compleated, whoever be confirmed. Now, where the next of kin himself is confirmed, though the confirmation constitutes him only executor or trustee, for the behoof of creditors and of others having interest, which can never be a title of property; yet it must be considered, that this trust is partly for behoof of the trustee himself. And therefore, taking his confirmation as a procuratory *in rem suam*, it must subsist until the uses and purposes for which it was granted be fulfilled; for this evident reason, that such a procuratory falls not by the death of the person to whom it is granted, especially when granted by the law which never dies. A confirmation, accordingly, of the next of kin, or of a creditor, cannot fall by their death, but may be taken up and executed by their representatives confirming to them; which must for ever exclude a new confirmation of the same subjects, as *in bonis primi defuncti*; for our law admits not the nomination of a second executor or trustee, while a prior confirmation is in force; and therefore, if the first confirmation subsist after the executor's death, to be executed by his representatives, there can be no place for a new confirmation of the same subjects, more than if the executor were still alive. It was *contended*, 2*do*, *Esto* a confirmation *ad non executa* could have place in this case, it would carry nothing but the naked office and *jus exigendi* for the behoof of the deceased executors' representatives or assignees. 3*tio*, This being so, the confirmation upon the act 1695, is null and inept; seeing, by the intendment of that statute, such a confirmation, calculated solely for the benefit of creditors, can never proceed where nothing can be carried by it but the naked office. No 10.

"Found, that Patrick Mitchel having consumed the 2000 merks and interest, as creditor to his brother James, to whom he was next of kin, the property thereof belonged to Patrick from the time of the confirmation; and that he might habily assign the same. Found the confirmation of James Mitchel, as executor-creditor *quoad non executa*, was inept and void; and therefore found Blairgorts the assignee preferable."

Fol. Dic. v. 2. *p.* 3. *Rem. Dec. v.* 2. *No* 9. *p.* 21.

*** Clerk Home's report of this case is No 88. p. 3900, *voce* EXECUTOR.

1738. *July* 21.

MARGARET, &c. CAMPBELLS *against* LADY INVERLIVER and her HUSBAND.

No 11.
A daughter who renounces her father's succession, cannot compete for the office of executor to him with the children of

DOUGAL CAMPBELL of Shirvine had issue, Archibald Campbell, and the said Jean; when Jean was married, her father gave her a tocher, which she, with consent of her future spouse, accepted, in full satisfaction of all portion natural, bairns' part of gear, executry, legacy, or others whatsoever, which she could expect, or that might accresce to her by and through her father or mother's de-

No 11.
her brother *in familia*, at the time of the renunciation.

cease, or by virtue of her parents' contract of marriage, or other security whatsoever.

Shirvine having died, his grand-daughters, Margaret, &c. Campbells, (Archibald's children,) moved an edict for serving themselves executors, *qua* nearest of kin to Shirvine their grandfather; and insisted, that, by the above discharge, Jean, their aunt, was forisfamiliated, and excluded from any legitim, which now belonged to Archibald her brother, the other child *in familia*, and his descendants, as if she had never existed; so her right of succeeding to her father, with respect to the dead's part, was excluded, and the same belonged to his son and his descendants. That Archibald being now dead, the movers of the edict, his daughters, were entitled to take up their grandfather's moveable succession; and that Jean could not, in contradiction to her own renunciation, claim any part of her father's succession; not the legitim, because she was forisfamiliated by the discharge granted in her father's life, nor the dead's part, seeing she had received a tocher in satisfaction thereof.

Answered for Jean Campbell, It was impossible to find the pursuers were nearest of kin, when she, who was confessedly nearer, was compearing and competing: That, with respect to the renunciation, as it was in favours of her father, so the benefit thereof accresced to his heir *ab intestato*, which she, as his nearest of kin, was, in the same manner as a renunciation of a right of succession in heritage, would not bar the renouncer from taking the succession as heir, if there was no settlement made excluding the renouncer.

Duplied for the pursuers, That, as moveables were, by law, understood to be destined for provisions to younger children; so the import of transactions between a father and his younger children, with regard to his moveables, had received a fixed interpretation, viz. That where the father gives a tocher to a younger child, but without taking a discharge, he was understood to intend that the child should succeed in his moveables with the rest, should take her legitim as a bairn, and her share of his other moveables, as heir *ab intestato*; but, where he gives the tocher in satisfaction of the legitim, this forisfamiliates the child, and the other children take the legitim, as if she had predeceased the father; however, she still takes the succession of the dead's part, as nearest in kin, with the other children. But if, as in the present case, she accept of her portion in satisfaction, not only of the bairns' part, but also of the executry, there it is understood that she has got her share of her father's succession by anticipation, so that she can no more claim, upon her father's death, to draw a share with his other descendants: That, in case of no such renunciation, she could claim a double portion; and there lies a material difference betwixt a renunciation of an heritable succession, and one of moveables; an heritable succession cannot be taken but by service, and none other can be served but who are heirs of the investiture; therefore, as a renunciation cannot alter the investiture, it cannot exclude the renouncer, if heir, nor give the right of succession to another; but it is quite otherwise in moveables, where both the of-

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