

No 15.
 ever defect
 might be in
 the second
 confirmation
 (as making
 thereby two
 principal tes-
 taments,
 which seems
 inconsistent)
 yet that it
 was sufficient
 to give the
 second the
 benefit of
 coming in
pari passu
 with the first.

you could in law do was to take out a dative *ad omissa*, or *male appretiated*, or *ad non executam*; but you could not confirm upon the same funds and subjects I had affected before you; and this was not the habile way of doing it, but only to get yourself conjoined, or by citing the principal creditor-executor, as is the practice of the Commissaries of Edinburgh, who no more allow two executors by distinct confirmed testaments, than there can be two heirs, not being heirs-portioners; and such a confirmation was found null betwixt Lees and Dinwiddy, *voce* EXECUTOR. *Answered* for Mr Ramsay; He opposed the act of sederunt, which allows them, within the six months, either to confirm or do some diligence against the principal executor, to give them a right to a proportion of the subject confirmed, or the value of it; and this is as agreeable to the analogy of law as the act 62d, 1661, bringing in all apprisers and adjudgers that are within year and day *pari passu*; and yet every creditor must apprise or adjudge for himself. And the second testament annulled in Lees's case was, because it was a testament dative; but this will not hold in creditors confirming, who, by the act of sederunt 14th November 1679, are obliged to confirm no more than what will pay their own debt. *See* Stair, tit. EXECUTRY, § 68. and Mackenzie's Institutes, p. 335. And *esto* it were an error, yet being the common practice through all the inferior commissariots, it is sufficient excuse *pro præterito*, as was found in a parallel case, December 14th 1671, Duff *contra* Forbes*, where *error communis quodammodo fecit jus*. And, by the 20th act of Parliament 1696, the founding on an executor-creditor's confirmation does not defend a vitious intromitter pursued, unless he derive a right from him; and the least that can be allowed to his confirmed testament is, that it may have the force, effect, and validity of a citation, which, it is yielded, would have brought him *in pari passu* with the first executor.—THE LORDS found, whatever defect might be in his confirmation, yet it was sufficient to give him the benefit of coming *in pari passu* with the first executor, the expence of the first testament being always deduced *primo loco*; and Mr Ramsay discounting what the inventory confirmed by him extends to more than the 40 bolls of victual confirmed by them both.

Fol. Dic. v. 1. p. 206. Fountainball, v. 2. p. 412.

1723. July.

GRAY against CALLENDAR.

No 16.

CREDITORS of a defunct, after the first six months, are preferable, according to the dates of their citations, against the executor; though it was pleaded by the competing creditor, whose diligence was first completed, that, from the nature of the thing, a citation, which is only a step of diligence, can give no preference, that it is the first completed diligence, not the first inchoated, that is to be considered. *See* APPENDIX.

Fol. Dic. v. 1. p. 207.

* Stair, v. 2. p. 23, *voce* PROOF.