No 11.

fice, and the right of succession, may be renounced; and, as the renunciation will exclude the renouncer, so it will give the next in kin a right to claim the office, and to take the succession.

Triplied, The pursuers are endeavouring to introduce a solecism hitherto unknown in the law of Scotland, viz. That any remote relation should be preferred to the nearest of kin in a moveable succession never yet taken up; founding their argument on a mistaken supposition, That the renunciation of a child extinguishes the *jus sanguinis*, just as if the renouncer were naturally dead, which is by no means the case. And, as a demonstration of the contrary, let it be supposed, which may often happen, That a man has provided all his children, and taken renunciations from every one of them, would it not be absurd to maintain, that, upon the father's decease, some remote cousin, who would be his nearest of kin, if all his children were actually dead, should take his moveable estate in exclusion of them.

THE LORDS found, That the defender and her husband having, in their contract of marriage, accepted of a sum in satisfaction of her father's succession, they cannot compete for the office of executor with the pursuers, the children of a son *in familia*, the time of the renunciation.

Fol. Dic. v. 2. *p.* 3. *C. Home, No* 100. *p.* 159.

*** See Kilkerran's report of this case, No 25. p. 8187., *vocc* LEGITIM.

1745. *January* 24. CARMICHAEL *against* CARMICHAELS.

No 12.
No right is vested by a decree dative without confirmation.

IN May 1743, James Carmichael, commissary-clerk of Lanerk, died without issue and intestate, whereby the succession to his moveables opened in favour of Robert Carmichael, his brother, residing in Ireland. Robert used all diligence to make up his titles, which was done by a commission from him. A decree dative was obtained 5th September, an inventory given up, caution found, and, upon the 20th September 1743, the testament was confirmed. But notice having come from Ireland, that Robert had died upon the 15th September, the other next of kin of the defunct apprehending that all the steps taken for behoof of Robert were of no avail, by his predeceasing the confirmation, made application for the office. This was opposed by Robert's representatives, for whom it was *pleaded*, That though the office was not established in Robert, who died before confirmation, yet that the dead's part was fully established in him by the decree-dative, so as to transmit to his representatives, who, after being confirmed as next of kin to him, are entitled to be preferred as executors to the first defunct, since the whole benefit of the office accrues to them. The commissary having sustained the edict at the instance of the next of kin of James, the first defunct, the cause was advocated; and the LORDS, upon the

No 12. principles set furth in a former decision, to wit, that the interest of the next of kin is only a succession, and that they have no right established in them capable to be transmitted to representatives, till one person or another be confirmed executor, pronounced the following interlocutor:

"THE LORDS repel the reason of advocation, in respect of the answer, and remit the cause, with this instruction, that the commissary confirm the next of kin now existing of the said James Carmichael, and that without regard to the decree-dative in favour of the deceased Robert Carmichael,"

Fol. Dic. v. 4. *p.* 18. *Rem. Dec. v.* 2. *No* 64. *p.* 101.

*** D. Falconer reports this case.

JAMES CARMICHAEL, Commissary-clerk of Lanerk, dying intestate, Robert Carmichael was decerned executor *quà* nearest of kin to him, and the confirmation was accordingly expeded; but before this could be, he had died in Ireland, whereupon James's other nearest of kin applied to be confirmed, and an opposition being made by the children of Robert, the cause was advocated, and the LORD ORDINARY, 12th December 1744, and 8th January 1745, "repelled the reasons of advocation, and remitted the cause with this instruction, That the Commissary should confirm the nearest of kin now existing, without regard to the decree-dative."

A reclaiming bill was presented, shewing, 1*st*, That by the law, as it now stands, the right of the nearest of kin is established, and transmits *sola superviventia*. 2*dly*, That, even as it formerly stood, the decree dative established the right so as to transmit.

