

1662. February 12. KIRKTOUNS against LAIRD of HUNTHIL

No. 137.

A debt due by a tutor to the defunct was found instructed against the tutor, because he had confirmed the testament without protest.

Isobel and ——— Kirktoouns pursue the Laird of Hunthill, their tutor, for a tutor count and payment of all that belonged to their father, who alleged absolutor, because nothing alleged, nor produced, to instruct his acceptance of the office of tutory. The pursuers opposed their father's testament confirmed, bearing the same to have been confirmed by the defender, and other three tutors, and that the tutors gave their oaths *de fidei administratione*, in the office of tutory. The defender answered, *non relevat*, to instruct, that the tutors made faith, because this confirmation is but the assertion of a notary, the commissary clerk, without a warrant in writ, subscribed by the tutors, and can prove in nothing, but what is ordinary the style of the Court, in judicial process, but the acceptance and making faith of tutors, is altogether extraneous, and is neither necessary, nor ordinary to be done by the commissaries. The Lords sustained the reply, especially, in respect, that the commissary clerk, was this defender's uncle, and there was no ground of suspicion, that he would adject that point without warrant, otherwise this were a dangerous preparative. *Secondly*, The defender further alleged absolutor, from a sum contained in the said testament as due to him, because there was nothing to instruct it, but the defunct's assertion in his testament, giving up his debts. The pursuer answered, that the defender hath homologated by confirming the testament, bearing the same, and not protesting against it, which is an acknowledgment thereof. The defender answered, that there being four tutors, it could not be constant, that they were all present at the act of confirmation, and saw and knew the inventory; but as it is ordinary in such cases, they might have come at several times, and made faith. The pursuer answered, that some of the four tutors behoved to do it, and these were thereby bound to have done diligence for it, and consequently, all the tutors being liable *in solidum*; this tutor is liable therefore.

The Lords found the reply and triply relevant, that the testament so confirmed instructed the debt.

*Stair, v. 1. p. 98.*

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1663. January 21. STEWART against SPREUL.

No. 138.

The tutor dative of a furious person does not exclude the nearest agnate from being served tutor of law.

*Stair.*

\*.\* This case is No. 5. p. 6279. *voce* IDIOTRY.