1707. *July* 18. YEAMAN *against* JANET and MARGARET GRIEVES.

No. 246.
Expence of confirmation allowed to a curator who omitted to make inventory.

Yeaman pursues Grieves, as representing their father, for payment of the sums contained in his bond.

The defenders alleged: They ought to have compensation or allowance of £.300 Scots laid out by the defenders' father, for confirmation of the pursuer's father's testament.

It was answered: No allowance of the said expense, because the same having been alleged debursed by the defenders' father, when curator to the pursuer, he had omitted to make inventory conform to the act of Parliament 1672, which provides, that tutors and curators neglecting to give up judicial inventories of their pupils' or minors' effects, shall have no allowance or defalcation of the charges and expenses wared out by them upon the affairs of the said pupils or minors; and this pretended ground of compensation being alleged laid out in the pursuer's affairs, falls under the certification and the penalty of the said act.

It was replied, 1*mo*, There was an ample inventory made up by the pursuer's friends on the father's and mother's side, and what was wanting in that inventory, such as moveables in the house, or accounts in the count-book, was fairly supplied by the inventory given up in the confirmed testament; 2*do*, The penalty of the act of Parliament extends only to personal expenses or incident charges debursed in managing minors' affairs, but not to necessary expenses, which are profitable to the minor; and so it was found in a case betwixt Cathcart of Carleton and Brown of Colston; 3*tio*, The expenses in question being laid out for quot and confirmation, were truly debts, because, by the law then standing, diligence was competent to be used by the Procurator-fiscal of the commissariot to compel parties to confirm.

It was duplied: 1*mo*, The alleged inventories made at the sight of friends, and the inventory in the testament, are not sufficient, because the law requires judicial inventories and eiks, and prescribes the form thereof, which is not to be supplied by equipollencies, otherwise many omissions might be covered, and this excellent law evaded; which is now more necessary, since the exact diligence of tutors or curators can be dispensed with, and often happens to be so by parents, in the confidence that tutors and curators nominated will be diligent in the discharge of their trust; 2*do*, The words of the act of Parliament are peremptory and express, that, in such cases, there shall be no allowance of charges and expenses wared out by them in the affairs of the minors. And as to the decision alleged, it appeared nowhere on record; neither could a single decision derogate from that excellent law; nor was there any speciality in expenses of confirmation of testaments, the same falling clearly under the words of the law.

"The Lords found the expenses wared out on the confirmation ought to be allowed, in which they were moved upon this consideration, that, by the law then standing, diligence was competent to the Procurator-fiscal to oblige parties to

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confirm, and so the expenses of confirmation was to be considered as a debt which, by no construction, could be reckoned to fall under the act of Parliament; and several of them did remember the decision in the case of Carletoun against Colston, in which it was found, that that did only extend to personal expenses; but in this case the Lords were not willing the decision should be understood as a rule upon the interpretation of the act of Parliament, but that the same did yet require a more particular consideration."

Dalrymple, No. 83. *p.* 105.

*** This case is reported by Forbes:

In the action of count and reckoning at the instance of William Yeaman, as assignee by John and Janet Yeamans, against Janet and Margaret Grieves, as representing umquhile George Grieve, their father, who had been curator to the pursuer's cedents, and also their debtors in a bond of 2000 merks, dated 28th March, 1682, the defenders founded upon an article £.300, the expense of confirming the said John and Janet Yeamans executors to their father, as a ground of compensation to extinguish the bond *pro tanto.*

Alleged for the pursuer: The defenders could have no allowance of the said £.300, in regard tutors and curators who give not up judicial inventories of the minors' effects, by the act of Parliament 1672, are to have no allowance of expenses wared out by them in the affairs of their minors; and *ita est* the defenders' father neglected to make up inventories in the terms of the said statute; *2do,* The bond was granted by Grieve, the curator, before his acting as such, and so can only be compensed by sums due to him before his entering upon the office; for, after that time, *præsumitur intus habere.*

Answered for the defenders: It was not necessary to give up judicial inventories, seeing, before George Grieve's acceptance of the curatory, full inventories of the minor's father's estate had been made by the friends on the father's and mother's side, and what is therein omitted was supplied by the inventories given up in the testament; *2do,* The act of Parliament doth only cut off personal expenses, and incident charges debursed in managing the affairs of the minor, though the clause seems to be general, and can never be extended to expenses profitable to the minor; *3tio,* The certification in the act being conceived against personal omission, it can only be extended to personal charges; *4to,* Expenses debursed in making up titles to pursue or discharge are as onerous as payment of the minor's debt; nay, the foresaid expenses of confirmation must the rather be allowed to be so, seeing it was given out at a time when the Bishop and Commissary could have forced the minor to confirm; and if an agent had debursed that money for the curator, it would have been a good article in his account.

Replied for the pursuer: Such sham pretences of previous inventories made up by friends, without a Judge present, cannot be esteemed exact and authentic, so as to free the defenders' father of supine negligence, and the breach of a standing

law for not making up judicial inventories at the time of his accepting the office of curator, or acting as such; from the omission whereof, the presumption of concealing, suppressing, and embezzling, becomes *juris et de jure* by the act 1672; *2do*, The act of Parliament, as clearly as words can express, excludes curators who neglect to make inventories from all manner of charges expended by them in the minor's affairs. It is absurd to pretend, that the expenses sought to be allowed were in *in rem versum* to the minor; for, by that rule, all incident charges of journies, or communing with the minor's debtors or creditors, might with as good reason be claimed; *3tio*, All omissions, however personal as to the curator, still become real lesion and prejudice to the minor; *4to*, However necessary the making up of titles may be, yet a curator, who enters upon his office otherwise than law prescribes, is presumed to do so rather for his own advantage, and to get access to the minor's effects, than towards the fair discharging of his office—*nam semper præsumitur contra versantem in illicito*; and though this article might have been sustained in an agent's account to a curator who employed him, that is no argugument for the curator's having allowance thereof from the minor contrary to a standing law; seeing it is not in the case of payment of a minor's debt.

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The Lords sustained the article of expenses of quot and confirmation of the minor's father's testament as a ground of compensation *pro tanto*.

Forbes, p. 185.

1707. *December* 5. JOHN CUNINGHAM of Enterkin *against* His CURATORS.

No. 247.

Curators of a minor who suffered him to intromit with his own rents during their office, accountable for the whole rents, except in so far as they could prove he actually intromitted, tho' the minor had retired receipts and renewed discharges to the tenants, and, after majority, fitted accounts with them as to preceding rests.

Enterkin's curators, who had suffered him, during their office, to intromit with his own rents, being pursued at his instance to count and reckon, the Lords, July 23, 1707, found, That the minor's uplifting a part of his rents did only make him liable for his actual intromissions, and did not exonerate the curators from counting for the whole rents, deducting what the minor uplifted. The curators now alleged, That Enterkin counted with and discharged the tenants, and thereafter retired these receipts, giving new ones in place thereof, and applying former payments in satisfaction of subsequent rents due to himself; which uncontroulable acting by himself, without advising the curators, was sufficient to exonerate them, who never meddled, further than to authorize him, when required, knowing his activity and application; especially considering, that he continued his management after majority, and fitted accounts with the tenants as to preceding rests, so that the curators could not know what he received, the receipts being retired and renewed.

Answered for Enterkin: That his discharging after majority some tenants, could not hinder to charge his curators for the rents of other tenants never intromitted with by him, and suffered to perish by the defenders' negligence. Again, seeing both the tenants and the curators were liable to Enterkin, he might take what he