

1630. November 27. DOUGLAS against JOHNSTON.

MR THOMAS DOUGLAS of Stainypath pursues one Johnston for reduction of a bond made of a sum of money to Johnston by Joseph Lermouth the common debtor, with the comprising deduced thereon of the debtor's lands, because the same was done after a bond made of borrowed money to the pursuer, and inhibition thereon. In which process it was *alleged*, That the pursuer could not seek reduction *in toto* of the whole comprising of all the lands, seeing the lands were more worth than would pay both the party's whole debts; and the pursuer ought only to have reduction for so much of the lands as might pay himself, that the defender's right might stand to him for the rest; seeing the defender being but a poor man, and his debt being of a less sum, the pursuer, who was of greater substance, and whose debt was twice as great as his, it were more reasonable that he should be paid by the pursuer of his sums, than that he should be compelled to pay the pursuer his greater debt, which he had no power to do, specially the land being more worth than both their debts. This allegiance was repelled, and the pursuer was found to have good action to reduce the bond, and all that had followed thereupon *in toto*, ay and while he were paid of his debt, and that he was not holden to pay the defender his debt, albeit the land might satisfy them both.

Clerk, Hay.

Fol. Dic. v. I. p. 477. Durie, p. 543.

1632. January 20. MONTEITH against HALIBURTON.

JAMES MONTEITH, assignee constituted by William Davidson, to a bond granted by James Blair, and to an inhibition executed upon the same, intended a reduction of another bond granted by the said James Blair to Jean Haliburton, and of a comprising and infestment following thereupon *ex capite inhibitionis*.—*Alleged, 1mo*, The pursuer's interest being only upon a bond and inhibition, could not be sustained for reducing of the defender's comprising and infestment, especially being cloathed with seven years possession, so that the legal was expired before the intending of his action, unless the pursuer or his cedent had some real right by comprising and infestment likewise.—THE LORDS repelled this allegiance, in respect that an inhibition gives one a good enough interest to reduce any posterior deed in prejudice of the said inhibition, albeit infestment has followed thereupon.—*2do, Alleged*, The inhibition is null, because by act of Parliament 1581, c. 119. all inhibitions should be registrated in the Sheriff-clerk's books, or Stewart's, where the person inhibited has his land lying; but so it is, that the pursuer's inhibition was not registrated in the books of the regality of Dalkeith, where the said James Blair's lands lay.—*Answered*, That ought

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A prior inhibitor may reduce *in toto*, a posterior bond and apprising, altho' the subject be sufficient to pay both. He is not obliged to restrict his inhibition to as much of the lands inhibited as may be sufficient to pay his debt.

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Inhibition is a sufficient title to reduce posterior deeds, made in prejudice of it, though infestment has followed on such deeds.

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to be repelled, in respect of the act of Parliament 1597, c. 268. which ordains inhibitions, &c. to be registrated only in the Sheriff or Bailie's books where the person inhibited dwells; but so it is, that the said James Blair, the time that he was inhibited, dwelt in Edinburgh, where the inhibition is registrated.—*Duplied.* The last act must be ruled according to the first, because in the end thereof it ordains all the clauses inserted in the former acts to be repeated and holden as insert in this last.—THE LORDS found this allegiance relevant; for an inhibition that should affect any lands must be served and registrated within the Sheriffdom where these lands lay.

Spottiswood, (INHIBITION.) p. 178.

* * * Durie reports this case :

ONE Blair being debtor to William Davidson, in the sum of L. 200, whereupon having served inhibition against Blair, both at the cross of Dalkeith, which is the head burgh of the regality where the said Blair had a tenement of land and houses, and also at the market cross of Edinburgh, being the head burgh of the Sheriffdom, within the which the debtor dwelt for the time; and this tenement of Dalkeith being thereafter comprised by Jean Haliburton, another of Blair's creditors, after the inhibition; Monteith, as assignee to Davidson's right and inhibition, pursues reduction of that comprising and infestment, as done after inhibition: Wherein the LORDS sustained reduction at this creditor and assignee's instance, upon the said simple moveable obligation and inhibition, albeit the pursuer was not infest, nor had any real right, and albeit it tended to reduce the infestment and comprising in the defender's person. And the LORDS found, upon another allegiance, the inhibition null, because the tenement comprised lay within the regality of Dalkeith; and albeit the inhibition was executed at Dalkeith cross, yet the same was not registrated in the clerk's books of that regality, as the defender alleged it ought to have been, and is provided by act of Parl. 1581; and which act, and the solemnities thereby appointed for executions within Sheriffdoms, is renewed and required within Stewartries and Regalities, by act of Parliament 1597; and which the LORDS found ought to have been registrated; neither found they it enough that it was executed there, not being registrated there; neither was it sufficient, that the pursuer replied that it was registrated in the Sheriff court books of Edinburgh, within which the party prohibited dwelt for the time, viz. within the town of Edinburgh, seeing he dwelt not then within the regality; and contended, that the act of Parliament 1597 required no such registration, where the parties dwelt not within the regalities; which reply was not respected, but the exception sustained, and the inhibition found null. See REGISTRATION. TITLE TO PURSUE.

Act. *Hart.*

Alt. —.

Durie, p. 613.