Pleaded on the *first* point, The nearest of kin's right is not to the *ipsa corpora* of the defunct's moveables, but to a proportion of the free effects, when they are turned into money by the executor: This is a claim which never was in the defunct, as neither was the legitim; and therefore neither nearest of kin, nor children, can properly be said to represent him, but the executor, who has right to the subjects that were his. As the claim of the nearest of kin and children is originally vested in them by law, without being derived from any body, there needs no making up of titles. And these two rights stand precisely on the same footing.

That our authors have laid down confirmation as necessary, in order to vest, proceeds solely from this, That of old, a person dying intestate, his effects were left to the disposal of the bishop, who might, if he pleased, prefer the nearest of kin; but there was no compulsion upon him to do so. This appears from act 120th, Parl. 1540, by which it is statuted, "That in the case of minors, who cannot make a testament, the nearest of kin should have their goods."—Before this act it was universally in the Bishop's power to name an executor-dative, against whom the relations had no claim, and the remedy here provided was only for minors dying, who could not make testaments; but other

people were supposed, if they made none, to leave their effects to the disposal of the Bishop. No 12.

A further amendment was made by the instructions 1563, by which the Commissaries were obliged to give the office to the nearest of kin, on their applying for it, and, by means of the office, they came to have right to the effects; but they had no other way to come at them, in so far that, as low as the 1633, it was a doubt in the Court of Session, whether executing the testament, as well as confirming, were not necessary to establish their right.

The 14th act, Parl. 1617, first gives any action, independent of the office, against executors nominate, and that whether confirmed or not, and this act makes the nearest of kin's right as extensive as that of the wife and children, but even after it no claim was competent against an executor-dative; and by the instructions 1666, such were accountable to the Bishop. While our law stood thus, all our lawyers wrote, and all our decisions were pronounced; so it was no wonder it was laid down as a rule, that confirmation was necessary to vest the dead's part in the nearest of kin; which meant only, that it was necessary in order to vest the office, without which there was no coming at the effects; but at present, their right is settled on the footing of the law of nature; and when episcopacy was re-established at the Restoration, the Bishops not having so much influence over the laity, as in Popish times, it came to be held, without any express statute, that they had a civil as well as a natural right; and this is supposed in the act of sederunt 1679, concerning executors-creditors; and by the time of the Revolution, it came to be an universally established doctrine, that if they do not claim the office, the executor-dative is accountable to them, as much as an executor nominated by the act 1617.

The right of the nearest of kin is a legacy given them by law, and requires no title, any more than any other legacy: There is no author says, that, independent of the office of executor, any confirmation is necessary to establish their right; on the contrary, the act 1617 gives them an action against the executor nominate intromitting; and on the same footing, action has been sustained at their instance against other intromitters, as well as at the instance of the wife and children. These are remarkable instances of the right being established by sole survivancy; and the distinction betwixt this right and the office of the executor, is the true key to understand the meaning of our lawyers, when they talk of the necessity of confirmation.

It has been lately found by the Court, That intromission with moveables vests a right without confirmation, and this virtually was finding the point here pleaded; for if the nearest of kin had no previous right, intromission could never give them any, as it does not to the heir intromitting with heirship moveables, who, if he die without service, does not transmit them, but they go to the next heir of the first defunct.

No 12. *Pleaded* on the *second* point, If the law stood as it did formerly, there is enough done here to establish the petitioners' right; by the old law, the nearest of kin had no other means of getting the effects, but by obtaining the office; the consequence of which, in strict principles, was, that if they died before execution, their representatives had no claim against the executor *ad non executa*. This is evident from the decision, 30th January 1633, Wilson against Nicolson, No 1. p. 9249.; but as this was contrary to the law of nature, there was a strong bent on the minds of the Judges to recede from it as far as possible; and though they could not give the dead's part to one that had neglected applying for the office, they soon came to a settled opinion, that confirmation was sufficient, though he died before uplifting; and in this they followed out the intention of the instructions 1563. They went further, and found, in a cause where a man died intestate, leaving his wife with child, and the child died in infancy, incapable of taking the office, "That the child's survivancy transmitted its right to his representatives;" Durie, 19th July 1623, Sibbald against the Procurator-fiscal of St Andrews, No 12. p. 8176. This was finding, that the nearest of kin are always entitled to their right, except when they neglect to claim the office; and so was found in a case precisely similar to the petitioners', *Hope De executoribus*, 18th January 1614, where a man being decerned, died *in cursu diligentiæ* before confirmation. (See No 35. p. 5798. —See APPENDIX.

