No 8.

father, to aliment his indigent brethren and sisters, to which the father was liable *jure naturæ*, is not extended beyond a suitable aliment during their state of incapacity to provide for themselves; and, therefore, as the pursuer's father, being arrived to manhood, could not, were he alive, have pretended to aliment from his brother, neither can his daughter pretend to an aliment from her uncle, there being no natural tie, upon any collateral relation, to aliment or provide for another, though in the nearest degree. Nor is the obligement upon the heir-male to aliment the heir of line, which ariseth from the same topic, of his representing the father, who was bound to do it, to be drawn in consequence, to fix a tie upon an uncle to maintain his neice out of his own property.

THE LORDS refused to modify an aliment to the pursuer, in respect there was no law or precedent for it. See p. 6288.

Forbes, p. 332.

*** The following case is connected with the above.

1710. *February* 23.

ALEXANDER MONCRIEFF of Mornipea *against* JAMES MAXWELL of Leckiebank.

No 9.
The nearest kinsman to a fatuous person on the father's side, has right to be his tutor of law, and the descendants by a sister-german are preferable to the descendants by a sister consanguinean.

See Fountainhall's report of this case, which also mentions, that in a brief of idiotry, bearing the party to have been idiot from a certain period, a tack granted by him, within that space, was found null.

LECKIEBANK having, by a gift of tutory from the Exchequer, found caution and acted as tutor-dative to Mr John Bonnar of Greigstoun, since the year 1702, when he was legally cognosced to be fatuous and *non compos mentis*; Mornipea (who was minor at expeding of the gift in favours of Leckiebank) now took a brieve out of the chancery for serving himself tutor or curator, as nearest of kin to Mr John, conform to the act 18th, Parl. 10. Ja. 6.

Alleged for Leckiebank; 1*mo*, He being already constituted tutor-dative, there is no place for a tutor of law; in respect *tutorem habenti tutor dari non potest*. 2*do*, The act of Parliament requires, that a fatuous person's nearest agnate, according to the disposition of the common law, (*i. e. Qui per virilis sexus cognationem junctus est*, § 1. *Inst. De Legit. Agnat. Success.*) be his tutor of law; whereas Mornipea is not agnate to the fatuous person, the former's grandmother being only the latter's father's sister. 3*tio*, Leckiebank, being the fatuous person's sister's son, is a degree nearer to him than Mornipea, who is but the father's sister's grandchild.

Answered for Mornipea; 1*mo*, The meaning of the brocard, *tutorem habenti tutor non datur*, is, that it is not consistent with the office of a tutor to have another joined to him as *tutor-dativus*; but it doth not hinder a tutor testamentary, or a tutor of law, to be preferred to a tutor-dative already in office, who is properly considered only as an *interim* curator appointed to manage till the tutor of law should serve, February 22. 1628, Colquhoun *contra* Wardrop, No 2. p. 6276.; January 21. 1663, Stuart *contra* Spreul, No 5. p. 6279. And much rather ought Leckiebank to cede to Mornipea, who was minor, and incapable to act, when the other obtained his gift of tutory. 2*do*, It was never

No 9.

intended, by the act of Parliament, that the tutory of idiots should in all points be regulated conform to the civil law; but only, that the nearest agnates and kinsmen to fatuous persons on the father's side, in the sense of our law, should be served and preferred to be tutors and curators to them; as, by the civil law, the nearest agnates, according to it, are appointed curators to such. For among the Romans all of the same degree were admitted tutors of law, and the novel constitutions do not exclude cognates and kinsmen by the mother's side; those in the collateral line had no right of representation beyond the third degree of brother's sons, and the *duplicitas vinculi*, the difference betwixt the full and half blood, is not regarded in the civil law farther than the third degree; whereas, with us, the eldest, *jure primogenituræ*, excludes others of the same degree; kinsmen by the mother-side are not regarded; and the representation of agnates is not stinted to the third degree. That, by agnates, our law understands only kinsmen of the father-side, is yet further clear from the stile of the brieve of tutory, *Quis est legitimus agnatus, i. e. consanguineus ex parte patris*; and from the rule of lineal succession, which doth not distinguish *inter agnatos et cognatos*. 3*tio*, Though Leckiebank be a degree nearer than Mornipea, the father hath the advantage of the full blood, his grandmother being sister-german to the fatuous person's father, whereas Leckiebank's mother was only sister consanguinean; and as Mornipea would be preferred to him in the succession, he must have right to the office of tutory, it being a principle in law, that *ubi est hæreditas, ibi etiam est tutelæ onus, Nov.* 118. *c.* 5. the tutory must follow the *jus successionis* in heritage, and not that of moveables. For, as it will not be found, that, in any act of Parliament, the interest of the nearest of kin in moveables is called succession, so the office of tutory passeth as heritage *jure primogenituræ*, to the eldest in the direct line, and is not divided *in capita*.

