseology And Order Of Development: Hume's Commentaries And The McNaghten Rules' Answer To Questions No. 2 & No. 3 | 338 |
| TABLE NO. 9: | Summary Of American Jurisdictions | 537 |
| TABLE NO. 10: | Summary Of Recommendations | 543 |
CHAPTER I

INTRODUCTION
Probably the most difficult problem in
the relationship of law and medicine is that of
mental abnormality. It is not so much a question
of the law or lawyers being dissatisfied with the
aid of psychiatry, as psychiatry being discontent
with the standard imposed upon its science. Criminal
law has often been assailed by the public, or by
experts in other disciplines. No branch of criminal
law has been as much the target of obloquy,
controversy and criticism, however, as the defence
of insanity. Vagueness, confusion, lack of clarity,
have been attributed to the legal definition; lack
of accord with the conclusions of modern science
has been alleged; and results at variance with the
principles of justice (or at least such fundamentals
of law as "actus non facit reum, nisi mens sit rea")
have been charged. At the same time, it must be
acknowledged by even the sternest critics that
determination of standards of criminal responsibility
are, and must be, a function of law as a learned
profession. A need for evaluation and clear
definition of the legal attitude toward mental
abnormality continues to exist. The attempt in
some small measure to meet that need has been the
justification, reason and purpose of this work.

The method, or scope of examination, adopted to achieve that end has been a comparative analysis of the historical and modern criminal law concepts regarding responsibility under mental deviation. The areas of investigation have been Scotland, England and the United States of America. The factors that determined these particular limitations of scope and area have been set out below.

It has already been noted that definition was part of the need to be answered by the present investigation. Customarily, definitions have been treated in a few pages of introductory analysis, or, less often in a chapter of conclusions. Neither approach was possible here, since the same word had different meanings at different times, and the legal attitude was in a process of historical evolution. And even if a historical examination were to be omitted altogether, no simple solution of definition could be achieved. The word "insanity" itself offered an example. It was found by some writers
that "insanity is a purely medical term", but others were equally positive that "insanity does not connote any definite medical entity but is solely a legal and sociological concept". There were those who regarded it as simply "a legal designation", while still others maintained, "with insanity as such the law has no concern". There was even the ambivalent outlook that, "Insanity, from a medical point of view, is one thing; insanity from the point of view of the criminal law is a different thing". These characterizations did not purport to define the


2. Sir Sydney Smith and Dr. F.S. Fiddes, Forensic Medicine (Lond. 1949) p. 384.


4. A.L. Goodhart, "Recent Tendencies in English Jurisprudence" in Canadian Bar Review, May 1929. Professor Goodhart went on to say: "It is concerned with insanity only in so far as the disease has caused an act. In other words the doctor asks, 'Is the man insane?'; the lawyers question is, 'Did the insanity cause the act?'."

term, but rather to assess upon whom the responsibility for definition should fall, law or medicine.

The result was that in the eyes of medico-legal experts, as Sir Sydney Smith and Dr. F. S. Fiddes pointed out, "No definition of insanity is laid down in the law". The answer was not to be found in a sentence or even a paragraph of definition. It had to be carefully reconstructed for each jurisdiction and period; and such reconstruction required not only an analysis of authorities then current, but some idea of historical perspective as well. The entire thesis was thus, in an important sense, a definition or series of definitions.

Examples could be multiplied. Insanity itself covered many different words and ideas when used generically, as frequently happened. An even broader example, however, was the aggregate of questions and answers termed the McNaghten Rules.

England and the American States have indicated the number and variety of meanings that have been judicially culled from that common origin. Definition was therefore not only an important end of this work, but in considerable measure had to be the substance of it, if the end were to be achieved at all. But, as Professor Weihofen once pointed out with respect to the strange laxity in legal definition of insanity, law is "a branch of learning which consists largely of definition."

The process of definition thus conceived required a wide frame of reference. The question could not be restricted to, "what did a particular word mean at a certain place and time?". From that question others naturally followed: - What legal consequences, if any, were entailed? How was the general concept of criminal responsibility affected? What possibilities were inherent in the particular concept? To what extent were they developed? What conclusions could be drawn from

1. Insanity As A Defense in Criminal Law (N.Y. 1933) P. 11.
comparisons within a given system or between systems? These and similar questions, to the extent that they could be answered, required consideration. They comprised the elements of the kind of definition that, it was felt, was needed.

As previously noted, the other aim sought to be accomplished was evaluation. Part of this evaluation had to be historical simply because definition in turn required it. There were other compelling reasons for a historical evaluation, however. Both the need and neglect of historical research were starkly apparent in law in general until recent times. J.W.C. Turner, of Cambridge, himself a scholar of note, has pointed out with respect to one of the greatest of legal historians that, "It is little more than twenty years ago that Professor Holdsworth could correctly say that the impossibility of gaining a complete grasp of the principles of English law without a study of their history was a truth still to a large extent unrecognized".

The McNaghten Rules held so large and commanding a position in Anglo-American law of the last century that they tended to eclipse all prior legal thinking for both England and the United States as mere antiquarianism. Thus the Lee Prize Essayist (Grays Inn Award) of 1946 was able to say: "An enquiry into the practice of English law in its older and harsher days is now of no more than historical interest, as the set of rules which the judges formulated in answer to the House of Lords after the MacNaghten case in 1843 has ever since been regarded as the sole repository of the present law on the subject." Short and simple answers, to this by no means uncommon view, were to be found in both Scotland and England. Lord Cooper put it in these words: "If you would know what a thing is, you must know how it came to be

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"what it is". Mr. Winston Churchill, who may be cited in many contexts, gave the additional aspect that, "The longer you can look back, the further you can look forward". For both reasons, a historical analysis was felt to be not only justified, but essential.

The second and more important aspect of evaluation was with respect to comparative law. This took place on two levels of interpretation, the historical and the modern.

On the historical level of comparison, a number of factors made a final choice of Scotland and England highly expedient. These factors have been elaborated upon at the opening of the Scottish

1. The Scottish Legal Tradition (Saltire Soc. Pamphlets No. 7, 1949) p. 7. Relating the principle directly to law, the ranking member of the Scottish Judiciary added: "and if we are to acquire a just perspective for a brief survey of the modern law, we must consider first the pedigree of its leading doctrines".

2. Including medicine as well as law. The remark was made in the course of his address to the Royal College of Physicians in March 1944, and has been used as the opening in Guthrie's, History of Medicine (1945 ed.).
historical development in Chapter V. Briefly, they were that within the English-speaking world, only Scotland and England possessed the following prerequisites: sufficient length of pedigree; sufficient independence of development, as general legal systems; sufficient similarity in common law method; sufficient differences in technique of procedure; and sufficient linguistic similarities of expression.

The ultimate factor that made a Scottish-English choice mandatory was the complete absence of such a comparative analysis at the historical level. Though much will still remain to be done in that respect, it was felt that some start should be made, however imperfect. So much as the present work was able to accomplish in that respect comprised a new contribution, however slight. The literature was vast but the historical-comparative analysis of Scotland and England was apparently wholly neglected; or, if it existed, it escaped not only the present writer's notice but attention and comment from other writers, whose works were examined, as well. There were, of course, a number of examples of comparative law exposition. Thus
Oppenheimer, early in the twentieth century, in his "Criminal Responsibility of Lunatics"; compared the standards existing in a number of states, including England and Scotland. The comparison, however, was not in historical terms, but in terms of law then current.

The extent of the historical comparison had to be carefully charted. For while a mass of interesting material was available, much of it would have taken this investigation too far away from its other objectives. Only the main streams of thought could be mapped for comparison. The collateral branches open for exploration were beyond the strict confines of this thesis, but it was hoped that they might elsewhere be developed.

At the level of modern comparison, the English and Scottish systems were continued, having once been embarked upon. The problem was whether to restrict the modern comparison to those states, or to include others. The difficulties imposed by the mass of differing American systems did not constitute a valid reason for omitting them from a modern comparison. On the contrary, the richness
of variety springing from a common source offered a perfect medium of comparison. Alternatives and modifications to the British standards might have been treated conjecturally, of course, and in some instances have had to be. But where there were concrete examples of variation in actual daily use, as was true of the United States of America, such, it was felt, were to be preferred.

As a matter of structure, neither evaluation nor definition could be confined to the conclusions terminating each chapter. Inferences and deductions had constantly to be drawn in the main body of the work as well. Where the material could be more conveniently handled topically rather than chronologically, it was reserved for the chapter conclusions. The sections so labelled were not, therefore, intended to separate data from conclusions, but merely to provide a convenient

1. All the American States except Louisiana take the English common law as the origin and the basic precept for their legal systems. And even in Louisiana, the influence of her sister States has indirectly resulted in an appreciable amalgam of English common law views.
place for drawing topical inferences and broader generalizations of period, jurisdiction, or comparison of either or both.

The investigation restricted itself to criminal law with private or civil law entering only collaterally. It was first thought that it might be possible to examine both. It quickly became obvious, however, that such could not be accomplished without sacrificing some part of the criminal law development. Organic cohesion dictated the alternative choice. Equally important was the fact that the criminal law aspect presented problems of greater complexity and magnitude.

Finally, the high incidence of mental abnormality in criminal law, as contrasted with private law, gave the former unquestionable priority. Sir David Henderson and Dr. R.D. Gillespie had indicated that it was "conservative to state that 10 to 15 per cent of criminals suffer from some degree of mental disorder or mental defect, but rarely is this 1 taken into consideration". The material for

examination forced its own choice of criminal law
over private law.

Psychiatrist, criminologist, sociologist, penologist and a host of others have their own particular way of regarding the legal attitude toward mental abnormality. Even the ultimate subject of all this concern may have some viewpoint. Certainly the public exercises a vocal, if not always discerning, review; usually in condemnation of psychiatry when that science is, or seems to be, in conflict, and sometimes in condemnation of law when the judicial process yields a result at variance with the lay diagnosis and lay standard of mental abnormality. The contributions of some of these groups, particularly the psychiatrists, afford lawyers insight that the framers of the present rules of law did not have. Nonetheless, determination of what the law should be must inevitably involve consideration of what it is,

1. It must also be acknowledged that the Supervisors of this work, in particular Sir D.K. Henderson, had anticipated just such a result when the problem was first broached to them.
what operated to make it that way, and what factors within law act as limitations upon change. The legal attitude toward mental abnormality must, therefore, fundamentally be considered a problem for legal analysis rather than scientific or social analysis.

One thing more might in caution be added. Both the spelling of some words, and certain manners of legal expression in this thesis may not wholly accord with accepted British usage, since the writer is a practicing member of the Bar in the United States. An attempt to conform was initiated, but abandoned in view of results that were an unrecognizable hybrid, neither British nor American. By eliminating idiomatic expressions wherever they consciously obtruded, a final product was reached that, it is hoped, may not be altogether alien.
PART ONE

HISTORICAL DEVELOPMENT IN ENGLISH COMMON LAW

Chapter II : Early English Institutional Writers
Chapter III : Rise Of English Legal Analysis
Chapter IV : English Case Law: Pre- McNaghten
CHAPTER II

Early English Institutional Writers
CHAPTER II
EARLY ENGLISH INSTITUTIONAL WRITERS

Bracton (13th Century) ................................ 36
The Brute Theory ........................................ 37
Britton (Late 13th Century) ............................ 41
Early Classifications And The Statute De
Prorogativa Regis (14th Century) ...................... 42
Sir Thomas Littleton (15th Century) ................. 43
The Cognitive Concept .................................. 44
Sir Anthony Fitzherbert (16th Century) ............... 46
Changing Emphasis ....................................... 47
The Twenty Pence Test .................................. 48
Conclusions ................................................ 49

-35-
Bracton (13th century)

Bracton was the first important British writer to influence the future development of the legal attitude toward mental abnormality. While Glanville had made important contributions to law in the preceding century, he left no legacy toward the subject matter of this thesis as did Bracton. Through Bracton, at least two influences were brought strongly to bear. He was intellectually subject to a powerful Roman law influence, and further, was originally ecclesiastic. Both these facts were reflected in his writing. His authority, however, does not rest on these factors. The intrinsic worth of his writings, augmented by his position as Chief Judiciary in the kingdom's highest court, the Aula Regis (circa 1265) have given Bracton an effect still felt in legal thought. More important still, in the period just preceding the McNaghten Rules, Bracton was an authority cited with a high degree of frequency in court cases.

The value of his thinking was not reflected in extensive writing nor compelling analysis. His contributions hardly rose above the level of dicta, yet in centuries of few rules and little thinking on
the particular subject with which this work is concerned, his words exercised unusual sway. In De Legibus were to be found his two principal observations, which subsequent generations of legal writing combined into the form: "Furiosus non "intelligit quod agit, et animo et ratione caret, "et non multum distat a brutis" - "An insane person "is one who does not know what he is doing, and is "lacking in mind and reason, and is not far removed "from the brutes".

The Brute Theory

While it is not clear whether Bracton meant these words to be taken as a definition or as legal tests, it is probably safe to surmise that an element of each of these conditions played some part. The law, as a profession concerned with practical realities, has a tendency to prefer practical tests to abstract definition. But

1. Bracton, De Legibus (1640), lib. iii, fol. 100 and lib. V, fol. 420 b.
thirteenth century ecclesiastics also had a certain penchant for abstraction.

In view of fairly modern disputes over the nature of the term insanity, it may be noted that Bracton's "furiosus" was least likely to have been meant as a medical entity. This seems probable not only from the fact that he was not trained in medicine, but even more likely from the abysmal medical ignorance of mental phenomena in that age. Nor was "furiosus" likely to have been a mere rendering of a lay concept into Latin. It seems far more probable that the term was meant to be understood as a legal entity, possibly even as a professional word of art.

Bracton's formulation may have foreshadowed the knowledge test and clearly established what may be called an approximation of the wild beast test. The phrase "one who does not know what he is doing" is too broad to constitute what may be called a knowledge test in itself. If it is taken to mean one who does not know what he is doing with respect to all his actions, it rises little above a wild beast concept. If, on the other hand, it is taken
to mean one who does not know what he is doing with respect to the particular act at legal issue, then, indeed, it comes fairly close to the McNaghten concept. From that point of view, however, it lacks the precise limitation of lack of knowledge of right and wrong; a limitation less effective in practice than in theory. The phrase "lacking in mind and reason" is even more ambiguous. It might with equal fidelity be related to either of the other two statements. The words "not far removed from the brutes" offer less difficulty. They are not surrounded with the more sophisticated eighteenth century nuances of Judge Tracy's opinion in Arnold's Case. Nonetheless, there is a surface similarity between the two views. If this similarity be more apparent than real, it is not due to the inadequacies of Bracton's language. The fault lies rather with that misinterpretation of Arnold's Case (as will be

1. 16 How. St. Tr. 695, 765.

2. Judge Tracy required that a man be "totally deprived of his understanding and memory, and ***not know what he is doing, no more than an infant, than a brute, or a wild beast ***"
demonstrated later) that persists in treating Judge Tracy's language as coextensive with only the wild beast test.

Perhaps the best treatment of Bracton's trilogy of ideas would be to regard them as practical equivalents. The law is fond of tripartite expressions of a single idea. There is a possible religious explanation for such usage in early law. Whether the Bracton formulation is regarded as one entity or as three distinct statements, it is clear that the wild beast test had origins some five centuries earlier than Arnold's Case which is generally cited as its source. The importance of Bracton's

1. It has been pointed out by C.F.C. Arensberg, "The Language of Wills" in XXI Pennsylvania Bar Association Quarterly 116, 121, that, "We say in "wills and contracts and in trust deeds: 'Make, "'publish and declare', 'Make, constitute and "'appoint', 'Pay over, transfer and deliver', 'Give, "'devise and bequeath', 'Sell, assign and set over'; "'Grant, bargain and sell', 'Signed, sealed and "'delivered'. Why always three? What does a "testator do, for example, when he 'makes, publishes "and declares' his will, except sign it?"


3. H. Weihofen, Insanity As A Defense In Criminal Law (1933) p. 20: "Of the early cases, Arnold's "Case, decided in 1724, is worthy of mention, for "it is usually cited as the source of what was "called the 'wild beast test' ".

-40-
contribution does not rest on this fact alone. At very least, the language he used offered some slight support for a cognitive concept of law, and at its broadest may perhaps be regarded as the foreshadower, if not forerunner, of the knowledge test.

Britton (Late 13th century)

The thirteenth century legal tendency to regard the mentally abnormal person as akin to a beast was continued in Britton. Unfortunately, we know nothing of the personality responsible for this writing; the name Britton actually refers to a set of six books of which the first is concerned mainly with criminal law. So far as may be judged from the writings themselves, the influence of Bracton seems manifest.

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Britton spoke of a class that might not inherit and that were not to be "accounted as "children but as beasts and monsters". At the same time there was introduced an elementary objective test that rested on simple physical description.

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1. 167 b. (Nichols trans.)
Thus a child is born a monster if it is "one that "has more than the proper number of members, as "three hands or three feet, or a deficiency in the "same, as no hands or no feet".

It is true, of course, that Britton had reference to a particular problem in civil law rather than criminal law. Nonetheless, there was implicit in both Britton and Bracton the legal attitude that human abnormality is the line of demarcation separating men from beasts. It is a short step from this kind of thinking to the view that those who are abnormal do not have ordinary rights, privileges, duties or liabilities, any more than the lower animals.

Early Classification and
The Statute De Prorogativa Regis (14th century)

Legal classification of mental disorder also had an early development, albeit one that remained rudimentary for a long period. By the fourteenth century a dichotomy between congenital disorder and acquired disorder had received statutory recognition. The Statute De Prorogativa Regis

1. 17 Edw. II.
of 1342 was the earliest legislation in the subject of mental abnormality of which we have record in English law. A simple distinction is drawn between "fatuus naturalis", or the condition of being a "natural fool", the disorder being regarded as congenital, and "non compos mentis" which is "by the visitation of God". Two categories of mental disorder were established; one consisted of congenital mental defect, the other of acquired mental aberration.

Sir Thomas Littleton (15th century)

Littleton as a judge of the Common Pleas Court and as author of one of the masterpieces of legal writing, "Tenures", gave further strength to a slowly developing cognitive legal attitude toward mental abnormality. But in the fifteenth century this was still far from being anything we could

1. Littleton served as judge of this court from 1466 to his death in 1481.

2. "Tenures" was originally written in Law French; but, the best known version in English is by an unknown translator. However, Coke wrote his famed commentaries around this English version and it has become a standard text. The extracts from Littleton used herein are taken from the Coke text.
recognize as the knowledge test of the McNaghten Rules.

Littleton was writing of a special branch of civil law, the law of property, yet he gave an indication of what must have been the representative view in an age when little analysis had been devoted to the problem of mental deviation. In that chapter of "Tenures" entitled "Discents", he associated "non compos mentis" with disordered memory in such language as the following: "Also if a man is of non "sane memory, that is to say in Latine, Qui non est "compos mentis".

The Cognitive Concept

Either of two interpretations are possible. It may be that nothing more was intended than a simple equation of translation, and that the terms non sane memory and non compos mentis were to be taken as synonymous. This is possible as a ruder

usage of the word memory than modern practice sanctions. It may also be, on the contrary, that non sane memory was a lesser category falling within the generic frame of non compos mentis. The former explanation is less labored than the latter; the greater simplicity of the former gives it more of the aura of validity. In either event, however, the principal submission would appear to be well established, namely- that the non compos mentis concept had acquired a readily discernible cognitive orientation that began to add substance to the rather faint shadow cast by Bracton in this direction.

It is often a distant cry from the recognition of a principle to its adoption in practice. That there was early resistance to an insanity plea admits of no doubt. This resistance took various forms, and one such form, the civil law doctrine of non-stultification, was given expression by Littleton. He indicated that a man could not plead his own

insanity in a civil law case of discent, for: "no man of full age shall be received in any plea by the Law to disable his owne person". Fortunately, the doctrine did not persist and by Blackstone's day was no longer law.

Sir Anthony Fitzherbert (16th century)

Fitzherbert, "one of the towering figures in the history of English literature" (as he has been described by Winfield) was a justice of the Common Pleas Court. He gave a direct and straightforward description of the relation of mental abnormality to criminal responsibility, saying:

"He who is of unsound Memory, hath not any Manner of Discretion; for if he kill a Man, it shall not be Felony, nor Murder, nor he shall not forfeit his Lands or Goods for the same, because it appeareth that he hath not Discretion; for if he had

1. 2 Bl. Com. 292.
2. During the period from 1522 to 1538.
"discretion he should be hanged for the same, as an "infant who is of the Age of Discretion, who commit-
teth Murder or Felony, shall be hanged for same".

Changing Emphasis

It must be noted that by the sixteenth century the cognitive concept had gained enough additional strength so that it was a man of "unsound memory" with whose situation Fitzherbert was concerned. Furthermore, the postulated individual was one who lacked discretion. An important attribute of discretion is ability to reason, which reinforces the obvious cognitive orientation of legal thought at this period. Another attribute of discretion, however, is facility of self-control. While it would be ridiculous to suggest that Fitzherbert had any irresistible impulse defense in mind, yet the language was broad enough so that such a doctrine could have been developed without doing violence to Fitzherbert's statement.

The parallel with an infant who has reached the age of discretion is one that is still drawn by some writers. It is of more moment as an indicator of another trend. When the standard of comparison
has become a child rather than a brute, it becomes obvious that the vigour of the wild beast concept had already declined considerably since Bracton's formulation.

The Twenty Pence Test

Fitzherbert's name is also linked to the so-called "twenty pence test". This was another early objective test, but differed from Britton's test in that it sought to determine mental content and capacity as a guide to mental condition. Fitzherbert placed his reliance on such cognitive factors as ability to count and knowledge of such things as age and parentage. The actual words of the test had reference to the definition of an idiot as "such person who cannot account or number "twenty pence, nor can tell who was his father or "mother, nor how old he is, etc., so as it may "appear he hath no understanding of reason what shall "be his profit, or what for his loss. But if he

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"have such understanding that he know and understand "his letters, and do read by teaching of another man, "then it seems that he is not a sot or natural fool".

This was not a test for criminal responsibility, but simply a means of distinguishing an idiot or natural fool from a person "non compos mentis". The distinction was firm in the law by this time but the directions for drawing the dividing line still varied somewhat with the writer. Thus another writer used the test "that if he bee able to "beget eyther soone or daughter hee is no foole".

Conclusions

The four hundred year period embodying the thirteenth to sixteenth centuries was characterized chiefly by the work of the institutional writers. The information derived is largely the product of indirection; we are compelled to draw inferences from material that is tangential to the strict subject matter of this thesis. Despite this

1. Staundforde, Kinges Prerog. (1567) fol. 35.
significant difficulty, there is much of value to be derived from the period.

It is submitted that the wild beast test had its origin as far back as Bracton in the thirteenth century rather than with Arnold's Case of the eighteenth century. Further, this formulation appears to have been a declining concept, so that by the sixteenth century, with Fitzherbert, the standard of comparison was an infant rather than an animal.

At the same time, the cognitive concept of mental abnormality showed a progressive growth from the bare possibility of Bracton, through Littleton's "non sane memory" terminology to the relatively sophisticated emphasis on "discretion" by Fitzherbert. Nowhere did the concept reach the proportions of what we call the knowledge test in the post-McNaghten period. But so firmly had legal thinking become established in terms of a cognitive approach that some form of knowledge test began to appear almost inevitable as an ultimate development.

Legal tests, as practical resolutions of the problem of definition, also showed some degree of
advance. The twenty-pence test was far from a final solution, yet it was a notable advance from Britton's test for a monster. While both strove for objectivity, at least Fitzherbert attempted to make an assessment in terms of mental function, however crudely.

Classification of mental disorder into congenital and acquired types, each roughly limited to mental defect and mental aberration, respectively, was characteristic of the whole period. This elementary form of analysis, though well established, remained essentially static. It appears to have carried over from a still earlier period.
CHAPTER III

RISE OF ENGLISH LEGAL ANALYSIS
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Legal Analysis And The First Psychiatric Revolution .................. 54
Sir Edward Coke ................................................. 56
Non Compos Mentis ............................................... 57
The First Stage of Legal Analysis .................................. 59
Sir Matthew Hale .................................................. 61
The Second Stage of Legal Analysis ................................ 62
Partial Insanity ..................................................... 64
Monomania .......................................................... 67
Lunacy ............................................................... 68
The Fourteen Years Of Age Test ................................... 70
The Infant Analogy ................................................. 71
Serjeant William Hawkins (Late 17th & Early 18th Centuries) ... 73
Emergence Of The Knowledge Test ................................... 73
Sir William Blackstone ............................................. 75
Procedural Elements ............................................... 76
Conclusions ......................................................... 80
Legal Analysis and The First Psychiatric Revolution

The seventeenth century ushered in the era of legal analysis of the problem of mental abnormality. This was not alone due to the intellectual stature and eminence in law of such men as Coke, Hale, Hawkins and, in the eighteenth century, Blackstone. Bracton, Littleton and Fitzherbert are equally renowned names in law. The change, or rather, intensification, of legal thought must be traced to a more fundamental genesis. Simply put, legal scholars devoted more attention to the problem of mental abnormality in degree as they recognized the importance of the problem in law. This recognition was the product of what has been termed the first psychiatric revolution. The inter-relations of law and medicine with respect to mental abnormality date from the seventeenth century. While medicine had begun to concern itself with the problem in the sixteenth century, it took roughly another century for law to begin closing the gap

which, to some extent, still exists between science and law. This culture lag is not restricted to law; science has a tendency to change faster than established social institutions can follow.

The sixteenth and seventeenth centuries were days when the law still tolerated trials for witchcraft. Hale, as a judge, himself tried at least two such cases. On the continent, a century before Hale, men such as Weyer and Agrippa fought as physicians against such legal travesties. Their fight did not meet with unmitigated success, for other such men as Bodin reacted with equal vigour to set up two standards of mental abnormality, one purely legal and the other purely medical. One important effect of these medical battles was to force legal thinkers to consider the problem of mental abnormality in greater detail. In the seventeenth century, the fruit of their thinking began to manifest itself.

1. A detailed description of one of these trials may be found in 6 How. St. Tr. 676.
Sir Edward Coke (17th century)

Coke served as Chief Justice of the Common Pleas Court from 1606 to 1613 and as Chief Justice of King’s Bench from 1613 to 1616. His influence on the law was extensive and penetrating.

