No 4. whose testament was confirmed by the said Jean. It was *alleged* for the defender, That the pursuer could have no right by any of these titles, because the said Mark himself died before James' testament was confirmed, or any sentence obtained, or established for the fourth part in his person, and so by our law they were in the case of *hæreditas non adita*, and were transmitted to surviving nearest of kin, who were his brethren and sisters. It was *replied*, That James Ker's testament being confirmed by the defender before Mark's decease, *ipso facto* she was liable to him for a fourth part as executor creditor to Mark. It was *secundo alleged*, That the pursuer could not have a right as donatar to Mark's escheat, because nothing could fall under his escheat but what was actually established in his person; but so it is, he never did obtain decreet for the fourth part, and so it could not fall under his escheat. It was *replied*, That the fourth part of his brother's testament being a moveable sum, and he dying at the horn, did fall to his donatar. THE LORDS did repel the first defence, and found that James' testament being confirmed, the defender as executor was liable to Mark for his fourth part and consequently to the pursuer as his executor creditor, as to all sums due by bonds bearing annualrent, but as to all other sums or moveables they found they fell under Mark's escheat, and belonged to his donatar conform to the act of Parliament 1641, and so found that Mark dying, who had never a sentence establishing a fourth part in his person, nor confirming himself, did not take away from his executors his right, which was transmitted to them so soon as his brother James' testament was confirmed.

Gosford, MS. No 910. *p.* 588.

*** Stair's report of this case is No 102. p. 3926, *voce* EXECUTOR.

1686. *November.*

INGLIS and ANDREW CHARTERS her Spouse *against* M'MORRAN.

No 5.
There having been a partial confirmation, it was found that the right of what remained unconfirmed, did not pass to the executors, but remained *in bonis defuncti.*

THOMAS INGLIS, executor *qua* nearest of kin to his mother, having confirmed a short inventory, and yet discharged the whole debt due to the defunct, particularly a debt resting by one M'Morran, which was not confirmed, his sister Janet, who had renounced in his favours, her interest in their mother's executry, and taken the gift of his escheat for repairing the prejudice she sustained by the renunciation, did after his decease confirm herseslf executrix *ad omissa et non executa* to the mother, and pursued M'Morran.

Alleged for the defender; That the pursuer was cut off from her interest, as nearest of kin to her mother, by the renunciation to the brother, who had discharged the defender.

Answered for the pursuer; The renunciation was granted without any onerous cause, before the mother's decease, when there was only *spes successionis*; 2*do*, It imports only a *non repugnantia* to the brother, in case he had confirmed the whole estate; but since he hath omitted a part, the right is devolved by

law on the pursuer, as now sole nearest of kin to the mother; so that the discharge from Thomas, who upon the event had no legal right established in his person, cannot secure the defender. No 5.

Replied; Albeit the interest of nearest of kin doth not transmit without confirmation, the brother's confirmation is *aditio hæreditatis mobilium*, and preserves his right, and transmits it, even as to what was not contained in the inventory confirmed; because, 1*mo*, By the civil law a person could not die *pro parte testatus, pro parte intestatus*, and so the *aditio* could not be partial. Now, Thomas hath confirmed a part *sine fraude aut dolo*; 2*do*, Before the year 1662, a testament was not counted executed, even by a total confirmation, unless there had been a sentence recovered thereon; and yet the LORDS have since found, that the interest of the nearest of kin being *jus sanguinis*, and favourable, is transmitted by confirmation only without a sentence. Now, the extention is as rational to sustain a total transmission by a partial confirmation, as it was to dispense with the execution by sentence; 3*tio*, The renunciation, though gratuitous, must exclude the pursuer's pretentions, and her confirmation *ad omissa* accresceth by the renunciation, and also the gift of escheat which was given to her for making up her loss by the renunciation, as appears from the back-bond to the Exchequer, although, if the Commissaries had confirmed any other person, the effect of the renunciation, that is not a positive right, would have been cut off.

Duplied for the pursuer; 1*mo*, By our law a person may be *hæres pro parte*, both in heritage and moveables; 2*do*, Confirmation being a full *aditio*, a sentence was not found necessary in order to transmission; but there is not *par ratio* in this case, where the goods not confirmed are *in bonis* of the deceased mother, and so could not be *in bonis* of her son; 3*tio*, There is no representation in moveables with us, and so the brother's descendents cannot compete with his sister, who is the nearer degree; 4*to*, The renunciation being no positive communicating right, but only a *non repugnantia*, passing from the making a concourse with Thomas, to hinder him from the executry; but he being dead, and the *omissa* at the Commissary's disposal, who might have confirmed his own fiscal) it was lawful for the renouncer to take the confirmation *ad omissa tanquam quilibet*; nor did she in the least contravene the obligement in the renunciation thereby, far less by taking the gift of Thomas's escheat upon his rebellion, many years before the mother's death.

