making inventories being mainly to secure the goods to creditors, legatars, and nearest of kin, which was unnecessary here; so that no body was prejudged, and it would all have fallen by his escheat; and such an executor who has the whole interest can transmit it by assignation without confirming every particular. *Answered*, This opens a door to fraud and perjury, and concealing of moveables, and is against our law, whereby one may die *partim testatus partim intestatus*, though they could not by the Roman law; and her discharge did not convey nor transmit the right of the omitted goods *positive*; and before the discharge, the brother was at the horn, and after denunciation, he could not validly discharge the curator. See the case of Sandilands in Stair's Institutions, tit. 30. No 46. (*See* APPENDIX.) No 5.

THE LORDS having advised the debate, and writs produced, found that Thomas Inglis, his being confirmed executor to his mother, did not empower him, either to transmit to, or discharge the curator, except as to the inventory confirmed; and that therefore there was place for Janet Inglis to obtain herself confirmed executor *ad omissa* to her mother, as to what was not confirmed; but find that the said Janet, pursuer, having granted a renunciation in favours of Thomas Inglis, her brother, of all interest or benefit could fall to her, as nearest of kin by her mother's decease; and she having acquired a supervenient right in her person by this testament *ad omissa*, it doth accresce, and is profitable to sustain the discharge granted by Thomas Inglis to the curator, as to the half of the executry which did fall to Janet by the mother's decease; but find, notwithstanding of the renunciation foresaid, the pursuer, by her testament *ad omissa*, may claim and have right to that half of the executry omitted, which did fall to Thomas, as the other nearest of kin by his mother's decease, deducting the sums contained in Thomas's confirmed testament; and ordain the count and reckoning to proceed accordingly. Then it was *alleged* for M'Morran the defender, that umquhile Thomas Inglis had as much heritable estate as would make his discharge to the curators effectual, which, if the pursuer did intromit with, she would be liable in the warrandice of her brother's discharge, as representing him; and if she did not intromit therewith, the same must be liable to the defender, as creditor by the warrandice.—THE LORDS remitted this article to be heard by my Lord Castlehill, Auditor. This was a very subtile debate.

Fountainhall, v. 1. *p.* 427.

1709. *June* 7.

LADY GRANGE, and her Husband, *against* CHEISLEYS, her Sisters. No 6.

The price of some land not having been added to an

WHEN Major Cheisley of Dalry died, his three brethren and three sisters are confirmed executors to him; but the remnant of the price of the lands of Dal-

No 6.
inventory, through uncertainty whether it ought to have belonged to the heir or execuor; having been afterwards determined to belong to executors, found to have been transmitted to the representatives of one of them deceased, by virtue of the protestation to eik.

ry, sold by the Major to Sir Alexander Baird, not being then clear, whether it was heritable or moveable, it was not confirmed, till the LORDS, long after the confirmation, by their interlocutor, found it fell under executry, and then it was eiked to the principal testament by a dative *ad omissa*; and the heir finding he would have no benefit by the heritage, offered to collate, and so came in for his sixth share of the executry. Robert, one of the executors confirmed, dying abroad, by his testament, legated his part to my Lord Grange's Lady, his sister. And she, by virtue thereof, claiming both her own share due to her *jure sanguinis*, and her brother's by his legacy, it was *contended* by the other sisters, that Robert's transmission of his share of the price was *a non habente potestatem*, no legal right of it being established in his person during his lifetime, seeing it was no part of the inventory of the testament wherein he is confirmed an executor, and never existed during his lifetime, the LORDS' interlocutor finding the price moveable, and the eiking it to the testament, being both posterior to his death, and no more can be said to be confirmed than what was in the inventory; even as in the service of an heir, he has right to no more lands than what are in the brief and claim; so, if one be heir apparent to two baronies, if he only serve to one of them, he can never validly transmit any right, or dispone upon the other; even so here, an executor is *hæres in mobilibus*, and has no more right than what he gives up in the inventory. It is true, before the 14th act, 1617, the executor nominate intromitted with all, but it was then redressed as an abuse; for an executor is no more than what the common law calls *hæres fiduciarius*, a feoffee and trustee for the behoof of the creditors, legatars, relict, and nearest of kin, and for which service he got the *quarto tribellianica*; and we, for his encouragement, give him the third of the dead's part; and if he be denounced to the horn, the whole moveables fall not under his escheat by the rebellion, but only his own share, as was found, 21st December 1671, Gordon, No 86. p. 3894., and can never pretend to more than they confirm; and so the LORDS, on the 17th February 1663, Forsyth *contra* Paton, No 6. p. 2941., found the father had no claim to his own child's goods, because he had neglected to serve him heir to his mother. *Answered*, That Robert Cheisley having not only survived the Major, his brother, but likewise being confirmed, he had a clear interest in the whole executry *jure sanguinis*; and his omitting then to confirm the price, was noways fraudulent, being then *sub judice*, and undetermined, whether it fell to the executor, or to the heir; and so soon as the LORDS found it moveable, it was eiked. And though Robert was then dead, *non refert*, for his legating is all one, as if he had assigned it by writ *inter vivos*, in which case it would have carried all. And the parallel case was found, 12th February 1662, Bells *contra* Wilkie, No 2. p. 9250., where the share of a testament unexecuted was found to transmit, without necessity of a new confirmation *ad non executa*. See Mackenzie's Observations on the said act 1617; Stair, B. 3. T. 8. § 51., and 28th November 1676, Ker, No 4. p. 9253. And an eik to a testament being but an accessory, it

accresces to the principal executor, as every *accessorium sequitur suum principale*; so here the price eiked must belong to Robert, and must be transmitted by his legacy to the Lady Grange, his sister. THE LORDS found, seeing Robert was confirmed one of the executors under protestation to eik, and that it was not then clear, whether the price would fall under the executry or not, but was so determined after his decease; that his transmitting it to his sister by testament, gave her his share of the price, as if it had been actually confirmed in the first inventory, and though he was dead before the same was eiked. No 6.

Fol. Dic. v. 2. p. 2. Fountainhall, v. 2. p. 500.

1729. *December* 17. SHEARERS *against* WILSON. No 7.

A Commissary, upon application made to him, having inventoried and sealed up the defunct's writs, and taken them into his custody, was decerned to deliver them up to the nearest of kin of the defunct, though they were not confirmed executors *qua* nearest of kin; which was found upon act 26th, Parl. 1690, discharging the necessity of confirmation; for this statute supposes that where the relict, children, or nearest of kin are willing to subject themselves universally to the defunct's debts, they may enter to possess without any confirmation. Hence the successor, whether in heritables or moveables, may continue the defunct's possession, without making up titles; and the relict, or nearest of kin, without confirming, may recover possession of what has been unwarrantably intromitted with after the defunct's death. *See* APPENDIX.

Fol. Dic. v. 2. p. 3.

1731. *February* 2. CAMPBELL *against* M'LEOD. No 8.

A son having accepted of a property from his father, and renounced all he could ask or crave by his father's death; his children, who were nearest of kin to their grandfather at the time of the confirmation, were excluded in competition with a remoter decendant of another child who had not renounced.—THE LORDS went upon this footing, that a father, by taking such a renunciation, means to exclude, not only the renouncer, but his or her descendants, reserving his effects to his other children and their descendants. But this exclusion will not have place where the competition is with the fisk, or even with collaterals; and some of the LORDS were of opinion to carry the exclusion no farther than in favour of the children themselves, not of their descendants. *See* APPENDIX.

Fol. Dic. v. 2. p. 4.