Book V.
Title LIII.

Concerning the assessment oath.
(De in litem jurando.)

Bas. 38.15; D. 12.3.

Headnote.

The assessment oath, here dealt with—juramentum in litem—was an oath whereby the plaintiff assessed or taxed the damages he had suffered by the loss of any object, that is to say, he was permitted to estimate the extent of his damages and to swear that in amounted to a certain sum. But the judge had the power of modifying such assessment. Colquhaun §2339; Sherman §69 note. In general, such oath was permissible only when an action was instituted for the purpose of compelling a party to restore or to produce something, and when the defendant either from disobedience or through fraud or gross negligence had rendered restitution or production impossible. Mackeldy §376; C. 4.49.4; C. 8.4.9; C. 3.32.1.

5.53.1. Emperors Severus and Antoninus to Asclepiodotus.

When a referee is appointed in an action against the heir of a guardian for the purpose of transferring the management of the property (to you), you will demand the documents belonging to the minor, of the age of puberty, at the time of litigation. But if they are not produced through fraud, you have the right of assessing the damages by your oath, if you are willing to extend the affection you owe to your former (and present) ward as far as entering into the bonds of religion.
Promulgated August 1 (205).

5.53.2. Emperor Antoninus to Severus.

A person who demands an accounting of a guardianship or curatorship cannot be compelled, against his wish, to assess his damages by his oath. And even if he is willing, he will be permitted to do so only in case the distant heir of the guardians does not, through fraud and for the purpose of cheating, produce the documents which belong to the minor. 1. But if he is shown to be guilty of neither cheating, gross negligence or fraud toward the heir, no right to take the oath exists, but the judge will investigate the truth, inquiry into which may be made (and which may be established) by clear proofs.
Promulgated September 21 (212).

5.53.3. The same Emperor to Priscianus, a soldier.

The amount for which your former curator, who was in default, was condemned by the judge in accordance with the assessment oath taken by you cannot be diminished by a pact (compromise).
Promulgated July 1 (215).

5.53.4. Emperor Gordian to Mucianus.

There are laws that govern a guardian, others that govern an heir. For if the guardian does not produce the inventory and other documents, an assessment oath may be admitted against him; but this will be allowed against his heir only if the documents belonging to the inheritance are not produced because of fraud. 1. But since you say that issue has been joined with the guardian himself, the president of the province will use his authority in your behalf in transferring the suit against the heirs of the guardian (substituted as defendants upon the latter's death) not unaware that unless they produce the documents, he must exercise his power in accordance with the constitutions.

Note.

The doubtful point here was whether where issue was joined with the guardian during the guardian's lifetime and the action transferred against the heirs, the assessment oath was admitted against such heirs even though they were not guilty of fraud. The answer is in the affirmation. But the rule was otherwise if no issues had been joined with the guardian himself. As to transferring actions against heirs, see C. 2.9.1.

5.53.5. Emperors Diocletian and Maximian and the Caesars to Artemidorus.

Although it has been decided that for failure of making an inventory an assessment oath is not admitted against the heirs (of a guardian) in an action on guardianship, still it is agreed that a judge must render a decision against them when informed by other proofs of the fraud of the guardian.

Subscribed at Nicomedia December 25 (294).