

1629. February 17. PRINGLE *against* M'DOUGAL.

SIR JAMES PRINGLE of Gallowshiels was obliged to infeft his son and his wife in conjunct-fee in certain lands, and that by two infeftments, the one to be holden of himself, and the other of his immediate superior. After his son's decease, she and her second husband, Sir William M'Dougal of Mackcairston, charged Gallowshiels 'to fulfil the contract, and duly and sufficiently,' (these were the words of the contract) 'to infeft her to be holden of the superior.' The LORDS found that Gallowshiels should procure the superior's confirmation upon his own charges, albeit he was not expressly obliged thereto by the contract.

Fol. Dic. v. I. p. 440. Spottiswood, (CONJUNCT-FEE & LIFERENT.) p. 58.

No 6.

Found in conformity with Colston against Hope Pringle, No 1. p. 6539.

1630. December 23. OGILVIE *against* LO. OGILVIE.

A CREDITOR to Mr David Ogilvie having comprised an heritable contract, whereby the Lo. Ogilvie was obliged to pay the said Mr David a sum of money, and to infeft him in an yearly annualrent therefor; and having pursued the Lo. Ogilvie for payment of the bygones owing before that comprising, and yearly thereafter, the LORDS sustained this action against the Lord Ogilvie for personal payment of the annualrent, although, by the contract, he was not obliged to pay the same personally, but only to give infeftment of that annualrent out of his land. The defender *alleged*, That he could not be convened thereupon for payment personally, but only to grant infeftment; which being first obtained, he had thereupon action to poind the ground, or personally to pay; but the LORDS found, that clause obligatory, to give infeftment of an annualrent, was alike as if he had obliged himself to pay the same yearly; *item*, the LORDS found, that a comprising gave not the compriser right to the bygone annualrents owing before the comprising, but only to the annualrents after the date thereof, and to the principal sum, seeing the bygones fall under arrestment or escheat, and are moveable, and so not comprisable; but because there were no other creditors, nor other party, who compeared to claim right to these bygones, and also that the donatar to Mr David Ogilvie's escheat, which was also declared, compeared in this process, and concurred with the compriser for the said bygones, and that the defender, who was debtor, had no right to retain them; therefore the LORDS sustained the pursuit, and ordained the pursuer to find caution to liberate him thereof at all hands, who might have interest thereto, and to refund the same to him if ever he should be distressed by any other therefor.

This contract being *alleged* to be prescribed as not being pursued on, or documents taken thereupon, within 40 years after the date thereof, the LORDS having considered the date, which was *anno* 1590, and blank both in the day and

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Found in conformity with Hamilton against Sinclair, No 4. p. 6540.

No 7.

month, as the defender could allege nothing wherefore the contract might not stand and be sufficient, if any day of the last month in that year, wherein it was dated, had been filled up in the contract; and as the prescription would not then have had place, since 40 years had not run betwixt the last day of the last month of that year, and the time of the calling of this cause, whereby documents were taken, and called, and brought in judgment, about three quarters of a year before 40 years out-run, counting from the last day of the last month of that year wherein it was dated; the LORDS found this computation might be ascribed to the contract, nothing being alleged by the party to qualify why it might not be of that date. They found it ought to receive such construction, since the same might congruously stand and subsist with the writ controverted, for the maintenance thereof, and to save from prescription, which in itself is odious; and ought to be straitly counted; and ought to be clear before it can have place. The pursuer *alleged*, That this contract was a contract of marriage, and whereupon marriage had thereafter followed; and thereby, that the prescription of 40 years could not be admitted against the same, although it had run; but this allegiance was repelled; for the LORDS found, albeit it was a contract of marriage, yet, for the sums and other conditions therein, the argument of prescription might competently be proponed against the same. Also, the LORDS found, that albeit the contract comprised contained a greater debt than was addebted to the compriser, yet that the compriser ought to have sentence for all that was comprised; but he being paid the true sum for which he had comprised, and his charges and annualrents, conform to the act of Parliament, that then he should be heard to exact no more; for then the force of his comprising should become extinct, and the rest pertain to the just creditors, or others who should be found to have best right thereto. See PRESCRIPTION.

Act. *Nicolson.*Alt. *Peirson & Baird.*Clerk, *Hay.**Fol. Dic. v. 1. p. 440. Durie, p. 551.*1665. *January 26.*BLACKET *against* BUNKLE.

No 8.

WILLIAM BLACKET, merchant in Newcastle, obtains a decret against Helen Bunkle, relict of John Loran in Kelso, for payment of certain sums, as being the remainder of a great debt owing by her husband, whereof she entered in payment, and promised or constituted herself debitrix for the rest. The decret is suspended, upon this reason, that it is without lawful probation, there being nothing produced to verify her to be debitrix; the most that can appear being only, that she paid a part, and desired his forbearance for the rest, which bindeth not the debt upon her unless she had promised payment.

THE LORDS found, that this was no valid ground to decern, and therefore suspended simpliciter.

Fol. Dic. v. 1. p. 440. Gilmour, No 136. p. 99.