He fulfilled what must always be one of the first requirements of analysis, a discussion of the terms employed. In commenting upon Littleton’s "non sane memory" definition, Coke said, "Here Littleton explaineth a man of no sound memory to bee Non Compos Mentis. Many times (as here it appeareth) the Latin word explaineth the true sense, and calleth him not Amens, demens, furiosus, lunaticus, stultus, or the like, for Non Compos Mentis is most sure and legall".

1. Holland says of Coke, "But upon any question how the law stood in his day Coke’s authority has reigned supreme. And many propositions stated by him as opinion have become law by judicial acceptance".

2. For a discussion of the nature of the terms in general, see "Part Two- Analysis" of this thesis

3. Co. Litt., Lib. 3, Ch. 6, Sect. 405.
Non Compos Mentis

The denotative precision of non compos mentis may be open to question, but it was at least as precise as the more modern term, insanity. It is quite clear that non compos mentis was, as Coke said, preferable to the other terms listed, each of which had special connotations that rendered it a poor choice for a general concept. In Bracton's day, and for some centuries thereafter, furiosus was sufficient; for the general concept was limited to the raving maniac or "one not far removed from the brutes". But as this special sense faded, it was necessary to utilize a term of greater latitude. Littleton in the fifteenth century was already making use of the term non compos mentis in preference to lunaticus. It remained for Coke, however, to place the competing terms in proper perspective. His distinction was an early recognition that the legal concept of mental abnormality was not the same thing as the various mental states that might satisfy it. Coke used non compos mentis as a generic term; a point which some later judges tended to overlook.
Coke divided non componens mentis into four types: congenital mental defect; acquired mental disease; temporary mental disease; voluntary mental disease such as drunkenness. The first two categories had long been recognized in law, since even the Statute De Prorogativa Regis spoke of them. The last two indicated a broadening of the legal concept.

1 The exact language of Coke's analysis was: "Non Compos Mentis is of foure sorts: 1. Idiota, "which from his nativity by a perpetuall infirmity "is Non Compos Mentis. 2. He that by sickness, "griefe, or other accident, wholly loseth his "memorie and understanding. 3. A Lunatique that "hath sometime his understanding and sometime not, "Aliquando gaudet lucidis intervalis, and therefore "hee is called Non Compos Mentis, so long as he hath "not understanding. Lastly, hee that by his owne "vicious act for a time depriveth himself of his "memory and understanding, as he that is drunken.

"But that kind of Non Compos Mentis shall give no
"privilege or benefit to him or his Heirs".

The First Stage of Legal Analysis

While it is quite true that Coke's classes
one and two had been recognized for some centuries
before him, his understanding of the nature of
acquired mental disease (Coke's class two) was far
more penetrating than that of any of the great
institutional writers who had preceded him. His
grasp of the etiology of mental illness, in the
phrase "by sickness, griefe or other accident",
showed greater insight than virtually all medical
writers and jurists were to display until quite
recent times. Almost entirely neglected by
subsequent judges, and entirely ignored in the
McNaghten Rules, was the fact that "griefe" had
been singled out as one of the causes of that loss
of "memorie and understanding" that rose to "non
compos mentis". So completely did this early

1. It should be noted that although Coke was using
the civil law as his point of departure, his language
was general enough to include criminal law.
recognition of an emotional basis for mental deviation disappear from the legal scene that even the probative efforts of modern psychiatry have not proved wholly successful in restoring it.

As often happens, while the emotion-concept failed to germinate in subsequent legal minds, some weedier growths flourished with all the prestige of Coke's name to lend nurture. Actually, Coke did little more than state the fact (in his class three) that temporary mental aberration was within the frame of reference of non compos mentis. This in itself was a harmless observation. It was used, however, to help strengthen the lunacy theory into which legal thinking was to detour. As often as not, Coke was to be cited as an ultimate authority; and "lucid intervals in lunacy" became the means of wedding Coke's otherwise useful concept to an unfortunate and unscientific theory. In much the same way, Coke's category of voluntary mental disease, through drunkenness, still has judicial sanction in many jurisdictions irrespective of the fact that mental or emotional infirmity may have led to the drinking which in turn led to the state of mind and
action that resulted in crime.

Sir Matthew Hale (17th century)

Hale was appointed a judge by Cromwell in 1654 and became Lord Chief Justice of King's Bench in 1671, a post he held until 1676. He analyzed the problem of mental abnormality in even greater detail than Coke and carried systematization further than any of his predecessors. While Hale benefited from Coke's prior writing and followed many of Coke's ideas, his influence was more extensive than that of Coke. The law today retains many of the elements of form that Hale bequeathed.

1. Coke also made what was probably the earliest distinction between insanity in civil cases and in criminal cases by pointing out that the doctrine of non-stultification "holdeth only in civil causes; "for in criminal causes, as felonie, &c., the act "and wrong of a madman shall not be imputed to him, "for that in those causes actus non fecit reum, nisi "mens sit rea (the act does not make the criminal "unless the mind, or intention, is criminal); and "he is amens (id est) sine mente, - without his "minde or discretion; and furiosus solo furore "punitur, - a madman is only punished by his "madnesse".
The Second Stage of Legal Analysis

Hale divided the legal concept into three parts. The first of these was "Idiocy" and the third, "dementia affectata" or drunkenness. These correspond closely to Coke's first and fourth classes respectively, viz., congenital mental defect and voluntary mental disease. It was in Hales's second category that significant changes were made. He separated acquired mental disease into two types, "total" and "partial". The latter form was then subdivided into mental disease "partial" respecting subject matter and mental disease "partial" respecting degree.

1. Of "Dementia affectata, or drunkenness" Hale says, "by the laws of England such a person shall have the same judgment as if he were in his right senses". While this treatment is similar to that of Coke, Hale's statement is clearer. One effect of the Coke and Hale rationale was to keep alcoholic insanity beyond the ordinary scope of an insanity defence for a long period.

2. Essentially, Hale had amalgamated Coke's second and third classes and then reanalyzed the whole.
In outline form, Hale's scheme could be reduced to the following pattern:

1. Idiocy, or fatuity a nativitate vel dementia naturalis.
2. Dementia accidentalis vel adventitia.
   a. Total.
   b. Partial.
      (1). With respect to subject matter.
      (2). With respect to degree.
3. Dementia affectata or drunkenness.

Hale's first category was simply a restatement of one of the oldest divisions of mental abnormality known to law. While congenital mental defect was not a new class, Hale liberalized the probative difficulties in establishing it. He swept aside Fitzherbert's twenty pence test, and urged that the question be treated as a simple matter of fact not confined to the narrow limits of a test. In his own language the first category he established

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1. Stemming back beyond the Statute De Prorogativa Regis, 17 Edw. II., of the fourteenth century.
was: "Idiocy, or fatuity a nativitate vel dementia naturalis; such a one is described by Fitzherbert, **2** who knows not to tell 20 shillings, nor knows who "is his father or mother, nor knows his own age; but "if he knows letters, or can read by the instruction of another, then he is no idiot. *** These, "though they may be evidences, yet they are too "narrow, and conclude not always, for idiocy or not "is a question of fact, triable by jury, and sometimes "by inspection."

Partial Insanity

Hale's second category was more than an ingenious combination of Coke's second and third classes. Both had much the same understanding of acquired mental disease, but Hale went considerably further in the separate field that he termed "partial insanity". He established his second general category in light of the medical knowledge

1. 1 Hale, Pleas of the Crown, Ch. IV.

2. While Hale and other writers have referred to it as the 20 shilling test, Fitzherbert originally denominated it the 20 pence test.

of his day, terming it, "Dementia accidentalis vel adventitia, which proceeds from several causes; sometimes from the distemper of the humours of the body, as deep melancholy, or adult choler; sometimes from the violence of a disease, as a fever or palsy; sometimes from a concussion or hurt of the brain, or its membranes or organs; and as it comes from several causes, so it is of several kinds or degrees; which, as to the purpose in hand, may be thus distributed: 1. There is a partial insanity of mind; and 2. a total insanity."

He further separated partial insanity into two classes, namely - those who "have a competent use of reason in respect of some particular discourses, subjects, or applications; or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons, who, for the most part, discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and

1. 1 Hale, Fleas of the Crown, Ch. IV.
"this partial insanity seems not to excuse them in "the committing of any offense for its matter "capital".

This subclassification had a number of important consequences. For the first time an important legal writer had recognized that mental states ("partial in respect of degrees") shade into one another by an imperceptible series of gradations. Had other judicial authority taken up this idea, a limited responsibility doctrine might have been developed in England similar to the Scots law doctrine of diminished responsibility. This aspect of "partial insanity" was ignored, however, and the scientifically invalid alternate aspect was emphasized.

Hale also emphasized that emotional factors ("excessive fears and griefs") might be responsible in "partial insanity" as well as in permanent mental disease as Coke had pointed out. This acceptance of a broad etiology by both Hale and Coke was also rejected, or at least not appreciated by subsequent generations of judges.
Monomania

While Hale did not use the term "monomania" in his analysis, his alternate aspect of "partial insanity" (i.e., partial with respect to "particular discourses, subjects and applications") became the keystone in the legal arch supporting the theory of monomania. It need hardly be pointed out that modern medicine has wholly invalidated monomania. Unfortunately, at an earlier day the judicial mind seems to have been completely captivated by the concept. Even the McNaghten Rules spoke of a person that "labours under such partial delusion only and is not in other respects insane." This attempted refinement, by means of which "partial delusion" was substituted for "partial insanity", sprang directly from the monomania theory. As both Mercier and Prince pointed out some time ago, the refinement had

2. (1843) 10 Clark & Fin. 200, 202.
as little validity as the original theory.

In the period before the Hadfield Case the monomania doctrine was at its strongest. The description as laid down by Hale fitted paranoid states, and Hale's dictum, magnified to the proportions of the monomania theory, became a ready means of holding paranoiacs criminally responsible. While Erskine in Hadfield's Case introduced a valid concept of delusion, it was not accepted by subsequent judges, and in 1843 the McNaghten Rules, in the language quoted previously, took a backward step historically and scientifically.

Lunacy

Hale equated his term "total madness" with Coke's term "total deprivation of sense". He

1. Dr. Morton Prince said, "The inadequacy of this formula or test will be seen when it is remarked that it is based upon a conception of insanity that is a myth *** The truth probably is as Dr. Mercier *** says: 'There is not, and never has been, a person who labors under partial delusion only and is not in other respects insane' ". Cited by Keedy (1911) 2 Jour. Crim. Law 539 and Weihofen, Insanity as a Defense in Crim. Law (1933) 76, 77.

2. (1800) 27 How. St. Tr. 1281.
also distinguished between permanent madness and "that which is interpolated, and by certain periods "and vicissitudes" which he called lunacy. His pseudo-scientific explanation of lunacy obscured legal thinking for a considerable period. The explanation reads: "For the moon hath a great "influence in all diseases of the brain, especially "in this kind of dementia: such persons commonly "in the full and change of the moon, especially "about the equinoxes and summer solstice, are "usually in the height of their distemper; and "therefore crimes committed by them in such their "distempers are under the same judgment as those "whereof we have before spoken, namely, according "to the measure or degree of their distemper; the "person that is absolutely mad for a day, killing "a man in that distemper, is equally not guilty as "if he were mad without intermission. But such "persons as have their lucid intervals (which "ordinarily happens between the full and change of "the moon) in such intervals have usually at least

1. 1 Hale, Pleas of the Crown, Ch. IV.
"a competent use of reason, and crimes committed by
"them in these intervals are of the same nature, and
"subject to the same punishment as if they had no
"such deficiency ...".

Hale's lunacy concept might better have been treated by him as still another subdivision of his "partial insanity" classification. In essence the theory may be read as "partial" with respect to time. This would have fitted well with his categories "partial" with respect to subject matter, and degree, respectively. The internal consistency of his analysis suffered from the treatment accorded lunacy. More serious was the fact that the lunacy theory had been accorded recognition at all. While, to some extent, he was merely following Coke in this matter of lunacy, Hale's authoritative and scientific-sounding exposition on lunacy gave this doctrine an unfortunately firm and durable hold in law.

The Fourteen Years of Age Test

Since "total insanity" under the Hale analysis excused from responsibility, generally speaking, and "partial insanity" did not, and since it was also not always easy to distinguish between
the two, Hale laid down the following test: "the
"best measure that I can think of is this: such a
"person as labouring under melancholy distempers
"hath yet ordinarily as great understanding, as
"ordinarily a child of fourteen years hath, is such
"a person as may be guilty of treason or felony."

This test was the resultant of several components. The growing cognitive concept was
reflected in the utilization of "understanding" as
the unit of measure. Equally reflected was the
increasing reliance on tests to satisfy the uncertain
demands of developing legal criteria.

The Infant Analogy

At the same time, another process was
occurring. Since the infant was the new standard
of comparison, the comparative wealth of learning
affecting the legal status, rights and immunities of
the infant began to be applied to the mentally
abnormal. The process of reasoning by analogy is

1. Hale does not appear to have realized that his
"fourteen years of age" test was open to the same
objections he himself had advanced against Fitz-
herbert's "twenty pence" test.
perhaps the commonest device utilized by the legal mind to meet the exigencies of a new problem or unusual situation. Mental abnormality as a relatively new, or at least newly recognized, problem was no exception to the well established rule. The analogous borrowing, once instituted, flourished apace. Almost as soon as the brute comparison was abandoned in favor of the infant, the idea of "age 1 of discretion" was transferred from the latter field to that of mental abnormality. The fourteen years of age demarcation line is also a direct example of this borrowing process. The final example of applied analogue was to be the most decisive. Thus while Hale used the expression 2 "knowledge of good and evil", he applied it only to infants; the transfer had not yet been completed. It remained for Hawkins to complete the process by applying the now familiar language of the knowledge test to the mentally abnormal.

1. A concept whose roots may themselves be traced back to Roman law.
2. 1 Hale, Pleas of the Crown 26.
Serjeant William Hawkins  
(Late 17th and early 18th centuries)

Hawkins was the author of "A Treatise of the Pleas of the Crown" which for generations was the standard work on criminal law. His contribution was short but highly important. He laid down the test that "those who are under a natural disability "of distinguishing between good and evil as infants "under the age of discretion, ideots and lunaticks, "are not punishable by any criminal prosecution "whatever".

Emergence of the Knowledge Test

Hawkins' statement constitutes the earliest formulation of the knowledge test in language resembling the modern terminology. The slowly emerging cognitive concept had matured into the archetype

1. Holdsworth described it as "remarkable both for "the learning of the author and his skill in the "presentation of his material".
of the knowledge test. Subsequent case law and the McNaghten Rules were to further shape the test, but the basic formulation had been achieved by Hawkins' day. It has already been pointed out to what a significant extent the infant analogy influenced this achievement. The first edition of Hawkins' "Pleas of the Crown" having been published in 1716, the knowledge test was little more than a century and a quarter old when the McNaghten Rules, in 1843, crystallized the subject.

The McNaghten Rules, of course, did more than just state that a "natural disability of distinguishing between good and evil" determined criminal responsibility for persons mentally abnormal. But much of the language used in the Rules was rendered necessary only by the misinterpretations of case law subsequent to Hawkins. Thus the question whether or not the knowledge test referred to the specific act or was to be applied generally to all actions of the accused, should never have arisen logically and historically. For if the test were interpreted to require inability to distinguish good from evil in all situations and actions, then obviously the concept has
degnerated to a level where one would need to be "little removed from the brutes" to escape criminal responsibility. Had the judges of the century and a quarter between Hawkins and McNaughten been fully aware of the historical development of the cognitive concept and the wild beast theory, such questions would not have been posed, and the McNaughten Rules would not have found it necessary to be concerned with them. Under the circumstances, Hawkins' formulation deserves to be ranked as the first statement of the knowledge test, despite the limited nature of its exposition.

Sir William Blackstone (18th century)

Blackstone was a Justice of the Court of Common Pleas as well as Vinerian Professor of English Law at Oxford; but it was his "Commentaries" that gave him the fullest measure of fame. By articulating each rule of law with a practical rationale, he achieved an atmosphere of logical precision seldom attained in a profession whose life blood (as Mr. Justice Holmes noted) is experience rather than logic.
He did not, however, advance the substantive legal concept of mental abnormality. The lunacy theory that held sway in both law and medicine clouded his vision so that the "idiot" and "lunatic" constituted his divisions of mental abnormality. He characterized alcoholism as "artificial voluntarily contracted madness" saying that the "law looks upon this as an aggravation of the offence".

Procedural Elements

Blackstone's statement of the procedural aspects of a mental abnormality defence had more characteristic stature. With notable precision he set out the times when the plea might be made and

1. It must be admitted on this score that the bulk of his Commentaries was devoted to civil law rather than criminal law.

2. Blackstone's understanding of the subject was cognitive in orientation. Although he set out no test, he spoke in terms of "defective or vitiated understanding", purely cognitive concepts.

3. In 4 Bl. Com. (10th ed.) 24, he stated, "II. The second case of a deficiency in will, which "excuses from the guilt of crimes, arises also from "defective or vitiated understanding, viz. in an "idiot or a lunatic". (Emphasis by Blackstone)
the justification. His epitome had a clarity and conciseness that rendered it free of challenge even in the post-McNaghten period.

Blackstone set out the general "rule of "law as to the ... (Idiot), which may easily be "adapted also to the (lunatic)... that'furiosus 1
" 'furore solum punitur'. "In criminal cases "therefore", he continued, "idiots and lunatics are "not chargeable for their own acts if committed "when under these incapacities: no, not even for "treason itself".

He reached the heart of the procedural aspect by noting: "Also, if a man in his sound "memory commits a capital offence, and before "arraignment for it, he becomes mad, he ought not "be arraigned for it; because he is not able to "plead to it with that advice and caution that he "ought. And if, after he has pleaded, the prisoner

1. 4 Bl. Com. (10th ed.) 24
2. Ibid, 24, 25.
"becomes mad, he shall not be tried; for how can he 
make his defence? If, after he be tried and found 
guilty, he loses his senses before judgment, 
judgment shall not be pronounced; and if, after 
judgment, he becomes of non sane memory, execution 
shall be stayed; for peradventure, says the 
humanity of the English law, had the prisoner been 
of sound memory, he might have alleged something 
in stay of judgment or execution."

Perhaps the best commentary on the 
Blackstone procedural analysis of the eighteenth 
century is simply to compare it with a modern 
statement made as late as 1949: "... there are 
three separate points of time which are material 
to the trial and punishment of an accused person.... 
"First, the Court must consider the prisoner's 
"mental condition at the time when he committed the 
"crime .... it is also material to know whether he 
"is sane at the time of trial .... In the third 
"place, when punishment is imposed and is to be

1. C. Binney, Crime and Abnormality, Oxford Univ. 
"carried into effect, the mental condition of the
"convicted person at the time of undergoing such
"punishment has to be considered".

1

Blackstone also pointed out the inherent
power in the common law to protect the public
without special authority: "madmen ... are not
"answerable for their actions ... (but) ought not
"to be suffered to go loose, to the terror of the
"king's subjects ... (and) might be confined till
"they recover their senses, without waiting for the
"form of a commission or other special authority
"from the crown". This eighteenth century statement
of common law power is important in view of
subsequent harshness toward mentally abnormal
defendants by judges and juries who feared that to
be more lenient and humane would merely result in
freeing a homicidal maniac to roam the streets
unmolested.

Conclusions

The seventeenth and eighteenth centuries brought to full fruition the work of the institutional writers. From the thirteenth to the sixteenth centuries inclusive, the contributions, while essential to a complete appreciation of subsequent developments, were fragmentary in nature. With the later institutional writers such as Coke, Hale, Hawkins and Blackstone, the contributions became well integrated. This period, the seventeenth and early eighteenth centuries, rose to the level of a concentrated attempt to solve the problems of mental abnormality by legal analysis.

It is submitted that this phase of growth in the law was an outgrowth of what has been termed the first psychiatric revolution; in particular, it was the outcome of the sixteenth and seventeenth century medical concern with the psychological aspects of the witchcraft trials.

On the positive side, the law developed and expanded the cognitive concept in several ways. The simple dichotomy between mental defect and mental disease that had prevailed was enlarged to
the more complex classifications of Coke and Hale. Even more significant, it is submitted, (although the idea was long to lie dormant) was the recognition of an emotional factor in mental abnormality. Coke spoke of "sickness, grieufe or other accident" as causative factors, while Hale talked of "excessive "fears and griefs" and extended the emotion concept to "partial insanity" as well as total. This recognition brought with it another consequence also to be long neglected by the legal mind, namely - appreciation that divisions in mental deviation were not hard and fast but were continuous in graduation, one merging by slow degrees into another. This principle of continuity pointed the way to a more liberal legal concept not realized in England but attained in the Scots law doctrine of diminished responsibility.

It is further submitted that the cognitive concept finally emerged into the first formulation of the knowledge test as the result of the analogy drawn by Hawkins to the law relating to infants. As the cognitive concept advanced it drew more and more on the law of infancy, borrowing "age of discretion", "the child of fourteen years" test,
and finally the terminology "knowledge of good and evil". Procedurally, Blackstone indicated the essential humanity and strength of the common law in dealing with the times when a plea of insanity might be made, and in handling the mentally afflicted who constituted a social threat but had as yet breached no law. Failure to appreciate the latter power was to lead to narrow self-protective case law.

The broadened concepts of the legal analysts also opened the way to more than one cul-de-sac in the law, it is submitted. "Monomania" could look to "partial insanity" as a mile-post of authority, and "lunacy" had Hale, as well as medicine, to support it as a theory. As will be pointed out in the next chapter, however, the role of medicine was a considerable one in leading law down these blind alleys.
CHAPTER IV

ENGLISH CASE LAW: PRE- McNAGHTEN
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Contemporaneous Medical Opinion ....................... 85
Precedent And Changing Content ........................ 91
Beverley's Case (1603) ................................. 92
Arnold's Case (1724) .................................... 94
The Wild Beast Test ...................................... 94
A New Evaluation .......................................... 96
Earl Ferrer's Case (1760) ................................. 98
Moral Knowledge and the Nature of the Act .......... 99
Hadfield's Case (1800) ................................... 102
Erskine's Delusion Test .................................. 103
Erskine's Qualified Knowledge Test ..................... 105
Criminal Lunatics Act (1800) ............................ 108
Bellingham's Case (1812) ................................. 112
Retrogression In Substantive Law ....................... 113
Parker's Case And Bowler's Case: Mental Defect .. 117
Offord's Case (1831) ................................... 119
Oxford's Case (1840) ................................... 122
Irresistible Impulse ...................................... 122
Table No. 1 .............................................. 127
Conclusions .............................................. 129
Contemporary Medical Opinion

The eighteenth century marked a decided shift in emphasis. Case law rather than the writings of the great institutional authors became the hallmark of the change. The first psychiatric revolution had spent itself, and medical psychology had entered a period of doldrums. With the medical voice silenced, layman-philosophers and ecclesiastics became the only voices of authority outside the courts. Judges are as prone as other men to regard their own views as philosophical; perhaps more so in view of the function they fulfill. It is not strange, therefore, to find this pre-McNaghten period characterized by variation and fluctuation of viewpoint, depending on the understanding or misunderstanding of the later institutionalists by judges, and depending also on the extent of independence of view they were willing to manifest.

An historian of psychiatry, Zilboorg, has summed up the general medical climate by noting that:

"... the seventeenth century, and for that matter
the greater part of the eighteenth, presents a
striking paradox: the scientist and the physician,
so seriously concerned with nature and man, gave
up their preoccupation with the human mind and
left it partly to the theologian who had always
claimed it as his own domain and partly to the
enlightened layman-philosopher who began to appear
in increasing number". He points out also, that:
"... to the historian it is as impressive as it is
disappointing to discover that Weyer is hardly, if
ever, mentioned in the medical treatises by the
great clinicians of the time, and that mental
disease occupies but a secondary place in their
systems of medicine".

What then was the concept of mental abnormality held by the ordinary medical practitioner, and what effect, if any, did it have on legal thinking in the critical period when case law began to supplant the institutional writers as the determinant of the law's pattern? Since the medical

historian offers no specific answer detailed enough for comparative purposes, the answer must be sought in the original source material.

The first part of the question may be answered by examination of a medical dictionary current during the period. Such a work as the "Lexicon Physico-Medicum" appeared in its third edition in 1726, and reflected a late seventeenth and early eighteenth century viewpoint. "Monomania", significantly enough, was not included in the work at all. For the term "madness" reference was made to see "mania"; "insania" was also defined. Significant too, was the inclusion of "lunatick" as a medical term worthy of definition.

The strong orientation in terms of lunacy theory was inescapable in the definitions. Thus, 1 "insania" was denoted as, "Madness; which see. "Some distinguish, and justly enough, between this "which is hereditary or from some Distemper, and "that which is influenced by the heavenly Bodies,

"and particularly the Moon, which therefore is called Lunacy". The term "Lunatick" was solemnly set out as, "signifies being mad, from Luna, the Moon; because it has anciently been an establish'd Opinion, that such Persons were much influenced by that Planet: And a much sounder Philosophy has taught us, that there is something in it, but not in that particular Manner as the Ancients imagin'd, or otherwise than what it has in common with other heavenly Bodies, occasioning various Alterations in the Gravity of our Atmosphere, and thereby affecting human Bodies". It is obvious that the chief difference between Hale's pseudo-scientific explanation of lunacy and that of the late seventeenth and early eighteenth centuries was that the latter group stressed a mechanistic explanation over the older supernatural one.

The effect on legal thinking of this

2. See f.n. 1, overleaf.
backward medical conception was to buttress some of
the least valuable thinking of the legal analysts
to the neglect of more valuable aspects of their
work. Further, these views concerning lunacy
(which apparently were the layman's understanding
as well as the physician's) were to some extent
responsible for Hale's emphasis on the concept.
But with respect to "monomania", it seems less
likely that medicine was a determining factor in
the formation of the concept, since the term is not
to be found in the Lexicon Physico-Medicum at all.