Replied for Leckiebank; *Interdum alibi est hæreditas, alibi tutela, L.* 1 § 1. *D. De Legit. Tut.* And, in our law, the right of succession is frequently distinct from the office of tutory; as when a mid-brother dies, the youngest is tutor of law to his children, albeit the immediate elder were to succeed; and, by the act 51st, Parl. 7 Ja. 3. the nearest agnate of twenty-five years of age should be tutor, though he be not to succeed. Again, it were reasonable that the office of tutory should rather go according to the rule of succession in moveables, than that of heritage; in respect that, as tutory is an office, so the succession in moveables is transmitted by way of office, aud is mostly regulated, according to to the civil law, by the degree of propinquity, without respect to the *jus representationis*. And the civil law is the standard, conform to which the act of Parliament prefers tutors and curators to fatuous persons; whereas, in the matter of heritage, we, for the most part, observe the feudal law.

THE LORDS found, 1*mo*, That Mornipea being minor the time that Leckiebank got his gift of tutory-dative to the idiot, and now major, or of lawful age, he hath right to serve himself as tutor of law. 2*do*, Having considered the act 18th, Parliament 1585, anent curators to idiots, with the stile of brieves, they

No 9. repelled the objection made against the mover of the edict, as not being agnate to the idiot. And, 3*tio*, Preferred Mornipea as being of full blood, and nearest in succession to the said idiot.

Fol. Dic. v. 1. *p.* 420. *Forbes, p.* 404.

*** Fountainhall reports the same case:

1702. *January* 7.—MR JOHN BONAR of Gregston in Fife, being alleged to be sometimes melancholy and furious, his brother Robert takes out a brief of idiotry before the stewart of St Andrew's to retour him an idiot, and himself his tutor of law. Gregston thinking this ignominious and defamatory, raises an advocation of the brief to the macers, with whom the Lords may conjoin assessors, who may first cognosce on the facts and circumstances from which the idiotry is craved to be inferred, which is not to be rashly done, *ubi de statu liberi hominis agitur*, and the diminution of his natural liberty craved against the presumption that *unusquisque est sanæ mentis donec probetur contrarium;* and this is to subject him, who is *sui juris*, to the nod and beck of his brother, grasping after his estate, and has a restrospect to annul a disposition he has made to his sister, and David Sinclair, her husband; for one of the heads of the brief is *a quo tempore furiositas inceperit;* and he is willing to subject himself to a trial before the Lords. *Answered*, Law and ancient stiles have fixed the manner of this trial to be by an inquest of 15 sworn men, and not by the Lords of Session; and it were a discouraging preparative to advocate such brieves; and the members of inquest ought to be *ex vicineto*, as the learned Craig, *L.* 1. *D.* 12. § 29. *Feud.* observes, because they know the persons best, and the deeds from which the furiosity results, which cannot be known to an inquest cited and dwelling in Edinburgh; neither will the assessors nor witnesses come over, and so the thing shall be quite disappointed. The Lords thought this man behoved once to be in some reputation of prudence and knowledge, being graduate a master of arts, and that it might be dangerous to allow a country assize to fix the period when it began, and that neighbours might be prevailed with to come to Edinburgh, and witnesses could be legally compelled, and it was hard to declare a man a fool who offered to subject himself to an examination, therefore they advocated the cause to the macers, and declared they would adjoin assessors if demanded.

THE LORDS afterwards called Gregston before them, and first examined him publicly, and then remitted him to some of their number, upon whose report they refused the advocation, finding great evidence of his weakness.

