

1628. February 22. COLQUHOUN against WARDROP.

No. 99.

Found, That the nearest agnate ought to be preferred to a tutor dative in the tutory of an idiot, notwithstanding the agnate's cessation for five years.

Fol. Dic. v. 2. p. 479. Durie. Spottiswood.

* * This case is No. 2. p. 6276. *voce* IDIOTRY.

1628. February 26. COWAN against WARDROPE.

No. 100.

Tutory of an idiot.

John Cowan takes a tutory dative to Wardrope, an idiot, being the nearest of kin agnate, had served himself tutor to him, but had not found caution. The brother of the idiot being of perfect age, raises brieves to serve himself tutor before the Bailies of the regality of Glasgow; which service the tutor dative advocates before the Lords. The cause being disputed, the Lords found, That the agnate might serve himself tutor, notwithstanding of the dative; and remitted the service to the Judge Ordinary, because of such tutors of idiots and furious persons, by the act of Parliament Ja. VI. Par. 10. Cap. 18. should be given only to the nearest agnate.

Wardrope being served idiot, his uncle serves himself tutor to him; but finds not caution within year and day. John Colquhoun, brother-in-law to the idiot, takes a tutory from the King, whereby he thought to exclude the tutor in law, who had not found caution. The brother of the idiot, being thirty years of age, thinking to be preferred before all others, raises a brieve out of the books of Glasgow's Chancery to be served tutor of law to his brother, the idiot, before the Bailie of the regality of Glasgow. The tutor dative raises advocacy of his intended service, for two reasons; *1mo*, Because *tutorem habenti non datur tutor*; *2do*, Because the Bailie has behaved himself partial in this matter. The Lords, although they be not in use to advocate brieves, yet thought meet to stay the service, that, in respect of the novelty of the case, the cause might be first disputed before them, whether or not the brother might seek to be served tutor after the King had made a lawful tutor dative; and if they found the brother should be preferred, then they would remit the service to be ended before the Bailies of the regality, or, in case he were suspended, before the Commissary, or other Commissaries. After the cause was reasoned in the Inner-House, and then remitted, the Lords remitted the service to the Judge-Ordinary, according to the common form of remits; but ordained the parties to have an extract of the Lords' interlocutor.

Auchinleck MS. pp. 8. 548.