1. The mechanistic explanation carried over into
the definition of "mania" as well: "madness: This
"is a delirium without a Fever ....... A Delirium
"is therefore the dreams of waking Persons .... all
"the known Causes of this Distemper give a greater
"Disposition to the Blood for Motion and render it
"fluxile, but not consistent and uniformly thick
"enough; ...... some Parts of the Blood be more
"nearly united, so as to form Molecules, consisting
"of cohering Particles; which Molecules will ......
"not so easily obey the Direction of the Heart's
"propelling Force. The blood cannot be uniformly
"rarefy'd, nor enter so easily into the small
"Orifices of the Vessels, and so soon travel into
"tho them; and therefore there will no fever arise,
"but a Delirium without a Fever, wherein the Heat
"of the Blood will be greater, and the Pressure in
"the Brain uncertain; whence uncertain Recursions
"of the Spirits, inordinate Undulations, confused
"Vibrations of the Nerves, and a remarkable Energy
"of Imagination; whence will proceed Audacity and
"Passion beyond measure. The cure of this is in
"refrigerating Diet, Evacuation, and especially by
"strong Emeticks and Catharticks". Lexicon Physico-
Both Coke and Hale had shown an appreciation of emotional factors such as grief and fear in the etiology of mental abnormality. Without the backing of medical science, it is not strange that these ideas failed to flourish, while "lunacy", with medical sanction, did develop.

The lunacy theory may have had one beneficial effect. It is possible that an age that regarded the influence of heavenly bodies as the cause of mental abnormality may have taken a more humane view of the afflicted than would otherwise have been the case. The difficulty is that as far back as the fourteenth century, De Prorogativa Regis, had spoken in terms of a "visitation of God" without producing liberality of thought. And between these terminal periods the witchcraft trials had flourished. Nonetheless, a moon psychology was inconsistent with the free will upon which the criminal law was predicated; to that extent the defense may have been aided.

Finally, the very fact that Hale had utilized the crutch of a medical theory, made it possible for judges in the ensuing period to use
the same crutch, or at least their own particular ideas of what constituted medical knowledge. This, coupled with the extremely weak position of medical psychology, gave the jurists wide latitude for individual variation.

**Precedent and Changing Content**

The advent of case law influence brought another factor into focus. Language which had been adequate to describe an earlier and cruder concept tended to be more stable than the concept itself. The result was that the concept changed in content while its external form, the language formula in which it had originally been cast, varied little. This was particularly true when one of the great authorities amongst the institutional writers had shaped the form in the first place. The intense preoccupation with precedent, that has always characterized legal thinking, made such a result inevitable, in England.

In other areas of law where the same tendency had been manifest, explicit legal
1 fictions were utilized to overcome the difficulty. This, at least, had the advantage of bringing the matter into the open. With respect to mental abnormality, however, the process was a tacit one. Consequently, it is not strange to find jurists, during the first important period of case law development, mistaking the form for the content.

**Beverley’s Case (1603)**

While the development of the case law aspects of the legal attitude toward mental abnormality were largely the products of the eighteenth and early nineteenth centuries, one earlier case deserves mention, if only as an example of new content in an old form. The Beverley Case was a civil matter relating to the effect of a bond if made while "non compos mentis". Coke, who reported the case, elaborated the civil law doctrine of non-stultification, but with respect to criminal law observed that,

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1. Macaulay epitomized it, "As full of fictions as "English Law". A collection of such legal fictions may be found in F. Watt, "The Law's Lumber Room (1896 and 1898) vols. 1 and 2.

"No felony or murder can be committed without a 
"felonious intent and purpose; et ideo dict est 
"felonia, quia fieri debet felleo animo: but 
"furiosus non intelligit quid agit, & animo & ratione 
caret, & non multum distat a brutis, as Bracton 
"saith and therefore he cannot have a felonious 
"intent". Not only did Coke's other writings 
indicate that he had a cognitive concept of mental 
abnormality, but even the stressing of what was 
essentially mens rea in the phrase "no murder .... 
"without a felonious intent and purpose" reinforced 
it. Yet the Bracton quotation that he cited was 
in form, at least, an expression of the brute theory 
or wild beast concept of mental abnormality. 
Examined more closely, it is apparent that the 
Bracton quotation is simply illustrative of a type 
of mind that quite truly "cannot have felonious 
"intent". Coke, in paying lip service to Bracton 
in this fashion, did some disservice to ensuing 
jurists who apparently read in haste and took this 

to be tacit approval of a Bractonian "non multum
"distat a brutis" concept.

Arnold's Case (1724)

Arnold's Case is the oft cited authority
for the "wild beast" test. Actually, this essentially Bractonian concept had fallen into desuetude as the cognitive concept gained strength. Nonetheless, there was continued apparent reliance on the brute concept as illustrated in the Beverley Case. If authority such as Coke could utilize the language of Bracton, it is not strange to find judges of lesser legal stature following. It is equally not strange that such lesser usage is neither as technically precise nor restrictive as Coke's.

The Wild Beast Test

This process seems to explain the attribution of the "wild beast" test to Arnold's Case. Unquestionably, Judge Tracy's language was looser than Coke's. Further, if that part of Judge

1. (1724) 16 How. St. Tr. 695.
Tracy's charge to the jury that is usually quoted is taken alone, it does quite clearly seem to approve a "wild beast" concept. The portion of the charge usually cited is: "It is not every kind of a frantic humour or something unaccountable in a man's actions that points him out to be such a madman as is to be exempted from punishment; it must be a man that is totally deprived of his understanding and memory and doth not know what he is doing, no more than an infant, than a brute, or a wild beast; such a one is never the object of punishment;", The apparent requirement of total deprivation of understanding and memory and comparison to a "brute or a wild beast" serve as the foundation for the absolutist interpretation. But "total" deprivation may be total in Hale's sense as well as in the ordinary sense. In any event, it is neither safe nor accurate to take the quotation out of context.

1. See, for example, I Wharton and Stille, Medical Jurisprudence (5th ed.) 524.
A New Evaluation

It is suggested that taken in context the Tracy charge in Arnold's Case does not necessarily, nor even probably, lead to a wild beast interpretation. The portion of the charge immediately following the "wild beast" quotation reads as follows:
"therefore I must leave it to your consideration, "whether the condition this man was in, as it is "represented to you on one side, or the other, doth "shew a man, who knew what he was doing, and was "able to distinguish whether he was doing good or "evil, and understood what he did". Judge Tracy concluded with, "if you believe he was sensible, "and had the use of his reason, and understood what "he did", then he would be criminally responsible.

Taken alone this language would as clearly and cogently argue for a simple knowledge test as the earlier quoted language seemed to argue for a wild beast test. It would be an over simplification to interpret the charge in terms of two distinct

1. 16 How. St. Tr. 695, 765.
and conflicting viewpoints. The jurist obviously meant it as a single unified expression of opinion, as is evident from the immediate juxtaposition of both quotations. And counsel as well as the jury seem so to have understood the charge for there was neither objection nor question raised on the point.

Part of the explanation apparently rests on the indiscriminate use of precedent. Bractonian language was still respectable, though the substantive law had advanced beyond the content of the Bracton formula. The fact that the use of similar language by a fairly recent authority such as Coke, was usage in a highly restricted manner, was plainly lost on Judge Tracy. Although Tracy used the form in a broader and looser manner, it would be a mistake to read too much content into his utilization. The relative stability of form over content in law, previously discussed, must neither be forgotten nor underrated.

The balance of the explanation may be

1. Recent in historical perspective of legal development and with respect to Arnold's Case.
found in the fact that a charge to the jury, being intended for lay comprehension, is not apt to be framed with the semantic precision of a judicial opinion. Judge Tracy was simply doing what was quite common and is still not unknown - employing a technique that may be called definition by approximation, for want of a better term. By a series of near misses he hoped to define the target that he could not quite hit. Thus, "totally deprived of "understanding and memory", "doth not know what he "is doing", "no more than an infant, than a brute "or wild beast", "knew what he was doing", "able to "distinguish whether he was doing good or evil", "understood what he did", "was sensible", "had the "use of his reason", and the repetition, "understood "what he did": none of them should be taken narrowly as the gist of the definition or as a single allinclusive test. Reading them together as close approximations, the proper view of Arnold's Case would seem to be little different from the then current knowledge test of good and evil.

**Earl Ferrer's Case (1760)**

The knowledge test had at best marked time
in Arnold's Case, even if what has here been submitted as a new and correct evaluation of it, be fully acknowledged. With Earl Ferrer's Case progress in development was resumed. The trial took place before the House of Lords in a period when defendant was not permitted the services of counsel. The House of Lords applied the knowledge test as then understood, and brought in a verdict of guilty. By far the most significant portion of the proceedings was the speech of Solicitor-General Yorke as counsel for the Crown.

Moral Knowledge and the Nature of the Act

The Solicitor-General drew upon both Hale

1. (1760) 19 How. St. Tr. 886.

2. This led to an inconsistency as absurd as it was tragic. The defendant had by his own efforts to display sufficient reason and acumen that he might conduct a defense based upon his own insanity. Crown counsel could and did point out that the better he conducted his defense the more indication was it of sanity. In other words, the theory was that the more he proved himself insane by external evidence the more did he prove himself sane by the evidence of the skill and reason he displayed. This, of course, depended upon a cognitive test, and such was the test proposed by Crown counsel and accepted by the House of Lords in finding the defendant guilty.
and Hawkins for the test he advanced saying that total want of reason would acquit, but partial reason "sufficient to have restrained those passions, "which produced the crime; if there be thought and "design; and faculty to distinguish the nature of "actions; to discern the difference between moral "good and evil" would result in criminal responsibil-
ity. He also pointed out that "The same evidence "which establishes the fact, proves, at the same "time, the capacity and intention of the noble "prisoner. Did he weigh the motives? Did he "proceed with deliberation? Did he know the 1 "consequences?"

The knowledge test was still phrased in terms of good and evil. Hawkins had used these words and subsequent cases followed his pattern as both Arnold's Case and Earl Ferrer's Case indicate. The key words of the McNaughten knowledge test, right from wrong, had not yet been adopted as the customary legal expression. There was no problem, therefore, as to the referent meaning of the test.

1. 19 How. St. Tr. 886.
While "wrong" might be interpreted as either a legal or a moral term of reference, "good from evil" obviously bore an implicit moral connotation. If there were any doubt, Earl Ferrer's Case removed it. When the Solicitor-General spoke of ability "to discern the difference between moral good and evil" the eighteenth century standard of reference in the knowledge test was purely a moral one.

Still another aspect of the case was the idea that "faculty to distinguish the nature of actions" was a determinative element in criminal responsibility. Hindsight may indicate that this language, to become increasingly important in the developing knowledge test, was even then squarely in conformity with a general cognitive approach. But at the time, the Solicitor-General must rather have been thinking in terms of mens rea. His concern with such questions as, "Did he weigh the motive?" and "Did he proceed with deliberation?" stemmed from the view that they were important not only to establish fact, but equally to determine "capacity and intention". His final question, "Did he know the consequences?" stressed the quality of foreseeability inherent in criminal intent and,
to that degree, in mens rea. While knowledge of the nature of the act was a step toward the knowledge test of today, its genesis lay not in pioneering boldness, but in a conservative retreat to the safety of mens rea thinking. Hadfield's Case, or rather Erskine, counsel for the defense, was to establish the milestone of brilliant and deliberate innovation.

**Hadfield's Case (1800)**

Hadfield was a war veteran who had received his army discharge because of insanity. He suffered from systematized delusions that for the salvation of the world he must sacrifice himself as a kind of Christian martyr. He sought to accomplish this by shooting at the King, knowing and desiring to be executed for it. It was clear that if the knowledge test of Coke, Hale, Hawkins, Arnold's Case and Earl Ferrer's Case were to be used, Hadfield would be guilty. He not only knew what he was doing, but he was doing it for the very purpose the prosecution sought to encompass. It was equally clear that to hold him criminally responsible would be both inhumane and absurd.
Erskine's Delusion Test

Erskine, who brilliantly defended Hadfield, broke through this dilemma by evolving a new concept, the test of delusion. His view was that, "Delusion where there is no frenzy or raving madness, is the "true character of insanity; and where it cannot be "predicated of a man standing for life or death, for 1 "a crime, he ought not to be acquitted".

He also pointed out that the delusion had to be causally connected to the criminal act, saying it was necessary "that the act in question was the 2 "immediate offspring of the disease".

Perhaps the most important individual contribution to the legal attitude toward mental abnormality up to the nineteenth century was Erskine's introduction of the delusion concept. The McNaghten Rules eloquently testify to the high place that Erskine's contribution attained in the law in less than half a century. Indirectly, this

1. 27 How. St. Tr. 1218.
2. Ibid.
also furnished evidence of another kind. Erskine's unqualified success in introducing a new concept barely half a century before McNaghten indicates that the common law position was still quite fluid and dynamic even at the beginning of the nineteenth century. Hence the McNaghten Rules did not simply state an inflexible common law rule, but rather rendered the common law comparatively static and rigid.

Erskine's mode of phraseology is also informative. He did not say that delusion alone was the test of insanity, but rather that, "Delusion, "where there is no frenzy or raving madness, is the "true character of insanity". The statement is not apt to impress a modern physician as a particularly penetrating psychiatric truth. Historically, it assumes greater dimensions even in medical psychology, as has been indicated. Juridically, it brought the English law out of a growing dilemma. In a time of relative political unrest, regicides, attempted regicides and what have been called "magnicides", or the killing of celebrated persons of power, were not infrequent. Whether, in any given case, the law was confronted with a political
extremist or scheming conspirator, on the one hand, or a person of diseased mind, on the other hand, was difficult to decide. And medicine offered little aid. Furthermore, the knowledge test at that stage of development was also largely ineffectual since the purely objective evidence often was equally rational in the two types of cases. The delusion test offered a simple way out, without destroying the fabric of precedent. For centuries, the raving maniac had been outside the bounds of criminal responsibility. Erskine's formulation carefully kept this idea intact. And since the brute theory and knowledge test were to some extent becoming confused, the only absolute area of agreement was the case of the raving maniac. It was important, therefore, to single out this category, as Erskine did. That Erskine himself was not confused with respect to the knowledge test was indicated by his reassessment of it into a qualified form.

Erskine's Qualified Knowledge Test

Erskine said he accepted Coke and Hale "as the most revered authorities of the law" but that their knowledge test was "too general a
"description", pointing out that "If a total
depprivation of memory was intended by these great
lawyers to be taken in the literal sense of the
words, then no such madness ever existed in the
world". He recognized as rare those extreme cases
where "the human mind is stormed in its citadel,
and laid prostrate under the stroke of frenzy".
He pointed out, however, that "in other cases,
reason is not driven from her seat, but distraction
sits down upon it, and frightens her from her
propriety".

The judge, Lord Kenyon, stopped the trial
and noted "with regard to the law, as it has been
laid down, there can be no doubt upon earth".

Erskine simply marked out that feature of
Coke and Hale that caused the most confusion. He
indicated what "total insanity" must not be inter-
preted to mean. For, if "total" meant absolute
rather than permanent, it was obvious that only the

1. 27 How. St. Tr. 1282, 1312-1314.
raving maniac could fit the description well enough to escape criminal responsibility. This misinterpretation of totality had led to an apparent, but false, rebirth of the brute theory within the framework of a well developed cognitive concept. Erskine interpreted totality clearly enough to make subsequent errors of confusion inexcusable. Yet as Bellingham's Case was to show only twelve years later, the lesson had not been learned by all jurists. The reason would seem to be that in labelling Coke and Hale's analysis, "too general a description", Erskine gave rise to a belief that he was establishing a new description. In actuality, he was merely qualifying the Coke-Hale description in terms of historical and logical necessity. The paradoxical result has been that while Erskine's innovation, the delusion test, was accepted with little hesitation, his logically imperative, and historically justified, qualification of an old concept, the knowledge test, was resisted.

Erskine was also careful in noting that "it was necessary that the act in question was the "immediate offspring of the disease". This
requirement of causal particularity he applied to the delusion test. It was, of course, implicit in the knowledge test as well, but not until Oxford's case, within the penumbra of the McNaghten Rules' coalition of tests, did it receive explicit statement.

Erskine's figurative illustration of distraction sharing the seat of reason, holding reason frightened and trembling, showed a germinal appreciation of emotional etiology, neglected in the knowledge test. But, just as it had failed to develop before, the idea continued unrecognized by jurists as a whole.

Criminal Lunatics Act (1800)

The Criminal Lunatics Act was enacted during the reign of George III, who not only suffered from mental illness himself, but was also the target of a madman (Hadfield). But for the McNaghten Rules, the year 1800, having produced both Hadfield's Case and the Criminal Lunatics Act, would have been the

1. (1800) 39 and 40 Geo. III, c. 94.
critical year of historical development. Even without this distinction, the year was a highly important one. Erskine made a noteworthy attempt to clarify and advance the substantive law, and at almost the same time the procedure, respecting a person thought insane at time of trial was codified from pre-existing practice. Section 2 of the Act accomplishes this, and still continues to be the law on the subject.

Section 2 enacts that "If any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury .... so that such person cannot be tried upon such indictment, it shall be lawful for the Court before whom any such person shall be brought .... to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody until His Majesty's pleasure be known".

1. Blackstone, as has been noted, stated the general common law view.

While this language covers everything from congenital mental defect, through mental disease, to senile dementia, it also is applicable to states that are customarily regarded as primarily physical, such as deafness, dumbness, and blindness. Any state, whether physical or mental in origin, which results in a lack of ability to comprehend the proceedings at trial, is sufficient to satisfy the act.

The statute also provided that: "In all cases where it shall be given in evidence upon the trial of any person charged with treason, murder or felony, that such person was insane at the time of the commission of such offense, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offense, and to declare whether such person was acquitted by them on account of such insanity; and if they shall find that such person was insane at the time of the committing such offense, the court, before whom such trial shall be had, shall order such person to be kept in strict custody, in such place
"and in such manner as to the court shall seem fit, "until his Majesty's pleasure shall be known; and "it shall thereupon be lawful for his Majesty to "give such order for the safe custody of such "person during his pleasure in such place and in "such manner as to his Majesty shall seem fit".

Though this power, again, is no more than a codification of common law power, it indicated the growing concern of the state, in its administrative function, with the problem of the mentally abnormal. This realization of the fact that the public safety could be protected administratively as well as judicially remains of prime significance. For without it, the necessity to guard the public interest on the part of the judiciary would be overwhelming. The rights (or what we have come to regard as the rights) of the mentally abnormal defendant would proportionately suffer. Even more dangerous, in its implications of inhumanity, would be the reluctance of juries to accept the defense of insanity, lest they set a madman loose to do more mischief.
Bellingham's Case (1812)

R. v. Bellingham was illustrative of the type of case whose chief difficulty lay in judicial reluctance to risk mistaking political extremism for mental abnormality. To the modern mind, uneffected by and almost unmindful of the then current political situation, the case offers little difficulty.

Bellingham suffered from the delusion that the government owed him a large amount of money. He tried to appeal to cabinet members and even to Parliament to obtain redress. He also attempted to get the First Lord of the Treasury to right the fancied wrong. When this failed, he shot and killed the First Lord of the Treasury. During the trial, Bellingham attempted to destroy the plea of insanity made by his counsel. Bellingham said in open court that his killing of the First Lord of the Treasury was right and justified because the government refused to do justice to him, and so he

1. (1812) V The Complete Newgate Calendar (1926, Nevarre Society) 134; 1 Collinson, Law Concerning Lunatics etc. 636.
dispensed justice himself.

Had either the delusion test or the knowledge test, as laid down twelve years earlier in Hadfield's Case, been applied, the defense of insanity should have prevailed. Instead, the judge in the case, Sir James Mansfield, chanted what was, in form at least, already becoming a litany in the law, and then proceeded to explain it in such a manner that its content was reduced to the absolutism of the Bractonian brute theory.

Retrogression In Substantive Law

In the charge to the jury, Mansfield paid full lip service to the knowledge test, saying:
"The single question was whether, when he committed "the offence charged upon him, he had sufficient "understanding to distinguish good from evil, right "from wrong, and that murder was a crime not only "against the law of God, but against the law of the "country". It introduced the words "right from

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1. Unfortunately for legal development, a judge of lesser stature than Lord Mansfield.
"wrong" as well, and these were to supplant "good
"from evil" as the formula ingredients of the
knowledge test. They were also to raise the
question, whether moral standard or legal standard
was meant when they were used. Mansfield quite
plainly meant both. This was not an innovation in
his eyes, however, since lack of knowledge of the
law was recognized as an invalid defense. Whether
"good from evil" constituted a less satisfactory
formulation than "right from wrong", will be
discussed later. It is quite clear, in either
event, that the former wording had less ambiguity
than the latter, succeeding version.

It was in the explanatory references of
the jury charge that the real effect and meaning
of Mansfield's test was made manifest. He stated
that "There was a .... species of insanity in
"which the patient fancied the existence of injury,
"and sought an opportunity of gratifying revenge by
"some hostile act. If such a person were capable,
"in other respects of distinguishing right from
"wrong, there was no excuse for any act of atrocity
"which he might commit under this description of
"derangement ...". This interpretation reduced
the knowledge test to complete ineffectualness, since if "in other respects" (i.e., aside from the delusion) the defendant was capable "of distinguishing right from wrong" the defense was not available to him. Aside from the raving maniac acting in frenzy, there were no defendants, as then known, who could qualify under so rigorous and absolute a test.

Essentially, Mansfield's interpretation reduced the knowledge test to the brute theory level. This is perhaps most clearly shown in the example he cites of the kind of person to whom the defense would remain open. The elucidation was: "If a man were deprived of all power of reasoning, "so as not to be able to distinguish whether it "was right or wrong to commit the most wicked "transaction, he could not certainly do an act "against the law. Such a man, so destitute of all "power of judgment, could have no intention at all". It is hardly strange that Bellingham was found
1. It might be pointed out that Bellingham was tried four days after the shooting and his body was on the dissecting table eight days after the shooting. Defense counsel’s pleas for more time to adduce evidence were denied. Wholly aside from its misinterpretation and misapplication of the law, Bellingham’s Case is hardly an ornament to British justice.
Parker's Case and Bowler's Case: Mental Defect

Mention must be made of two further cases the results of which, at least, were departures from the main development of common law principles. Parker's Case and Bowler's Case were both concerned with mental defectives. Parker had been captured by the French and joined this army because "liberty" and money" were better than prison. This display of apparent rationality seemed to be sufficient to assure his conviction of treason, despite the skill of Brougham who defended him on the ground that he was too weak minded to be held criminally responsible. Bowler was both an epileptic and an imbecile. He had even been found insane, on what they considered strong evidence, by a commission in lunacy. He was convicted of murder and executed.

The jury had been instructed to consider whether Bowler "was under the influence of any

1. 1 Collinson, Law Concerning Lunatics, etc. 477.
2. Ibid, p. 673 note.
"illusion ... which rendered his mind at the moment "insensible of the nature of the act". This rough and tumble application of the careful doctrine of Hadfield's Case, not to paranoiacs for whom it had been designed, but rather to a mental defective could hardly hope for success at a time when the delusion concept was new and little understood or tried in courts. The knowledge test qualification, "insensible of the nature of the act" was probably a reliance on the language of Earl Ferrer's Case. If so, it meant little more than absence of mens rea; although Sir Simon Le Blanc, the judge, apparently thought of it in the wider terms of a cognitive approach. In any event, both cases seem to have suffered from a failure to differentiate between two of the earliest classifications known to the English common law respecting mental abnormality. If the law were to be applied as though all mental abnormality were disease, and none of it simple mental defect, then juries could hardly rise above the jurists' errors.

1. The loose usage of the early nineteenth century may be translated as delusion.
Offord's Case (1831)

Offord suffered from the same type of delusional mental disorder as Bellingham. Offord, however, was acquitted while Bellingham was hanged. Lord Lyndhurst, the judge, referred to Bellingham's Case and said he agreed with Mansfield's opinion. The wording of Lyndhurst's test, however, was somewhat different: "... did not know, when he committed "the act, what the effect of it, if fatal, would be, "with reference to the crime of murder. The question "was, did he know that he was committing an offence "against the laws of God and nature?" Whether or not Lyndhurst meant these words as an equivalent to Mansfield's, the Lyndhurst test did not in actuality go so far. The Lyndhurst test, though a clumsy statement, was far closer to the simple test of knowledge of right from wrong. This probably explains the difference in result between the two cases. Some writers, relying on Lyndhurst's statement that he was following Bellingham's Case, have found it impossible to reconcile the results
of the two cases. A comparison of the actual language, however, shows that Lyndhurst was stating a different test even if he did not mean to.

Perhaps the one element that most clearly separated the two views was that Mansfield abandoned all particularity and said that if, wholly aside from delusion, the defendant knew right from wrong, he was criminally responsible. Lyndhurst, on the other hand, adhered closely to the requirement of particularity, saying the defendant must have been one who did not know at the time of the act what the effect of "it" (i.e., that particular act) would be with reference to the legal standard, if he was to avoid criminal responsibility. The distinction is all important. Without a limitation of the mental condition to its affect on the particular act, the door is opened wide to the

1. Notably Professor Wharton, who said, "It is "difficult to understand why if the former (Belling-"ham) was convicted, the latter (Offord) was found "not guilty. The crime of each was precisely the "same, - the murder of an unoffending man; and the "motive was the same, - the impulse of an insane "delusion. Legal writers who attempt to defend the "courts cannot escape the dilemma presented by these "two cases ***" 1 Wharton & Stille, Med. Jur. 535,536.
requirement that all the defendant's actions and mental processes, at any and all times, must meet the requirements of the knowledge test in full. This is so onerous a burden that it equals the brute theory. By holding the inquiry to the mental state at the critical (particular) moment of action, Lyndhurst retained that final shred of legal substance that Mansfield abandoned.

The words "know ... the effect, if fatal... "with reference to .... murder..." seem to imply a legal standard. But Lyndhurst went beyond a simple "knowledge of legal wrong" test to enquire whether the defendant also knew that his act was "against "the laws of God and nature". This accords well with Mansfield's view, which acknowledged both a moral and legal standard of reference. To this extent Lyndhurst did agree with Mansfield's opinion, and only to this extent can Lyndhurst's statement of reliance on Mansfield be regarded as true.
Oxford's Case (1840)

Oxford's Case was still another example of the most difficult problem facing the pre-McNaghten jurists, namely - the framing of a test that would hold the political extremists responsible while freeing the mentally abnormal in cases of attempted regicide. Oxford fired at Queen Victoria without striking her. It is questionable whether he even intended to wound her. It is not even certain that his pistol was loaded. Both his father and grand-father had been insane and he himself was found "not guilty on the ground of insanity".

Since this case was a forerunner to the McNaghten Rules by only three years, it is plain that the judge's charge to the jury is important for purposes of comparison with the McNaghten Rules.

