sum was public and known, the defender, by virtue of his disposition, having been many years in possession of the land. *Replied*, That albeit the act of Parliament allows a party's furiosity to be proved by a sworn inquest, which is declared to be drawn back to the time of the furiosity, yet does not exclude other manner of probation; and the LORDS, by their constant decisions, have sustained the reason of furiosity to be proved by witnesses, and was so decided, Alexander against Kinneir, No 3. p. 6278.; and Loch against Dick, No 4. p. 6278.; and, by a late decision, in the case of Sir William and Thomas Stewart of Gairntully, where the LORDS found, that there was no necessity of a previous trial of an inquest; and there is no difference betwixt heritable and personal rights as to that point, seeing the same militates equally, in both which is, that the right was granted by a party who being furious *pro mortuo et absente habetur*. THE LORDS, before answer, allowed a joint probation to either party, for proving the condition John Lindsay was in the time of the disposition quarrelled. No 6.

Sir P. Home, MS. v. 1. No 404.

1700. *February* 13. THOMAS CHRISTIE *against* ANDREW GIB.

No 7.
Found in conformity with Loch against Dick, No 4. p. 6278.; that reduction of a deed, *ex capite furoris*, is competent after the granter's death, though no brief of idiotry had been expede during his life.

THE LORDS decided that important case of the reduction, Anna Aird and Thomas Christie brewer in Edinburgh, her husband, against Andrew Gib in Dundee. John Aird merchant in Dundee makes a disposition of his heritage and moveables to Elizabeth Bowman, his wife, he wanting children. Anna Aird, his niece and nearest of kin to him, raises a reduction upon the head of fatuity and idiotry, wherein a mutual probation was allowed, before answer, anent his condition at and before granting that disposition. The pursuer proved, by sundry witnesses, that he had a sufficient capacity for business till 1679, after which he was seized with such a weakness in his judgment and brain that he became silly and incapable of doing ordinary business, and that it continued with him till 1695, when he made the dispositions quarrelled, and lasted till his death, which happened in the year 1696, so he was under this silliness and alienation of mind constantly for the space of 17 years, and ay till his death; that he seldom went abroad without a guide, and knew not the way home again, and was seldom at church, and when he came, used to gaze about him like a child, and draw the eyes of all the people on him; that his wife managed all, and gave orders for drawing the dispositions, &c. Gib, the defender, as nearest of kin to the wife, proved that the disposition was read over to him, and being asked to whom he would leave his gear, he always answered, 'To whom but my wife?' That a part of the land came by her; that he went to kirk and market after the disposition, and bought a leg of veal, and a book, and paid for them; and he gave the earth and stone with his own hand at giving of the sasine, and used to subscribe discharges: Which qualifications being conjoined with the natural and legal presumptions that every man is presumed rational till the contrary be

No 7. proved, do sufficiently evince that he was *sanæ mentis et satis rei suæ providus.*

This being the sum of the probation on both sides, and coming to be advised, it was *alleged* for the defender, 1*mo*, That our law, by the 66th act 1475, had prescribed a certain form of trying idiotry and furiosity, viz. by a brief out of the Chancery, and an inquest before whom the party might be sifted, and they might instantly cognosce his idiotry or furiosity; and this method not being used in John Aird's lifetime, it cannot be now tried and cognosced after his death. 2*do*, Fatuity and weakness has not been sustained by us as a ground of reduction, as fury has been, for the acts of the one are far more convincing than what can arise from the other; for as there is no man so perfectly wise, but he will have some mixture of folly and weakness at some occasions, *nullum magnum ingenium sine aliqua mixtura dementiæ*; so there is no man so perfectly stupid and silly as not to give at some times small evidences of reason; and they may be famous for some lucky hits of wit by chance; so it is impossible to determine the limits and boundaries betwixt an absolute fool and a sensible man, there being so many degrees, that a standard is unfixable; and for some acts of levity and folly to declare men idiots, were a most dangerous preparative, especially after they are dead. *Answered* to the *first*, The LORDS are the great inquest of the nation, and the trying by a brief noways excludes their cognition, and it has been so decided, Alexander *contra* Kinnear, No 3. p. 6278.; and Loch *contra* Dick, No 4. p. 6278.; where the furious person's heir was allowed to reduce, though never tried by a brief and inquest in his lifetime. To the *second*, Natural infirmity and weakness of spirit is equivalent to fury, and worse; for furiosity is a *rabies* that has oft dilucid intervals, whereas the other is frequently perpetual, *et mente captus magis est in quiete.* THE LORDS found the reduction receivable this way, and no necessity of its being tried in the party's lifetime.