1704. *February* 9.—MR JOHN BONNAR of Gregston being unfit for business, a brieve of idiotry and furiosity was taken out of the chancery, as mentioned 7th January 1702, and by a verdict he was found under an indisposition of mind, and fatuous, and that he had been so for three years bygone; whereon James Maxwell of Leckiebank is named his tutor dative, and he pursues a re-

moving against Anna Bonnar, Gregston's sister, and David Sinclair her husband, to remove from the house and lands of Gregston; who defending themselves by a tack set to them of the same for seven years in 1699, it was *alleged*, this tack was *ipso jure* null, because it was within the three years that the inquest had found he was in that distemper, which made him incapable of managing business. *Answered*, They had raised a reduction of the retour, and depositions of the witnesses on which it proceeded; and whatever might be pretended for incapacitating him in time coming, there was neither law nor justice for the retrotraction summarily without so much as a reduction, to annul a tack legally set by him for a competent tack-duty; and though the 66th act of Parliament 1475, introducing this brieve of idiotry and furiosity adds a clause, that the inquest try *a quo tempore* he was such; yet that only relates to the quarrelling alienations he has made of his lands during that space, but cannot be extended to tacks; for though a nineteen year's tack has been reputed *species alienationis*, yet this was never extended to short tacks, such as this is. 2*do*, Sir George M'Kenzie, in his observations on that act, says, it only relates to natural fools and idiots, but not to those who become so by accident, which is neither so notour nor of that continuance with the other, but has lucid intervals, as where they proceed from melancholy, a fever, the height of the moon, or the like; and country assizers are but very incompetent judges of that; and it were hard to take away her tack by a verdict, to which she was not cited, nor heard. *Replied*, 1*mo*, A reduction is not the formal way to annul this verdict, but there must be a summons of error in Latin, whereto all the members of inquest must be called; and though a reduction were here competent, yet it cannot be summarily and *incidenter* thrown in, because the principal depositions must be in the field, and they must have their *inducia legales*: And as to the act of Parliament, it is a very plain retrospect, empowering them to try when it began; and Craig, L. 1. Dieg. 12. § 29. says, 'Ex hac 'quindecimvirali sententia damnato non solum a tempore sententiæ rerum sua-'rum alienatione interdicitur, sed et omnia gesta ex quo furere vel delirare cœ-'perat, fiunt irrita;' and that they are null *ope exceptionis, nec opus est judicio rescissorio*, so they need not a reduction. It is true, if the party lesed were seeking to be restored *ex capite furoris*, there he behoved to have a reduction; but where there is a brieve, and a verdict, that is more solemn than any declator whatsoever; and there is no difference whether he be wronged by a tack or any other alienation. And the distinction betwixt natural fatuity and accidental has no foundation in law; for, at that rate, none should be reputed idiots but natural born fools; whereas he who falls into this misfortune by other accidents, deserves as well the assistance of law as the other born idiot does; and there is no such practice as to call parties in the executing of brieves; for if they find themselves concerned, they may compear, and see it be legally done. THE LORDS decerned in the removing, reserving reduction of the verdict as accords, and would not receive it summarily *hoc ordine*.

No 9.

