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 amitted 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 appretiata*, 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 appretiata*. 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 amitted 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. *Fountainhall*, *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 decreet 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

posterior to her husband's decease, because that liferent annuity was heritable *quoad debitorem;* that is to say, the debtor's heir was bound to pay it, and relieve the executor of the same, and therefore ought not to have been ultroneously paid by her, the executor, without a distress by a process, and decreet obtained against her. *Answered*, The creditor in law has both the heir and executor liable and subject to him, and he may pursue and affect any of them he pleases, at his option; only, law has provided recourse to the heir against the executor, where the heir is compelled to pay a moveable debt; and *e contra* the executor has relief against the heir if he pay an heritable debt; but this does not hinder an executor to make payment of a true debt, though heritable, without putting the creditor to the charges of a pursuit; and though it be voluntary, yet they may recur against the heir, as he who is *primo loco* liable for such debts; as was found 7th March 1629, Falconer *contra* Blair, *voce* PROOF. *Replied*, This being an annuity, not accessory or relative to any principal sum, it did not burden his executor, there being *quot anni tot debita, l.* 4. *D. de ann. et menstr. legat.* and was so decided by the Lords, 5th February 1663, Hill *contra* Maxwell, *voce* HERITABLE and MOVEABLE; and so Lord Stair seems to understand it, *lib.* 3, *tit.* 8. However you have neglected to seek relief of this debt from the heir, and therefore can never burden the executry due to us *jure sanguinis* therewith, but must take it in your own hand, and operate your own relief as you think fit, having paid it without a sentence, and so exhausted the inventory by partiality and gratification, in preferring one creditor to another, which is unwarrantable. THE LORDS considered that a sum may be heritable *quoad* the creditor, and fall to his heir, and yet be moveable *quoad* the debtor, and *primo loco* affect his executry and moveables, *et e contra*; but here they found the executor paying this heritable debt without a sentence, and having never pursued the heir to make him liable for it, she cannot exhaust the testament thereby, nor get allowance of the same. No 34.

Then she claimed a third of the dead's part, as being executrix nominate. *Alleged*, That, by the 14th act 1617, that third is only due to stranger executors, which the relict is not, but falls to a third of the whole; and it were unjust to give her likewise a third of the dead's part; and so thinks Lord Stair, *lib.* 3. *tit.* 8. and that stranger-executors get a third for their encouragement to accept, even as the fiduciary heir among the Romans deducted his *quarta trebellianica*; and in this sense the heir was found a stranger-executor, and got a third as having no proper interest in the executry,—December 1690. *Answered*, Wives fall their share in their husband's moveables, not *jure successionis*, but rather as a division of the communion of goods now ceased by the dissolution of the marriage; and Sir George Mackenzie, in his first observation on that act of parliament 1617, seems to incline to give the wife a third of the dead's part. THE LORDS having balanced the decisions, and particularly, 29th November 1626, Forsyth, *voce* EXECUTOR; 9th July 1631, Wil-

No 34. son, Ibid.; and 15th January 1674, Paton, Ibid.; they found a relict being executrix nominate, had no right to a third of the dead's part.

In the preceding decision the question was, where the creditor died, whether his heirs or executors had right to the money? In the first branch of this decision, the doubt is just in the opposite case; the debtor dying, whether his heir, or his executors are *primo loco* liable in payment of the debt, and which of them is bound to relieve the other in case of distress?

Fol. Dic. v. 1. *p.* 240. *Fountainhall, v.* 2. *p.* 250.

1708. *July* 23.

The Lord Elibank and his Sisters *against* Lord Prestonhall and Alexander Mackenzie of Frazerdale, his Son.

No 35.
An executrix was found liable for diligences and omissions, although by the testament the legatees and others therein honoured, had power, in case of her refusing or delaying to implement the defunct's will, to pursue for and affect the whole goods conveyed to her, as effectually as if the same had been directly disponed to themselves by the defunct.

Alexander, late Archbishop of St Andrews, having, by his principal testament, 'named the Lady Prestonhall, his second daughter, his executrix and 'universal legatrix, reserving to himself to burden her with what debts and legacies he thought fit, and power to the persons in whose favours these should 'be granted, to pursue her for implement, and she refusing or delaying to do 'the same, to pursue for and affect the whole goods conveyed in her favours, 'as freely and fully as if they were disponed directly to themselves by the testator.' Thereafter by a codicil, he burdened his executrix with the payment of some particular debts and legacies, and ordained her to divide the remainder of his effects betwixt herself, and her eldest sister the Lady Elibank, and her children. Both the sisters being now dead, the present Lord Elibank and his Sisters, as representing their mother, pursued the Lord Prestonhall to count and reckon for his and his Lady's intromission with the Bishop's executry, and Alexander Mackenzie of Frazerdale their son, as executor to his mother.

Alleged for the defenders; The Lady Prestonhall was not bound to do diligence as an ordinary executor, but only liable for the equal half of her actual intromissions; and being equally concerned in the subject, law presumes she acted providently. So they are willing to assign the equal half of all outstanding debts, which is all that the testament and codicil obligeth them to: It being provided in the testament, 'That in case that the executrix should refuse or 'delay to make payment, the legatars might pursue and affect the defunct's 'goods and gear, as effectually, as if they were immediately conveyed to 'themselves;' which argues, That the Bishop did not intend to oblige the executrix and her husband to more diligence for his sister's half of the executry, than for their own.

Answered for the pursuers; Executors are liable for diligence, when they have little or no benefit by the testament; and the Lady Prestonhall, who had