THE LORDS found, that the right of what was unconfirmed did not pass to Thomas's executors by the partial confirmation, but remained *in bonis* of the deceased mother, and that the gift of escheat, and the supervenient confirmation *ad omissa*, did accresce by the renunciation *quoad* the half, which was the renouncer's interest as nearest of kin the the time of the renunciation; but that the said gift of escheat and confirmation subsisted *quoad* Thomas's part, viz. the other half, which the renunciation did not concern.

Fol. Dic. v. 2. p. 2. & 3. Harcarse, (EXECUTRY.) *No* 444. *p.* 121.

No 5.

*** Sir P. Home reports this case:

JOHN M'MORRAN having obtained a gift of curatory to Isobel M'Morran his sister, who was fatuitous, and having intromitted with a yearly annuity of 1800 merks, provided to her in liferent by her contract of marriage, and Thomas Inglis her son being decerned executor, as nearest of kin to her, and having confirmed only L. 300 Scots, and he having likewise deceased, and Janet Inglis his sister being decerned executor dative *ad omissa*, and as nearest of kin to her mother; pursues James M'Morran as representing John M'Morran, his father, the curator, for count and reckoning for his father's intromissions with Isobel M'Morran, the mother's annuity. *Alleged* for the defender, That he could not be liable to count for his father's intromissions preceding the year 1659, because Thomas Inglis the son had granted a discharge to the defender's father, of his intromission preceding that time in the year 1659; and after his mother's decease, which was in the year 1678, he being executor confirmed to his mother, he granted a ratification of the former discharge. *Answered*, That the discharge in the year 1659, could not exoner the defender, because Isobel M'Morran the mother being then alive, Thomas, the son, had no right to discharge any thing that belonged to her, during her lifetime, and yet the ratification granted in the year 1679, after the mother's decease, and that Thomas was confirmed executor, can operate no farther, but in so far as he was confirmed, which was only in L. 300; so what was more than that sum was *in bonis defuncti* of the mother, and consequently belongs to Janet Inglis the daughter, as executor dative *ad omissa* to her mother. *Replied*, That albeit Thomas, the son, had no right to discharge what belonged to the mother, during her lifetime, yet after her decease, he being executor confirmed to her, and as executor, having ratified the foresaid discharge, it must exoner the defender of all his father's intromissions, albeit Thomas had confirmed only a part of the moveable estate, seeing the rest did accresce to him as executor confirmed in a part; and whatever may be pretended in the case of an extraneous person, who has no more but a naked office, and confirmed only for the use of the creditors, legatars, and others having interest, in that case he could discharge no more than what is confirmed. But it is otherwise in the case of an executor, as nearest of kin, who having confirmed and accepted of the office of executor *et sic adeat hæreditatem*, the confirming of a part gives him right to transmit to his nearest of kin, the rest of the executry, albeit not confirmed. And by the 14th act of Parliament 22d, King James VI. it is provided, 'that exe-'cutors, strangers, are obliged to make count to the defunct's wife, bairns, and 'nearest of kin;' by which it appears, that the nearest of kin have right to the defunct's moveable estate, and consequently have right to transmit the same to the nearest of kin, without confirmation; and as this is clear in the general, much more in this particular case, seeing there is no person prejudged,

