

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.