Then *alleged* for the defender, The disposition must subsist for security of the obligement of her contract of marriage, giving her a power to dispose on 3000 merks. *Answered*, 1*mo*, She deceased before her husband. 2*do*, That faculty she never made use of, nor exercised the same. 3*tio*, If the disposition be null, as done by one incapable to give his consent or dispone, then it could neither ratify nor corroborate any provisions contained in her contract of marriage. THE LORDS repelled this allegation likewise; and then proceeded to advise the probation, and found the probation led by the pursuer more pregnant, and reduced the disposition as made by one incapable to give a clear and distinct consent; for it was thought all the acts of reason proved to have been done by him might have all been done by a child of six or seven years old, being taught and imposed on as he was, and that a parrot may repeat the words, 'all to my 'wife,' if it be once instructed to pronounce them; and this was more than a careless sort of incogitancy and inadvertency, as some Philosophers have, like Archimedes, who was so intent upon his mathematical demonstrations, that he knew not where he was; and therefore the LORDS reduced the disposition on

the grounds of the common law, that *fatuus consentire non videtur*; and found the probation of fatuity and idiotry more pregnant than that adduced for his sobriety and judgment. The like was sustained in 1683, in a reduction pursued by one Lindsay against Maurice Trent, No 6. p. 6280. No 7.

Fol. Dic. v. 1. p. 421. Fountainhall, v. 2. p. 88.

1709. *June* 15.

MARGARET BONNAR, brother daughter to Mr John Bonnar of Greigstoun, *against* The said Mr JOHN BONNAR, and JAMES MAXWELL of Leckiebank his tutor-dative.

No 8.
Aliment refused to an indigent fatherless infant, out of the estate of her uncle, to whom she was presumptive heir of line, although he was past 60 years of age, unmarried, and under the care of a tutor-dative, as a person *non compos mentis*, and so in effect a liferenter only, through his incapacity to exercise any act of property; in respect there was no law or precedent for modifying aliment in such a case.

MR JOHN BONNAR of Greigstoun being past 60 years of age, unmarried, and several years ago found by an inquest to be fatuous or not *compos mentis*, and therefore put under the care of a tutor-dative, Margaret Bonnar, an indigent fatherless infant, his apparent heir of line, pursued him and his tutor for an aliment.

Answered for the defender; That no aliment was due to the pursuer, there being no precedent for it in our law or custom.

Replied for the pursuer; The Lords are in use to decide matters of aliment upon the principles of equity, and the law of nature; and, therefore, obliged an eldest brother, succeeding to his father in a competent estate, to aliment his younger brethren and sisters during their minority, Children of Netherlie against his Heir, No 50. p. 415.; June 29. 1676, Row *contra* Row, *voce* PRESCRIPTION; and heirs-male to aliment the heirs of line, Lady Otter *contra* The Laird of Otter, No 49. p. 414.; November 12. 1664, The Daughters of Balmerino against The Heirs-male, (APPENDIX) *voce* ANNUALRENT; albeit no statute or municipal law could be urged in either of these cases. Again, liferenters are bound to aliment apparent heirs; consequently nothing is more agreeable to law or equity, than that an aliment should be modified to the pursuer out of her uncle's estate, who is upon the matter a liferenter, through his incapacity to exercise any act of property, she being his apparent or presumptive heir, and there being found sufficient to aliment both.

Duplied for the defender; *Non sequitur*, that because law appoints liferenters to aliment the fiars, proprietors should aliment their presumptive successors; for this were in effect to destroy property, and make apparent heirs partial proprietors. And seeing fatuity or furiosity divests no man of his property, Mr John Bonnar cannot be subjected, by his fatuity, to a burden he would not otherwise have been obnoxious to; on the contrary, it is the design of law to protect, and not to destroy, the rights and interests of those who are incapable to look to themselves, by appointing them tutors. The practiques cited are not to the purpose; for the obligation on the eldest son, as representing his