nor is there any person that can pretend interest in the executry but Thomas, the son, there being neither wife, bairns, nor creditors, the pursuer being excluded by the renunciation in her contract of marriage, in favour of Thomas her brother; and albeit the addition of the moveable estate by a partial confirmation should not transmit the whole executry to the executor nearest of kin, yet the confirmation of a part transmits the *jus adeundi et acquirendi hæreditatem* to the rest, so that the nearest of kin of the party confirmed by a partial confirmation may confirm the rest, for in law *aditio hæreditatis est actus legitimus quæ non recipit diem nec conditionem*; and *hæreditas* being *individua* the addition of a part must transmit the whole; and in the case of Bell against Wilkie, No 2. p. 9250, the LORDS found that the nearest of kin might transmit the right of the defunct's moveables to their nearest of kin, without confirmation. *Duplied*, That a partial confirmation of the moveable estate is not such an addition as transmits the whole executry to the nearest of kin; because it is a certain principle in law, that *hæreditas non adita non transmittitur*; but a confirmation of a part of the executry cannot be understood to be an addition of the whole moveable estate, in respect the executor having confirmed only one part, has declared his intention that he will have right to no more of the moveable estate, but only to that part he has confirmed, and so can transmit no more to the nearest of kin than what he has confirmed; and by the analogy of law, the nearest of kin confirming themselves as executors, has the same effect as to the moveable estate, as an apparent heir serving himself heir in special to lands, and being infeft; but an apparent heir being served heir in special, and infeft in several lands, can transmit the right of no other lands but of those to which he was served heir in special and infeft; and the other lands to which he might have succeeded will go to the heirs of the person that died last infeft, and not to the heirs of the apparent heir; and so by that same reason and analogy of law, the apparent heirs who are nearest of kin *in mobilibus* cannot transmit the right of any moveable estate to their nearest of kin, but in so far as the same was confirmed, and by the constant custom and practice of the Commissary Court of Edinburgh, and of all the Commissary Courts of Scotland, if a child be confirmed executor as nearest of kin to the mother, to a part of the moveable estate, when the rest of the moveables come to be confirmed after the child's decease, it was always confirmed as *in bonis defuncti* of the mother, and not of the child; which is a clear evidence that the moveable estate not confirmed by the child was not transmitted to his nearest of kin, but was *hæreditas jacens et in bonis defuncti* of the mother; as also, the moveable estate not confirmed does not fall under the executor's escheat, nor is it subject and liable to be affected with his debts; and if the nearest of kin, confirming a part of their moveable estate should give them right and interest *ad assem hæreditatis*, by the same reason and analogy of law, it should make the nearest of kin confirming a part subject and liable to the defunct's whole debts, by an universal passive title, seeing the one necessarily follows the other; and yet by our law, *hæres in mobilibus* is

No 5.

No 5. only liable *secundum vires inventarii*, which is certainly upon this ground, that the executor is not farther liable for the defunct's debt than only in so far as he confirms; and it is clear from the principles and analogy of law, that the confirming of a part of the moveable estate does not transmit the right of that which is not confirmed to the executor's nearest of kin; so likewise, by several decisions, and particularly in the case of Forsyth against Paton, No 6. p. 2941, where the LORDS found that a child, not being confirmed executor to his mother, could not transmit the right of the moveable estate that might belong to him as nearest of kin, and consequently to his father, as his nearest of kin, but the same belonged to the nearest of kin of the mother; and the same was decided in the case of the Duke and Dutchess of Buccleugh against Earl of Tweedale, No 8. p. 2366; and Wilson against Nicolson, No 1. p. 9249, where the LORDS found, that albeit a child was confirmed executor, both to the father and mother, the child dying before the testament was executed, that the right of executry, in so far as belonged to the mother, was not transmitted to the nearest of kin of the child, but to the nearest of kin of the mother; and if the tight of the executry could not be transmitted, unless the confirmation had been executed in the child's person, much less could it be transmitted when the same was not confirmed. And if it were otherwise sustained, that the nearest of kin confirming a part of the moveables should transmit the right of that which was not confirmed to the nearest of kin, it would cut off all confirmation, at least, of the greatest part of the moveable estate in prejudice of the Bishops, their quots, and the Commissaries of their dues; for hereafter, albeit the moveable estate were never so great, yet the nearest of kin would only confirm some small part thereof, in order to transmit the whole, and there should be no need of confirmations of dative *ad omissa*; so that if partial confirmations were sustained to give right to the whole moveable estate, it would overturn the foundations of our law as to the confirming of testaments; and the act of Parliament of King James the sixth is a correctory law introduced to rectify that unjust custom, that where executors strangers were confirmed, they did carry away the whole moveable estate in prejudice of the defunct's nearest of kin, and so is strictly to be understood, and only gives the nearest of kin an interest in the defunct's moveable estate, where there was an executor stranger confirmed, that they might call them to an account; but that act gives the nearest of kin no interest to the moveable estate of the defunct, where there is no executor confirmed; or if a stranger be confirmed, it is evident by the act, that the nearest of kin in that case have no farther interest to call the executor stranger to an account, but only in so far as he is confirmed; seeing it is a principle that an executor, especially a stranger, who has but the naked office, cannot be farther liable but *secundum vires inventarii*; so that there is nothing provided by that act, that the nearest of kin who are strangers, being confirmed executors in a part, should have right to the whole moveable estate not confirmed, but only in so far as it is confirmed; for it is evident by that act, that it is supposed that the executor stranger had

No 5.

