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. No 10.

Objected, 2*do*, 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, 3*tio*, 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. 1. *No* 144. *p.* 181.

1747. *July* 25. 1748. *June* 18.

BLAIR *contra* BLAIR.

No 11.
An idiot not capable of marriage.

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

No 11. nullity of the alleged marriage of Hugh, his eldest brother, on this ground, 'That the said Hugh is, and from his infancy has been, so far in the state of 'idiotry, as to be incapable of giving consent in any contract, and more espe-'cially incapable of the matrimonial vows;' the Commissaries 'Allowed either 'party a proof before answer.'

Of which the defender having complained by bill of advocation, the chief reason insisted on was, that the process depended on an allegation of idiotry, to which the Commissaries were not judges competent, it being only cognoscible before the Judge Ordinary by an inquest of 15 sworn men.

Answered for the pursuer, That though idiotry in general falls regularly to be cognosced by a jury, yet where it is alleged as a medium to annul marriage, it may be *incidenter* cognosced by the Commissaries *ad hunc effectum*; and instances said to be similar were condescended on. If a nearest of kin shall object to a testament, wherein an extraneous person is named executor, that the testament is forged, the Commissaries may *incidenter ad hunc effectum* cognosce upon the forgery, though regularly not judges in forgery; and in the case of Pringle, 25th Jan. 1744, *voce* JURISDICTION, an objection having been made to a testament on which confirmation was sought, that the testament had been elicited by fraud and circumvention, whereon the Commissaries allowed a proof; a bill of advocation, complaining of that interlocutor, was refused, the Court being unanimously of opinion, that the Commissaries were competent judges in that incident question *ad effectum*.

Replied for the defender, That in this case the idiotry is not an incident occurring in an original competent process brought before the Commissaries, but is the very foundation of the original action; and as the Commissaries are not competent judges of idiotry, the instances of incident questions do not apply, but the process must stop till the idiotry be cognosced before the proper Court.

THE LORDS "Remitted to the Ordinary to refuse the bill of advocation."

Upon advising the proof, the Commissaries found, "That the defender had been from his youth a natural fool, and void of that degree of reason and understanding which is necessary to the entering into the marriage-contract; and therefore found the pretended marriage between him and the defender Nicholas Mitchel, to have been from the beginning, and to be in all time coming, void and null."

And the defenders having again brought the matter before the Lords by bill of advocation, the LORDS "Remitted to the Ordinary to refuse the bill;" and this they did, notwithstanding that Nicholas Mitchel, the pretended wife, was in the *interim* delivered of a child. See JURISDICTION.

Fol. Dic. v. 3. *p.* 297. *Kilkerran* (IDIOT.) *No* 1. *p.* 277.

*** D. Falconer reports the same case: No 11.

1748. *June* 28.—HUGH BLAIR of Borgue was cognosced to be deaf and dumb, and thence incapable of managing his affairs; after which application was made by his mother to the minister of Kirkcudbright for proclamation of banns, in order to his marriage; but he, from his knowledge of him, did not think him capable of the matrimonial contract, and having advised with the Presbytery, who called Borgue before them, he was by them enjoined not to proceed to the proclamation or celebration of any marriage.

A marriage was said to have been solemnized, and the parties cohabited together, and thereupon John Blair his brother, with concourse of the Procurator-fiscal, insisted before the Commissaries of Edinburgh in a declarator of his incapacity of marriage, on account of idiotry, and of the nullity of the pretended marriage.

The Commissaries having called the man before them, and examined him in presence, (as he spoke some, though indistinctly, and also wrote after a copy, but was incapable, as appeared, of answering a question in writing, or expressing any purpose of his mind by that means,) granted a proof before answer; against which interlocutor an advocation was offered, and refused.

On the proof, the Commissaries, 29th March 1748, 'found that the said Hugh Blair was and from his youth had been a natural fool, and void of that degree of reason and understanding which was necessary to the entering into the marriage contract, and therefore found and declared the pretended marriage to have been from the beginning, and to be in all time coming, void and null.'

An advocation was presented, for that idiotry was not an impediment to marriage, and that the man could not be looked upon as an idiot, unless he had been found so by the verdict of an inquest, for that was the proper method of trial; which was so far from being this man's case, that his state had been tried, and cognosced deaf and dumb; and from the proof led in this cause, it appeared he was no idiot.

Answered, That a person incapable of consent behoved to be incapable of marriage; and the proof of that incapacity might properly be led in the instance, wherein the validity of the marriage was tried, and behoved to be so, although he had been formerly cognosced; as a person might be in a degree of incapacity unfit to manage his affairs, and yet not incapable of marriage; that this defender must have been found an idiot, if his friends, in tenderness to him, had not been satisfied with cognoscing him deaf and dumb, which was sufficient for putting his estate under management, and was no evidence of his sound judgment; but in this trial his incapacity for marriage fully appeared.

THE LORDS found the Commissaries had proceeded according to law and justice, and refused the bill. See FRAUD.

Reporter, *Leven*. Act. *R. Craigie & Brown*. Alt. *A. Macdouall*.

D. Falconer, v. 1. *No* 267. *p.* 358.

See APPENDIX.