Irresistible Impulse

The most striking illustration of the fact that the McNaghten Rules did not simply restate an
already fixed and fully developed common law position is provided by Oxford's Case. Within the shadow of the McNaghten Rules (just three years earlier) the then Chief Justice enunciated a doctrine that we would today designate as an "irresistible impulse" test. The failure of the McNaghten Rule jurists to include a similar test in their answers, cannot be brushed aside as a failure in the questions. Both Oxford and McNaghten attempted to kill an important political personage because of delusions. The jurists who gave the answers must have been fully aware of so recent a decision as Oxford's Case in which the Chief Justice himself had delivered the charge. It is difficult to escape the conclusion that the neglect of irresistible impulse was a deliberate one. This could not have occurred unless the common law concepts were still flexible and in process of development. Had the McNaghten jurists regarded the law as fixed, they might have suggested a change with respect to irresistible impulse, but they would not have merely ignored the concept.

The language used by Chief Justice Denman was: "If some controlling disease was, in truth, the
"acting power within him, which he could not resist, "then he will not be responsible".

This language is beyond the ambit of the knowledge test. It presupposes an appreciation of mental abnormality in terms broader than a simple cognitive approach. In so doing, the Chief Justice was not alone in the law, nor was he the first. Others, as has been pointed out, had indicated some misunderstanding of emotional etiology. Denman, however, was the first to carry this appreciation out to its logical conclusion by incorporating it into the legal tests for mental abnormality. Even this explicit extension did not save the concept from extinction as the McNaghten Rules proved.

The studious avoidance of irresistible impulse in the McNaghten Rules poses another question as well. Were the judicial "answers" intended as a complete statement of the common law

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1. At least in Britain. Some American jurisdictions have adopted it, as will be indicated in a later chapter.
respecting mental abnormality? The consideration of this question will be undertaken at another point, in evaluating the Rules themselves. In any event, the question quickly became academic, in view of subsequent judicial treatment of the Rules as an organic whole.

Lord Denman set out his understanding of the knowledge test in language that had a distinct McNaghten ring. He charged that: "The question is whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing; or, in other words, whether he was under the influence of a diseased mind, and was really unconscious, at the time he was committing the act, that it was a crime."

When coupled with the proximity in time, and with the fact that the Lord Chief Justice was speaking, it is clear that this language must have influenced the McNaghten Rules. In view of the rank of the putative victim, it is not likely that the Lord Chief Justice would have spoken off-
handedly or given light consideration to the matter. Lord Denman pointed out further that the test was whether the defendant, "was insane at the time when the act was done, - whether the evidence given "proves a disease of the mind, as of a person quite "incapable of distinguishing right from wrong".

The "nature of the act" had been amplified into unawareness "of the nature, character, and "consequences of the act", and "incapable of "distinguishing right from wrong" was no longer coupled to the explicitly moral standard of "good "from evil". But the best indication of the Oxford Case influence upon the McNaghten Rules follows from a direct comparison of terminology. Table No. 1, overleaf, is of this nature.
<table>
<thead>
<tr>
<th>Oxford's Case</th>
<th>McNaghten Rules</th>
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<tbody>
<tr>
<td>&quot;labouring under that species of insanity&quot;</td>
<td>&quot;labouring under .... defect of reason, from disease of the mind&quot;</td>
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<tr>
<td>&quot;under the influence of a diseased mind&quot;</td>
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<tr>
<td>&quot;was insane&quot;</td>
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<tr>
<td>&quot;disease of the mind&quot;</td>
<td></td>
</tr>
<tr>
<td>&quot;quite unaware of the nature, character, and consequences of the act he was committing&quot;</td>
<td>&quot;as not to know the nature and quality of the act he was doing&quot;</td>
</tr>
<tr>
<td>&quot;at the time that the act was done&quot;</td>
<td>&quot;at the time of doing the act&quot;</td>
</tr>
<tr>
<td>&quot;incapable of distinguishing right from wrong&quot;</td>
<td>&quot;or ... that he did not know he was doing what was wrong&quot;</td>
</tr>
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<td></td>
<td>&quot;knew the difference between right and wrong&quot;</td>
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<td></td>
<td>&quot;knowledge of right and wrong&quot;</td>
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<td></td>
<td>&quot;had a sufficient degree of reason to know that he was doing an act that was wrong&quot;</td>
</tr>
<tr>
<td>&quot;at the time he was committing the act&quot;</td>
<td>&quot;in respect to the very act with which he is charged&quot;</td>
</tr>
<tr>
<td>&quot;really unconscious ... that it was a crime&quot;</td>
<td>&quot;conscious that the act was contrary to the law of the land&quot;</td>
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The direct comparison of language indicates that while Oxford's Case in many places sounds much like the McNaghten Rules there is no striking congruence or parallelism. The influence is no more than might be expected from a very recent case, and in some ways perhaps less, since irresistible impulse was ignored. It is in the more general aspects rather than the finer and more specific points of cognitive development that the two phraseologies come closest together.

Both require "disease of the mind" but the McNaghten Rules are more specific in requiring that the result be "defect of reason". Both utilize the "right from wrong" test, but while Oxford's Case uses the general language "incapable of distinguishing", the McNaghten Rules emphasize the knowledge element more directly by speaking of "knew the difference" and again, "knowledge of right and wrong". Still again, both require particularity in the restriction, "at the time of doing (or he was committing) the act", and both use a legal standard in the language, "unconscious .... that it was a crime" and "conscious that the act was contrary to the law of the land". Alternatively,
the rambling "unaware of the nature, character and "consequences of the act" (Oxford's Case) is narrowed to "not to know the nature and quality of "the act" with the disjunctive integrating phrase, "or ... that he did not know he was doing what was "wrong" (McNaghten Rules).

Conclusions

The seventeenth and most of the eighteenth centuries were a period of medical ignorance and misconception, with the "lunacy" theory a common explanation of mental abnormality by the physician. During the same period, case law began to assume importance in the development of the legal attitude toward mental abnormality. With the shift in emphasis to case law came an intensified reliance on precedent. This, in turn, was accompanied by confusion of form and content illustrated in a superficial "resurgence" of the brute theory in the law.

Both Beverley's Case and Arnold's Case are examples. In the former, Coke managed to cite the Bractonian precedent in form, but was skillful enough to avoid any necessary retrogression in
content. In Arnold's Case, however, a less technical phraseology resulted in language commonly interpreted in terms of the "wild beast" theory. It has already been submitted that the brute theory has roots that go back far beyond Arnold's Case (its commonly ascribed genesis) to Bracton. It is further submitted that Arnold's Case should not properly be interpreted as a wild beast standard at all. It is suggested that the case stands for no more than a simple knowledge test, somewhat clouded by older forms of language brought in by precedent.

Erskine, in Hadfield's Case, indicated a way out of the dilemma of form vs. content. He reanalysed the "total insanity" concept of the later institutional writers to rule out any interpretation of "totality" in terms of absolute alienation of reason, or brute theory.

Bellingham's Case, early in the nineteenth century, brought the process of confused intermingling of the cognitive and brute concepts to a point of logical absurdity. Voicing the newer language form of the knowledge test, the case injected a wild beast content of absolute alienation of reason.
Scarcely two decades later, Offord's Case, dealing with a similar set of facts, used much the same words of the knowledge test, but preserved the essential cognitive content, and brought the law back to its main channel of development. Oxford's Case reemphasized this return to the cognitive concept in language somewhat similar to that of the McNaghten Rules.

The transition from the eighteenth to the nineteenth century was marked by an alteration in the standard of reference for the knowledge test. Earl Ferrer's Case in 1760 utilized a purely moral standard in the phrase "good from evil". By 1812, in Bellingham's Case, the wording was alternative in form with "right from wrong" joined to the earlier phrase. Offord's Case continued the trend and by 1840, with Oxford's Case, the standard was a legal one. "Good from evil" was no longer mentioned, and "right from wrong" was further buttressed by the requirement that the defendant be "really unconscious .... that it was a crime".

From time to time during the case law period, a fleeting glimpse is caught of an appreci-
ation of an emotional basis for mental abnormality. But even in the cases where it occurred, Hadfield's Case and Oxford's Case, it made no great impression and left no mark on the law.

Still another concept that left no mark on British law was that of irresistible impulse suggested in Oxford's Case.

The law was marked in other ways that showed themselves in the McNaughten Rules. The requirement of a "faculty to distinguish the nature of actions" laid down in Earl Ferrer's Case was picked up again in Bowler's Case. In Oxford's Case the requirement elaborated to "quite unaware of the nature, character and consequences of the act he was committing", but it was joined with the alternative of "not (to) know he was doing what was wrong" as in the McNaughten Rules. The development short of such an integrated statement was clear and positive.

The contribution of the concept of delusion as a test of mental abnormality was the result of one case and one man. Erskine, in Hadfield's Case, introduced a new doctrine into the
law; its general application, however, had to await the powerful influence of the McNaghten Rules. The delusion test met a prime need of the nineteenth and late eighteenth century - a means of separating the madman from the political extremist in the courtroom. The cases of Bellingham, Offord and Oxford, as well as that of Hadfield, illustrated the problem but only the latter used Erskine's remedy until the McNaghten Rules gave it currency.

Finally, it is submitted, the innovation of delusion in Hadfield's Case, the causal introduction of irresistible impulse in Oxford's Case, and the cognitive retrogression of Bellingham's Case, all clearly establish the pre-McNaghten fluidity of the common law. Far from simply restating a static substantive law, the McNaghten Rules rendered rigid and inflexible what had been a rather dynamic development.
PART TWO
PART TWO

COMPARATIVE HISTORICAL DEVELOPMENT
IN SCOTTISH COMMON LAW

Chapter V : First Scottish Aspects
Chapter VI : The Scottish Developmental Period
Chapter VII : Scotland's Early Modern Phase
CHAPTER V
FIRST SCOTTISH ASPECTS

Reg. Maj. As Precept ......................... 139
Reg. Maj., A.P.S., And Frag. Col. ............ 142
Three Sixteenth Century Cases
(Neilson, Launder and Guyld) ............... 147
Comparisons and Speculations ............... 151
Table No. 2 .................................. 158
The pre-McNaghten era in either Scotland or England is not so sharply self-illuminated that it cannot gain in definition and relief by comparison to a sister legal system. Of the English speaking world only Scotland and England have the historical resources to serve one another in this fashion. Those great borrowers of modern law, the United States and the British Dominions and Empire, can make no significant contribution to comparative law in the pre-McNaghten period.

The Continental systems are beyond the scope of this investigation. Nonetheless, there is some reason to believe that Scots law offers a better standard of comparison. Its criminal law, like that of England, has utilized a common law mode of development. At the same time, its law in general has managed to evolve a unique structure, partaking of the two chief legal systems of western culture.

1. The Rt. Hon. Lord Cooper, LL.D., The Scottish Legal Tradition (1949 Saltire Pamphlets No. 7) p. 29, cites: "A very eminent and detached critic, Professor Levy Ullmann of Paris, (who) has ventured the assertion that 'Scots Law as it stands gives us a picture of what will some day be the law of the civilized nations, - namely a combination between the Anglo-Saxon system and the Continental system'".
On the practical level, Scottish criminal law and administration have achieved and maintained a standard that invites comparison.

Reg. Maj. as Precept

Scots law as an independent legal system must always give the English or American lawyer reason to pause. When an investigation requires consideration of such ancient elements of Scots law as the Regiam Majestatem the pause may become painfully long and disconcerting.

The troublesome question of authenticity is to some extent foreclosed. Although the Regiam Majestatem was apparently known in Scotland as early as the thirteenth century, no valid conclusions may be drawn from it concerning the central problem of

1. The Rt. Hon. Lord Cooper, LL.D., The Scottish Legal Tradition (1949 Saltire Pamphlets No. 7) p. 26, "This is a branch of our legal system in which Scotland may justly take pride, and which has been maintained at a high pitch of efficiency".

2. Holdsworth, Sources and Literature of Eng. Law (Oxford 1928), p. 26, speaks of "an edition of (Glanville) .... introduced into Scotland in the early part of the thirteenth century under the name of Regiam Majestatem".
this thesis, until the fifteenth century. Lord Cooper, whose scholarship would be sufficient warrant without the commanding authority of highest judicial office, has characterized the work as two different books with respect to its legal position before and after the fifteenth century. The relatively unknown book of the thirteenth and fourteenth centuries was neither an accurate mirror of contemporary Scots law, nor an effective influencing force upon it.

The change in status of the book was gradual, and in the fifteenth century it still seems to have been regarded with mixed veneration and misgiving. By the sixteenth century, however,

1. The Rt. Hon. Lord Cooper, LL.D., Regiam Majestatem and Quoniam Attachiamenta (Stair Society 1947), P. 1, "The truth is that Regiam Majestatem is not one book but two, the original compilation which some forgotten and unknown scholar constructed in the early 13th century, and the rediscovered Regiam Majestatem of professional tradition, which from the 15th century onwards was prized by lawyers as a supposedly authentic record of 'our most ancient law'."

2. Ibid, p. 2, "while therefore Regiam Majestatem could be described in 1425 as the first of Scotland's two 'bukis of the law of this realm' and must therefore have held a unique place in public estimation, it was at the same time openly recognized that the book was already obsolescent and in need of 'reforme'!

-140-
it had achieved a high degree of currency in the legal profession. Though it still lacked validity as a historical record of earliest Scots law, it began to create its own validity as an ideational influencing force and as a determinant of legal growth. It is this aspect of Regiam Majestatem that compels examination of its substantive views respecting mental abnormality.

The power of the Regiam Majestatem to rough-hew law was augmented by other writers until the late seventeenth century when a marked change in the general outlook of Scots law ushered in a period of controversy over the Regiam itself. Balfour borrowed heavily from it, and Hope borrowed

1. Ibid, p. 3, "During the 16th century Regiam Majestatem must have enjoyed a wide circulation for a book of that kind. It was being cited in the civil and criminal courts, superior and inferior. Craig, who did not live to see the book in print, had closely studied it. Balfour *** evidently had access to several copies ***".

2. The Rt. Hon. Lord Cooper, Select Scottish Cases of the Thirteenth Century (Edin. 1944) p. XXii, "For centuries Regiam Majestatem meant as much in Scotland as Glanvill and Bracton did in England, and the influence of that treatise long survived the growing doubts as to its origin and character".

3. Lord Cooper, op. cit., p. 5.
from both the Regiam and Balfour. In a time of few books, this must have resulted in increased prestige and wide circulation of the ideas of the older work. Although Craig had attacked the work, his repudiation was not printed until some 52 years later; and in any event, even he leaned on it to some extent.


In their civil affairs the mentally abnormal were protectively limited in a manner basically familiar. Unless execution took place during a lucid interval, their contracts were not binding, but no indication is given of the effect of a contract for necessaries made during a non-lucid interval, nor are similar matters considered. As might be expected, they were not permitted to

2. Loc. cit.
act as arbiters, nor could a furious person be a witness for or against a party. The idea that an insane person might be a competent witness as to some matters, despite his mental condition, apparently required a higher degree of medical sophistication than the period afforded. While furious persons were to be kept by their friends, the lands of natural fools were to be in the custody of the king. The land eventually descended to their heirs, but idiots could not alienate it themselves. As early as 1475 a clause was required in briefs of idiocy to determine the length of time fatuity had existed.

1. 2 Reg. Maj. c.2, I 607a, A.P.S. (Rec. ed.)
2. Frag. Col. c.18, I 744, A.P.S. (Rec. ed.)
3. Ibid, c. 22, I 752.
4. 2 Reg. Maj. c. 40, I 617, A.P.S. (Rec. ed.)
5. Loc. cit.
7. A.P.S. (Rec. Ed.) c. 8, II 112.
This was to protect alienations "throw ydiotis and "natural fulis, furious and wodmen", since alienations by such persons were to be null. By 1585, the common law position was enacted into legislation ordaining that the nearest agnates of such persons were to be served as their tutors and curators.

In criminal matters the Regiam Majestatem offered a simple procedure. In the event a furious person killed another an inquisition was to be taken. The inquisition had power to determine whether the act was done in "frenzied furie". If the act was done "in their wit and gud minde", the accused were to be punished as "men of haill mind, "and of sound wit". If the act was done "throw "the heat of furie and madnes", they were deprived of liberty, but not punished in the ordinary manner. Their friends were permitted to keep them and be responsible for them; a most serious responsibility

1. A.P.S. (Rec. ed.) c. 25, III 396.
3. Loc. cit.
4. Loc. cit.
5. Loc. cit.
since any negligence that permitted the insane ward to get free and do "evil" resulted in imputation of the act to his keeper. If no friend could be found to shoulder so heavy a responsibility, the "furious men" were to be imprisoned by the Justiciar or by the Sheriff.

Fragmenta Collecta yields the same formulation. In greatly abbreviated form, the gist of the matter is also to be found in the appended treatise on Capital Crimes in the Regiam Majestatem again. The reference given, however, brings the search back to the Second Statutes of Robert the First. Cosmo Innes has shown the

2. Loc. cit., "Justitiar".
3. Loc. cit., "Schiref"
weakness of that authority in general. However, as has already been noted, Regiam Majestatem is important as an influencing factor rather than a model of original authenticity.

Regiam Majestatem also proclaimed that mental illness was sufficient to excuse failure to obey a summons, but even so simple a statement may overstate the case. It was lawful for a man, who was summoned, to excuse himself in various ways, one of these being infirmity. But the infirmity referred to was a physical infirmity, and the mental aspect has the parenthetical appearance of what might be regarded as an afterthought.

1. A.P.S. (Rec. ed.) I 45, "Sir John Skene has not only given a chapter, with the title of 'Statuta Secunda Roberti 1.', while acknowledging it is of no authority, but he has avowedly placed there many laws which are not even ascribed by any of the Manuscripts to this Sovereign".
3. Ibid. par. 2.
4. Ibid., fol. 9, par. 10.
Three Sixteenth Century Cases

The most complete compilation of the earliest recorded criminal law proceedings in Scotland was that of Pitcairn. Only three instances of mental abnormality were mentioned, and all three occurred in the sixteenth century.

The first reference in point of time was a fragmentary recording of Jan. 18, 1540. Actually this was not a criminal matter at all, but a private law proceeding selected from the Register of the Privy Seal of Scotland and contained in an Appendix by Pitcairn. The extract was a "Lettre to John Lausoune, makand him Curatour, gydour, and gouernour to Patrik Neilsoun, quhilk is daft, and hes na wit to gyde him selff; for the

1. The earliest actual records extant appear to be two ancient manuscripts that Pitcairn noted as "preserved in the Library of the Faculty of Advocates Edinburgh"; but these have been incorporated in the more extensive collection by Pitcairn.


"weile and proffeit of him and his barnis, quhill
"God send him witt and knawlege to rewle and gyde
"him self, his barnis, and guidis, and mend him of
"the said infirmite."

Next, chronologically, was the first
1 criminal case, that of Jasper Lauder. Lauder was
accused of art and part of the slaughter of John
2 Balcasky in May of 1554. The prolocutor for Jasper
Lauder, "allegit that he sall nocht be put to the
"knowlege of ane Assise for the allegit Slauchter
"..... becaus the tyme of the committing theirof,
"and lang of befoire, and as yit, continualie, the
"said Jasper hes bene furious and wantand the use
"of resoune, doand in all the said tyme, viz. be the
"space of xvij yeris last bipast, furious and daft
"dedis; ..... And sua, as furious during the said
"space, commonlie haldin and repute, as is notourlie

1. Ibid, p. 363*.

2. The recorded date was May 7, 1554, and the
   alleged date of the crime was May 1, 1554.

3. Pitcairn translated "daft" as "Insane; fatuous".
"knowin .... and sua is comparit of the law to ane "infant, pupill, or beist, wantand the use of 1 "resoune ....". The argument was also advanced that such a person as the accused could not contract, trespass or do any binding deed, and was not responsible with regard to his personal estate as well as criminally. It was stated in addition that an "Inventour" would be adduced in proof; this was not done. Apparently the defence failed because of this and Lauder was convicted and beheaded.

The third case, also a criminal trial, 3 was complicated by a double defence. James Guyld was indicted, on Dec. 16, 1561, for stealing. The defence alleged that Guyld was a minor and an idiot. He was described as an "ydiot of natur, nor has

1. I Pitcairn, Crim. Tr. (Pt. I) 363*, 364*.
2. The last recorded entry was that of May 10, 1554, which was also the date assigned by the Justice Depute "for geving of Interloquitour upoune the "said Exceptioune and allegeance".
3. Ibid, 415*.
"nocht the knawlege to decerne the perrell and the feir of deid .... And forder, is subdeuit to ane malancolius humour, naturallie descendand from his progenitouris, swa that he is mair desyrous to dee nor to leif, as be experience is notour, be samekill that his fader exponed him selff sindre tymes to the perrell of deid, and wald haue drouned him selff in the North Loch .... and syclyik Maister Walter Guyld, his fader bruder, occupiit with the same humour, slew him selff in Paris. And thairfoir, the said James, beand bayth minor ... and occupiit with the said humour, mair willing to de nor to leif, and haifand na cuyr of deid, aucht not to underly the law for the lybellit pretendit cryme, and aucht not to perise ..... And eikis allegeance, that the same boy ranne sindrie tymes nakit to Ingland .... The case

1. Translated by Pitcairn as "death". I Cr.Tr. (Pt. I) 415* note 5.
2. Translated by Pitcairn as "subjected, liable to". Ibid, note 6.
3. Translated by Pitcairn as "to die than to live". Ibid, note 7.
5. Translated by Pitcairn as "perish". Ibid, note 10.
6. Translated by Pitcairn as "adds". Ibid, note 11.
passed to Assise "nochtwithstanding any allegeance, "because of the practik sene of befoir". A verdict 1 of "Convict" was returned.

Comparisons and Speculations

The earliest period of Scottish common law offered little material from which confident conclusions could be drawn concerning mental abnormality in criminal law. As a consequence, the summation of the period must be largely in terms of speculation rather than anything that may be dignified by the term "conclusion". This condition persisted until the late seventeenth century Scottish metamorphosis in legal thinking. The sixteenth century, therefore, becomes pivotal; it was at or near the evolutionary peak of the earliest period, and it furnished some speculative clues to later development.

1. Pitcairn notes that, "No traces are left on record of the fate of this poor creature; but it is likely that the punishment was trivial, and that his relations would be bound over, under penalties, for his future good behavior. I Cr. Tr. (Pt. I) 416* note 1.
From the thirteenth to the fifteenth centuries the doubtful authority of Regiam Majestatem could not be said to furnish trustworthy evidence. From the fifteenth century on, Regiam Majestatem became an influencing source of legal thinking. In this new role it contributed a concept of insanity that may, speculatively, be regarded as equal to Bracton's thirteenth century wild beast view in English law. In a criminal inquisition, persons "in their wit and gude mind" were to be punished as "men of haill mind, and of sound wit". Unless this was a meaningless pleonasm, the contrast must have been meant between the abnormal, but responsible, person of "wit and gude mind" and the normally responsible person of "haill mind and "sound wit". The implication of a distinction such as this was that wit and mind were altogether wanting in the abnormal person who was not criminally responsible.

The distinction between congenital mental defect and acquired mental illness was recognized at an early stage in both Scots law and English law. By the fifteenth century the evidence was fairly
plain in Scotland. In 1475 a clause to determine duration of mental affliction was required in briefs of idiocy. The scope of the action, however, was the protection of natural fools and furious persons. In England, in 1342, the Statute De Prorogativa Regis had made clear a distinction between natural fools and "non compositis"; the latter affliction being "by visitation of God".

While the evidence of the existence of two classes of mental disorder came to light earlier in England, it cannot be said that the distinction was actually recognized earlier there. It was obvious from the almost casual manner of making the distinction that it had been a part of legal thinking for some time in each country. No conclusion as to priority may be drawn.

Guyld's case in the sixteenth century also emphasized the interpretation of mental defect as congenital; the descriptive term was not merely idiot, but "ydiot of natur". Although Mackenzie, in the next century, was to be silent on this point, its recognition in law was already clear; perhaps so clear that Mackenzie felt no need to reiterate it.
Erskine, still later, raised the matter again, and affirmed the venerable view of idiocy as a congenital condition.

The case of Lauder, in the sixteenth century, indicated that there was probably no sharp line between the standards of mental abnormality in criminal law and private law. Lauder's case utilized as an argument the allegation that the accused could not contract or trespass because of his mental condition, and hence was generally not responsible, even in criminal law. The argument implied that in sixteenth century eyes the civil incapacity was tantamount to a criminal incapacity. This was not particularly surprising since in England much the same lack of differentiation had prevailed. It was not until Coke, who in the seventeenth century restricted his doctrine of non-stultification to civil causes, that the first distinction between insanity in civil cases and in criminal cases was made in English law.

The physicians' role was apparently more circumscribed while that of the lay witness appeared broader than we now know them. Not only did the
latter testify to past instances of abnormal conduct, but he seemed able to give opinion as to mental condition in a manner analogous to that of character or reputation testimony. Thus Lauder was characterized as "furious and daft" on the ground that it was commonly so held and reputed, and notoriously known. Similarly, Guyld, it was contended, was an idiot because by experience such was notoriously the case.

Whether the sixteenth century Scottish attitude toward mental abnormality rose to the level of a cognitive concept was difficult to determine. The period fell between the first influencing effects of Regiam Majestatem in the fifteenth century and Mackenzie in the seventeenth. Both these sources stood for absolute alienation of reason as the desideratum of lack of criminal responsibility. Regiam Majestatem, however, was not nearly as clear as Mackenzie on this point of concept; nor could the suspicious origins of Regiam Majestatem be ignored. An even greater difficulty was the fact that the three sixteenth century cases mentioned yielded no positive inferences on the question. The phraseology could be equated with
anything from the Bractonian wild beast language of
the thirteenth century, to Littleton's "non sane
"memory" of the fifteenth, and finally to
Fitzherbert's cognitive emphasis on "discretion" in
the sixteenth. The table at the conclusion of
this chapter illustrates some of the parallelisms.

