

P R E S C R I P T I O N .

D I V I S I O N I .

Negative Prescription of Forty Years.

S E C T . I .

Nature and Effect thereof.

1630. *November 27.* L. LAWDER *against* L. COLMSLIE.

A CONTRACT of marriage betwixt the L. of Lawder and a daughter of Colmslie, dated 1565, and registered that same time, being desired to be transferred in the parties representing the contractors, the LORDS found, that the same could not be transferred, but that it was prescribed, conform to the 28th act, Parl. 5th, James III., because no pursuit, nor other document following by execution or legal deed, was done thereon within forty years after the date, nor after the registration thereof; for albeit the registration of the same done at the date thereof made it a sentence, yet lying over since, that was not found to interrupt the prescription; and albeit it was a mutual contract, and also a contract of marriage, whereupon marriage had followed, yet it was found to be as an obligation which came under the prescription of forty years; and albeit the pursuer, who craved the transferring, to the effect that the sum of 600 merks might be paid to him, which sum, by the contract, is appointed to be paid to his predecessors, to the end it might be employed upon land, for the heirs mentioned in the contract, whereby he alleged that it was an heritable right, which came not under that act of Parliament, but by the act of prescription in the Parliament 1617 there were 13 years granted after the date of that

No 1.

An obligation in a contract of marriage to pay a certain sum, not insisted on within 40 years, found prescribed, tho' the contract itself was saved from prescription by the diligence of other creditors who had interest in it.

No 1. act to prosecute such heritable rights, within the which time also the other party representing the other contractor obtained execution against this pursuer for fulfilling of their part of the contract to him, which was done *anno* 1624, whereby he alleged that it was not equitable that the one party should have execution thereupon, and the other party to be prejudged thereof; yet this was repelled, and the prescription sustained, seeing this pursuer had not *debito tempore* sought execution, for his part, contracted in his favours; for when execution was sought against him for employing of that sum, appointed by the contract to be laid out, and it was competent to have been then alleged by him, that he could not employ that sum which they were obliged to pay to him before he had received payment thereof, and being then omitted, it was probable that the sum was paid, and he could not thereby seek implement thereof, not being then neither alleged, nor no pursuit made within the time of prescription to interrupt the same before this pursuit, which was not moved before the expiring of these 13 years granted by the last act, as said is.

Fol. Dic. v. 2. p. 97. Durie, v. 1. p. 542.

* * * Spottiswood reports this case :

By contract of marriage 1567, between the Laird Lawder of that Ilk, and the Goodman of Colmslie and his daughter, Colmslie was obliged to pay in tocher 600 merks, which Lawder was obliged to employ upon land or annual-rent for him and his wife, and the children of that marriage. Lawder's heir having registered this contract of marriage, charged Colmslie's heirs for payment of the 600 merks. He suspended, because the contract was prescribed by the act of Parliament. *Alleged*, Not prescribed, *1st*, Because it was registered within the years of prescription; *next*, The suspender had forced the charger within the time to fulfil his part of the contract, and so it could not prescribe on the one side, and not on the other. THE LORDS suspended the letters *simpliciter* upon that reason; and found, that registration could not interrupt the prescription, unless more had followed on it, as had been found before, between the Lord Borthwick and the Laird of Smeiton.

Spottiswood, (DE PRÆSCRIPTIONE ET USUCAPIONE.) p. 236.

1703, December 7.

NAPIER of Kilmahew against Sir HUGH CAMPBELL of Calder.

No 2.

A bond being prescribed, the pursuer alleged he might prove resting owing

NAPIER of Kilmahew, as executor to Sir George Maxwell of Newark, pursues Sir Hugh Campbell of Calder, for payment of a sum contained in his bond to the said Sir George in 1667. *Alleged, imo*, The bond is null, wanting the writer's name and designation. *Answered*, He can never quarrel the