When our authors and decisions are attentively considered, they do not lay it down, that confirmation is absolutely necessary. Once execution was requisite, but this was receded from; on the other hand, when a person neglects to claim, he can transmit nothing. But this question is never stated, if a decree-dative is not sufficient? It is certain that their expressions do not exclude a decree-dative, for confirmation is used to express the procedure before the Commissary-court, as well as for the warrant to intromit, which is the last act, and in that sense may be taken for the decree-dative.

THE LORDS have found a partial confirmation sufficient, 7th June 1709, Chiesly against her Sisters, No 6. p. 9261. Now in this case, the subjects not confirmed are no more vested, than if there had been no confirmation at all; and if the dead's part transmits with regard to the subjects omitted, as well as those contained in the inventory, it can only be the effect of the decreet. There is no medium, either this must be sufficient, or nothing can transmit but what is actually confirmed.

On the whole, it has been long established, That the nearest of kin, without making up titles, has an action against the executor nominate, and against every other intromitter; it is established, that he can intromit without making up titles; it has been found, That the dead's part is vested in him by confirming the smallest part: These things cannot be made consistent but by the LORDS finding, that it is also vested, and will transmit though he died be-

fore confirmation, after taking all proper steps, without losing an hour to be confirmed. No 12.

THE LORDS refused the petition.

Petitioner, *H. Home.*

D. Falconer, v. 1. *p.* 50.

*** This case is also reported by Kilkerran.

UPON the death of James Carmichael, Commissary-clerk of Lanerk, his brother Robert took out an edict in order to a confirmation, as executor *qua* nearest in kin to him, and proceeded so far as to obtain decree-dative; but though no time was lost, Robert died before the confirmation could be got expede.

A question arose between the children of Robert and the other nephews and neices of the first defunct; the children of Robert alleging, that though the office had never been vested in Robert, who deceased before confirmation, yet that the dead's part was fully established in him by the decree-dative, so as to transmit to his children, who therefore ought to be confirmed as nearest in kin to him, and being so confirmed, were entitled to be preferred to the office of executors of the first defunct, as the whole benefit thereof was to accrue to them; the other nearest in kin of the first defunct, on the other hand, contending, that since Robert the brother had deceased before actual confirmation, the decree-dative fell, and was of no effect.

This the Commissary found, and sustained the edict at the instance of the nearest of kin of the first defunct.

The question being brought before the LORDS by advocation, the LORDS "Repelled the reasons of advocation, and remitted the cause with this instruction, That the Commissary confirm the nearest in kin now existing of the said James Carmichael the first defunct, without regard to the decree-dative in favour of the deceased Robert Carmichael." *See* SERVICE and CONFIRMATION.

Kilkerran, (SERVICE and CONFIRMATION.) *No* 5. *p.* 511.

1745. *January* 23. SOMMERVILLE *against* MURRAY'S CREDITORS.

No 13.

THE LORDS, upon a hearing in presence, determined, that a partial confirmation of executors *qua* nearest of kin established their right to the whole dead's part of the executry, so as to make it transmit to their assignees, whether legal or voluntary.

Fol. Dic. v. 4. *p.* 18. *D. Falconer. Kilkerran. Rem. Dec.*

*** This case is No 89. p. 3902., *voce* EXECUTOR.

*** Similar decisions were pronounced, 10th August 1755, Brodies against Stephen, No 90. p. 3911., and 11th February 1778, Nasmyth against Commissaries of Edinburgh, No 93. p. 3918., *voce* EXECUTOR.