

## SECT. III.

Whether a Party can be required to depone a second time upon special Interrogatories?

No 29.

Tutors who had sworn to an inventory in a confirmation, were required to make oath again as to alleged omissions.

1665. June.

WEATHERSTON *against* Her TUTORS.

IN a process pursued at the instance of Margaret Weatherston, and John Lermont her husband, against her tutors, for making count, reckoning, and payment of her father's moveables pertaining to her; it being *alleged*, That they could not be further charged than the inventory contained in her father's confirmed testament; it was *answered*, That the inventory being given up, and confirmed by the tutors themselves, the pursuers offered to prove, by their own oaths, that they intromitted with more than was confirmed, and greater prices than those confirmed. *Replied*, That they were not holden to swear contrary to the oath in testament. *Answered*, *Sibi imputent*, and tutors giving up inventory in name of their pupils, should do it so faithfully, as they may not be liable to circumvention and omission therein, else minors could be in no security, who, in such cases, are more privileged than others.

THE LORDS repelled the allegiance, and ordained the tutors to swear; but withal, if any thing after oath should be found omitted, or ill appretiated, that the same shall be confirmed by a dative before sentence.

*Fol. Dic. v. 2. p. 14. Gilmour, No 151. p. 107.*

\* \* \* Newbyth reports this case :

1665. June 22.—MARGARET WEATHERSTON being executrix confirmed to her father, and the inventory being given up by her tutor, who made faith thereupon, in regard of her minority, the said Margaret being now past tutory, pursues her tutors for count and reckoning of their intromissions as her tutors; the account being produced, it is offered to be proven, by the tutors oaths, that they had intromitted with more goods, and had got greater prices, than those contained in the inventory, and for which they ought to be countable. It is *alleged* by the tutors, That they cannot now depone, least it infer perjury; and that the pursuer has no right to these goods, ill appretiated or omitted, till they be confirmed.—THE LORDS found, that the tutors ought to depone, both as to the prices received, and as to the intromission; and found, that it could not infer perjury against them, having given their *juramentum credulitatis* at the confirmation of the testament; but found, that the pursuer

behoved to confirm, and take a dative *ad omnia* before extracting of the decret.

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*Newbyth, MS. p. 28.*

1666. February 1.

A. against B.

AN executor-dative, *ad omnia et mala apprehiata* pursuing the principal executrix, and referring the goods omitted, and prices, to her oath, she *alleged*, that she had already deponed at the giving up of the inventory, and could not be obliged to depon again.

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THE LORDS ordained her to depon, seeing she might have intromitted after, and more might have come to her knowledge of the worth of the goods, or a greater price gotten therefor.

*Stair, v. I. p. 347.*

1667. July 16.

KER against KER.

THE LORDS found, that an executor, notwithstanding of the oath given upon the inventory the time of the confirmation, may be urged to declare upon oath, whether, since the confirmation, it is come to his knowledge, that some goods and debts were omitted which he did not know the time of the confirmation, and whether he has gotten greater prices than are contained in the inventory.

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Clerk, *Gibson.*

*Fol. Dic. v. 2. p. 14. Dirleton, No 97. p. 39.*

\*.\* Stair's report of this case is No 63. p. 3874. *voce* EXECUTOR.

1673. July 29.

MOWAT against The EARL of SOUTHESK.

THE EARL of Southesk having obtained a decret against James Mowat, for payment of a sum which Mowat was obliged to advance to the Earl in France, Mowat *alleged*, That he had advanced the same to Mr James Maitland, then the Earl's servant, and keeper of his money; Mr James Maitland being examined upon oath, remembered not of the same; whereupon Mowat was decerned. He now gives in a bill of suspension, and *alleges*, That he had then produced in process a count written by Maitland's own hand, and a letter relative thereto, bearing the payment of this sum, which was not produced or

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In a process, the defender had condescended on payment by a servant, who deponed *non memini*. Afterwards, a written acknowledgment of the