No 1.

was past by a brief of idiotry directed forth of the Chancery, so that all things done by him, and all alienations and dispositions made since the —— year should be of none effect by reason of the said sentence. It was *alleged* into the reason of the summons reductive, that the judges had done wrong to have taken away the rental by nullity of exception, but it behoved to be declared null by way of action; and, for the corroboration of this allegeance, there was alleged the act of Parliament made by King James the 3d, cap. 66., anent the brief of idiotry and furiosity, whereintill it is contained, that all alienations made by furious persons should be retracted and rescinded, and not taken away by way of exception; for, of the law, est textus expressus, D. De officio præsidis in L. 14. in qua fit distinctio furiosorum, nam alii qui continua mentis alienatione omni intellectu carent, et perpetuo furiosi vel mente capti dicimus; alii lucida intervalla habent; and so it might be that dictus Jacobus Arran, during the time that he had set the said assedation and rental, had intermission of his sickness, and was at that time *compos mentis*, and the same not to be done in his fury, and *ideo* the same could not be taken away by way of exception, but behoved to have a special declarator. It was *answered* to this, That by the act of Parliament, nullities come in by way of exception, as there was practised betwixt Wedderburn and Blackadder, *voce* REMOVING; where a sasine was made null by way of exception; and the decreet that was given, making all things done by James Earl of Arran to be null since the beginning of his fury in *anno* 1561, made no distinction whether he was perpetuo furore agitatus vel si habebat intermissionem et lucida intervalla; et ubi lex non distinguit non aliter distinguendum. THE LORDS, after long reasoning, and that the matter was heard under the payment of an amand, found *definitive* that the said reason of the summons was relevant, *et quod judices male judicarunt*, and yet assoilzied them from the pain, *et hæc omnes domini una voce dicebant, quod rarum est.*

Colville, MS. p. 369-70.

No 2.
The King may grant gifts of curatory to idiots when the nearest agnates do not pursue their interest, but if these agnates afterwards serve themselves curators, the King's gift will fall.

1628. *February* 22. COLQUHOUN *against* WARDROP.

IN an action of advocation of the service of brieves of idiotry betwixt Colquhoun and Wardrop, wherein the LORDS having heard the reasons of both parties, why the service should proceed, or why no such service should take effect, before they gave answer to the advocation, or remit; and the question being betwixt one, who was nearest agnate to the idiot, and who thereby, conform to the 18th act, Parliament 1585, claimed to be served curator to the idiot, and betwixt another who had obtained a gift of tutory-dative from the King, to be tutor and curator to the idiot, by reason that the agnate had not raised the brieves, and desired that service, but only since the obtaining of his

gift of tutory-dative, which was complete and expede, and caution found, and the oath *de fideli administratione* given by him before the raising of the brieves by the agnate, and who had not sought them *debito tempore*, but had ceased five years after his majority, before he had raised these brieves; which cessation he alleged made him to fall from that office, as in tutors lawful after the expiring of year and day. THE LORDS found that the agnate should be preferred in the tutory to the tutor-dative, notwithstanding of the gift expede to him, and notwithstanding of the agnate's cessation, and therefore ordained the agnate's brieves to proceed, and remitted the cause. See TUTOR AND PUPIL. No 2.

Act. *Hope et Nicolson.* Alt. *Stuart.* Clerk, *Gibson.*

Fol. Dic. v. 1. *p.* 420. *Durie, p.* 349.

