bond to his brother John within five months of his father's death, the said disposition is not effectual against Anne Mackay, who was a creditor to the father, being contrary to the enactment of the second clause of the statute 1661.'

No 13.

To that judgment, which was brought under review by mutual petitions and answers, the Court adhered; with this only variation, that as it had been omitted to mention, that Anne's Mackay's preference was effectual on the wadset, this omission was now supplied. *See* INHIBITION.

Reporter, *Lord Gardenstone.* For Mrs Anne Mackay, *Elphinston.* Alt. *Honyman.* Clerk, *Home.*

S. *Fol. Dic. v.* 3. *p.* 166. *Fac. Col.* No 93. *p.* 144.

SECT. II.

Decisions upon the act of Sederunt 1662 *.

1685. *March.* CAPTAIN M'KEITH *against* KENNEDY.

No 14.

IN a special declarator at the instance of a donatar of escheat, compearance was made for an executor-creditor who had confirmed the subject, prior to the gift or general declarator; *alleged* for the donatar, that as the confirmation could not exclude another creditor doing diligence within six months after the rebel's decease, no more could it exclude the pursuer's declarator raised within the six months.——THE LORDS preferred the executor-creditor, in respect the act of sederunt only concerns creditors, and the donatar is in *causa pœnæ.*

Fol. Dic. v. 1. *p.* 206. *Harcarse, MS. No* 2.

*** *See* The particulars of this case *voce* COMPENSATION, No 67. p. 2616.

1708. *January* 2. RAMSAY *against* NAIRN.

No 15.
A testament being confirmed by the defunct's creditor, and the same subject being again confirmed by another creditor within the six months, the Lords found, that what-

WILLIAM NAIRN of Dunsinnan, being creditor to Young in Dunkeld, confirms himself executor-creditor to him, and thereby uplifts forty bolls of bear and malt he had lying in his barns. Mr David Ramsay being likewise a creditor, he coufirms the same subject, with sundry other goods; and, being within the six months of the debtor's death, he pursues Dunsinnan to communicate to him a proportional part of what he had intermeddled with, in respect of the act of sederunt 1662, bringing in all creditors confirmed within six months of the defunct's decease *pari passu.* *Alleged,* Your confirmation is null, because there cannot be two principal testaments, and therefore, I being first confirmed, all

* The object of this act of sederunt is explained in No 19. p. 3141.

No 15. ever defect might be in the second confirmation (as making thereby two principal testaments, 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 appretiata*, or *ad non executa*; 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 opponed the act of sederunt, which allows them, within the six months, either to confirm or do some diligence against rhe 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. *Fountainhall, 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.