Under the circumstances, no conclusion
would be warranted beyond the probable conjecture
that the law was still fluid and that no binding
definition had been adopted. Whether absolute alien¬
ation was required to exculpate probably varied some¬
what from case to case. In some instances the broad
generalizations employed may have left the matter in
the hands of the jurors; one American State, New
Hampshire, uses a very similar method even now. If
this interpretation were correct, it meant that Scots
law was free to develop along several quite different
lines. One of these lines, Mackenzie's rule of
proportions, was quite different from anything in the
English experience. Another line was the development
of a cognitive concept resulting eventually in a
knowledge test, as in England. That Scotland did
both may be an affirmation of the foregoing
interpretation; or it may signify something quite different, such as growing English influence; or perhaps a combination of these or other factors may be indicated.
<table>
<thead>
<tr>
<th>ENGLAND (13th to 16th centuries)</th>
<th>SCOTLAND (16th century)</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;does not know what he is doing&quot; (Bracton)</td>
<td>&quot;na wit to gyde him selff&quot; (Neilson's Case)</td>
</tr>
<tr>
<td>&quot;and is lacking in mind and reason&quot; (Bracton)</td>
<td>&quot;furious and wantand the use of resoune&quot; (Lauder's Case)</td>
</tr>
<tr>
<td>&quot;and is not far removed from the brutes&quot; (Bracton)</td>
<td>&quot;comparit .. to ane infant, pupill or beist&quot; (Lauder's Case)</td>
</tr>
<tr>
<td>&quot;non sane memory&quot; (Littleton)</td>
<td>&quot;knowlege to rewle and gyde him self&quot; (Neilson's Case)</td>
</tr>
<tr>
<td>&quot;unsound memory&quot; (Fitzherbert)</td>
<td>&quot;knowlege to decerne the perrell and the feir of deid&quot; (Guyld's Case)</td>
</tr>
<tr>
<td>&quot;not any manner of discretion&quot; (Fitzherbert)</td>
<td>&quot;wantand the use of resoune&quot; (Lauder's Case)</td>
</tr>
<tr>
<td>&quot;as an infant&quot; (Fitzherbert)</td>
<td>&quot;comparit of the law to ane infant, pupill or beist&quot; (Lauder's Case)</td>
</tr>
</tbody>
</table>
CHAPTER VI

THE SCOTTISH DEVELOPMENTAL PERIOD
CHAPTER VI
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Sir George Mackenzie ................................. 161
Areas Of Agreement With Predecessors .......... 162
Punishment: Rule And Rationale .................. 165
Abnormality: Time, Type and Presumptions .... 169
Definitions Of Idiotsy And The Ten Finger Test .......... 174
The Standard Of Absolute Furiosity .......... 175
The Rule Of Proportions: Precursor Of Diminished Responsibility ...... 179
Drunkenness ........................................... 184
Two Seventeenth Century Cases
(Johnston, and Chislie) ............................ 185
Three Early Eighteenth Century Cases
(Sommerville, Thompson, and Spence) .......... 189
Erskine .............................................. 196
Idiotsy And The Absolute Standard ............... 198
The Cognitive Concept In Furiosity ............... 200
Effect On The Rule Of Proportions ............... 202
Three Late Eighteenth Century Cases
(Crockat, Blair, and Coalston) ................... 204
Comparisons And Conclusions .................... 213
The seventeenth century English transition from fragmentary writing to the analytical thinking of Coke, Hale and Hawkins was marked in Scots law with an equally sharp and dramatic change in the late seventeenth century. Lord Cooper, speaking of the law of Scotland generally, has noted that no satisfactory explanation exists for the abrupt alteration in outlook that he has described as a "transition from the medieval to the modern world".  

Sir George Mackenzie

The several writings of Mackenzie, considered as a whole, indicate a comprehension and analysis of mental abnormality far in advance of the extant writings of his predecessors. Although, as Lord Cooper points out, Mackenzie drew liberally

1. The Rt. Hon. Lord Cooper, Reg. Maj. and Quon. Attach. (Stair Soc. 1947), p. 8. The Lord Justice General also points out several of the alternative possibilities: "It may be that we have here a complete break in the continuity of our legal development. Or it may be that the finished products of the closing years of the 17th century should be recognized as a sudden and swift inflorescence from seeds which had long been germinating unseen".

2. The name is variously spelled. Cf. McKenzie, Pleadings Rem. Cases Scotland Since 1661 (Edin.1672). The dominant form, Mackenzie, will be used in all the references hereinafter.
upon Regiam Majestatem, yet, so far as the subject matter of this thesis is concerned, he appears to owe comparatively little to the older work.

Areas of Agreement with Predecessors

Mackenzie made the same distinction between idiocy or mental defect and mental illness that had arisen early in both the common law of England and Scotland. He consistently labelled mental illness as "furiosity". Mental defect, however, he sometimes denoted by the term "fatuity" and at other times simply by the term "ideot". He regarded the distinction that the law had made between fatuity and furiosity as "very remarkable" and based his system of analysis upon it.

1. Op. cit., p. 6, "Sir George Mackenzie declared the Regiam to be 'authentick' in matters criminal, and drew copiously from its fourth book in his treatise on criminal law".


3. Loc. cit.

The method of establishing these mental states also confirmed earlier writing. An inquest consisting of fifteen neighbours was required. The individual to be examined was brought before them and upon the examination of the individual, plus the testimony or depositions of witnesses, and finally upon the personal knowledge of the members of the inquest, a finding was made. While apparently post-mortem inquests as to mental state were permitted, Mackenzie was careful to add that he could give no instance of either fatuity or idiocy having been proved in this manner. The inquest had to establish the date of beginning of the mental state since "all deeds" after that date were a nullity. If an affirmative finding were

2. Loc. cit.
3. Loc. cit.
4. Mackenzie, Institutions, p. 52. The authority cited was the Act of 1475, adverted to in the preceding chapter.
made, the nearest kin might "serve themselves 1 tutors", or failing that, a tutor-dative might be granted by the exchequer.

Mackenzie followed the imputation theory set out in Stat. 2 Rob. 1. However, he made an important distinction. The keeper was still regarded as liable for the damage done by the mentally afflicted person in his care. However, no mention was made of the old requirement that negligence on the part of the keeper had to be proved in order to establish liability. Instead, Mackenzie compared the situation to one in which damage had been done by an escaped wild beast. Significantly also, liability was expressly limited so that the doctrine of imputability extended only to civil suits and

1. Loc. cit.
2. Loc. cit.
4. Loc. cit.
This clear distinction between civil and criminal liability was a distinct improvement upon the ambiguous silence of the earlier period.

In civil law also, Mackenzie affirmed that idiots and furious persons could not marry during the period of mental disturbance since they were not able validly to consent. Testamentary capacity was also deemed absent except in lucid intervals.

Punishment: Rule and Rationale

Mackenzie categorically stated that those who were furious were not in legal construction

1. Loc. cit. Mackenzie noted as an exception to his rule of non-imputation in criminal matters, the case where the keepers "are commanded by the Judge to keep him (the afflicted) exactly". At the same time he pointed out that the exception "ought not to be extended against such as are only his curators, or nearest of kin". This latter group fell within the general rule that "it were too severe to punish them corporally for the murders, and other Crymes which he (the afflicted) commits".


capable of committing crime. He did not mention the case of the idiot except by implication. The reasoning that furious persons were not criminally responsible because the law compared them to infants or dead men raised a similar inference of non-responsibility with respect to idiots, to whom the same reasoning applied.

The rational foundation for his rule was to be discovered in several of the principles to which Mackenzie later adverted. A strong humanitarian impulse was reflected by his observation that the mentally abnormal "are excused by their own misfortune and abundantly punished by their own fury." Equally humane was his refutation of the notion that Church discipline required punishment

1. Mackenzie, Laws and Customs of Scotland in Matters Criminal, p. 15.

2. Loc. cit. Mackenzie also observed that "the Law commiserates so far their condition, that it expostulates with such as would pursue them for a cryme".
of the transgressions even of the mentally afflicted. He pointed out that it was "against Christian 1 "Charity to add affliction to the afflicted". The problem of the individual who, after the criminal act was completed, had recovered his mental faculties was disposed of with equal force and simplicity. Mackenzie argued that it would be "bruttish for Church men (and the law) to be more "severe, than the madness itself was, which was so 2 "charitable as to take its leave". That which we are accustomed to regard as twentieth century enlightenment was vigorously and cogently advocated by Mackenzie in the seventeenth century.

Mackenzie also advanced the argument that the spectacle of a madman being punished would not 3 act as a deterrent to crime. Even this clear recognition of the deterrent theory of punishment was introduced by the observation that to punish such

1. Ibid, p. 18.
2. Loc. cit.
3. Loc. cit.
a person "were to endanger his soul". The theological element always managed to intrude in some way in Mackenzie's rationale.

The principle of non-punishment of the mentally afflicted was open to two possible exceptions in the Mackenzie analysis. He stated that they might "be punished in (their) goods". This apparently referred to a fine of some sort rather than civil liability. But he made it abundantly clear that he doubted the technical applicability of the exception in ordinary cases, and would have restricted it to cases of treason. The other exception, also open to doubt, was the case of one "who used any means to make himself mad after his sentence". This concept of what may

1. Loc. cit.
2. Loc. cit.
3. Loc. cit. At a later point, Mackenzie spoke of "the inflicting of a pecuniary punishment" with respect the criminal act.
4. Loc. cit. Mackenzie reasoned that since "a mad man is lookt upon as absent", and since absence could not be criminally tried except in cases of treason, therefore in latter case the madman might be punished.
be termed voluntary madness rendered its subject liable to lesser punishment. This was based on the principle that the law did not presume that the individual had become "furious upon design". That voluntary madness and its mitigating presumption were to some extent self-contradictory does not seem to have occurred to Mackenzie.

Abnormality: Time, Type and Presumptions

Mackenzie, at various points in his treatise on criminal law, considered the time of affliction in relation to procedure. Bringing these diverse elements together, it may be said that a three-fold consideration of the time factor was understood by him.

The first consideration was the case of

1. Loc. cit.

2. Punishment in voluntary madness was condoned because the "madness was occasioned by himself, and so should not disappoint the Law". Alternatively, mitigation was permitted precisely because the law did not presume that the condition was willful. Further, the very process of mitigation inevitably brought it about that the individual should "disappoint the Law".
the individual who had been sane at the time of the act but was not sane at time of trial. Mackenzie doubted whether such a person might be tried. One reason was the analogy of a man "absent" in mind to one absent from the trial physically and mentally. The other reason was the presently operative one that "mad men cannot inform their friends or Lawyers, so as they may propon their just defence".

The second case for consideration was that of an individual who committed a crime while "furious" and regained his sanity before trial. Such a person was not to be punished according to Mackenzie. The principle adduced to support this view was all important. Mackenzie stated that "in punishing crymes, the time of commission is to be considered". He refuted the view that if the crime had been a "very atrocious" one the individual who

1. Ibid, p. 18.
2. Loc. cit.
4. Loc. cit.
had recovered might still be subjected to the penalties of law.

The third consideration was the case of the individual who while sane had committed a criminal act and before execution of sentence lost his sanity. Mackenzie advocated that there be no punishment. He advanced two surprisingly modern-sounding principles of penology in support of his view. Such an individual was, he argued, "not sensible of correction", and secondly, the people would not "be deterred from vice" by such an example.

The Mackenzie distinction between furiosity on the one hand and fatuity or idiocy on the other, has been mentioned. He recognized other broad categories as well. He distinguished temporary from permanent mental abnormality, in figurative language Lucid intervals received a slightly

1. Ibid, p. 18.
2. Mackenzie, Pleadings, p. 74. "In whom fury is but an ague: madnesse is but a disease in the one, but it is the temperament and the complexion of the other; in the one the judgment is but darken'd as by an eclipse; but in the other, it lyes like the Cimmerians under a constant night".
more extended treatment. They depended, according to Mackenzie, on the moon, and waxed and waned in the same way. Of course, the individual was criminally responsible only if the criminal act had been committed during a lucid interval. This analysis gave rise to the problem of what presumption, lucidity or furiousy, should be applied to such an individual.

Mackenzie met the problem by two general presumptions and two exceptions. The first presumption was that "every man be presum'd to be sound in his judgment till the contrary be proved". As the next presumption was to show, this one applied to the individual who had never been proved furious. The strength of this presumption may be judged from the observation that "two witnesses deponing de sana mente, are preferred and believed

1. Mackenzie, Laws and Customs of Scotland in Matters Criminal (Edin. 1678) p. 16.
2. Loc. cit.
more than a hundred who depone upon fury"! The second presumption was that "when a man is once proved to have been furious, the law presumes that he still continues furious, till the contrair be proved". Mackenzie reasoned that mental abnormality was relatively incurable, and that criminal conduct was more consistent with the disordered state.

The second presumption was limited in two ways. Mackenzie's cautious introduction of these exceptions indicated that they were the products of his own thought and did not reflect current opinion at the Bar. The first exception was in the case of fixed frequency or regular intervals; an act committed in that period was not saved by the

1. Mackenzie, Pleadings, p. 73.
2. Mackenzie, Laws etc. in Matters Criminal, p. 16.
3. Loc. cit. His apt phrase was, "madnesse is but too sticking a disease; and is seldom or ever cured".
4. Loc. cit. He stated that, "the committing of a cryme, looks liker the madnesse, then the lucid intervals".
5. Loc. cit. He introduced the exceptions by saying, "And yet if my opinion were authority enough".
presumption of continued abnormality. The second exception was in the case of motive or ill feeling manifested during known lucid intervals or prior to mental abnormality, and in the case of intelligence shown in the execution of the criminal act.

Definition of Idiotry and the Ten Finger Test

The definition of and test for idiocy were clearly set forth in Mackenzie's various writings. Idiotry was said to consist in the "want of wit and judgment". Such persons were regarded as slow of comprehension, dull and stupid, and were thought to be suffering from want of spirit. They were understood to be without powers of reasoning and judgment.

1. Ibid, p. 17, "If the person offended was one against whom the offender had prejudice in his lucid intervals, or before his madnesse".

2. Loc. cit., "... if he shew any wit or contrivance in the execution of the wrong he did".


4. Loc. cit. "Fatuous persons, whom we call Idiots, are these who want spirit enough, tardi, bardi, moriones, maccarones, qui inopia caloris & spirituum laborant".

5. Loc. cit. "Fatui sunt (as Zackeus observes) illi tantum qui omni ratiocinatione & judicio carent".

-174-
As a result of this view, Mackenzie was able to formulate a test for fatuity: "if a person "can count their ten fingers, they are not accounted "Idiots, nor fatuous". The test was, of course, strongly reminiscent of Fitzherbert's "twenty pence test", of the sixteenth century in England. While Hale in the seventeenth century no longer felt bound by Fitzherbert's test, on the ground that it was "too narrow", yet Hale still admitted such tests on what he called the "question of fact" of idiocy. With respect to these early calculation tests, the English position was somewhat in advance of that of Scotland by the seventeenth century, but the lead was not decisive.

The Standard of Absolute Furiosity

Mackenzie's principal work in criminal law offered a scanty definition of furiosity. His treatise on crime pointed out that since furious

1. Loc. cit.
3. 1 Hale, Pleas of the Crown, Ch. IV.
persons were not punished because they lacked "all judgment" therefore only the "absolutely furious" could qualify. Though the exposition of ideas was rather circular, the expressions "want all judgment" and "absolutely furious" did not constitute a tautologism. For, while it was clear that the raving maniac fell within the category of "absolutely furious", Mackenzie's statement carried the further implication that lack of an intellectual faculty, capacity of judgment, was the hallmark of the category, and that behaviour, whether frenzied or quiet, was not the determinative element. This was re-emphasized in the presumption of lucidity attending criminal acts whose manner of execution indicated "any wit or contrivance."

Mackenzie's earlier work mixed the roles

1. Mackenzie, Laws etc. in Matters Criminal, pp.15, 16: "since the Law protects furious persons from punishment because they want all judgment ... It follows naturally, that this privilege should be only extended to such as are absolutely furious".

2. Ibid, p. 17.

3. Pleadings In Some Remarkable Cases Before the Supreme Courts of Scotland Since the Year, 1661, To which, the Decisions are subjoin'd. (Edin. 1672).
of advocate and teacher so that it was difficult to
tell where one left off and the other began. The
taint of advocacy was purged by two factors. First,
the arguments confirmed as well as amplified the
views he later expressed in his criminal law
treatise. Second, the ambit of operations of the
"rule of proportions" helped define the dominant
concept, furiosity.

The "Pleadings" explicitly embarked upon
a definition of furiosity. This was said to be
madness with ferocity and violently dreadful action.
But the definition was not left in terms of behaviour
even though Mackenzie in the role of advocate might
have been better served if it could have been so
left. The legal definition continued in terms of a
state of mind embracing: lack of all understanding;
inability to know or discern; lack of feeling; and

1. The rubric in the fifth pleading for Sir Thomas
Stewart of Gairntully against Sir William Stewart of
Innernytie, was "How Fury and lucid Intervals may be
"proven". Mackenzie, Pleadings, p. 69.

2. Mackenzie, Pleadings, p. 73: "your Lordships will
"be pleas'd to know that furor is defined to be
"dementia cum ferocia & horrenda actionum vehementia;
"Fromanus, de jure furiosorum, p. 6."
lack of all judgment. Reliance upon the same factors was indicated in the argument that the woman (who gave rise to the litigation between the Stewarts) was not furious since she did not lack all sense and judgment. The extent of alienation of mental faculties contended for by Mackenzie was patently demonstrated in the argument that signing a paper upon advice that it would otherwise be a nullity showed that "she could reason and deduce consequences". This, it may be inferred, was sufficient to take her out of the category of the "absolutely furious".

Such a standard was essentially that of the English wild beast test, substantively.

1. Loc. cit., "In Law he is said, omnia intellectu "carere. 1. 14. ff. de officio, prefid. qui nec "discernere potest, 1. 9. ff. de acq. haered. qui "carent affectu, 1. 7. sec. 9. quib. ex caus. in "possess., qui caret omni judicio, 1. 12. Sec. 2. "ff. de judici".

2. Ibid, p. 74.

3. Ibid, p. 76.

4. Although Mackenzie, somewhat ungalantly noted that "women can (because of their sex and employments) "show but little sagacity", he argued that in signing the paper she showed "actus sapientis, as well as "sapienti conveniens".
Conceptually, however, it was expressed in cognitive terms. The wholly negative nature and absolute extent of the concept were both confirmed and alleviated by the "rule of proportions".

The Rule of Proportions: Precursor of Diminished Responsibility

The rule of proportions was the outgrowth of the definition of "furiosity" in terms that made it absolute in degree. The English experience had been a broadening of the absolutism of the wild beast theory into a cognitive concept of mental abnormality. In Scotland the harsh effects of the absolute standard were mitigated by Mackenzie's argument for a rule of proportions.

The category established by Mackenzie's contention was such that it included persons neither completely sane nor completely insane. This was important, and remains significant for a number of

1. Mackenzie, Laws etc. in Matters Criminal, p. 15: "It may be argued, that since the Law grants a total "impunity to such as are absolutely furious, that it "should by rule of proportions, lessen and moderate "the Punishments of such, as .... are not absolutely "mad...". 
reasons. It recognized that mental abnormality obeys a law of continuity and that the various mental disorders shade in imperceptible gradations from one stage of intensity to the next. It also recognized an obligation on the part of the law to deal not only with the clear cases of criminal responsibility and irresponsibility, but with the intermediate cases as well. This recognition has become a hallmark of Scots criminal law in the doctrine of diminished responsibility. English law did not (and still has not) accepted so mature a view, being content with the oft-times abused argument that a line must be drawn somewhere, and litigation must come to an end sometime.

The comparison of the rule of proportions with the doctrine of diminished responsibility cannot be pushed to the point of complete congruence. Mackenzie's rule was not limited to cases of murder, and no mention was made of reduction of the crime to culpable homicide in cases that would otherwise be murder. Both diminished responsibility and the Mackenzie rule, however, effected a mitigation of punishment that in turn reflected a more humane and more liberal outlook of law.
The mental states included within the rule of proportions indicated that the concept had a high degree of medico-legal utility. In this the Mackenzie rule again invites favorable comparison with the doctrine of diminished responsibility. Both theories met a defect of English law in that they provided a means whereby mental abnormality based upon emotional factors was not excluded from the framework of criminal law and medical reference. Mackenzie's rule included "such as .... are not absolutely mad, yet are "hypocondrick to such a degree that it clouds their "reason... ". This class of persons it was said were known to lawyers as "insania". They were persons whose senses, or powers of perception and apperception were diminished. This idea alone brings the rule of proportions and the doctrine of diminished responsibility fairly close together in spirit and phraseology.

1. Loc. cit.

2. Loc. cit. Mackenzie spoke of those "qui sensum "aliquem habent, sed diminutum ... ".

-181-
Both doctrines also covered mental abnormality tested in cognitive terms. Mackenzie's rule included those persons whose criminal act indicated some use of reason (such as would be implied by an act of resentment or revenge) but not that degree amounting to normal mental function. It will be remembered that Mackenzie, at a later point, based one of his exceptions to the presumption of continued furiosity on grounds indicating some use of reason. Under such circumstances Mackenzie "presume(d) that the offence was committed in the lucid interval". Where the case was founded on the latter presumption, and possibly even where lucid intervals were clearly

1. Loc. cit. "...such as shew any acts of resentment, or revenge, in the wrong they do, may be punished with some degree of severity, since they show some degree of judgment ...". Mackenzie also argued that the "Parliament of Paris" was unjust to have executed an individual, "but since he did show "memory and revenge in (killing), he might have been punished justly to some moderate degree".

2. Ibid, p. 17. The exception was based on whether the "person offended was one against whom the offender had prejudice in his lucid intervals, or before his madness, or if he shew any wit or contrivance in the execution of the wrong he did".

3. Loc. cit.
proved, it was argued that punishment should be mitigated. The reasoning was that "where madnesse has once disordered the judgment, and much more when it recurs often, it cannot but leave some weakness, and make a man an unfit Judge of what he ought to do...". The area of cognitive defect embraced by Mackenzie's rule was naturally large since only absolute furiosity constituted a complete defence. The corresponding area within the doctrine of diminished responsibility is smaller, of course, due to the knowledge test now prevailing as a defence. Nonetheless, there remains a similarity in kind if not in degree between the two concepts.

The usual origin of the doctrine of diminished responsibility is considered to be the case of Dingwall in 1867. This should certainly

1. Loc. cit. "... possibly that Judge would not be "much mistaken who would remit something of the "ordinary punishment in all Crymes committed, even "where the lucid intervals are clearly proved ...".

2. Loc. cit. Mackenzie added: "... est tantrum "adumbr at a quies, intermissio, sed non resipiscientia "integra: And as our proverb well observes, once Wood, "say the worse".

3. 5 Irvine 466.
be regarded as the ground to which the stem of the plant may be traced from its present flowering. If the metaphor may be extended, there are roots several centuries older, and the rule of proportions was a very powerful one of these. It is submitted, in short, that Mackenzie's rule was the forerunner of diminished responsibility.

**Drunkenness**

The principle behind reduced punishment in cases of drunkenness was comprehended by Mackenzie to be "want of dole, and malice". This came far closer to modern thinking than Coke and Hale in seventeenth century England were able to approach. Mackenzie, however, did not argue that drunkenness excused criminal conduct in all cases.


2. Coke spoke of a drunken person as one who "by his owne vicious act for a time depriveth himself of his memory and understanding" and concluded "that kind of Non Compos Mentis shall give no priviledge or benifit to him or his Heirs". Co. Litt., Lib. 3, Ch. 6. Hale simply put it that "by the laws of England (a drunken) person shall have the same judgment as if he were in his right "senses". 1 Hale, Pleas of the Crown, Ch. IV.
His analysis was:

1. Reduced Responsibility Drunkenness ("want of dole, and malice ... especially if they were cheated upon design, into that condition by others").
   a. "Inter ebrios" ("who are rarely drunk") mildly punished.
   b. "Ebriosos" ("who are habitually drunk") more severely punished.

2. Full Responsibility Drunkenness
   a. Foreseeable Consequences ("such as knew they were subject to extravagancy in their drink") treated as though sober.
   b. Deliberate Design ("such as make themselves drunk upon design to excuse or lessen thereby their guilt") treated as though sober.

The analysis paved the way for reception of medical testimony particularly with respect to alcoholicly induced insanity.

Two Seventeenth Century Cases

On the 19th of February, 1674, Agnes

1

Johnston was tried for the murder of her eight

month old grand-niece whose throat she was alleged to have cut while the two were alone in the house together. She had no counsel and her own confession was the only evidence adduced against her. In this confession she said that a spirit had tempted her to kill herself, that she had attempted to drown herself as a result, that the spirit often drew her neck together, that she was then ill, that her people said this illness was feigned, that they threatened to evict her from the house because of it and that in consequence she cut the child's throat. One more point should be noted, namely - that she was then a spinster of about fifty years of age and that the spirit had begun to trouble her at about the preceding "Fastren's-even". She was found guilty and sentenced to be hanged two days later.

The second case was that of John Chislie who was examined before the Lord Provost on April 1,

1689, concerning the murder of Sir George Lockhart, Lord President of the Court of Session and member of His Majesty's Privy Council. Chislie was put to the torture and confessed. His confession was borne out in several important points. He had told at least three people that he was going to do the act. One of these was an advocate and another was a W.S. The shooting was done openly and before witnesses. The reason was that the Lord President had been one of the judges who had decreed an "aliment of 1700 "merks yearly" to Chislie's wife and ten children. Seized as soon as he had done the shooting, Chislie said, according to one of the witnesses, that "he "had done the deed, and would not fly, and that was "to learn the President to do justice". Chislie was unanimously found guilty of "murder, out of "forethought felony" and was sentenced to have his right hand cut off alive and then to be hanged, with his body to be hung in chains thereafter, his right hand to be fixed on the West Port and his moveables to be confiscated. The question of insanity does not seem to have been raised at all.
The two cases illustrated particular problems of their time. It was still difficult to draw the line between the supernatural and the unnatural in the seventeenth century. Hence in Johnston's case, despite evidence that could easily support a finding of insanity today or, at least, diminished responsibility, a guilty verdict was found. Since there was no conflicting evidence in the case (the confession of Agnes Johnston appears to have been the only evidence as to state of mind) the result implied a narrow test of mental abnormality such as would have been in keeping with the concept "absolutely furious".

Chislie's case involved the problem of "magnicide". The killing of a celebrated person of power and prestige in the community must have had much the same social effect in Scotland as in England. The act was attended with a thirst for social revenge that tended to obscure the difference between bad and mad motivation. The fact that the killing was done openly, and even advertised in advance, tended to lose itself in the enormity of the deed. The severity of the punishment reflected
the sense of community outrage. Under such circumstances only a liberal test of mental abnormality could have aided the defence, and the failure to raise such defence at all argued for a narrow concept consistent with absolute furyosity.

