

No 62. prized the goods within a half or third of the true avail, to the advantage of the executor, and prejudice of the wife, bairns, or creditors.

THE LORDS did also allow aliment to the wife out of her husband's moveables to the next term, albeit she liferented an annualrent, payable at the next term. See HUSBAND and WIFE.

Fol. Dic. v. I. p. 275. Stair, v. I. p. 90.

No 63.

An executor is obliged to depone both upon subjects omitted, and the wrong appropriation of those confirmed, at the instance of the executor *ad omissa*.

1667. July 18.

JOHN KER against JEAN KER.

JOHN KER being executor-dative *ad omissa et male appretiata*, pursues Jean Ker, as principal executrix, for payment, and referred the particulars to her oath. She *alleged*, That she had made faith at the time of the confirmation, that nothing was omitted or wrong prized, she could not be obliged to depone again. It was *answered*, That this was the ordinary custom, and was no more than a re-examination, and that it would not infer perjury though it were different; because, if she had any thing omitted that had come to her possession and knowledge after the inventory, or if she had then possessed it, but did not know, or remember, that it was in her possession, or in *bonis defuncti*, and ordinarily the prices are made by the Commissary, and but upon conjecture, and may be much better known thereafter.

THE LORDS repelled the defence, and ordained the executrix to depone.

Fol. Dic. v. I. p. 275. Stair, v. I. p. 477.

No 64.

The estimation put upon goods by the defunct himself, must be the rule, in which case, there is no place for an executor *ad mala appretiata*.

1672. February 2.

WILLIAM MARTIN against AGNES NIMMO.

WILLIAM MARTIN, as executor *quoad non executata et appretiata*, pursues the said Agnes Nimmo, who was executrix confirmed to her husband, Abraham Pargillies. It was *alleged*, That he could have no right, because he was neither a creditor nor nearest of kin to the defunct; neither were the particulars libelled *dolose* omitted, seeing they consisted of a number of bolls of corn, which were estimated by the defunct himself to the third curn of the growing crop, and was so given up in inventory. It was *replied*, That the crop being then in the barn-yard, and in the defender's possession when the testament was confirmed, she knowing that they amounted to much more than the husband did estimate, was in *pessimo dolo* to make that inventory, and make faith thereupon, and so ought to forfeit her right, which must fall and belong to the pursuer, as executor *ad omissa* and *male appretiata*. THE LORDS, in *hoc facti specie*, did not find that the executor was *in dolo* being a woman, and having given up inventory by a procurator, as her husband had estimated the same, and therefore assoilzied her; but they did not decide, if she had been *in dolo*, that a

stranger being executor *ad omissa*, would have right in prejudice of a creditor or nearest of kin, which in reason and law seems not to be sustained; for, albeit as to the principal executor he would be preferred, yet the fault of the principal executor ought not to prejudice the nearest of kin, or a lawful creditor, who would have good action against the executors *ad omissa* to make compt *deductis impensis*.

No 64.

Fol. Dic. v. 1. p. 275. Gosford, MS. No 458. p. 238.

* * * Stair reports the same case :

ABRAHAM PARGILLIES having no children, nominates his wife, Agnes Nimmo, his executrix and universal legatrix, and gave up his crop that was then upon the ground at the third curn, and at L. 4 the boll. She confirmed the testament after separation of the crop. William Martin being nearest of kin to the defunct, takes a dative *ad omissa et male appretiata*, and thereupon pursues the executrix for the quantities and prices of the corns more than she confirmed, the quantities being much more, she having gotten L. 6 for the boll, and having confirmed after she knew the quantities and prices. It was *alleged* absolutor; because the defender being universal legatrix and relict, all that was omitted belongs to herself; and albeit an executor that has only right by his office will be excluded, if *dolose* he omitted, yet legatars will not, but have access against all, even *ad omissa*. 2do, The husband having given up the quantities and prices of his crop by his own mouth, his determination thereof is sufficient, and greater prices cannot be demanded; for, if the prices had fallen lower, the executrix would have been liable for the prices expressed by the defunct. 3tio, Though these prices should not hold, *etiamsi sit magna differentia*, yet it is sufficient *purgare dolum*.

Which the LORDS found relevant; but had no need to determine, whether *dolose omissa* were lost to the executor, whatever her interest were, whether by her office only, or also by any other interest.

Stair, v. 2. p. 59.

1679. February 7. PEARSON against WRIGHT.

THE inventory given up by the executor must be the rule of the charge unless he prove that it was given up at random, and was truly less.

No 65.

Fol. Dic. v. 1. p. 276. Fountainhall. Stair.

* * * See This case, No 32. p. 3497.