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

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