

No 21. 1632. January 20. HALYBURTON against MONTETH.

INHIBITION found null, though executed at the head burgh of the regality where the lands lay, and of the shire where the party dwelt, and was registered in that Sheriff's court-books, in regard it was not registered in the regality books, as is required by the acts 119th, Parl. 1581, and 268th, Parl. 1597.

Fol. Dic. v. 2. p. 333. Duris.

* * This case is No 18. p. 6947, *voce* INHIBITION.

No 22. 1632. July 10. MARGARET BROWN against EXECUTORS of JOHN DALRYMPLE.

MARGARET BROWN pursues the Executors of unquhile John Dalrymple, for registration of her contract of marriage. The Executors *allege*, There can be no registration against them, because the whole free gear contained in the testament was exhausted by lawful sentences, deduced upon lawful probation, long before the intending of the cause, except only the sum of L. 20. It was *alleged*, Registration cannot be stayed for exoneration, so long as any part of the defunct's gear is unexhausted. Which reply was sustained.

Auchinleck, MS. p. 189.

No 23.

An unregistered sasine was sustained in a declarator of thirlage, being nor about the mill, but about multures.

1638. July 21. ROWAN against COLVIL.

ONE ROWAN being infeft by the Abbot of Dumfermline in the miln of *cum astrictis multuris*, and specially with the astricted multures of the lands of _____ pertaining to the defender, who was convened by this heritor of the miln, to hear it found that his said lands are thirled to his said miln; and the defender *alleging*, that his author, viz. the Laird of Dury was infeft by the same abbot in the said lands, (albiet after the infeftment of the miln) which Laird of Dury had disposed the same lands to the defender's father, who thereafter resigned the lands for new infeftment to be given to him and his heirs; upon which resignation he was infeft, with a clause in the *tenendas cum molendinis et multuris*; by reason of which clause he has liberty and freedom from being astricted to the miln libelled, and in respect of this his right and interest to claim liberty, he *alleged*, that the pursuers sasine of the miln libelled, so far as he craves thereby the defender's lands to be astricted, and to pay multure, and to grind at the miln libelled, is null, because the same is not registrated in the secretary's register, conform to act of Parliament; and the pursuer *replying*, That this nullity cannot be respected unless it were proponed

by any having better right to the miln than the pursuer, which this defender has not; and he *duplicating*, That albeit he had no right to the miln, yet he might propone that nullity, so far as the sasine may be sustained to give the pursuer any pretence to the multures of his lands;—the LORDS sustained the sasine, albeit it was not registrated against this defender, who had no right to the miln. And where it was proponed (*in quantum* it might affect the defender's multures of his lands), the LORDS found, that the sasine could not divide to be good for the miln, and evil for the multures, but ordained the defender to propone his defence upon his own right, whereby he might claim liberty, which was the only ground giving him interest to quarrel the pursuer's sasine, that thereby it might be tried if he might justly elide the pursuer's action. And the defender repeating his allegiance upon the right *cum molendinis et multuris*, and which he alleged made him free from this astriction, in respect his infeftment, albeit after the pursuer's, yet it is confirmed before, and the first confirmation of kirk-lands is preferred by the act of Parliament, to the prior infeftment which is last confirmed; and the pursuer *replying*, That his prior right confirmed at any time ought to be preferred, in respect that the first infeftment of the defender's lands given to his author (which is after this pursuer's right of the miln) contains an express clause that the defender's lands shall be thirled to the said miln, and no posterior infeftment acquired thereafter by the defender's predecessor, upon his own resignation, containing the general clause, *cum molendinis, &c.* can derogate to his preceding lawfully constituted thirlage; specially seeing the defender, or his father, in the infeftment, which he has acquired of the lands *cum molendinis*, from the umquhile Queen Anne, as Lady Dumfermline, has accepted the same infeftment, with this clause *reddendo omnia alia servitia et divorias quascunque contentas in infeofamento concesso per abbatem de Dumfermling, domino de jure et Lundie ejus Sponsæ*; which clause being so specific, and making mention of the duties contained in the first infeftment, granted to the Laird of Dury and his spouse, expressly therein named, which contains the said astriction, must be of that same force, as if *per expressum* the thirlage had been also specially expressed therein, and must produce the same effect against the defender, except he were able to show and produce another infeftment granted to the same Laird of Dury and his said spouse, without any such clause of astriction. This reply was found relevant; and in respect thereof the exception was repelled.

Act. Nicolson.

Alt. Stuart & Nisbet.

Clerk. Hay.

Eol. Dic. v. 2. p. 331. Durie, p. 858.