

1630. November 27. LD. LAUDER *against* COLMSLIE.

No 29.

MUTUAL contracts suffer the negative prescription as well as simple obligations.

*Fol. Dic. v. 2. p. 98. Durie. Spottiswood.*

\* \* \* This case is No. 1. p. 10655.

1630. December 23. OGILVIE *against* LORD OGILVIE.

No 30.

A CONTRACT of marriage, notwithstanding that marriage follows, may prescribe as well as any other obligation.

*Fol. Dic. v. 2. p. 98. Durie.*

\* \* \* This case is No 7. p. 6541. *voce* IMPLIED OBLIGATION.

1637. July 26. L. LAWERS. *against* DUNBARS.

No 31.

THE umquhile Countess of Murray, and the Earl of Argyle, her husband, for his interest, having obtained decret *in anno* 1583, against Dunbars, for the violent profits of certain lands in Murray, pertaining to the Countess in conjunct-fee, by her right thereof made to her by the umquhile Earl of Murray, her first husband; which decret was given against the defender's therein comparing; after which decret no other thing being done therein, while about the year 1597, at which time the parties in the sentence being all then dead, the Laird of Lundie, son procreated betwixt the said Earl of Argyle and the Countess of Murray, obtainer of this sentence, obtains this decret transferred in him, as executor to the Lady his mother, who was conjunct-fiar of the lands, and in some other Dunbars, as representing the defenders in the first instance, (the Laird of Lundie not being then, nor at no time thereafter decerned executor to the Earl of Argyle, husband to the Lady, and to whom, *jure mariti*, the benefit of the sentence behoved to pertain,) and in this case the matter so stands, while the year 1636 or 1637, that Lundie disposes his right of the said sentence to the Laird of Lawers, for satisfying of a debt paid by Lawers for Lundie, which Lawers obtains himself executor-dative decerned to the Earl Argyle, husband to the Lady, and upon these rights now pursues the said Dunbars for payment of the sums contained in the said decret of violent profits. And it being *alleged*, That the said decret was prescribed, conform to the act 28th Parl. 5th James III. there being 40 years since the date thereof, and no documents taken thereon since. Whereto it was *replied*, That sentence *in foro contentioso* prescribes not, as was found by the Lords in an action betwixt

Found, that the act 1469 extends to decrees, though *in foro contradictorio*.

No 31.

Currouns, and the act of Parliament, which mentions not decreets, cannot be extended to decreets, seeing acts of Parliament are *stricti juris*, and cannot extend to any further than the same bears, specially *in odiosis*, as all prescriptions are, which are of this kind; 2do, That it was interrupted, (*posito* that sentences might prescribe, which is denied,) in respect within the time of 40 years, the Laird of Lundie had obtained the said decreet transferred, the parties being cited thereto, which was a sufficient interruption; and it being *duplied*, That that pursuit at his instance, as executor to his mother, could not be sustained as a valid interruption in law, seeing the benefit of this sentence behoved to pertain to the executors of her husband, and so the other title being null, to claim the right of the said decreet thereby, which could not pertain to her executor, the same cannot be found an interruption; and the pursuer *tripling*, That he was that same person, who would have also been executor to the husband, and that the interruption made, as is above-written, ought therefore to be sustained to stay the course of the prescription, which was in itself odious, to take away a decreet given against a party compearing, and holden as confessed, who could never be found *in bona fide* to take away that decreet without a specific discharge: THE LORDS found that this decreet, albeit given against a party compearing, was prescribeable, where no diligence followed thereon, within the time required by the foresaid act of Parliament; and declared, that they would observe this, and the like decision in all time coming, when the like question of prescription should be obtruded against decreets, albeit *in foro contentioso*, and found that the same comes under the act of Parliament foresaid. And as to the reply of interruption, because the sentence of violent profits contained a great sum, the party being holden as confest upon the whole libel, not compearing to swear upon the quantity; the LORDS found this interruption sufficient to stay the course of prescription against the decreet, which decreet the LORDS found should remain in force to have effect for refunding to the pursuer of the just and true interest, which the obtainer thereof can be qualified to have sustained; sicklike as when the same might have been tried and qualified by the party obtainer, before the obtaining of the sentence, but not to infer execution for the whole quantity in the decreet, which is the whole libel, in respect the parties were holden as confessed, as said is; which quantity the LORDS found ought to be retrenched as the Lady's true and just interest, and no further; and after the trial whereof they found, that they would modify also the same quantity; and for which quantity so to be modified, the LORDS found that the said interruption ought to be sustained to maintain the said decreet and execution thereof, and no further.

Act. *Advocatus, Nicolson & Stuart.*  
Clerk, *Gibson.*

Alt. *Burnet, Gilmore, Nicolson younger, Johnston & Gibson.*

*Fol. Dic. v. 2. p. 98. Durie, p. 854.*