No 9. 1710. *February* 16.—Mr John Bonnar of Greigston having been found idiot and *non compos mentis*, by an inquest on a brief of idiotry, (as mentioned *supra* in January 1702), and James Maxwell of Leckiebank, being constituted his tutor dative, for managing his affairs, Alexander Moncrieff of Morniepaw thinking the office of tutory belongs to him as his nearest kinsman, takes a new brief of idiotry out of the Chancery, not so much for cognoscing him fatuous, (which the former retour sufficiently proves, he not being convalesced since that time) as to serve himself tutor at law; and my Lord Blairhall and I being nominated assessors to the macers, compearance was made for Leckiebank, who *alleged*, That he being invested in the office of tutory, and in the actual exercise these several years bygone, there can no tutor be served till he be removed as malversing or suspected, which is not pretended; for the 18th act 1585 statutes, that the nearest agnates of natural fools or madmen are to be preferred to the tutory, according to the disposition of the common law, which is the civil law, by which it is an undoubted maxim, that *tutorem habenti, tutor non dari potest*; and therefore, he being *in officio* there can be no new service of a tutor. The law of the twelve tables was, *si furiosus existat agnatorum gentiliumque in eo pecuniaque ejus potestas esto*. But if the prince has given a tutor, there is no more room *tutori legitimo*. *Answered*, This brocard holds only in proper tutors to pupils and minors, but not *quoad* extraordinary tutors in cases of furiosity; and Leckiebank at most is but an interim tutor till the nearest agnate should claim his right. See Vinnius *ad* § 5. *Instit. De curator.*; and though *l.* 3. § 8. *D. De legit. tutor.* says, *Si legitimus tutor remotus sit vel excusatus, non defertur tutela ejus filio, sed locus fit dativo*; but that is not the present case; for there is no vacancy here, but the nearest agnate claims his right, which the Lords sustained 22d February 1628, Colquhoun *contra* Wardrop, No 2. p. 6276.; and 21st January 1663, Steuart *contra* Spreul, No 5. p. 6279. In the first of which cases, the Lords found a tutor of law to an idiot serving *quocunque tempore*, would remove a tutor dative, who was actually entered to the office. 2*do*, Objected by Leckiebank, that our two acts of parliament in 1475 and 1585, required, that the tutors to idiots should be the nearest agnate, which Morniepaw was not, being only related to Mr John Bonar, the idiot, by his grandmother, who was Mr John's father's sister or aunt, and so not being *per sexum virilem* attingent to the party, he was only a *cognatus* and no agnate. *Answered*, The acts of parliament have another word besides agnates, viz. or nearest kinsmen, which takes in both the agnatic and cognatic line. Likeas, Justinian by his 118th Novel. took away the distinction both in succession and tutories; and Leckiebank *eodem laborat vitio*, for his relation is also by a sister, and can never compete with Morniepaw, whose grandmother was full sister-german to the idiot's father, whereas Leckiebank's was only a sister consanguinean, and the *duplicitas vinculi* certainly states a preference. 3*tio*, Objected, *Esto* my mother was only a half-sister, though that would postpone me in the case of succession, yet half-blood is sufficient in a tutory, where

the nearest heir ought not to have the custody of the person. Besides, I am a degree nearer, for my mother was his aunt, whereas it is your grandmother by whom you have the relation; even as Bruce pleaded preference to the Baliol, as being *uno gradu stipiti propior*. No 9.

1710. *February* 28.—THE LORDS decided the cause mentioned *supra* 16th February 1710, betwixt Morniepaw and Leckiebank, and repelled all the three defences. As to the *first*, They found the tutor-dative was but an *interim* tutor till the nearest in law should claim his right, as Morniepaw now did. As to the *second*, Though agnate in the strict acceptation of the Roman law signified one related *per lineam masculorum*, yet with us those descended by women, if *ex parte patris*, were reputed the nearest kinsmen. And for the *third*, Though Leckiebank was a degree nearer, yet Morniepaw being come of a sister-german was preferable to the descendants of a consanguinean sister; and so Morniepaw was preferred to the office of tutory. Some asked where the hidden profit lay, that men strove so strenuously for a place more burdensome than profitable to outward appearance.

Fountainhall, v. 2. p. 136. 221. 568. 573.

1746. *December* 3. STARK *against* STARK.

No 10.
A brief of idiotry obtained by a pupil, with concourse of one of several tutors, sustained.

JOHN STARK a pupil, with concourse of one of his tutors, (the rest refusing to concur) obtained a brief for cognoscing George Stark of Gartshary, his elder brother consanguinean, and to whom he was presumptive heir, to be an idiot: And the macers having, by advice of their assessors, sustained the pursuer's title, Gartshary reclaimed, on this ground of law, that a pupil not properly authorised, had no title to carry on this or any process; at the same time insinuating, that the allegeance was groundless, proceeding from a sinistrous view in the concurring tutor: Whereupon the LORDS, before answer, appointed the assessors, with two more of their number, as a committee, to converse with Gartshary, and report their opinion of his state: And they not being all of one mind, he was brought into Court; and it appearing to the majority that he was an idiot in the sense of law, "The pursuer's title was sustained."

The minority took the matter in too narrow a view, as if to cognosce one an idiot, he behoved to be fatuous or altogether incapable; whereas, no more is necessary than that the person appear not to be endued with a disposing mind; and as for the title, the concourse of one tutor was thought sufficient.

And whereas the procedure was further objected to on this ground, That there were two brieves, one of idiotry, and another of furiosity, which were blended together in one claim, it appeared upon search of the Chancery records, that the two brieves are in use to be taken out, and one only to be re-