

M^rMath having intented reduction of this assignation, as done by her after she became furious and fatuous, and during th etime of her furiousness and fatuity ; and it being *alleged*, That seeing the party, maker of the assignation controverted is now dead, and no declarator purchased of her disease of madness in her own lifetime before she died ; that therefore no such action ought to be sustained upon this reason, now after her death, to have been proved by witnesses, whereas it ought to have been tried while she lived, by a brief and a sworn assize, as is appointed by the 66th act, Par. 8. Ja. 3 ; and it were a dangerous preparative, to admit any such action, after the party's death to be proved by witnesses ; for, so none might be sure of their estates, and thereby heritable rights may be everted by the depositions of witnesses. THE LORDS repelled the allegiance, and notwithstanding thereof sustained the reason ; for the LORDS found, that the trial might be taken in this case now controverted (being of a moveable bond) after the party maker's death, and by witnesses, seeing it may fall out, that while the maker lived, the writ might remain obscure and never come to light, and no other has power to quarrel such deeds, nor interest thereto, while they who make the same are living ; for furious persons also may have *dilucida intervalla*, so that all such deeds, except they be done the time of the fury, are not quarrellable.

Act. ———.

Alt. *Stuart.*

Clerk, *Gibson.*

Ed. Dic. v. 1. p. 420. Durie, p. 861.

1663. *January 21.*

STEWART *against* SPREUL.

MR JAMES STEWART, a person alleged to be idiot or fatuous; and Robert Stewart, Provost of Linlithgow, as he who has obtained a gift of curatory to him past in Exchequer, pursue Mr John Spreul for payment of a debt owing to the idiot.—It was *alleged*, No process, unless the idiot were declared by a sworn inquest, upon a brief out of the Chancery, and that the pursuer Robert was also declared nearest agnate, and a person fit to administrate ; and any gift he has purchased is *periculo impetrantis*.—It was *answered*, That the allegiance is founded *super jure tertii*, and is not competent to the defender, whom the pursuer is content to secure by sufficient caution. *2do*, Though the nearest agnate were compearing, proponing the defence, yet it were not proper to him, unless he would offer to pursue a brief, and obtain the idiot declared, and himself to be nearest agnate, according to the order of the brief of idiotry ; and it is most lawful for the King to grant a gift, when the parties interested will not, nor do not pursue their interest ; yea, it is necessary it should be so, lest furious persons and idiots should be left destitute of governors.

THE LORDS sustained the process, the pursuer finding caution to make the sum forthcoming ; without prejudice always to the nearest agnate to serve, in which

Found in conformity with Wardrope against Colquhoun, No 2. P. 6276.

A gift of tutory to an idiot, past in Exchequer, was sustained as a title in an action against the idiot's debtors, though no brief of idiotry was exped ; but the pursuer was obliged to find caution to make the sums forthcoming to all parties having interest.

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.

Fel. 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 Kinneir, No 3. and Loch against Dick, No 4. p. 6278.

IN the reduction of a disposition of lands upon this reason, That the disponent 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.

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