

alleged, That the defender, being only pursued as executrix, and having only done diligence against the debtors of the said Thomson who left the legacy, all she was bound in law to do, was to assign, or to do diligence, that the pursuers might recover payment. It was *replied*, That any diligence done against the debtors being only by obtaining decret, and no execution used for many years after the decret, the debtors were now insolvent, so that the pursuer was not obliged to take an assignation; but the defender is liable for suffering the debtors to become insolvent. It was *duplied*, That the executrix obtaining a decret against debtors, constituting the debt against them, who, at that time, were reputed to be solvent, the executrix was not obliged farther to execute the same; and they ought to be presumed to be now in no worse condition.—THE LORDS did find the executrix liable, notwithstanding she had obtained decret, for not executing the same, unless she could prove, that, the time of the decret, the debtors were bankrupts, and had no estate that could be recovered.

No 31.
was found
liable, unless
he would
prove the
debtor was
insolvent at
the time of
the decret.

Fol. Dic. v. I. p. 240. Gosford, MS. No 817. p. 515.

1679. February 7.

PEARSON *against* WRIGHT.

IN the case of Pearson of Kippenross against one Wright, the LORDS found an executor-creditor liable to do diligence for recovering what he had confirmed, yea as exact as other executors, who are bound the length of a registrate horn-ing. And this the Lords resolved to make a precedent for their constant decision in the like cases hereafter.

No 32.

Fol. Dic. v. I. p. 240. Fountainball, v. I. p. 41.

* * * Stair reports the same case:

JAMES PEARSON of Kippenross, as assignee by James Buchanan to the sum of L. 300 due by James Sinclair, obtained decret against James Wright as executor to Sinclair. Wright suspends, on this reason, that he is but executor-creditor, and therefore is only obliged to assign, but to do no diligence. It was *answered* for the pursuer, That though executors-creditors have not been holden to do the most exact diligence for recovering the defunct's debts, yet, in this testament, there being confirmed the defunct's moveable goods, which are perishable, and which are presumed to have been possessed by the executor, so that, without necessity of diligence, he must be liable for the superplus of the moveables more than pays himself;

Which the LORDS found relevant, unless the executor condescend and instruct how he was put from the possession of the moveables; for, if testaments do not instruct against executors confirming, that the goods in inventory were existent, upon which they make faith, the interest of creditors, wives, and bairns

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 omissa et male appretiate*, 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 appretiate* 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 omissa et male appretiate*. 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