

No 32. will be exceedingly prejudged, so that the executor must be obliged to count for the inventory, unless where he instructs he was excluded.

*Stair, v. 2. p. 689.*

1703. February 16. ROBERTSON against ROBERTSON.

No 33.

A brother having confirmed himself executor *qua* nearest of kin, neglecting a sister, and having *ex proposito* omitted several articles out of the inventory, the Lords found he had omitted the benefit of having any share of the goods so fraudulently omitted by him, and that they fell to the sister.

JAMES and John Robertsons in Dumfries having confirmed themselves executors to Andrew their brother, and neglected Agnes Robertson their sister, who had an equal third share with them, and having omitted several parcels of goods and debts belonging to the defunct, the said Agnes, and William Purdy her husband, confirm themselves executors-dative *ad omnia et male apprehiata*, and pursue John Robertson as the intromitter. THE LORDS found sundry qualifications of fraud and dole on the said John's part, and particularly that he had kept the said Purdy in prison two years for a debt, when he was more than paid in his own hand, only to force him to quit his right to a small and inconsiderable thing: But the question arose, What should be the legal penalty of this fraudulent concealment? Some proposed it should be the forfeiture of his share in these omitted *et male apprehiata* goods, and that they should *in solidum* accresce and belong to the sister; and my Lord Dirleton, in his *Dubia et Questiones*, seems to incline to this opinion, *voce* Executor *ad omnia et male apprehiata*. Others thought there was neither law nor decision to warrant this, *et erubescimus sine legi loqui*; and that it were too severe a certification, but he might be punished by the loss of the expenses of confirmation, and on the ingathering of the inventory of the testament, seeing these concealments and under-valuations are most frequent and ordinary: Yet THE LORDS, by plurality, found he had omitted the benefit of having any share of the goods so fraudulently omitted by him, and that they fell to the sister.

*Fol. Dic. v. 1. p. 240. Fountainball, v. 2. p. 180.*

No 34.

An executor was not allowed to exhaust the testament by an heritable debt paid by him without distress, he having omitted to do diligence against the heir for his relief.

1704. December 26. ROBERTSONS against BAILLIE.

GILBERT ROBERTSON in Inverness, by his testament, nominates Jean Campbell his spouse, his executrix. She is afterwards married to William Baillie commissary of Inverness, who confirms the first husband's testament in the relict's name, and intromits with a considerable moveable estate. Janet and Isobel Robertsons her daughters, and as nearest of kin to their father, pursue their mother, and Baillie her present husband, to count to them for the inventory of the testament. *Alleged*, It is exhausted conform to a decret of exoneration produced. *Objected*, That though they allowed all the legacies and testamentary debts, with the privileged funeral charges and medicaments instructed, to be paid, yet she could not exoner herself with an annuity of 400 merks yearly due to Marjory Ross, the said Gilbert's mother, whereof she produced discharges for four years