

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.

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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

of reduction and mails and duties. *3tio*, Elshiesheills hath used inhibition before Lockerby's new right, which though it cannot be made use of by exception, yet may be by reply, or in competition.

THE LORDS found that the inhibition could not be made use of without reduction; and found that the apprising did not make the subject litigious after denunciation, unless the appriser had proceeded in exact diligence to obtain infestment, or to charge the superior, but having delayed for a long time, they found the base infestment clad with natural possession, preferable to the public infestment, though both was before the term, and in this case the new infestment was not gratuitous or merely voluntary, because Janet Johnstoun who gave the same, was not only heir to her father, but also to her goodsire, who gave the first wadset. See LITIGIOUS.

*Fol. Dic. v. 1. p. 175. Stuir, v. 2. p. 280.*

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S E C T. XVIII.

Challenge on the Head of Interdiction, how Proponable.

1630. *March 17.*      *SEMPILL against M'NISH and DOBIE.*

ONE M'Nish, son to umquhile Robert M'Nish, and Agnes Dobie his relict, executors confirmed to the said umquhile Robert, having obtained decret against John Sempill, for a sum owing by him to the defunct; and he suspending upon payment made to M'Nish, one of the executors, and producing his acquittance thereon; and the relict, who was co-executor, and had obtained the sentence with the other, *alleging*, that that discharge would only liberate the suspender of the one half of the sum, and that the other half was yet resting to her, seeing the one executor could not discharge but his own part; and the suspender *alleging*, That the acquittance, albeit granted only by one of the two executors, yet ought to liberate him of the whole debt, seeing he had paid, and might pay the whole debt to any one of them, and he needed not to be troubled in seeking them both, and to pay a part to ilk one of them, but they ought to compt amongst themselves anent their receipts, and the executors and the debtors ought not to be troubled with any thing, which was betwixt them; for ilk one of them having found caution in the testament, thereby the debtors ought to be found *in tuto*, and that they might lawfully pay the whole to any of them. THE LORDS found, That seeing two were confirmed executors, that payment

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The Lords refused to receive interdiction by way of exception or reply, but allowed the proponer to reduce.