

1668. November 14. CALDERWOOD *against* SHAW.

MARGARET CALDERWOOD being assigned to a bond granted by George Shaw, her deceased husband, for the sum of L. 220, did thereupon pursue Janet Shaw, as heir served and retoured to the said George, for payment thereof; which bond was holograph; and it being *alleged*, That holograph bonds do not prove against the heir *quoad datam*, and are null *ipso jure*, being presumed to be done upon death-bed; this allegiance was sustained, unless the pursuer would offer to prove that the bond was subscribed by the defunct before his sickness whereof he died; and that, notwithstanding it was *replied*, That holograph bonds are valid against the heir of the granter as well as against himself, and that it can only be objected by a third person that they do not prove *quoad datam*; and notwithstanding it was likewise *replied*, That they could not be sustained by way of exception, but by intending reduction.

*Fol. Dic. v. 1. p. 175. Gosford, MS. p. 18.*

No 71.

In a pursuit against an heir for payment of a bond, death-bed was found competent by way of exception.

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SECT. XVII.

Exhaustion of Executry;—Challenge on the Head of Inhibition,  
—how Proponable.

LORD BRUGHTON *against* AIKMAN.

AN executor confirmed, pursued for payment of soumes contracted for the husband, contained in a bond registered, she may except upon the exhausting of the goods and gear contained in the confirmed testament *et habens beneficium inventarii non tenetur ultra*; and although she have not decret of exoneration, the same may be proven by way of exception, by paying of particular sums whilk she paid upon decret recovered against her before ordinar judges.

*Fol. Dic. v. 1. p. 175. Colvill, MS. p. 3.*

No 72.

Found that exhausting may be proponed for an executor by way of exception, altho' he have no decret of exoneration.

1639. January 24.

INGLIS *against* BELL.

MARGARET INGLIS, relict of umquhile Alexander Douglas macer, pursues Patrick Bell, provost of Glasgow, as executor confirmed to James Inglis, who was the pursuer's debtor, for payment of the sums addebted to her by the said

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No 73.

A party sued an executor, who had intromitted be.

No 73.  
yond what he  
had given up  
in testament.  
Found not ne-  
cessary for  
the pursuer to  
confirm *ad*  
*omissa*.

James. And the said Patrick *alleging*, That the testament was totally exhausted by sentences, obtained by lawful creditors, to whom he had made payment; the pursuer *replying*, That the defender had intromitted with as much more of the defunct's goods as would pay her, by and attour the goods confirmed, and which she referred to his oath of verity *simpliciter*;—the defender *duplied*, That an executor is not obliged *ultra vires inventarii*, and if he have intromitted with any further, the pursuer may take a dative *ad omissa*, whereupon being pursued, he will be answerable. THE LORDS repelled the allegiance in respect of the reply, which the LORDS sustained, specially being referred to the defender's own oath; and found no necessity that the pursuer should be put to take a dative *ad omissa*, but sustained the trial thereof in this same process to be proven, as said is. See EXECUTOR.—SERVICE and CONFIRMATION.

*Fol. Dic. v. 1. p. 175. Durie, p. 870.*

1674. July 23.

JOHNSTOUN *against* JOHNSTOUN.

No 74.  
Inhibition  
cannot be u-  
sed by excep-  
tion or reply,  
but only by  
way of reduc-  
tion.

JOHNSTOUN of Elshiesheills having apprised the lands of Temple-land from Janet Johnstoun, as charged to enter heir to her goodsire his debtor, did thereupon pursue reduction of a wadset of the lands granted by her father to Johnstoun of Lockerby, and reduced the same as being a *non habente potestatem*, because her father granter thereof died, never being infest; he did also obtain decreets for mails and duties against Lockerby, who raised suspension of both decreets on this reason, that he had now, since these decreets, obtained a charter of confirmation of his former wadset from Janet Johnstoun, who was infest as heir to her goodsire, containing a precept for infesting him, whereupon he was infest before any infestment was taken by Elshiesheills upon his apprising, and being in the natural possession of the lands by the first reduced wadset, *eo momento*, that he was infest upon his new right, the same though base was clad with possession, and is prior and preferable to Lockerby's posterior public right on his apprising. It was *answered*, That the public right is preferable, the same having been in May, and the base infestment in March, both before Whitsunday, so that the base infestment could have no effect by lifting of the duties, till the term, before which the public infestment intervened, and Elshiesheills having obtained decreets of mails and duties against Lockerby, he became thereby in the civil possession. *2do*, *In re litigiosa* no new right granted by the common author voluntarily, can be preferred to the anterior diligence of a creditor; and so it hath always been found, that after denunciation of lands to be appraised, they become litigious, and no infestment upon a voluntary disposition, though prior to the infestment on the appraising, is preferable thereto, otherwise creditors' diligences might be altogether disappointed, and others preferred; and here the matter is not only litigious by appraising, but by decreets