No 6.

because a simple executor dative is obliged to give up inventory of the defunct's whole goods, and it is good defence to one pursued as vitious intromitter with the defunct's goods, that a third party is confirmed executor dative, albeit the intromitter derive no right from him; whereas an executor *qua* creditor needs only to confirm as much of the defunct's goods and gear as he thinks fit; and his confirmation would not purge vitious intromission, unless the intromitter derive right from him, as is clear from the act of Parliament 1696; for that a creditor by confirming, designs only his own security, and not to represent the defunct. The act of sederunt bringing in all creditors confirming themselves executors within six months of the defunct's decease *pari passu*, is not to be restricted to several executors in one testament, as is clear both from the tenor of the act, and from my Lord Stair and Sir George Mackenzie's Observations thereon, and the analogy of our law in other cases. Doth not the act of Parliament 1661, upon the same ground, bring in apprisers within year and day *pari passu?*

Duplied for the defender; As to the point in controversy, there is no distinction betwixt an executor dative who has the whole office, and an executor creditor; seeing, as to the subject confirmed, both equally represent the defunct. And though different executors creditors may, one after another, confirm different subjects, they cannot confirm one and the same subject; according to the constant practice of the Commissary Court of Edinburgh. The parallel of apprisers or adjudgers within year and day doth not hold, for apprising or adjudication is no title of representation; and two persons may very well have different securities upon the same subject, who could not be different representatives.

THE LORDS found, that the pursuer and defender should come in *pari passu*; the former paying always a proportion of the charges wared out by the latter, as executor-creditor first decerned and confirmed.

Forbes, p. 217.

1737. *June* 24. MITCHEL *against* MITCHEL.

No 7.
Though an executor-creditor die before sentence there is no place for an executor *ad non executa.*

AN executor-creditor is but a trustee, as well as a simple executor; but then he is a trustee principally for his own behoof; the law, which never dies, gives him a procuratory *in rem suam*, which is not a simple trust to die with himself, but may be followed forth by his representatives as a *jus quæsitum*. And as a decerniture and confirmation is truly an assignation to the subjects confirmed in security and payment of his debt, there can be no place for a new assignation or confirmation *ad non executa*, though he die before sentence.

Fol. Dic. v. 1. *p.* 279.

*** This case is reported by Clerk Home, No 88. p. 3900.; and by Lord Kames, *voce* NEAREST OF KIN.