In both cases, reasoning of an elementary order was established by the facts. Under their separate delusions, each had thought out a plan of action and executed it. If an absolute want of reason was the legal test for lack of criminal responsibility, then obviously neither had hope of a successful defence.

Three Early Eighteenth Century Cases

The three cases to be considered all arose in the first half of the eighteenth century, and therefore pre-dated Erskine's "Principles" and his "Institute".

1

John Sommerville's case was tried in

1704. He was a town officer of Edinburgh who had been ordered confined to his home because of his mental condition. He had delusions of persecution, and to humour him the Provost had issued him a safe conduct. Sommerville had threatened his neighbours, and had threatened to kill his brother. The jury found it proven that some months before the trial, he "had acted like a furious or madman". They also found that his victim was killed by a shot through the key hole of the door, while engaged with others in "breaking up the door", after attempts to persuade Sommerville to come along to the Baillie had failed. When he learned he had shot a man, Sommerville was found to have said "God have mercy upon my soul", and later used "scurrilous language" about the Baillie. The Court "sustained the defence of his being mad relevant to assoilzie him from the "ordinary pain". He was ordered imprisoned until he regained his mind.

Robert Thompson's case was tried in 1739.

He knocked a man down with a stone and cut his throat as he lay on the ground. He did the act in mid-day and said that although the man had cried out for mercy, nonetheless, "I trow, I had no mercy on him, for I believed it was the devil that I killed". He also said that he had been chasing the devil who had suddenly vanished just before the victim appeared. Evidence was adduced that Thompson suffered from fits. The Court allowed the defendant to produce evidence, "That, at the time libelled, he was so far furious, "mad, and distracted, as to be totally deprived of "his reason and understanding", The jury verdict was "no proof of furiosity till after the murder was "committed".

Robert Spence was tried in 1747 for murder. He had rushed into a woman's home, struck her on the head with a hatchet or chopping knife and then returned to his own home where he used the same instrument on a wig block. He had a history of abnormality extending back several years and apparently manifest during the few days preceding

the attack. The jury brought in a verdict of "proven, that the pannell was furious at the time he "committed the said murder, but to what degree of "furiosity, they could not determine". He was ordered confined to the custody of his friends.

Of the three cases, Thompson's case came closest to that of Johnston in the preceding century. Although sixty-five years had elapsed between the two cases, there still appeared to be a reluctance to accept delusions, linked with the supernatural, at their face value as delusions. Even with the additional evidence that Thompson suffered from fits, the jury could find no proof of furiosity at the time of the criminal act. The case, therefore, pointed in the direction of a narrow test such as "absolutely furious" even without the conclusive sign-post of judicial opinion spelling out "totally deprived of ... reason and "understanding". It was not clear on what evidence the jury concluded that Thompson was not furious until after the killing. In view of that verdict, however, he was given a transportation-pardon. This was in complete accord with Mackenzie's
contention that there should be no punishment for the individual who, while sane, had committed a criminal act and before execution of sentence (in Thompson's case, at or before the time of trial) had lost his sanity.

The cases of Sommerville and Spence had one striking factual element in common. In both cases there had been a history of abnormal mentality and conduct, and the latest manifestations had been shown shortly before the criminal act. Both cases were also distinguishable from Chislie's case of the previous century in that the person killed was not an important figure in the community. The nature of the delusions in all the various cases differed too much from case to case for any justifiable legal conclusion to be drawn.

Both Sommerville and Spence met the mental requirements for lack of criminal responsibility in that the former was held to be "mad" and the latter was found to be "furious". It was curious, however, that in neither case was it stated that the defendant was "absolutely furious". On the contrary, in the case of Spence, the jury verdict
explicitly said that "they could not determine" the "degree of furiosity". And in the case of Sommerville, he was not found to have been absolutely mad, but only "mad relevant to assoilzie "him from the ordinary pain". Both cases, therefore, strongly argued that Mackenzie's "rule of proportions" was more than just an isolated opinion, or bookish theory, in the first half of the eighteenth century. Pragmatically, Mackenzie's principle had been recognized, even though no one called it Mackenzie's principle, or the rule of proportions, or by any other descriptive title. It was a common sense view that regarded mental abnormality approaching close to, but not quite attaining, the stature of "absolute furiosity" (such as would constitute a full defence) as deserving of something less drastic than the full penalty of the law. It saved Scots law from the harsh consequences of a wild beast test of criminal responsibility. Erskine, just seven years after Spence's case, was to put the matter boldly and simply by saying that "lesser "degrees of fatuity, which only darken reason, will "not afford a total defence, though they may save
"from the poena ordinaria". Nineteen years later, in his "Institute", Erskine added furiosity to this category.

The means adopted to lessen the penalty of the law in these cases was also significant. The magistrates were ordered to turn Spence over to such friend as would post assurance that he would be confined in safe custody for life. In Sommerville's case, the procedure differed to the extent that he was imprisoned, and ordered not to be released until the magistrates and two physicians had presented a certificate to the Lords that Sommerville had regained his mind.

Whether or not the gap of forty-three years between the two cases accounted for the milder treatment accorded Spence in the later case

1. Erskine, Principles (17th ed., Edin. 1886) p. 652. The earliest cases cited by the editor of the 17th edition are William Baird, 12 March, 1835, Bell's Notes 5, and Thomas Henderson, 13 March, 1835, ibid. It is submitted that Sommerville and Spence, since they precede Erskine's writing, are stronger authority.

2. Erskine, Institute (Edin. 1773) p. 703.
must be purely speculative. But the fact that Spence was not imprisoned indicated that the lesser punishment, of which Mackenzie talked in his rule, could be taken to the point where punishment, strictly so-called, was no longer involved. The latitude of judicial discretion was as wide as the practical common sense that gave rise to, and was expressed in, the idea of diminished "punishment", or as it is suggested it be called, the rule of proportions.

Erskine

Erskine based his classification of mental abnormality in criminal law on the preliminary proposition that intent was an essential element in criminal guilt or responsibility. Involuntary actions were therefore not criminal. The acts of an idiot or furious person fell within this category.

Drunkenness, on the other hand, was not an

1. Erskine, Principles (17th ed. Edin. 1886) pp. 651, 652. "It is of the essence of a crime that there be an intention in the actor to commit it ....... (therefore we cannot) ..... reckon in the number of crimes, involuntary actions, the first cause of which is not in the agent, as those committed by an idiot or furious person.
involuntary act, and was moreover criminal. The
fact that the same internal conflicts and tensions
that led to mental abnormality in one person might
have led to excessive or habitual drinking in
another was not appreciated. This simplified
analysis both as to mental abnormality and drunken-
ness was in essential accord with the English view.
It was, with respect to drunkenness, less flexible
and less understanding than that of Mackenzie. In
other respects, however, Erskine's elaboration from
this simple base, advanced Mackenzie's position
considerably; notably in the concept of furiosity.
In still other respects Erskine and Mackenzie took
substantially the same view. Thus, for example,
Erskine taught that supervening fatuity or furiosity
at time of trial was a bar to criminal proceedings.

1. Ibid, p. 652.

2. Ibid, p. 676. "No criminal trial can proceed
unless the person accused is capable of making his
defence. Absents, therefore, cannot be tried; nor
fatuous nor furious persons, durante furor, even
for crimes committed while they were in their
senses".
Idiocy and the Absolute Standard

In his earlier work, the "Principles", Erskine took the absolute view that "Idiots, or "fatui, are entirely deprived of the faculty of "reason". The conclusion appeared as the result of his examination of the grounds for appointment of curators. "Defect of judgment" was one of the conditions that resulted in that inability to manage one's own affairs that justified a curatorship. While both idiots and furious persons were, in this earlier work, found to be within the "defect of judgment" category, only in the case of the idiot was the defect an absolute one by definition.

In the later "Institute", the conditions compelling curatorship were set out more specifically and more completely. His first class became

1. Ibid, p. 103.
2. Loc. cit.
3. Erskine, Institute (Edin. 1773) p. 139. "It has been said, that our law provides curators, not only for minors, but for every person, who, either from a total defect of judgment, or, 2 dly, from a disorder ed brain, or 3 dly, from wrong texture or disposition of the organs, is incapable of managing affairs with discretion".
"total defect of judgment" rather than just "defect of judgment" and within this class only the fatuous person or idiot was to be found. Parenthetically, he again denoted the idiot as "entirely deprived of the faculty of reason". This class of persons had the general characteristics of stupidity, inattention and childish speech. In complete accord with the English view, and clarifying a point on which Mackenzie had remained silent, Erskine regarded idiocy as a congenital condition. He also made a distinction between the legal condition of fatuity (or idiocy) and "imbecillity". The distinction only emphasized the absolute nature of the idiot concept since the idiot was "quite destitute of reason"; while in "imbecillity" the

1. Loc. cit.
2. Loc. cit. "... fatuous persons, also called idiots in our law ... have an uniform stupidity and inattention in their manner, and childishness in their speech, which generally distinguished them from other men ...".
3. Loc. cit. "... this distemper of mind is commonly from the birth and incurable".
4. Ibid, p. 140.
person might "nearly approach" idiotry, there was always some "least spark of judgment" still remaining.

The Cognitive Concept in Furiosity

In the development of furiosity, Erskine marked a decided advance over the narrow absolutism of Mackenzie's definition. As will be indicated later, Erskine managed to accomplish this without destroying Mackenzie's "rule of proportions".

While retaining the essentials of that doctrine, Erskine noted a cognitive element in the definition of furiosity that extended beyond phraseology into the substantive realm.

1. Loc. cit.

2. Such a destruction might easily have resulted. The English had never developed a diminished punishment doctrine because they took the alternative road of broadening the legal test that resulted in non-responsibility from a wild beast concept to a cognitive concept. Once Scots law similarly broadened its test, it might have been anticipated that the rule of proportions thinking would die out. Fortunately, this was not the case.
Erskine stated that persons of "disordered brain" constituted the class into which furious persons were to be placed. He made it clear that they could not be said to be "deprived of judgment; for they are frequently known to reason with acuteness". Ability to reason existed, although there might be an obstruction of the application of reason. Equally significant was the appreciation of the role of emotional factors in mental abnormality: "their infirmity is generally brought on by sickness, disappointment, or other external accidents and frequently interrupted by lucid intervals. The absolute irrationality that had constituted the older test of non-responsibility had been enlarged to admit an element of reason,

1. Erskine, Institute (Edin. 1773) p. 139.
2. Loc. cit. In his "Principles" also, (p. 103) he declared that "The distemper of the furious person does not consist in the defect of reason, but in an overheated imagination, which obstructs the application of reason to the purposes of life".
3. Loc. cit. "... but an excess of spirits, and an overheated imagination, obstructs the application of their reason to the ordinary purposes of life".
4. Loc. cit.
but the older forms of conduct still remained. "Madmen", therefore, were those whose behaviour was set apart "by acts of fury" or merely "by a certain "wildness of behavior flowing from a disturbed "fancy". And "lunatics" were persons suffering from "periodical fits of frenzy".

Effect On The Rule of Proportions

Erskine retained the purely Scots reasoning that where circumstances closely approached, but did not quite reach the standard of non-responsibility, there should be mitigation of the punishment afforded. Both idiots and furious persons were regarded as not responsible for crime, "but lesser "degrees ... afforded) not a total defence to the "pannels, but barely save (d) from the poena 3 "ordinaria". While this was persuasive, none-the-less, standing alone it might be open to doubt

1. Loc. cit.
2. Loc. cit.
3. Ibid, p. 703.
whether the essential elements of the rule of proportions had received support from Erskine.

Additional strength was derived from his views with respect to a criminal act committed in a lucid interval. An act committed during such an interval was attended with the presumption of reason. Despite this view, Erskine advocated that under such circumstances "punishment ought to be mitigated". His reasoning was simple and lucid:

1. A difficulty, at first glance, arose from the fact that these "lesser degrees of fatuity or furiosity" were regarded as something which would "only darken reason, without totally obscuring it". The total obscuring of reason, however, seemed to apply only to fatuity. In the first place, we had the clear evidence of Erskine's own definition of furiosity as something that did not exclude all reason. Secondly, there was the evidence implicit in the mitigation of punishment for a criminal act committed in a lucid interval.

2. Op. cit. "If the madness recur regularly at certain stated periods, and if the crime be committed in an interval between those periods, the committer is presumed to have had, at that interval, the exercise of his reason".

3. Loc. cit. "After a person, however, has fallen under the power of that distemper, his punishment ought to be mitigated, though the crime should have been committed in a lucid interval...".
"Where madness has once disordered the judgment, especially if it has often recurred, it leaves such a degree of weakness in the mind as is apt to betray the person affected into acts of a criminal nature". This eighteenth century viewpoint retains the hard ring of common sense even to the twentieth century ear. It also indicates that the kind of thinking that produced the rule of proportions had not passed out of Scots law, despite the modification in the concept of furiosity that had taken place.

Three Late Eighteenth Century Cases

The cases of Crockat, Blair and Coalston all occurred in the last half of the eighteenth century. The first of them, Crockat's case in 1756, fell between the earlier work of Erskine, the "Principles" of 1754 and the more comprehensive treatise, the "Institute" of 1773. Both Blair's case and Coalston's case were subsequent to the "Institute".

1. Loc. cit.
Agnes Crockat's case (1756) was one of infanticide. She was an unmarried mother who had strangled her infant when it was about one week old and left it lying in bed beside her. There had been no attempt of concealment of either the delivery or the subsequent criminal act. When members of the household returned she informed them that she had been tempted by the devil. She was found guilty, but was granted royal clemency.

Jean Blair's case (1781) was one of murder. She killed her mistress with a hatchet, wrecked the furniture, fired the house, and then ran out naked and bloody to shout what she had done. Her family history gave evidence of insanity, and she herself had earlier manifested similar symptoms. She was acquitted of the murder charge, but ordered confined.

2. Loc. cit.
Robert Coalston's case (1785) was also one of murder. He had snatched an infant out of its mother's arms and ran off with it. Subsequently, he was found sitting quietly by the dead body and made no attempt to escape or resist. For the next few days he was in "a state of langour and "stupefaction", followed by retrograde amnesia, such that he "suffered great agitation on being told "what had passed". His previous history indicated a general state of "melancholy and depression of "spirits" dating from a time several years earlier when lightning had struck him. This had not prevented him from fulfilling his ordinary duties as a servant in the interval. He left home the day before the killing, and wandered aimlessly about the countryside. While his behaviour was characterized as absurd during this roaming, he had given no signs of violence then, nor at any time before. The next

1. Loc. cit. Hume noted that the circumstances of the case did "not appear on the record", but were known to him, "as having been counsel for the pannel".
2. Loc. cit.
3. Loc. cit.
4. Loc. cit.
day, he returned home and his behaviour had deteriorated to the point where he "abused his fellow servants, assaulted and struck his mistress; and "at last snatched (the) infant out of her arms". The jury brought back a finding that the slaughter was proved but that the insanity was also proved. He was ordered into confinement.

Crockat's case illustrated the tendency in common law for special problems to evolve special solutions, if the general rule shocked the community feeling of justice. Sometimes this was accomplished by a change in the general rule itself or in the area of operation of that rule. At other times, as Crockat's case illustrates, the means was a reliance on the administrative rather than the judicial power.

1. Loc. cit.

2. In English law, Erskine's advocacy of the delusion test in Hadfield's case was one of the most notable examples. The knowledge test with respect to cases of magnicide might be cited as still another example. And the kind of thinking in Scots law that resulted in the rule of proportions could constitute yet another.

As late as 1662, when indictments in Scots law were still conceived in general terms, the jury in the case of Marion Lawson brought in a verdict which found her "cleaned and not guilty ... in respect of "no probation; but in respect of the presumptions, "remit the pannel to the justice consideration".

Maclaurin pointed out that "Tradition says, the jury "thought this woman guilty, though they did not chuse "to find her so". He concluded that as a result of this case, "indictments (were drawn) more specially" and the legal loop-hole closed. Nonetheless, community feeling made itself known and resulted in a high incidence of royal clemency in cases such as these. The Infanticide Acts of 1922 and 1938 are a rather belated expression in England of the same kind of community feeling.

1. Maclaurin, Arg. & Dec. in Rem. Cases (Edin. 1774) p. xx. The justice-depute, less touched by her condition, had her whipped through Edinburgh and banished from Mid-Lothian and Lanerk counties.

2. Ibid, p. xxi. He added his own view "that such was their opinion is pretty plain from their verdict".

3. Loc. cit.
Since under similar circumstances Scots law later applied the doctrine of diminished responsibility to reduce the crime to culpable 1 homicide, the question remains whether Crockat's case may not be regarded as a refutation of the principle of the rule of proportions. A complete answer does not readily present itself. Part of the answer was the fact that some sort of solution had been achieved through royal clemency. Another part of the answer was the undeniable fact that the rule of proportions (or at least similar thinking) was not as universally known and accepted by Bench and Bar as is the modern doctrine of diminished responsibility. But it must also be admitted that to some extent Crockat's case indicated diminishing vigor in the rule of proportions in that it failed to be applied to this type of case.

1. Roy. Com. Cap. Pun., Minutes of Evidence, 5th Aug., 1949. (Memorandum of Scottish Home Dept., Par. 5) "At Scots law if a mother kills her newly-born child while the balance of her mind is disturbed the offence of which she is guilty is culpable homicide."
Blair's case may be contrasted with that of Spence in the first half of the same century. Both used a hatchet to kill; one afterwards attacking the furniture, while the other had attacked a wig block. Both had previously given evidence of mental affliction. Neither had a discernible motive. Since these factors of method of killing, instrument, motive, previous condition and subsequent behaviour are the external indicia by which juries evaluate conduct, it is noteworthy that the jury findings were qualitatively different. The earlier case, that of Spence, brought in a verdict of furiosity, "but to what degree they could not determine". In Blair's case just thirty-four years later, the jury had no such difficulty and brought in a verdict of acquittal. It may, of course, have been a mere matter of chance. In that event, to chance would have to be added the coincidence that the Scots law

1. As opposed to the less obvious and often more determinative psychological indicia which the psychiatrist weighs in addition to gross behaviour.
concept of non-responsibility had been enlarged. Under such circumstances what had formerly been a matter of doubtful inclusion could have become more certain. On the whole, a purposive explanation in terms of a broader concept of furiousity would seem somewhat better warranted. Such an interpretation would, naturally, act as an element of confirmation of the definition of furiousity marked out by Erskine.

It might also be of value to compare the four cases involving a previous history of mental affliction. Sommerville's case (1704) and Spence's case (1747) both occurred in the half century preceding Erskine. In the earlier case the jury had found it proven that for some months prior, Sommerville "had acted like a furious or madman". In the later case, Spence had a history of abnormality extending back several years, and apparently manifest during the few days preceding the killing. Blair's case (1781) and Coalston's case (1785) both arose in the quarter century following Erskine. Blair had a family history of insanity and had herself earlier manifested similar symptoms. Coalston had for several years indicated a general
"melancholy and depression" which ripened to violent behaviour prior to the killing. All four cases may therefore be regarded as particularly strong; in that, in each the previous conduct and condition alone might have supported a presumption of insanity. Nonetheless, in the two pre-Erskine cases, the narrow concept of furiosity that prevailed rendered relief necessary by way of mitigation of punishment. In the two post-Erskine cases there was no need to mitigate punishment since the interpretation of furiosity was such that verdicts of acquittal on the ground of insanity were involved. Again it may merely be that chance factors, or that different sets of facts were responsible for the different results; although the facts themselves offer no clue as to the operative nature of such differences. And to assign the results to chance strains the burden of coincidence still further. On the other hand, a simple explanation is possible in terms of different results between the two sets of cases due to different interpretations of furiosity. If such were the circumstance, then obviously the acquittals in the post-Erskine cases argue a broader view of furiosity, such as Erskine had marked out.
Comparisons and Conclusions

The late seventeenth century inaugurated a general advance in Scots law that extended to legal thinking about mental abnormality, among other ramifications. From that period until the nineteenth century two main branches of development were in progress.

At first the idea of a limited and sharply defined area of non-responsibility was in the ascendant. This was complemented by a larger penumbra of diminished punishment. Mackenzie's "absolute furiosity" concept and his "rule of proportions" were the strongest statement of this view. English law had no parallel for this particular Scots law development known as the rule of proportions. It must be recognized, of course, that Hale's analytical class termed "Dementia, partial as to degree" implied a continuity in degrees of mental abnormality ranging in imperceptible gradations from the ordinary person to the raving maniac. This same idea was implicit in the rule of proportions. The difference lay in the failure of English law to implement factual
continuity of degree with a legal doctrine, while in Scotland the Mackenzie rule did precisely that.

The second stage of Scottish development was really an intermediary phase between the Mackenzie formulation and a knowledge test. Erskine best signified the content of this change. Furocity was no longer absolute with respect to deprivation of reason. As he pointed out, such persons were "frequently known to reason with acuteness". However, he did not set out any clear test whereby such individuals might be separated from the ordinary individual. Despite this, the important fact remained that Erskine had recognized a cognitive concept which was a necessary forerunner of the later knowledge test in Scotland. At the same time, Erskine also recognized the validity of the thinking implicit in the rule of proportions, even though he did not refer to it as such.

It cannot be assumed that these two stages in the Scottish development were fixed in time, nor that they constituted distinct successive categories. Mackenzie and Erskine were landmarks in an evolutionary progress. The Mackenzie complex
(absolute deprivation of reason plus the rule of proportions) gradually lost its power as the alternative view gained strength. Erskine marked the approximate mid-passage of transition with the introduction of a cognitive concept and the retention of the essential features of diminished punishment. As the test for lack of criminal responsibility was broadened, the need for the complementary concept of diminished punishment lessened.

But all during the eighteenth century the evolutionary process was primarily in terms of technique. The change affected only those cases that approached, but did not quite attain, absolute deprivation of reason. At the end of the seventeenth century they would have been dealt with in terms of diminished punishment as Mackenzie's rule suggested. By the middle of the eighteenth century they might have been exempt from punishment (but still subject to custodial confinement) in terms of the growing cognitive element in the definition of furiosity; or they might yet have fallen within the framework of a mitigating principle, depending on circumstances.
This was the result of the indeterminate nature of definition in a cognitive concept that had not yet developed into a knowledge test. By the third quarter of the eighteenth century the likelihood was appreciably greater that such cases would lead to acquittal as a result of the broadening of furiosity to include a cognitive element. The cases of Blair and Coalston were illustrative of the tendency.

The Scottish period, ranging from the late seventeenth to the early eighteenth centuries, cannot be directly compared to the similar period in English law, since two entirely different methods were in use in the two jurisdictions. Nonetheless, if a twentieth century defence counsel were to be suddenly transported back to the late seventeenth - early eighteenth century period, it would be conceivable that he preferred to try an issue of insanity under the Mackenzie formulation rather than that of Coke, Hale or Hawkins. For while the "absolute furiosity" concept of Mackenzie would have given little hope for his client, the rule of proportions might well preserve the life of the accused. And were Hale's "fourteen years of age"
test or Hawkins' knowledge test to be applied to the same individual, the verdict might not have been so propitious, despite the relatively advanced standard employed. The English knowledge test as a standard was too young to give positive results save in the most obvious cases. There was always the chance that the newer knowledge test language would be so intermingled with older Bractonian language that the jury would actually apply the absolute standard rather than the knowledge test. Arnold's case, in 1724, furnished an illustration in point. Furthermore, even if the knowledge test were applied by a jury, it was subject to enough reservation that a guilty verdict might result, as the Lords indicated by their finding in Earl Ferrer's case.

It may well be, of course, that factors other than the particular test would determine the result. Even so, some of these background factors would also seem to have favored a Scottish venue. A humane outlook may be as important as the precise wording of a test or standard, insofar as the ultimate verdict is concerned. Blackstone's eighteenth century English dictum that madness was
its own punishment could be countered, however, with Mackenzie's view in seventeenth century Scotland that the furious were "excused by their own misfortune and abundantly punished by their own fury".

Again, Blackstone's statement of English common law concerning supervening mental abnormality may be favorably compared with the earlier Mackenzie view. Blackstone considered that a man of "sound memory" at the time of the criminal act was subject to the following saving circumstances: not to be arraigned if unsound mind supervened before arraignment; not to be tried if before trial; judgment not to be pronounced if after trial, but before judgment; and execution to be stayed, if after judgment. Mackenzie, on the other hand, had pointed out that: supervening furiosity before trial could be a bar to trial; supervening furiosity before execution of sentence would act as a stay of execution; and supervening sanity would not result in punishment for an act done while furious.
Both England and Scotland had a presumption of sanity. Mackenzie, however, had added a presumption of continued furiosity once prior furiosity had been proved. And despite the two exceptions to the latter presumption, it must be admitted it would constitute a decided benefit for the defence.

With respect to the calculation tests employed in both countries, England seemed to have sooner realized the small reliance that could be placed in them. Thus Mackenzie postulated his "ten finger" test for idiocy in the century following Fitzherbert's "twenty pence" test. But by that time, in England, Hale had already poured a full measure of scorn on such tests employed for anything more than circumstantial argument.

The more than half a century lead that England enjoyed in formulating a knowledge test was not particularly significant in producing results more in accord with modern thinking than Scotland's amalgam of absolute furiosity and rule of proportions. Neither system can be said to have been materially in advance of the other during the
period just before and just after the beginning of the eighteenth century. Scotland innovated the concept of diminished punishment while England innovated the knowledge test. The results under each would seem to have been about the same, with possibly a slight edge in defensive amplitude in Scotland.

As the eighteenth century developed, the English knowledge test was subjected to a variety of judicial sifting and resifting in an uncomfortable awareness of the novelty of the doctrine. The Scottish change seemed to involve less difficulty of adjustment. Perhaps this was due to the fact that the diminished punishment of the rule of proportions had prepared the way for acceptance of non-capital verdicts in cases where there was something less than absolute alienation of reason. Or, perhaps the English experience helped prepare the way simply by acting as a prior example. In any event, the cognitive concept charted by Erskine was apparently received smoothly into Scottish law; and the continued increase in cognitive strength and concomitant decrease in the strength of the
diminished punishment idea were accomplished with relatively little friction.