*** Spottiswood reports the same case:

JOHN WARDROP having raised brieves out of the Chancellary of Glasgow to serve himself tutor of law to Thomas Wardrop his eldest brother, who was declared an idiot, this service was advocated before the Lords by John Colquhoun, tutor-dative given to the said idiot by the King. Before the Lords remitted it, they ordained the parties to dispute, whether or not the service should go forward, or if the tutory-dative did hinder all other tutors to be served thereafter. *Alleged* for the Tutor-dative, That the pursuer of the brief cannot be served tutor of law to the idiot, in respect of his tutory-dative purchased of the King, whereupon he has found caution, and given his oath *de fideli administratione*, and so it is perfect and consummated; which tutory-dative was given to the said John Colquhoun, because James Wardrop being served tutor of law to the said idiot 1612 (as nearest agnate to him at that time, in respect of the minority of John, who now seeks to be served) he never found caution, in fault whereof through his cessation, the King gifted it to him; in respect whereof, the dative should be preferred, it being impossible that a tutor of law after the cessation of the first can be served, after the granting and perfecting of the said dative. *Answered*, The dative cannot hinder his service; because, by the act 18th Parliament 1585, the nearest agnates to idiots and furious persons should be preferred to all others. Next, there can be no cessation alleged on the part of the first tutor, because he behaved himself as tutor, likeas he gave a factory to this same pursuer for keeping of the idiot, and guiding of his affairs, who found sufficient caution to the first tutor upon his factory; further, the first tutor needed not to find caution, in respect he was nominated tutor testamentar by the idiot's father. *Replied*, The act of Parliament made in favours of the nearest agnates, takes not away the King's right to give datives to idiots, the nearest agnates not serving themselves within year and day, because the act appoints the said tutors to be given according to the common law, by which *agnato cessante, furioso ex judiciali electione a prætore vel magistratu curatorem dari necesse est, L.* 7. § 6. *C. De Curat. furios.* The cessation was

No 2. clear by not finding of caution for so long a space, *qua non præstita, non habuit potestatem administrandi, et quicquid gessit ipso jure nullum erat, C. De Satisd. Tut. et Cur.*; which gave the King occasion by the prerogative of his Crown to give a dative. THE LORDS remitted the matter, and ordained the brother to be served notwithstanding of the dative.

Spottiswood, (IDIOTS AND FURIOUS PERSONS.) *p.* 163.

1632. *February* 21. ELIZABETH ALEXANDER *against* KINNEIR.

No 3.
Reduction *ex capite furoris* may proceed after the granter's recovery, upon a proof of the madness at the time of granting the deed sought to be reduced, though no inquisition of the furiosity had been taken by an assize.

IN a reduction of a disposition of a liferent made by this woman Alexander to the defender, upon this reason, because the woman the time of the making thereof, was then furious and distracted of her mind and wit, and was done without an onerous cause; the circumstances of her fury being qualified in the summons, and offered to be proved by the ministers of Dundee and doctors of medicine and apothecaries, and other honest burgesses of that town where the woman then remained; this reason so to be proved was found relevant, and sustained at the woman's own instance, who was now convalesced and recovered of that madness; albeit the defender *alleged*, That there ought to have preceded a precognition and declarator of her fury, by the determination of an assize, after trial taken, and that it ought to have been so first found by an assize before this reduction could be sustained, being of a dangerous preparative, to reduce lawful deeds upon allegeance of fury, and to be proved by witnesses, which may offer occasion to others to move the like actions, and to prove the same after that manner; which allegeance was repelled. For the LORDS found, that the party recovering, albeit no friend should seek protection of the person of the furious, nor of her goods the time that she was diseased, yet it were not just to deny that remedy to herself, which her nearest agnate or friend might have gotten of the law, if they had sought the same, and their omission could not prejudge her therein.

Act. *Burnet.* Alt. *Mowat.* Clerk, *Scot*

Durie, p. 623.

No 4.
Found in conformity with the above. In this case, the granter of the writ was dead, and the reduction was pursued by her heir.

1638. *July* 26. LOCH *against* DICK.

ONE Henry Nisbet, burgess in Edinburgh, being owing by bond to umquhile Sarah M'Math 3000 merks, and the said Sarah M'Math having assigned the sum to Janet M'Math, one of her sisters; and the said Janet, and William Dick her spouse, having obtained decreet upon this assignation before the Sheriff, against the said Henry for payment, and James Loch burgess of Edinburgh, who had married another sister of the said umquhile Sarah; and Janet