No 5. case this gift is to expire. This they did the rather, that diverse of their number did declare upon their certain knowledge he was turned idiot, *et rei suæ minime providus*, which if they had not declared, the Lords would have caused produce him before themselves, and examined him whether he had been so or not.

Fol. Dic. v. 1. *p.* 420. *Gilmour, No* 67. *p.* 50.

*** Stair reports the same case :

MR JAMES STEWART, and Robert Stewart, Bailie of Linlithgow, as curator to him, as a furious person or idiot, by gift of the Exchequer, pursue Mr John Spreul for sums of money due to Mr James.—It was *alleged* no process at the instance of Robert Stewart, as curator, because by law the tutors or curators of furious persons are, conform to the act of Parliament, to be cognosced by an inquest, whether the person be furious, and who is his nearest agnate of the father's side past twenty-five.

THE LORDS found process, Robert Stewart finding caution to make forthcoming, and declared it should be without prejudice to the nearest agnate, to serve according to the said act of Parliament; for they thought, that as the Lords might name curators *ad litem* in the interim, so might the King, and that the Exchequer was accustomed to do. See TUTOR and PUPIL. *Stair, v.* 1. *p.* 159.

No 6. 1683. *February.* LINDSAY *against* TRENT.

Found in conformity with Alexander against Kinnear. No 3. and Loch against Dick, No 4. p. 6278.

IN the reduction of a disposition of lands upon this reason, That the disponer was furious,

It was *alleged* for the defender; That by the act 66, Parl. 8. James III. the furiosity ought to be found by an inquest upon brieves out of the chancery; and now the party is dead, and not questioned in his lifetime.

Answered, The act of Parliament cited is before the institution of the College of Justice, and the Lords of Session are now the great inquest of the nation; so they did proceed to try furiosity and idiotry, in the cause between Gairntully and Innernytie, for reducing an assignation; and though one party's wounding another during the dependence of a process, and parricide, are by acts of Parliament to be found by an assize, yet the LORDS always proceed to cognosce these crimes without a previous verdict.

THE LORDS, before answer, ordained witnesses to be examined as to the condition of the party the time of the disposition.

Fol. Dic. v. 1. *p.* 420. *Harcarse,* (IMPROBATION AND REDUCTION.) *No* 537. *p.* 149.

*** Fountainhall reports the same case: No 6.

1684. *November* 14.—ELIZABETH LINDSAY, relict of one Dobson, and one Somervile, as nearest heirs to umquhile Robert Somervile, pursue a reduction against Maurice Trent, of a disposition of some houses and waste ground lying in Leith, made by the said Robert Somervile to Antony Rosnall, and now disponed by the said Rosnall to the said Maurice, *ex capite furoris et amentiæ*, that the said Robert was mad and distracted when he granted the said right; and condescended on clear acts of fury, as tearing his clothes, disturbing divine service in the church, beating a Bailie of Leith in the court; all which proceeded not from drunkenness, but from an evident distemper in his brain, which continued to his death.

It was *answered*, That though he turned mad in the latter end of his life, yet in 1654, which was the time of his granting this disposition, he had not fallen into that distemper; at least they offered to prove, that he had then a clear lucid interval and cessation, and so the deed was valid. THE LORDS before answer, having allowed a conjunct probation anent his condition when he gave the said disposition, whether he was then sober or mad; and Maurice Trent having adduced sundry witnesses, who proved that at the said time, in 1654, he was a procurator before the Bailies, and they had oft then conversed with him, and he was cheerful and rational;—and the pursuers having proved, that he was subject to fits then, though his constant and habitual madness began not till 1656; and that all he got was only 3000 merks, and the land was worth 7000 merks;—(But *nota*, there was a prior wadset lying on it unredeemed; 2*do*, Its price and value is raised *ex post facto*, by a house built on it since, which was not at the time of the sale;)—The probation coming to be advised this day, it was *urged* for the defenders, that the alleged furious person being dead long ago, and the disposition thirty years old, and never quarrelled till now, nor his furiosity cognosced by a brief and inquest, conform to the 66th act of Parliament 1475, nor so much as proved in his lifetime, the same cannot be reduced on a probation by witnesses now led, of his furiosity, *post tanti temporis intervallum*, which were of most dangerous consequence. *Answered*, That the trial of the furiosity, by an inquest, is not exclusive of other probation by witnesses; and that the Lords of Session have sustained it so probable, as is recorded by Durie in two decisions; Elizabeth Alexander against Kinnear, No 3. p. 6278.; and Loch against Dick, No 4. p. 6278.; and renewed again lately in 1669, between Stewart and Stewart of Gairntully; and they ought not to be prejudged by their nearest of kin omitting to get them declared furious by a brief. *Replied*, The cases cited do not meet; for the *first* is at the instance of the furious party himself reconvalesced; and the *second* is in personal rights, which may be latent during the furious person's lifetime; and the foresaid act of Parliament, introducing the cognition by an inquest, is only

No 6. conceived for preservation of heritage. Yet by this a furious person may alienate sums of money of far greater value than some houses and tenements are; and why should the furiosity be more probable by witnesses in the one case than the other? But the latency of personal rights makes some difference; and I observe, by the tenor of that old act, it was a correctory law; for prior thereto no deeds of furious people were quarrellable, but only from the date of the inquest's verdict; but by this law the brief is appointed to be declaratory, and with a retrospect to inquire into this head, *a quo tempore furor inceperit*, so that all done from that time may be declared null.

This debate being advised on the 18th November, and the LORDS being divided, they at last fell upon this *medium*, to make another act before answer, and appoint two of their number to visit the houses, and to take trial and probation anent their value and worth the time of the disposition, that so they might see if the price was adequate, or to the disponer's lesion. But they should have remembered, if the furiosity be proved, then the deed is simply null, whether there be lesion or not; but the probation was obscure; and this interlocutor was given to move the parties to settle.

Fountainhall, *v.* 1. *p.* 310.

*** This case is also reported by Sir P. Home:

JOHN LINDSAY in Leith having granted a disposition to Antony Rosnall, of a tenement of land, who having disponed the same to Maurice Trent; and William Lindsay, being served heir to the said John, having raised a reduction of the disposition, upon this reason, that the said John was furious, the time of the granting of the disposition, which he offered to prove by witnesses; *answered*, That the said John's furiosity cannot be proved by witnesses now after his decease, nor can the disposition be reduced upon that ground, unless the furiosity had been cognosced, and tried by the verdict of an inquest, upon a brief out of the Chancellary, as is prescribed by the 66th act, Parliament 8, James III. that it being above thirty years since the granting of the disposition, it were a dangerous preparative that such rights should be called in question after so long time; for if the right had been called in question, either in the defunct's own time, or shortly after the granting thereof, then the defender would have proved, that it was granted in the defunct's lucid intervals; therefore the act of Parliament did justly provide, that the trial should be by a sworn assize, by giving a verdict of the state and quality of the fury, and how long the party had been furious, which not being done in the defunct's lifetime, no such trial can now be taken after his decease, much less can the same be now allowed to be proved by witnesses; and however in some cases the Lords have allowed the furiosity to be proved, to reduce personal rights for sums of money, in respect of the latency of the deeds, but it has never been sustained to reduce the real right of lands, which are of greater importance, especially where the

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