Erskine also recognized that emotion might play a role in mental affliction. "Sickness, "disappointment or other external accident" constituted his expression. It was of much the same order as the earlier recognition, in England, of the same factor. Coke spoke in terms of "sickness, grieue or other accident" while Hale confined himself to "fears and griefs". In both jurisdictions, of course, no legal doctrine followed upon the recognition. The English priority was as sterile of results in law as the subsequent Scottish comprehension.

The infant analogy was not as fruitful in Scotland as in England; nor was it identically employed in the two countries. In the latter country, it will be remembered, there was a period of gradual borrowing of the legal attributes of infancy and application of these to the abnormal person. It started, in England as in Scotland, with a transition of comparison from the beast to the child or infant. In England it continued
through such stages as Hale's "fourteen years of age" test, to the ultimate expression in Hawkins' knowledge test which borrowed the concept of "distinguishing between good and evil" from infant age of discretion. In Scotland, a different order of development co-existed with a different technique in mitigation of punishment. Whether a causal relationship between these differences may also be inferred is difficult to judge.

The analogies used by Mackenzie ranged wide. Those who were furious were comparable to "infants, or to dead men" in the eyes of the law. Their standard of guilt was regarded as no higher than "a stone from a house or a beast". There was no need, however, for an extension of the analogy as in England, since the rule of proportions accomplished the same purpose as was in England achieved by broadening the legal doctrine, i.e. - mitigating the harshness of the narrow rule of absolute or total deprivation of reason. As the rule in mitigation of punishment faded in Scots law, and as the cognitive concept grew in strength, Scots law also tended to increase slightly the range of borrowing from the infant analogy, but
never as extensively and directly as English law had done.

Part of the reason undoubtedly rested upon a somewhat different descriptive wording of infancy, and a slightly different concept of infancy. Lord Stair used the language "they have not the use "of Reason" to explain the contractual incapacity of infants. He fixed the attainment of reason "at the "end of Pupilarity, which in Men is fourteen and in "women twelve years of age". At the same time, the infant was joined with idiots and furious persons as a class lacking contractual capacity; similar thinking applied to testamentary capacity. Thus the analogy existed but its basic expression was uniform in Scots law, i.e., idiots, furious persons and infants were all regarded as a class without "use of Reason". In England a basic dissimilarity had existed in that the mentally abnormal had in the beginning been regarded as without use of reason while the infant had some reason but not enough for all purposes. The analogy, when made in England, had therefore injected new content (a cognitive concept) into thinking concerning abnormal persons.
From there the borrowing of an age of discretion test, and other indicia of incomplete reason, were natural steps. In Scotland, on the other hand, all three (idiot, furious and infant) had been logically considered part of a class that had lack of the use of reason in common. The analogy involved no alteration in thinking regarding anyone in the class and hence suggested little or nothing in the way of borrowing.
CHAPTER VII

SCOTLAND'S EARLY MODERN PHASE
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Kinloch's Trial (1795) .......................... 228
The Emergent Knowledge Test In Scots Law ...... 229
Prosecution ........................................ 230
Defence .............................................. 234
Medical Opinion ................................. 240
Judicial Opinion ................................. 243
Legal Consequences Of Verdict .................. 251
Baron David Hume ............................... 254
Hume's Knowledge Test .......................... 255
Presumptions ...................................... 260
Judgment, Diminished Punishment,
And Social Protection .......................... 262
Select Scots Case Results:
Early 19th Century .............................. 264
Burnett .............................................. 268
Alison ............................................... 269
Comparisons And Conclusions ................. 273
Table No. 3 ........................................ 283
In the eighteenth century the Scots law principle of diminished punishment was supplemented by a cognitive enlargement of the concept of furiosity. Just before the beginning of the nineteenth century, a knowledge test was applied in Kinloch's case discussed below. These developments rendered the older principle of diminished punishment (best exemplified in the rule of proportions) very much less necessary as a humanizing element in Scots law. The question naturally arises whether the Union of 1707 may not have opened the door and permitted English legal thinking to influence, and to some degree perhaps supplant, certain elements of Scots law. Kinloch's case again gives some indication of the answer. To find that answer, however, it becomes necessary to go beyond the facts and the judicial charge and to examine the arguments of counsel as well. Finally, one of those advocates was David Hume, whose "Commentaries" two years later may be said to have inaugurated the modern era of Scots legal
thinking on this subject.

**Kinloch's Trial (1795)**

Sir Archibald Kinloch was tried for the murder of his brother before the High Court of Justiciary in Edinburgh on June 29, 1795. The evidence was clear and undisputed that the pannel had suffered from a West Indian fever some fifteen years earlier, and that his conduct and speech since that time indicated some degree of mental derangement. The only previous evidence of violence  

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1. The drawing of any such line as that between the developmental and modern periods is, of course, purely arbitrary. In English law the task is easier because of the dominating influence of the McNaghten Rules; otherwise Hadfield's case might have been a better starting point. Hume and Kinloch's case were chosen for Scots law because they represented language most nearly like modern phraseology in both Scots law and English law. At the same time the threshold of the nineteenth century provided a convenient place from which to begin, because it was near enough to the English McNaghten Rules to make comparisons fruitful, and sufficiently prior to them to gain some idea of development unobstructed by the McNaghten clouds.

2. Trial of Sir Archibald Gordon Kinloch for the Murder of Sir Francis Kinloch (Edin. 1795). This report, printed by C. Denovan for J. Elder, Edin., and G.G. & J. Robinson, Lond., was stated to have been "taken in short hand, - and carefully revised by the counsel".
that he had exhibited was slitting his wrist so severely as to require months of hospitalization. His family were aware of his condition, and had finally made preparations to secure a nurse and to confine him in a strait jacket. Before these arrangements could be completed, he killed his brother under the delusion that he was being plotted against.

The Emergent Knowledge Test in Scots Law

Although Erskine had put forth a cognitive concept of furiosity by admitting that a man might be furious and still retain some degree of reason, he had not established what degree of reason would exculpate. In the effort to determine this, it was natural that arguments would be sought not only in native analysis, but in the writings of the sister kingdom. Thus, the Lord Advocate relied on only two authorities, one English and one Scottish; he read extracts from both Hale and Mackenzie. In addition, he even indulged in the rhetorical flourish that the laws of Scotland and England were

-229-
the same in this respect.

Prosecution

The prosecution started with the proposition that only absolute insanity was a bar to trial and made it clear that this was the same concept as absolute furiosity or madness. The defence of insanity was analyzed into three classes:

1. Permanent, absolute insanity which clearly exculpated.

2. Temporary, absolute insanity which also exculpated if the act were not done in a lucid interval.

1. Trial of Kinloch, p. 114: "The law of Scotland is, and must in this respect be the same with the Law of England, because both are founded in the plainest and most obvious principles of justice".

2. The Lord Advocate, Robert Dundas, Esq. in his closing speech stated: "... but I do say, under correction of the Court, that it is only he who is absolutely insane, who is perfectly mad or furious, that is free from trial, and consequently free from punishment". Trial of Kinloch, p. 114.

3. Loc. cit.

3. Mental derangement with "a sufficient share of judgment to discern good from evil, and moral right from wrong". This category, to which Kinloch was alleged to belong, did not exculpate.

Class three by implication required the conclusion that in the other two classes some share of judgment was possible to a person who was exculpated on the ground of absolute insanity. Otherwise no test (whether ability to discern good from evil, or something else) would have been needed to separate out those whose share of judgment was sufficiently large as not to result in exculpation.

The nature of this critical degree of judgment was illustrated in both the closing speech of the Lord

1. The complete description of this category was:
"But there is a third description of persons, and to this I request your particular attention, for it is the description under which the present case falls; I mean that degree of melancholy and depression of spirits, which, tho' it may border on insanity, is nevertheless accompanied with a sufficient share of judgment to discern good from evil, and moral right from wrong; which never has, and never can be sustained as a bar to trial, or a defence against punishment for a crime so atrocious as murder; but subjects such persons to conviction and punishment, as much as if no symptoms of derangement had ever appeared, or as if complete evidence had been laid before you, that he was in a lucid interval, and in the full possession of his senses when the action was committed". Trial of Kinloch, p. 115.
Advocate and in his examination of witnesses. At one point he argued that the following characteristics indicated such a degree of judgment that absolute insanity was excluded: "That he has method in his derangement, and that he does not converse like a madman ... he has complete recollection as to circumstances that happen some time before; and though he may reason absurdly, still he does reason, and understands the consequences of what he has done, and the cause of his confinement."

The test for the critical degree of judgment was what may be described as a limited form of the knowledge test. It involved incapacity to distinguish moral right and wrong or good and evil. It also implied necessary incapacity to distinguish legal right from wrong in that the general knowledge that murder was a crime resulted

1. Trial of Kinloch, p. 122.

2. Loc. cit. The Lord Advocate stated: "Gentlemen, the question you are to determine comes to this short and simple issue: If it appears that the panel was in a situation of knowing good from evil, you cannot acquit him."
in liability to punishment. This was a limitation that rendered the prosecution's knowledge test almost useless as a defence. It eliminated the cases of delusion where the particular killing was regarded as good and right although murder in general was still regarded as evil and wrong. To the disregard of particularity was added a requirement of lack of knowledge of the nature of the act; the individual had to be "perfectly and truly ignorant of what he was doing". If this had been insisted upon, it is submitted that the prosecution's test would have been one of absolute furiosity in the Mackenzie sense. However, the elements that received reiteration in the closing speech and in examination of witnesses were knowledge of good and evil and general knowledge that murder

1. Loc. cit. The Lord Advocate argued that, "... if you shall believe that he knew murder to be a crime, you must be of opinion that he is answerable for his actions, and consequently liable to punishment".
was a crime. While it may, therefore, be said that the prosecution employed a knowledge test in form, it was so limited in substance as to amount only to a general recognition of a cognitive concept.

Defence

The defence was conducted almost entirely by David Hume and Charles Hope. No elaboration of

1. Thus in examining George Somner (a Haddington surgeon and one of the witnesses) the Lord Advocate asked, "When you saw him in jail, did you then think him capable of discerning good from evil, and of knowing that murder was a crime?" Trial of Kinloch, p. 29. Again in his closing speech, the Lord Advocate observed, "But it will be recollected and it seems material, that on a question explicitly put to Mr. M'Millan, whether the pannel was able to distinguish good from evil, he answered in the affirmative". Trial of Kinloch, p. 119. Still earlier in the examination of Somner, the Lord Advocate had hammered at the same ideas by such questions as: "When you saw the pannel at Mrs. Fairbairn's on the Monday, was he in such a situation as to discern good from evil, or to know that murder was a crime?" ... "When you saw him next night in his own room at Gilmerton, down to the time of his appearance in the parlour, can you say, during that period, from ten at night to three in the morning that the pannel was in a condition to discern good from evil or to know that murder was a crime?" Trial of Kinloch, pp. 26, 27.

2. The other two defence advocates were William Rae and David Monypenny; the law agents were James and Charles Bremner. Trial of Kinloch, p. 2.
the categories of insanity that might exculpate was necessary, since the defence was based on the theory that Kinloch was absolutely insane. Nevertheless, by the kind of evidence adduced and by their cross-examination and argument, the defence gave numerous indications of the strong cognitive content their understanding of absolute insanity entailed; a cognitive concept that was sufficiently developed to count as a knowledge test.

The "kind" of madness of which the defence spoke was delusion of persecution, although neither counsel nor medical experts in the case so named it. Kinloch was said to "apprehend plots, "and mischief and danger from all around him,

1. Charles Hope, Esq. in his final speech observed: "Whatever may be the general and ordinary degree of symptoms of the disorder in the patient, if a total insanity be upon him at the time, it excludes the possibility of guilt or of punishment". He also affirmed that "By this rule I desire you to try the prisoner...". Trial of Kinloch, p. 129.
particularly his friends". This symptom was regarded as the strongest evidence of absolute insanity; it also implied a creature with ability to reason and form judgments, however mistaken the premises to which, in delusion, he might cling. Moreover, such delusions, Hope declared, indicated "degree" as well as "kind" of disorder. If accompanied with need for restraint, they passed degrees and should be described as at the point of "crisis", i.e., the ultimate point. Although Kinloch was regarded, by the defence, as having reached the point of "crisis", the argument in its entirety raised a clear inference that the "degree"

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1. The complete exposition of this view was in Hope's final speech: "If you wish for the kind or species of his madness, the witnesses will tell you, it was of that kind as to make him apprehend mischief either to himself or to others; to make him apprehend plots, and mischief and danger from all around him, particularly his best friends, which Dr. Monro told you was the never-failing and strongest symptom of entire madness". *Trial of Kinloch*, pp. 129, 130.

2. *Trial of Kinloch*, p. 130. "If you wish for the degree of his disorder, it is in some measure implied in the above description of its kind, and can be further read in the advice which every person gave to confine him, and in the preparations which the family had actually made for coercion. Indeed, his madness seems to have passed degrees, and to have arrived at its crisis, as Fraser emphatically termed it".
of alienation of reason characterized by delusions of persecution was sufficient to satisfy the definition of absolute insanity. The final indications that the defence did not regard absolute insanity as congruent with absolute lack of intellectual or cognitive faculties were the arguments than an absolute madman might yet retain memory and be able to act on it in a reasoned plan of revenge.

Delusion was not the only aspect of absolute insanity (short of "crisis") in the defence view. Incapacity to distinguish good from evil was also recognized. And if the defence did not labour this point to the extent that the prosecution did,

1. Ibid, p. 147. "The most complete insanity is not attended with a total loss of memory; else how could madmen remember their keeper, and those circumstances which make them stand in awe of him. Nay, in some points, the memory of madmen is most perfect and tenacious; they never forget an injury, they never forget their revenge ...".

2. Since the defence argument was that Kinloch was at the ultimate point, or point of "crisis", it was not necessary for them to dwell at length on lesser manifestations that would equally satisfy the definition of absolute insanity.
yet the defence understanding of the knowledge test was more in accord with modern thinking, and not as limited as that of the prosecution. The recognition of the knowledge test was indirect; the prosecution had alleged that Kinloch knew good from evil and the defence, rather than reject the test itself, argued that Kinloch did not know moral right from wrong, nor the nature of the crime. Recognition of a knowledge test was also implicit in the cross-examination. Thus Hume asked the surgeon Somner whether on the night of the crime Kinlock "was in such situation of mind as to be "capable of distinguishing the good or evil intentions of those who came near him, or interfered

1. Trial of Kinloch, p. 134. Hope observed that the prosecution "has contended that the prisoner's malady was mere melancholy and depression of spirits— that he was not mad— was in the perfect knowledge of right and wrong— knew friends from foe — and was perfectly conscious of the nature of a crime. What then must the learned Lord say of the attempt to confine him? Is he prepared to say that Sir Francis and the family were in a foul conspiracy against the prisoner, that they were attempting against him a crime little less horrible than that of which he is accused?"
"with him?" The defence also indicated in cross-examination that the determinative question was not whether Kinloch believed murder in general to be a crime. Thus Hume asked Somner whether the reply of an inmate of Bedlam that he regarded murder as a crime would imply that the individual was sane enough to be trusted not to do violence of that nature. Hume's questions foreshadowed the conclusions that were to appear two years later in his "Commentaries". In general, the defence position in Kinloch's trial was this:

1. Ibid, p. 28. The question was not framed in the manner later customary, i.e., good or evil with reference to the act rather than with regard to the victim's real or supposed actions or attitudes toward the accused. The effect of the question was much the same, however: for if Kinloch believed his brother about to kill him, even under the McNaghten Rules he would have been exculpated. And in any event, the act itself, broadly considered, would include the actions of the victim toward the accused as the accused deludedly understood them immediately prior to the killing.

2. Ibid, p. 27. Hume's query was, "If you were carried from this room to bedlam, and there shown a lunatic in his cell; if this lunatic, on being asked, 'If murder is a crime?' should answer, 'Yes!', would you, on the faith of that answer, think it safe to put yourself in his power, or to venture within his reach?" Mr. Somner replied, "I would not".
1. Absolute insanity at point of "crisis" would exculpate, and such insanity was equivalent to Mackenzie's absolute furiosity.

2. Absolute insanity would also exculpate when the kind and degree of insanity were those of delusions of persecution such that there was incapacity to distinguish right from wrong; and subject to the understanding that the recognition, generally, that murder was a crime did not imply capacity to distinguish right from wrong.

Kinloch was by either test to be exculpated, but was regarded as belonging to the first class. Essentially, this view meant that the term "absolute" had been infused with a legal meaning broader than that of Mackenzie's time, and embodying a cognitive concept equivalent to a knowledge test though not as precisely framed as in the subsequent "Commentaries".

Medical Opinion

At a time when Edinburgh medical opinion led the world, it was not strange to find no less
than five medical witnesses participating in the trial. Of the group, Alexander Monro and Benjamin Bell achieved a firm place in medical history. Their testimony brought the problem of delusion into focus in the trial, although neither they nor the others used the term itself.

Bell testified, under cross-examination by Hume, that the insane "are capable of dissimulation and show cunning and contrivance to gain their ends: That one of the most constant symptoms of madness, is a jealousy of plots and conspiracies.

1. Alexander Monro, Benjamin Bell, Jame Home, William Farquharson and George Somner.

2. This was most likely Monro Secundus, the most illustrious of the famed Monro Dynasty in Edinburgh. Alexander Monro Primus had died in 1767. At the time of the Kinlock trial in 1795 both Monro Secundus (1733-1817) and Monro Tertius (1773-1859) were alive. But Secundus was not to relinquish his professorial chair to the less talented Tertius until 1798. It would appear more likely that the witness was the then incumbent of the chair, Alexr. Monro, Secundus.

3. Apparently the Benjamin Bell (1749-1806) "who has been acclaimed as 'the first of the Edinburgh scientific surgeons'". Guthrie, History of Medicine (1st ed.) p. 230.
"against them; and that most frequently the objects of these suspicions are their best friends, or the persons to whom they had been most attached. Monro, also under cross-examination by Hume, testified that "their friends were most commonly the objects of their suspicion, and that he thought it natural it should be so: for as madmen were not sensible of their own condition, or of the necessity of restraining them, and as friends and relations were chiefly active in controuling or imposing restraints on them, so these persons irritated them, and in consequence became the objects of resentment."

Both witnesses had been called by the prosecution; yet the testimony singled out above fitted Kinloch so well that it was almost imperative for the defence to avail itself of these concepts. In addition, the testimony that madmen could show

1. Trial of Kinloch, p. 36.
cunning and contrivance strongly supported the cognitive element already recognized in late eighteenth century law. If delusions of persecution were medically a cardinal symptom of madness and if reasoning madmen were recognized by medicine, it was not difficult, in a community where medicine was at its height of power and prestige, to infuse these concepts into legal argument. Particularly was this simple when the law had already achieved a cognitive conceptual standard, but had not yet evolved a hard and fast rule as to the degree of reason that would suffice. It may be conjectured whether the English Erskine in Hadfield's case five years later had knowledge of Kinloch's case. While he actually introduced delusion as a term and as a test, the concept had already made a prior appearance of note in a Scots trial. Whatever other influence or effect it may have had, the medical testimony bolstered the cognitive approach upon which a knowledge test must be founded.

Judicial Opinion

In their Interlocutor, the Lord Justice Clerk and Lords Commissioners of Justiciary seemed
to imply recognition of the principle of diminished punishment, but as Kinloch required no such relief, the principle did not again appear in the proceedings. The Court not only allowed "the pannel to prove all facts and circumstances that may tend to exculpate him" but also alternatively to establish those facts and circumstance that might "alleviate his guilt". This kind of thinking, however, found less and less need as the knowledge test emerged; both covered the same kind of cases, although the principle behind the rule of proportions was a much more flexible instrument, and could have covered other types of cases as well. It was not until the growing realization, that a knowledge test did not suffice to meet all the problems, rendered a supplement necessary, that the older form of thinking was revived in the modern doctrine of diminished responsibility.

1. Trial of Kinloch, p. 10. The Court "find the libel relevant to infer the pains of law; but allow the pannel to prove all facts and circumstances that may tend to exculpate him, or alleviate his guilt: And remit the pannel, with the libel, to the knowledge of an Assize".
The Lord Justice Clerk's charge to the jury was short and in essential agreement with the analysis of the Lord Advocate. The charge began with a simple statement of fact that there were "different degrees of insanity" to be considered. These were analyzed as follows:

1. Permanent total madness which was a bar to trial. This was apparently the equivalent of the Lord Advocate's class of permanent absolute insanity and the defence class of absolute insanity at point of crisis. Kinloch was regarded as not of this category since he had been judged fit to stand his trial.

1. Robert McQueen of Braxfield was Lord Justice Clerk.

2. Scots law always tended to be frank on this point. English law tended to obscure it by insisting, with the vigour of logical purists, on an all-or-none characterization into sanity and insanity; the two categories were in theory separate, distinct and antithetical.

3. Trial of Kinloch, p. 150. "If a man is totally and permanently mad, that man cannot be guilty of a crime; he is not amenable to the laws of his country. There is no room for placing the pannel in that predicament; for as a person, totally and absolutely mad, is not an object of punishment, so neither is he of trial."
2. Temporary total madness which exculpated provided that the accused was able to meet the burden of proving that at the time of the act he was "actually insane". This was also similar to the Lord Advocate's second class.

3. Partial insanity which exculpated provided that the accused could not "distinguish between right and wrong".

The knowledge test established in this last category involved moral right and wrong. If the accused could not distinguish moral right from

1. Loc. cit. "The next insanity that is mentioned in our books, is one that is total but temporary. When such a man commits a crime, he is liable to trial; but, when he pleads insanity, it will be incumbent on him to prove that the deed was committed at a time when he was actually insane".

2. Loc. cit.

3. Ibid, p. 151. At the conclusion of his charge the Lord Justice Clerk stated: "On the other hand, if it shall appear to you that he was not able to distinguish between moral good and evil, you are bound to acquit him".
wrong then he was "totally bereaved of reason". It was recognized that a person still had some actual reasoning powers even if he did not have "as much reason as enable(d) him to distinguish between right and wrong". But if a person could not meet the knowledge test he was regarded as absolutely without reason in law. This concept which might be regarded as one of constructive, absolute insanity was termed "partial insanity" by Lord Justice Clerk.

The term "partial insanity" was a recognition of a factual situation. It enabled the absolute form of older law ("totally bereaved "of reason") to be preserved, while the content of law was broadened to exculpate persons who actually had some powers of reason though not enough to meet a knowledge test. Hale, in dealing

1. Ibid, p. 150. "...if he has as much reason as enables him to distinguish between right and wrong, he must suffer that punishment, which the law inflicts on the crime he has committed. You have therefore to consider the situation of the pannel, whether his insanity is of this last kind, or whether he was, at the time he committed the crime, totally bereaved of reason".
with his English concept of "partial insanity" had indicated the two senses in which the term might be understood: partial with respect to "particular discourses, or subjects or applications"; or, partial "in respect of degrees". The first sub-class was in accord with the now discredited medico-legal concept of "monomania"; the second was an early recognition of the continuity in gradation now accepted as characteristic of mental abnormality. The Lord Justice Clerk offered scant evidence in his charge as to whether he favored one or both of the interpretations. He spoke of "partial insanity" as that "which only relates to "particular subjects or notions". On the other hand, he started with the consideration of "different "degrees of insanity"and after describing two, came

1. 1 Hale, Pleas of the Crown, Ch. IV.

2. Op. cit., p. 150. "There is still another sort of distemper of mind, which only relates to particular subjects or notions; such a person will talk and act like a madman upon those matters ...".
to "still another distemper of mind, a partial "insanity". Thus he apparently recognized both the Hale sub-classes, one explicitly and the other implicitly. Whether this was an English influence or indigenous analysis cannot be said, but it illustrated that the emerging English knowledge test and the emerging Scots Knowledge test were moving along somewhat the same lines.

The knowledge test as laid down by the Lord Justice Clerk, however, was apparently as restricted as that set forth by the Lord Advocate. Again the evidence was scanty, but in the charge to the jury it was said that if the accused "was capable of knowing that murder was a crime" then he was to be found guilty. During the testimony of the surgeon Somner, the Lord Justice Clerk also asked whether "The last time you saw the pannel, "previous to the event that took place (was he) in "such a situation as not to distinguish moral good "from evil, and not to know that murder was a crime?"

1. Loc. cit. "For if it is your opinion from the evidence, that he was capable of knowing that murder was a crime, in that case you have to find him guilty".
Both the question and the instruction indicated a requirement of lack of knowledge that murder in general was a crime rather than that the particular act was the crime of murder. This lack of particularity, with respect to the specific act at the critical moment, greatly weakened the knowledge test as judicially enunciated. Nonetheless, the Lord Justice Clerk's knowledge test as judicially applied had sufficient vitality to result in advising the jury to bring in an acquittal on the ground of insanity. This alone was enough to distinguish it from the Lord Advocate's knowledge test that was so similar to it on the surface. It may be that the Lord Justice Clerk thought in terms of particularity while expressing himself in general terms. In any event, the point was soon to be rendered moot by the simple and unambiguous language of Hume in his "Commentaries".

1. Ibid, p. 151. Actually the Lord Justice Clerk told the jury "to return a special verdict finding that the pannel was guilty of taking the life of his brother, but finding also that he was insane at the time". He also told them that a general verdict of "not guilty" would not be the "proper verdict for you to return".

-250-
Legal Consequences of Verdict

The jury, in accordance with its charge, unanimously returned a verdict that "the pannel killed the deceased ..." But find it proven, that "at that time the pannel was insane, and deprived of his reason". The next step, as Lord Eskgrove pointed out, was consideration by the Court as to "what must be the legal consequences of this verdict?" All the judges were agreed that the accused could not be punished in view of the verdict. Equally,

1. Ibid, p. 152.
3. Lord Eskgrove put it that a "man under the influence of real madness, has properly no will ... On this ground, I am clearly of opinion that the pannel is not an object of punishment, and that he must be assolized from the charge of murder ...". Ibid, p. 154. Lord Swinton added that "Punishment is intended for example; but a person insane can have no design; and to punish him can be no example". Ibid, p. 155. Lord Dunsinnan said that "as appears from the verdict of the Jury (there was) no guilt upon the part of the pannel; and therefore can he be the subject of no punishment. Ibid, p. 156. Lord Craig and the Lord Justice Clerk concurred. Loc. cit.
however, all were agreed that their duty to protect the public required some custodial order and that they had the power in law to fulfill their duty of social protection.

