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 prejudge 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* absolvitor; 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*. 2*do*, 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. 3*tio*, 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.