

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.

JOHN STARK a pupil, with concurrence 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 allegiance was groundless, proceeding from a sinister 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."

No 10.

A brief of idiotry obtained by a pupil, with concurrence of one of several tutors, 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 concurrence 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-

No 10. toured ; but as the form of the claim could not be discovered at the Chancery, it remaining with the clerk to the process, the LORDS appointed a claim to be given in on each brief without blending them together, that the jury might adapt their verdict to the one or the other as the proof should come out.

Fol. Dic. v. 3. p. 297. Kilkerran (IDIOTRY AND FURIOSITY), No 1. p. 278.

* * D. Falconer reports the same case :

GEORGE STARK of Gartshery interdicted himself to certain persons, amongst whom was Mr John Currie, minister of the gospel at East Monkland, uncle by the mother's side to John Stark, his brother consanguinean ; and all which interdictors were by nomination of John Stark of Gartshery, father to George, left tutors to his youngest son.

Briefs of idiotry and furiosity were obtained for cognoscing the state of George Stark ; which being advocated and remitted to the macers, certain objections were made to the procedure of the service ; and they, by the advice of their assessors, pronounced an interlocutor, 12th August 1746, ' Repelling the objections made against the briefs and process : ' And on a bill and answers, the matter was determined by the Lords.

Objected, imo, These briefs are taken out, and the service sought to be carried on at the instance of John Stark a pupil, with concurrence of his tutors ; and Mr John Currie is the only tutor who is the carrier on thereof, contrary to the inclinations of the rest, who are satisfied with the interdiction, as a sufficient security to their pupil, against dilapidation of the estate.

Answered ; There is no need of any pursuer in this case, the inquisition being taken on the king's precept ; though no doubt, in the nature of the thing, this must proceed upon some information ; and these briefs differ in this respect from the brief of inquisition for serving a man heir, which is always issued at the suit of the party : But supposing that they could not be taken out by an indifferent person, yet they may by any shewing an interest ; and the tutor has an interest on his pupil's account, as also has the pupil's mother, who is another of the tutors, and concurs in the procedure.

2do, Supposing it necessary the pupil should be authorised, the Lords may, *causa cognita,* oblige the other tutors to concur in a step taken for his benefit, or sustain process upon his being authorised by one tutor, the interdiction being no sufficient security, as Gartshery's moveable effects may be squandered away, and then the moveable debts left by his father will affect the heritable estate.

Replied ; This is no popular action, nor would these briefs be allowed to be proceeded in, except at the instance of a person having some concern in him whose state is enquired into, and this pupil unauthorised can be considered as nobody.

In order to determine whether there was such probable cause for the trial, as to move the Court to let it go on against the inclinations of the majority of the tutors, a Committee was appointed to converse with Gartshery, and afterwards he was seen and examined by the whole Court, but they did not express in their interlocutor, sustaining process, whether they proceeded on this cognition, or were of opinion that the tutor had a sufficient interest to follow out the brieves.

Objected, 2do, There are two brieves taken out; and accordingly, before the inferior Judge, two claims were exhibited; but now before the macers, both are blended into one incongruous claim, upon which the procedure is intended to be had.

Answered, Two brieves are taken out, because it may be uncertain whether, upon the proof, the person will appear furious or an idiot; but the procedure may be before the same jury, who will adapt their verdict to the brief which shall be verified; and there is no incongruity in laying before them a claim, that a person be found either fatuous or furious, as his case shall appear.

The practice of the Chancery was inquired into, and a case was found in 1733, where two brieves were taken out, to enquire into the state of Blair of Burrowland, but there was only a retour on one of them; and it was said the form of the claim could not be discovered at the Chancery, as it always remained with the clerk of the process.

Objected, 3tio, The jury is not indifferent, being chosen by the pursuer, who called his own acquaintance; whereas it is the duty of the Judge to summon a jury of *probi et fideles homines*.

Answered, This jury is chosen in the same manner as all others of this sort generally are; the Judge gave warrant to summon an inquest, and no particular objection to any man was made; and if this were such an objection as to cast the inquest, now that they are sworn, it would annul most services.

THE LORDS repelled the objection to the purchaser of the brieves, his title to prosecute the same; as also repelled the objection to the inquest, and found, that as there were two separate brieves issued out of the Chancery, separate claims ought to be made on each of them; and remitted to the macers, with this instruction, to proceed in the trial of the different claims separately.

Act. Ferguson.

Alt. Lockhart.

Clerk. Forbes.

D. Falc. v. I. No 144. p. 181.

1747. July 25. 1748. June 18.

BLAIR *contra* BLAIR.

IN the process at the instance of John Blair, second son to the deceased David Blair of Borgue, before the Commissaries of Edinburgh, for declaring the