

fore confirmation, after taking all proper steps, without losing an hour to be confirmed.

THE LORDS refused the petition.

Petitioner, *H. Home.*

*D. Falconer, v. I. 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 expedite.

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 advocacy, the LORDS "Repelled the reasons of advocacy, 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.

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.