

no total sum qualified, upon which the adjudication is redeemable; 3. Such an adjudication could not expire in ten years. Answered for the adjudger, The foresaid arguments take only place where the ground of an adjudication is *obligatio dandi* by payment, and not where it is *obligatio ad factum præstandum*, as this is; and here the obligation, in the contract, to settle a sum in favours of the wife, betwixt and such a day, became prestable *in totum* after elapsing of the day, although the particular payments fall to be due at the several terms of her life, and these could not be valued estimate to a liquid sum, it being uncertain how long she would live; and it were unreasonable that other creditors should carry away all, in the case of her surviving the years of the modification. It were also a defect in law, to find no diligence equal to the performance of a debtor's obligation; and in this case the adjudication of the property of the sum, or of an annual-rent effeiring to £10,000 out of it, is but in effect a real security, and always redeemable upon securing the adjudger by infestment, conform to the obligation in her contract of marriage. Again, an adjudication of lands upon an obligation to dispoise the same, is not redeemable by payment of money, seeing the lands in special are *in obligatione*, which could not be fulfilled *per equipollens*; and, as there may be arrestment *declaratorie*; before the term of payment in moveables, so there may be an adjudication; which is not execution, but only a diligence. The Lords found the answer relevant, and sustained the adjudication as formal.

Thereafter it was contended for the relict, That the other posterior diligences, though within year and day, could not come *in pari passu* with her adjudication, whereof the ground is an obligation to infest, and not to pay: and not liquid to a particular sum before the leading of it; and, consequently, falls not under the Act of Parliament, which seems only to respect diligences for liquid sums, which may be proportioned in a competition;—December 12, 1677, *the Lady Frazer against the Creditors of the Lord Frazer and the Lady Marr*. Answered, The reason of the Act of Parliament militates equally in all cases; and the interest of this adjudger may receive an estimation in a competition with other diligences. The cited practise seems not to be well founded: besides, there is this difference between the two cases, that the obligation, to the Lady Frazer, was to infest her in particular lands in lieu of others renounced by her, which stated her in the case of one having a special disposition; whereas the obligation here is but to employ a sum in general. The Lords allowed the other diligences within the year, to come *in pari passu*.

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1684. *January*. JEAN CALLENDER *against* My LORD SALINE'S DAUGHTERS.

A MAN having a bond of 3000 merks, to himself and his wife, in liferent, &c. whom he was formerly obliged, by contract of marriage, to provide to the liferent of 5000 merks; she, after his decease, pursuing for the annual-rent of the bond, the debtor pleaded compensation upon sums belonging to him which the pursuer's husband intromitted with. Answered, The compensation can only affect the fee, and not the liferent, which is secured to the pursuer by the provision in the bond. Replied, It is usual for men to provide the liferent of sums

to their wives, and yet, being master of the bonds, to give them back, and uplift the money without the wife's consent; and, consequently, they might discharge or extinguish the same by compensation. Duplied, When such a thing is intended, the bond uses to bear a faculty to the husband to uplift without the wife's consent, and this bond must be presumed to have been so conceived, in implement of the contract of marriage, although it do not expressly relate thereto. The Lords found the answer and duply for the relict relevant, though no infestment on the bond had passed in her person; and that the grounds of compensation, prior to the bond, could not be obtruded against the wife, seeing the obligation to pay annual-rent to her was a passing from all these grounds.

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1684. *January.* JEAN YOUNG *against* WILLIAM YUIL.

THE like to the former decision, [the preceding case,] was found two days after, betwixt Jean Young and William Yuil, with this difference, that the bond related to the obligation in the contract, whereby the tocher was to be so employed.—*Vide 29th March 1626.*

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1684. *January.* LEARMONTH *against* THOMAS WILSON and His WIFE.

MR Thomas Learmonth having complained to the Lords, by bill, in his own name, That a decret against his deceased client, the Laird of Ratho, a tutor for whom he had compeared, was surreptitiously extracted in terms different from the minutes; and thereupon, the Lords having ordained the decret to be re-produced, Mr Thomas insisted upon his new defences, which occasioned new interlocutors: but the pursuer perceiving that the apparent heir, who bruiked the defunct's estate by an expired apprising, lay by, and did not crave any amendments to shun a passive title, he alleged there could be no ratification of the decret, unless there was a lawful contradictor; and that Mr Thomas's *mandatum*, as advocate, expired with the death of the tutor: and though the defunct's other creditors should concur, as they do not, yet they could only crave that the decret should be conform to the minutes that were passed before the defunct's decease; but an advocate who had no interest could crave no rectification. The Lords adhered to the new rectifications craved by the advocate, they being materially just, though there was no other contradictor. This was irregular.—*Castlehill's Pratt. tit. Decrets, No. 33.*

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1684. *January.* AGNES BAIRD *against* ROBERT STUART.

Found that a decret-arbitral, whereof the matter in difference was depending in a process, was not reducible upon lesion *ultra dimidium*, more than if there had been a transaction; seeing, the matter being uncertain and litigious, the lesion could not be known.

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