confirmed the whole moveable estate; so that if the whole moveable estate be not confirmed, but only a part, the nearest of kin, by that act, can transmit no right to his nearest of kin, but what is confirmed, and not the right of that which is not confirmed; and whether they be wife, bairns, or creditors, prejudged or not, it does not alter the case, but the preparative is to be considered. If there were a wife's children or creditors, and the renunciation granted by the pursuer in her contract of marriage in favours of Thomas her brother cannot prejudge her, nor establish the right of the moveable estate that might fall to her by her mother's decease in favours of Thomas; nor can Thomas, his discharge, as having right by virtue of that renunciation, operate against the pursuer; for, *first*, as to Thomas, his part of the moveables that might belong to her as executrix, and one of the nearest of kin to his mother, that was more than L. 300 confirmed, he not having confirmed the same in his own time, that half of the mother's moveables was *in bonis defuncti* of the mother, and after Thomas, his decease, doth now belong to Janet his sister as executrix dative *ad omissa* and nearest of kin to the mother; so that the sister not having so much as *jus apparentiæ* in so far as concerns that half of the moveables that might have belonged to Thomas the time of his granting of the renunciation, the renunciation cannot prejudge her as to that half, neither can the renunciation prejudge the pursuer as to the other half of the moveables, whereof she had *jus apparentiæ* the time of the granting of the renunciation; because Thomas the brother, in whose favours the renunciation was granted, confirmed not the same in his own person; and all that the renunciation could operate as to the pursuer was only a *non repugnantia*, that she could not hinder Thomas to confirm her mother's whole moveables; but he not having confirmed the same, the benefit of the renunciation did again recur to the sister, and was in the same case as if it had never been granted; so that all resolves in this, that if it be found that a partial confirmation doth not transmit the whole executry to the executor's nearest of kin, but only in so far as is confirmed, then the discharge and ratification granted by Thomas cannot prejudge the pursuer, nor be effectual to the defender, but only in so far as concerns the L. 300 which Thomas confirmed; and the nearest of kin confirming a part of the moveable estate doth not transmit the *jus adeundi et acquirendi* of the rest of the estate to the nearest of kin, because *jus adeundi et acquirendi hæreditam* is only personal to the nearest of kin, and cannot be transmitted to the nearest of kin unless the same were confirmed, and the faculty exerced in their own time, as is clear from Guidelin *De jure novis* lib. 2. cap. 18. page 82, who is express that 'jus adeundi et acquirendi hæreditatem est personale, quia tribuitur hoc jus a testatore, vel a 'lege ob merita alicujus, vel ob affectum erga eum, vel ob necessitatem sanguinis, vel ob alias ejusmodi causas personæ coherentes,' which being only some personal respects, cannot be transmitted by the nearest of kin unless the faculty be exerced in their own time; and that subtilty in the civil law, that *aditio hæreditatis* was *actus legitimus*, and that an addition of a part of the heritage trans-

No 5. mits the whole, in respect *hæreditas* was *individua* is receded from the custom and practice of all nations, as appears by Guidelin, in the forecited place; and as to the practick of Bells against Wilkie, it does not meet this case; because, in that case there being three sisters that were confirmed in the whole moveable estate as nearest of kin to their mother, and one of them having died before the testament was executed, the question there was, if that daughter could transmit that part to her nearest of kin, albeit the testament was not executed as to her part, and albeit it was the constant custom before that time that if the testament was not executed by the nearest of kin in their own time, that they could not transmit the right of the executry to their nearest of kin, which was conform to that decision in Durie, No 1. p. 9249, but the LORDS did so far alter the former custom and practice by that decision, that they found that if the nearest of kin were executors confirmed, albeit the testament was not executed, yet they might transmit the right of executry, in so far as was confirmed to their nearest of kin. But there is nothiug in that decision finding that the nearest of kin could transmit to their nearest of kin that part of the moveable estate that was not confirmed, but the contrary is insinuated, that the nearest of kin could transmit nothing to their heirs, but only in so far as they were confirmed. THE LORDS found, that Thomas Inglis being confirmed executor to the mother, did not empower him either to transmit or discharge the curator, except as to the inventory confirmed, and that therefore there was place for Janet to obtain herself confirmed; but found that the pursuer having granted a renunciation in favours of Thomas, of all interest or benefit which could fall to her, as nearest of kin, by the mother's decease, and she having acquired a supervenient right in her person by the testament *ad omissa*, it doth accresce, and is profitable to sustain the said discharge granted by Thomas Inglis to the curator, as to the half of the mother's executry 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 ordained the count and reckoning to proceed accordingly.

Sir P. Home, MS. v. 2 No 801.

*** This case is also reported by Fountainhall.

1686. *November* 16.—THE LORDS consumed a whole forenoon in advising the debate between James M'Morran, and Andrew Charteris and Janet Inglis, his spouse. Janet Inglis's brother having given her a tocher of 6000 merks, he took from her a renunciation of all that could befal her by Isobel M'Morran her mother's decease. Notwithstanding of this renunciation, Janet Inglis, and Andrew Charteris, her husband, pretending that some curator accounts were not confirmed by her brother in his mother's testament, they take a dative *ad omissa*, and pursue. *Alleged*, He was not a stranger executor, but the nearest of kin, and so might omit what he pleased; the use and design of

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-