The Judgment, therefore, was to "assailzie him simplicitor: But in respect of the insanity "and deprivation of reason found proven", he was to be "confined prisoner during all the days of his "life" in the Edinburgh tolbooth, unless and until "any friend or other person" should "find sufficient "caution and surety acted in the books of adjournal, "to the satisfaction of this Court, to secure and "confine him in sure and safe custody, during all

1. Lord Eskgrove pointed out that lack of punish-
ment of the pannel "will not altogether exhaust or terminate the business .... Your Lordships have further to discharge the duty you owe to the country, or to the people, by taking such precautions for their future safety against similar violences, as your wisdom may direct, and to which your powers are undoubtedly adequate". Ibid, p. 154. Lord Swinton too was of the opinion that "another duty remains upon the Court. It is a duty not only to punish, but to prevent all manner of evil". Ibid, p. 155. The other Lords Commissioners concurred.
"the days of his life ...". Similar judgments had been handed down in the cases of Blair (1781) and Coalston (1785). All these cases indicated a clear distinction in the judicial mind between the sometimes conflicting duties of protecting the rights of the individual and protecting the rights of society. The trial was concerned with the former duty and the judgment was concerned with the latter. The judgment, as has been seen, exercised its function of social protection by punishment, if the verdict was one of guilty; and by protective custody, if exculpating insanity was found.

1. Trial of Kinloch, pp. 156, 157. The actual "certificate of Caution" resulting from Kinloch's case was: "I Robert M'Queen of Braxfield, Lord Justice Clerk, hereby certify, That Doctor William Farquharson ... has found sufficient caution and surety, acted in the Books of adjournal of the High Court of Justiciary, That he shall secure and confine Sir Archibald Gordon-Kinloch of Gilmerton ... in sure and safe custody, during all the days of his life, in terms of, and conform to the sentence of the said Court in all points, pronounced against him upon the 15th day of July current. Witness my hand, this 17th day of July 1795. Robert M'Queen". As a result, Kinloch was removed from prison that same day. Ibid, p. 158.
Baron David Hume

Hume's "Commentaries", published in 1797 when he was still Professor of Scots Law at the University of Edinburgh, brought the knowledge test in Scotland to maturity. It resolved the difficulties of particularity that the Lord Justice Clerk and the Lord Advocate had raised in their elucidation of law in Kinloch's case.

Hume's analysis resolved itself to these general propositions:

1. Absolute alienation of reason resulted in lack of criminal responsibility. It existed in law if either of the following situations obtained:
   a. Madness, "attended with fury and "tempestuous violence", or
   b. Lack of "knowledge of good and evil, "right and wrong" in general, or

1. For purposes of citation, hereinafter, the second edition (1819) will be used. The text material was the same, but the notes covered some early nineteenth century cases necessarily absent from the edition of the late eighteenth century.


3. Ibid, p. 36.
c. Lack of "knowledge of good and evil, "right and wrong" with respect to the particular criminal act in question. This was regarded as the result of delusion.

2. Absolute alienation of reason might be of either of two types:
   a. Permanent, i.e. "constant and "unremitting" or "continual in respect "of time", with certain presumptions obtaining.
   b. Temporary, i.e. "only returns at "intervals", with certain presumptions prevailing.

**Hume's Knowledge Test**

The absolute alienation of reason of which Hume spoke embraced the category designated by Mackenzie in his "absolute furiosity" and described...

1. Loc. cit.
2. Loc. cit.
4. Loc. cit.
by Hume as madness "attended with fury and tempestuous violence". It also included the categories covered by the third classes of the prosecution and judicial analyses in Kinloch's case; these might be grouped under the heading "lack of knowledge of "good and evil" generally. But Hume went a step further and injected real vitality into his knowledge test concept by not limiting it to the above group. He concluded that the deluded individual who did not know "good from evil, right from wrong", with respect to the particular criminal act, was also within the legal definition of the term "absolute alienation of reason". This latter test was broad enough to include an individual in either of the other categories, for obviously neither the raving maniac nor the person who did not know that murder, generally considered, was a crime could meet the more delicate requirement of knowledge that the particular criminal act was evil and wrong.

1. The other two categories ("a" and "b" of No. 1 in the analysis) have been mentioned only for the sake of historical perspective, and not because they were analytically necessary. The essence of Hume's analysis lies in the particularized knowledge test ("c" of No. 1 in the analysis).
Hume reached his conclusion, that the knowledge test must be applied to the particular act, by deliberate enquiry. He negatived the application of the test to acts in general by noting that a man might know that it was wrong to kill, and yet be so "absolutely insane as to have lost all power of "observation of facts, all discernment of the good "or bad intentions of those who are about him, or "even knowledge of their persons". On the other hand, it was a pertinent and material question to ask if the accused knew good from evil, right from wrong, provided it were put in a "special sense". This "special sense" was "relative to the act done "by the pannel, and his knowledge of the situation "in which he did it". This, in turn, meant "taking "into consideration the whole circumstances of the "situation" in each case.

2. Loc. cit.
3. Loc. cit.
The circumstances that Hume had especially in mind were what we today know as "delusion", and what he himself called "illusion". He pointed out that the pannel might have enough reason left to answer in general that murder was a crime, and yet not be able to "distinguish a friend from an enemy, "or a benefit from an injury". If he mistook "the illusions of his fancy in that respect for "realities" then his "remains of intellect" would be useless "towards the government of his actions, "or for enabling him to form a judgment as to what "is right or wrong on any particular occasion". Similarly, if he had delusions of persecution, he might as well "be utterly ignorant of the quality

1. Loc. cit. The modern distinction between delusion and illusion rests on the persistence of the belief in the former case, even when the misapprehension has been pointed out. It is clear from the context of Hume's exposition that what he called "illusions" had this quality of persistence, and would today be called delusions.

2. Loc. cit.

3. Ibid, pp. 36, 37.

4. Ibid, p. 37. "... the vain conceit that his friend is there to destroy him, and has already done him the most cruel wrongs, and that all about him are engaged in a conspiracy to abuse him ...". 
"of murder" and "his judgment of right and wrong, "is, as to the question of responsibility, truly 1 "the same as none at all".

Two other aspects of Hume's particularized knowledge test should be mentioned. It might seem that he had in mind both a legal and moral standard since he coupled "good and evil, right and wrong" in his wording of the knowledge test. He made it quite clear at a later point that he had a moral standard in mind when he summed up his position in these words: "It is therefore only in this "special sense, as relative to the particular thing "done, and the condition of the man's belief and "consciousness on that occasion, that an inquiry "concerning his intelligence of moral good or evil "seems to be material to the issue of his trial". Secondly, Hume used such expressions as "that vestige "of reason" and "those remains of intellect" to describe a person suffering from delusions such

1. Loc. cit.
2. Loc. cit.
that he did not know the particular act was wrong although he knew that murder generally was a crime. These expressions did not contradict his general rule that only absolute alienation of reason would result in non-responsibility. They simply affirmed that the term "absolute alienation of reason" was a legal term of art, and no longer a factual definition as in Mackenzie's time. As had happened in England, form tended to be preserved while content changed. Legally considered, the particularized knowledge test amounted to constructive, "absolute "alienation of reason".

Presumptions

Hume also distinguished between permanent and temporary forms of absolute alienation of reason. With respect to a person hitherto sane, the position was quite free of ambiguity; the burden of proof rested on the accused. With respect to a person

1. Ibid, p. 42. "It is not disputed, that in the case of one who has always been reputed sane, it lies with him fully to establish this, (insanity) like any other defence".
suffering from "lunacy or periodical madness" the position was more doubtful. The presumption, if any, was to obtain only where the jury held the evidence equally balanced. Where evidence existed of "no symptoms of disorder, or but slight ones" at the time of the act, previous insanity raised no presumption in the panel's favor. But "evident "symptoms of fury... recently after the deed" coupled with insanity for a period of years with few, short lucid intervals, raised a presumption in favor of the accused. In between these situations, the presumption was to be against the accused although "on account of the natural suspicion of "the lurking vice,... weaker evidence may here be "admitted to cast the balance". From these views as to temporary alienation, the conclusion would seem justified that the permanent form would raise

1. Loc. cit. "One thing is obvious, that there is no room for presumptions, unless in the case, which must be a rare one, that the jury cannot come to a conclusion either way, on the proof of the panel's situation of mind, at the time of doing the deed".

2. Loc. cit.

3. Ibid, p. 43.

4. Loc. cit.
a presumption in favor of the pannel; Hume, however, was silent on this point.

Judgment, Diminished Punishment and Social Protection

While absolute alienation of reason resulted in acquittal, "inferior degrees of derangement, or natural weakness of intellect, not amounting to madness" did not. Hume stated that under such circumstances only royal clemency was available to the pannel. He noted immediately after, however, that in the case of Sommerville, "a middle course" was taken, but did not approve of the precedent. Hume also indicated in his "Introduction" that the wide powers of judicial discretion in Scots law often resulted in mitigation of punishment, especially in capital crimes. Among the illustrative situations he gave was the case of "weakness of

1. Loc. cit.
2. Loc. cit. "... the culprit has to seek his relief, in the course of application for mercy to the King".
3. Loc. cit. "... by absolving the pannel from all corporal pains, but awarding a fine to the fiscal, and an assyment to the widow and children of the deceased".
"intellect". Thus during the eighteenth century what had started out as a vigorous principle in Mackenzie's rule of proportions faded gradually until at the end of the century only royal clemency and judicial discretion were left of it. At the same time a cognitive concept had entered the law and gradually developed into a knowledge test. It is submitted that there was a necessary relation between these progressive changes, for the knowledge test covered the same kinds of cases that the old rule of proportions had embraced.

One other matter persisted relatively unchanged. This was the constant recognition by Scottish jurists of their function as public protectors. Kinloch's case best illustrated this, and the cases of Sommerville, Spence, Blair and Coalston were further examples. Hume stressed the point by stating that this was a matter concerning "which the Court never fail(ed) to take order by

1. Ibid, p. 11. The other mitigating situations were "youth, or weakness of intellect, or because instigated by old transgressors, or for some other the like favorable circumstance in the case ...".
"by their sentence".

Select Scots Case Results: Early 19th Century

David Hunter (1801) suffered from the delusion that the woman he shot had smothered his mother in the presence of a group of people who were part of the conspiracy. A plea of insanity in bar of trial was sustained.

Alexander Campbell (1809), convicted of highway robbery, was recommended "to mercy, on account of a certain degree of weakness of intellect ...". His sentence of death was commuted to transportation-pardon.

James Cummings (1810) was teased by a fellow soldier while on guard duty. During pursuit of the soldier, who eventually escaped him, Cummings lunged his bayonet at several people and then killed

1. Ibid, p. 43. The only exceptions Hume gave were "those rare cases of delirium from fever, or other bodily disease, which leave no reason to apprehend a return".
3. Ibid, p. 37, f.n. 3.
another soldier who happened by. Cummings made no effort to escape, and simply continued his guard duty. There was evidence of a severe head injury several years before. Cummings was found insane at the time of the act.

Robert Robertson (1810) was the object of the following verdict: "Find it proven, that the pannel, time and place libelled, did strangle the deceased John Bryce; but find, from the provocation he received, and from the general insane state of the pannel's mind, that he was not guilty of feloniously murdering him."

William Gates (1811) was charged with the murder of his wife. Hume points out that apparently "liquor, and consequent irritability of temper, had a considerable share in the deed ... (but) that even when sober, he was of a melancholic temperament, and not a person of firm intellect, or quite

1. Ibid, p. 39, f.n. 1.
"like other men". The jury finding was "That the "pannel then laboured, and still labours, under a "state of mental derangement". Gates was not punished, but provision was made for his confinement under security.

John Gardener (1811) was charged with rape and the jury found that he had committed the act but "That the pannel has been subject to fits of insanity, and was not a proper object of punishment ...".

Pierce Hoskins (1812), while under the influence of alcohol, cut his four year old child to death. The jury found that the act was done "in a temporary fit of insanity".

Susan Tilly (1816) was charged with theft and fire-raising which she attributed to the promptings of the devil with whom she had delusions.

1. Ibid, p. 40, f.n. 1.
2. Ibid, p. 43, f.n. 1.
of conversation. Hume points out that "on other subjects she spoke reasonably and correctly and that she knew right from wrong". She was found guilty but with a recommendation of mercy which resulted in her pardon from sentence of death.

Jean Campbell, alias Bruce, (1817) was deaf and dumb from birth but was tried on a charge of infanticide. The Court permitted the trial on the grounds that she still had other powers of communication extant, and that she had sufficient intellect to appreciate right and wrong, and that she understood the charge against her. A verdict of not guilty was returned upon the evidence led.

It is not to be assumed, of course, that the foregoing cases are statistically representative. Not all results were so fortunate for the accused. Selection was made on the basis of results that indicated some positive operation of principles.

1. Loc. cit.
2. Ibid, p. 44, f.n. 2.
Before considering the significance of these early nineteenth century case results, consideration should be given to two other treatises of the same period.

Burnett

1

Burnett's work appeared in 1811, and had almost nothing to say on the subject of mental abnormality. Brief mention is indicated, however, only because it reinforced, in another application, the general tendency to separate mental abnormality into the classes of congenital defect ("idiots") and acquired aberration ("madmen") on the one hand, and to subdivide the latter category into permanent and temporary ("lunatics") forms, on the other. Burnett was concerned only with the problem of receiving the evidence of mentally afflicted persons. He pointed out that the ground of objection was "want or defect of understanding" and that in

2. Ibid. p. 390.
the case of "idiots (and) madmen ... a settled "state of the malady" was presumed, and hence their testimony was "wholly inadmissable", while in the case of "lunatics ... it (was) receivable during "lucid intervals".

The succeeding treatise, that of Alison in 1831, more than compensated for Burnett's general silence on the topic of mental abnormality as a criminal defence.

Alison

If Hume could be regarded as having ushered in the early modern period, then equally Alison's work might be said to have provided a consolidated analytical statement based on Hume during the first half of the nineteenth century.

One general characteristic of modern law as opposed

1. Loc. cit. With respect to lunatic's testimony, Burnett indicated also that it was receivable "as to any fact which has fallen under their observation when in sound mind, especially it be a recent fact, and no fit of insanity have intervened".

to historical periods is the degree to which modern law speaks for itself with significantly less need for interpretation of meaning or laboured reconstruction of analysis. Alison's treatise was marked by this characteristic.

His analysis, consisting of six sections, reduced to outline, amounted to these four propositions:

1. Insanity was a complete defence ("bar to punishment"), if accused,
   a. At the time of the act, and
   b. With reference to the particular act ("as applied to the act in question"),
   c. Did not know "that he was doing wrong".

The above requirements amounted, in law, to "entirely deprived ... of the use of reason", or "complete alienation of reason", but did not mean, in fact, that the individual was "altogether "furious" or that he "did not understand the
"distinction of right or wrong" generally. In short, as with Hume, the historical label of absolute alienation of reason was being used to cover the new particularized knowledge test content of the law. As with Hume, also, delusion was regarded as the circumstantial factor producing the inability to distinguish right from wrong respecting the particular act. And just as in Hume's case, the word "illusion" was used to describe a situation today termed "delusion".

1. Ibid, p. 645. Alison used the following general statement: "To amount to a complete bar to punishment, the insanity, either at the time of committing the crime, or of the trial, must have been of such a kind as entirely deprived him of the use of reason, as applied to the act in question, and the knowledge that he was doing wrong in committing it". However, he went on to explain that by "complete alienation of reason" it was "not to be understood that this means either that he was altogether furious, or did not understand the distinction of right or wrong ... in the general case". Alison's understanding was, therefore, in complete accord with that of Hume on this point, since their particularized knowledge tests covered the two "extreme" cases, mentioned as well as the more delicate case of the individual who had not known right from wrong respecting the particular act.
2. Partial derangement short of the requirements above stated should result in,
   a. Verdict of guilty alone, or
   b. A recommendation of royal clemency, in addition to the guilty verdict.

   No clear standard was given whereby it was possible to separate the cases deserving of mercy from those that were not. The particularized knowledge test separated the guilty from those who lacked criminal responsibility.

3. Burden of proof rested on accused; with possible exception if,
   a. Lucid intervals were "of short duration", and
   b. "Apprehended shortly after the act in a state of furiosity".

   Little faith was placed in the exception, and on the whole, the question was considered one for the jury rather than "any unbending presumptions".

4. Insanity could be,
   a. Plead in bar of trial, or
   b. Taken cognizance of by the Court, ex proprio motu, or
   c. Found proven by a jury.

   The latter circumstance resulted in protective confinement or protective custody by friends under caution.
Comparisons and Conclusions

The process of enlargement of the cognitive concept in Scots law culminated in a Scottish knowledge test. Whether English law caused this development can not be determined; it would seem open to serious doubt, however, since there was no pressing need for borrowing from England. The doctrine of mitigated punishment, even as it declined in vigor, rounded out Scots law sufficiently to preclude recourse to another system. On the other hand, it is submitted that English law did exert an influence upon the rising Scots knowledge test. The prosecution reliance on Hale and Mackenzie equally, in Kinloch's case, was illustrative.

This influence, it is submitted, resulted from the longer history of both the cognitive concept and the knowledge test in England. It did not stem from nor imply, a more precise substantive content in English law. Hume, in 1797, fully understood that reference to the particular act was necessary if knowledge of right and wrong was not to be reduced as a test to an absolutist or
wild beast standard. In England as late as 1812, in Bellingham's case, retrogression was still possible in that salient aspect.

The English influence was felt in terms of form rather than substance. This, it is submitted, was partly due to the lack of any superior denotative quality in the English formulation. In part also, it is submitted, it was due to the fact that the infant analogy, which had largely determined English form, could not as readily do so within the Scottish frame of reference. It was natural, therefore, that the older forms of English law should find ready acceptance in Scotland. Such language as lack of knowledge of right and wrong provided a convenient way of stating the growing Scottish recognition of cognition in mental abnormality; and at the same time it afforded a means of separating those who were reasonable enough to be responsible from those who lacked criminal responsibility as a result of their affliction.

The operative strength of the Scottish knowledge test could be seen in numerous early nineteenth century cases. The most striking of
these were the cases of Cummings, Robertson, Gates, Gardener and Hoskins. In each instance there was some element in the case that might have prejudiced a jury against the accused or might have overridden a weak test. Cummings, it will be recalled, had bayoneted a soldier after having been teased by another soldier. The element of insufficient provocation did not cloud the legal standard of insanity for he was found insane at the time of the act. Robertson, on the other hand, was found to have received provocation that the jury did not characterize as adequate or inadequate. It must have been regarded of greater weight than in Cummings' case since it was included in the finding jointly with insanity. Hume regarded the verdict of "not guilty of feloniously murdering" as grounded on "infirmity of mind, and consequent susceptibility of irritation", rather than what he considered to be the only proper ground for acquittal, namely - "alienation of reason". Yet if Hume was right concerning the jury's thinking, the implication was that the content of the Scottish standard was in accord with the purely Scottish rule of proportions thinking rather than with English
knowledge test thinking. The content of the Scottish standard was apparently Scottish, whatever the form may have been.

Gates, who killed his wife in a fit of temper while drunk, might easily have alienated a jury or confused their understanding of the insanity issue. Nonetheless, the jury was able to find "a state of mental derangement" at the time of the act and still persisting. Even more significant was the judicial attitude that treated this finding as one of exculpation. This did not mean that any evidence of mental illness or abnormality, no matter how slight, would be sufficient to acquit; but it did indicate that there was still somewhat greater amplitude for the defence in the Scottish standard than in the English. Hoskins, who cut his four year old child to death, was also under the influence of alcohol and again the jury had no difficulty with the insanity issue, since they found that the act was done "in a temporary fit of insanity". Gardener's case is possibly the strongest of the group for the charge was rape and the jury found he committed the act. Despite the hostile feelings that such an act inspires toward
its perpetrator, the finding was that the pannel had been "subject to fits of insanity and was not a "proper object of punishment". The essence of the Scottish standard lay not so much in emphasis on the formula of words (as in the English knowledge test) but rather in the spirit of broad tolerance or humanity of outlook with which it was applied.

Tilly's case illustrated that the formula "knew right from wrong" was not something to be altogether ignored in Scotland. Where the evidence that the accused knew right from wrong was clear, a guilty verdict could be expected. It was in the relatively greater liberality in the terms of its application that Scotland was distinguished from England. It might almost be said that in Scotland evidence short of clear knowledge of right and wrong would acquit, while in England evidence short of clear lack of knowledge of right and wrong would convict. Without any shift in burden of proof, the actual risk of non-persuasion on the part of the defence seemed greater in England than in Scotland.

It has already been submitted that the development to a Scottish knowledge test was
accompanied by a decline in rule of proportions thinking to the point where only such rudiments of a mitigated punishment doctrine were to be found as royal clemency and ordinary judicial discretion. Nonetheless, the general aura of the principle remained; or, at least, the same Scots jury liberalism was manifest in recommendations to mercy as had been noticeable in application of the knowledge test. Thus, even though Tilly was found guilty, there was an accompanying recommendation of mercy that resulted in her pardon from sentence of death. Similarly, Campbell, the convicted highwayman, received a mercy recommendation "on account of a "certain degree of weakness of intellect" and his death sentence was commuted to transportation pardon.

The Kinloch verdict and the Gates verdict, when contrasted with the Harding verdict in England a century later, illustrate a fundamental difference between the two nations. Scotland, at the turn of the nineteenth century as well as before, and in a somewhat different way since, took a hard-headed and practical, judicial view of law and of verdicts. Thus the finding in Kinloch's case that "the pannel "killed the deceased ... (but) ... at that time the
"pannel was insane and deprived of his reason" was enough to render him free of criminal responsibility. In Gates' case the finding was "a state of mental "derangement" at and since the time of the act. In neither case was there punishment, although provision was made in both for confinement under security. England, however, always tended to treat language as a formula, and to confound logic with law. Thus, in R. v. Harding, 1 Cr. A.R. 219 (1908) a verdict of "guilty, with the strongest possible recommendation to mercy, and we consider she was in a frenzied "state of mind" was held not equivalent to a verdict of guilty but insane.

Whether the English Erskine, as defence counsel in Hadfield's case, was familiar with Hume's "Commentaries" or with Kinloch's case cannot be said. Erskine's priority of use of the term "delusion" extended to both England and Scotland. In the latter jurisdiction, however, delusions of persecution, although not so called, had been argued in court and discussed in a legal treatise shortly before Erskine's usage. A fairly clear pattern of influence was noticeable within the Scottish development. Apparently the medical testimony concerning
delusion gave the defence a welcome opportunity which they quickly seized. Dr. Bell and Dr. Monro were prosecution witnesses and hence the defence was not likely to have anticipated their evidence. The evidence itself was phrased in language so very close to that later employed by Hope in his closing speech, that it may be fairly concluded he had simply woven the unlooked-for testimony into both his argument and into the defence theory of exculpatory mental abnormality. Table No. 3, at the end of this chapter, illustrates the congruence of language between the medical experts and defence counsel in Kinloch's trial.

The same table also reveals that Hume's language, although somewhat different in form, was not radically unlike that of his colleague Hope, in the Kinloch defence. However, Hume's use of the idea of delusion was in illustration of the kind of circumstances that might have to be considered when applying his particularized knowledge test. Neither Hume's use of the idea of delusion nor his wording of it were as broad as Erskine's. Hume may have been a direct heir of Bell and Monro's testimony and Hope's ready utilization of it; but Erskine
in England could not be so characterized with any degree of assurance. Table No. 3 illustrates such similarities as existed between the various Scottish expressions and the English statement. The only clear correlation that could be established was within and among the Scottish sources themselves.

While Alison drew upon English law, his English comparisons did not advance his analysis particularly. His usage of English law was not always apposite. Thus he quoted Hale's discussion of "partial insanity" in the discussion of the particularized knowledge test. The quotation would have been more appropriate for Alison's third category, i.e., persons "somewhat deranged ... yet "able to distinguish right from wrong". On the other hand, the English cases of Ferrer, Arnold, Parker, Bowler and Bellingham were cited in support of that proposition. The only attempt at differentiation that was made was the observation that the law was "more correctly laid down" in the cases of Hadfield and Bowler than in that of Bellingham. While Hadfield and Bellingham were correctly compared, it is submitted that Bowler's case could only have been included under a misapprehension of
the issue there involved. Bellingham's case, Parker's case and Bowler's case were exceptionally weak illustrations from the standpoint of English legal development. It must be admitted, however, that the hindsight of more than an additional century of legal history yields a perspective that Alison was hardly in a position to avail himself of.

When Alison drew upon Scots law his touch was surer. Essentially his position was the same as that of Hume, from whom, indeed, his ideas concerning mental abnormality seemed directly to devolve. By reducing the sometimes discursive style of Hume to a fixed set of categories, Alison consolidated the contributions made by Hume. There was too little difference in time between the two to expect much advance to have been made in the interim, once a particularized knowledge test had been achieved. The credit for that achievement in Scots law clearly belonged to Hume rather than Alison.
### TABLE NO. 3.

**Early Concepts of Delusion in Scotland and England.**

<table>
<thead>
<tr>
<th>Scotland 1795</th>
<th>Scotland 1795</th>
<th>Scotland 1797</th>
<th>England 1800</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drs. Bell and Monro (called by prosecution, but their testimony, below, utilized by defence).</td>
<td>Hope, counsel for the defence.</td>
<td>&quot;Commentaries&quot;</td>
<td>Erskine, counsel for the defence.</td>
</tr>
</tbody>
</table>

"one of the most constant symptoms of madness....."

"the never failing and strongest symptom....."

(of madness)

"a pertinent and material question....."

"the true character of insanity........" ("where there is no frenzy or raving madness")

is "delusion".
TABLE NO. 3. (Continued).

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"is a jealousy of plots and conspiracies......"

"most frequently the objects of these suspicions are their best friends......."

"or the persons to whom they had been most attached......."

"is to "apprehend plots and danger from all around him..........."

"particularly his best friends......."

"or to "apprehend mischief either to himself or others....."

"if he "mistakes the illusions of his fancy.......for realities", as, for example, "a conspiracy to abuse him"

"and "cannot distinguish a friend from an enemy......."

"or is "possessed of the vain conceit that his friend is there to destroy him, and has already done him the most cruel wrongs".

"reason is not driven from her seat, but distraction sits down upon it, and frightens her from her propriety".

"reason is not driven from her seat, but distraction sits down upon it, and frightens her from her propriety".
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"reason is not driven from her seat, but distraction sits down upon it, and frightens her from her propriety".

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