

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 allegiance 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 allegiance 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. Morat.*

*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 decret 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

M<sup>r</sup> Math 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.