

in general for the sums which might become due to her in virtue of the marriage contract. But the petition was refused.

No 53

Lord Ordinary, *Braxfield*. Act. *Wight, C. Hay*. Alt. *Lord Advocate, Solicitor General*.
Clerk, *Home*.

Fol. Dic. v. 4. p. 18. Fax. Col. No 327. p. 501.

S E C T. IV.

Contract when understood Mutual, when Conditional.

1609. *July*. EARL of MORTON *against* DOUGLAS.

A PARTY having granted bond to another, wherein he binds himself to set a tack of a mill to him, provided he should pay the granter a certain sum at a certain term, the LORDS, at the instance of the granter, reduced the bond for not performance of the condition; and this notwithstanding there was no clause irritant in the bond, and that the party, within ten days after the term, made offer of the money.

No 54.

Fol. Dic. v. 1. p. 597. Kerse.

* * This case is No 78. p. 7256. *voce* IRRITANCY.

1667. *July 18*.

EXECUTORS of the EARL of DIRLETON *against* DUKE of HAMILTON, EARL of CRAWFORD, and Others.

IN August 1645, the Earls of Crawford, Lanark, and several other noblemen and gentlemen, granted bond to the Earl of Dirleton, bearing an obligation therein, conjunctly and severally, to pay ten merks for each boll of 6000 bolls of victual, that should be delivered by Dirleton to James Riddel, or his deputies, the said Earl always obtaining James Riddel's receipt thereupon; which delivery and receipt were to be betwixt and a blank day, and the receipt to be delivered before payment; the term of payment of the price was Candlemas 1646; whereupon Dirleton's executors pursue the subscribers of the bond, who *alleged*, That this bond was clearly conditional, that the victual should be delivered betwixt and such a time, which, though it be blank, yet must be understood to be before Candlemas, which was before the term of payment of the price, and upon obtaining James Riddel's receipt thereof; *ita*

No 55.

A party was bound to pay a sum for every boll of grain delivered by a certain day. This was found to be a conditional bargain, and the purchaser free, because the grain had not been delivered as stipulated.

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est, there is nothing to instruct the delivery to James Riddel, or the obtaining his receipt *debito tempore*. It was *answered*, That the condition bears delivery to James Riddel, or his deputies, which terms signifies only persons under him in office, and therefore it must relate to James Riddel, as he was then a public person, one of the commissaries of the army under Humby, *ita est* there is produced Humby's discharge, and receipt of the victual, which is better than Riddel's, who was his depute; and there is also a declaration by Riddel, that the victual was truly delivered. It was *answered* for the defenders, That their obligation being conditional, must be performed *in forma specifica*, so that it being in Dirleton's power to deliver or not, if he delivered on other terms than the bond bears, it was on his own peril, neither is there any thing to show that this victual was destinate for public use; and albeit it had been the purpose of the defenders so to have employed the victual, yet they might chuse their own way of putting it in the hands of a person whom they did trust, who, without their warrant, could have given it out to none, and whose trust they only followed thus qualified, that a receipt were then obtained from him; so that they are not obliged to trust Humby's receipt, nor can that prove against them, for his oath, much less his acknowledgment could not bind upon them his debt, neither is Humby's receipt *debito tempore*; and likewise Humby's receipt relates not to this bond, but bears to be conform to a contract betwixt Dirleton and the committee of estates; neither can Riddel's declaration *ex post facto* prove against the defenders, or burden them, because they have qualified Riddel's trust, not to his write at any time, yea not to his oath, but to his receipt within the time limited; and there is no reason to enforce the defenders contract, to the tenor of their bond, to trust the declaration of James Riddel emitted at any time, for his condition might change, both as to his estate, and to his trustiness; and they were not obliged, though they were to trust his receipt within such a time, therefore to trust his declaration for ever; and albeit the victual had been appointed for public use, yet the delivery and receipt should have been made furthcoming to the defenders, that they might have obtained relief of the public; but never having been delivered to this day, the defenders cannot be burdened therewith. It was *answered*, That Dirleton was known to be an illiterate person; and albeit he takes Humby's discharge relative to a contract of the Committee of Estates, yet this same bond is understood, for the name of contract may well comprehend a bond; and the subscribers of this bond, albeit they be not so designed in the bond, yet all of them were members of the Committee of Estates, and a quorum thereof, and the quantity of victual was the same, and the date of that contract is the day of August 1645, which shows it was not then present; and this bond is in August 1645, and it cannot be imagined that Dirleton would have engaged in the same month for 6000 bolls of victual twice; and as to the time of the receipt and declaration, there is no clause irritant upon not obtaining it at such a time,

and that is no detriment to the defenders, neither can it be presumed that they would have obtained relief, seeing they attained no relief of many public bonds they were engaged into at that same time.

THE LORDS found the defence founded upon the conditional clause relevant, and the condition was not fulfilled, chiefly upon this consideration, that James Riddel's receipts were not obtained in the time limited, after which the defenders were not obliged to trust any declaration of Riddel's or Humby's.

Fol. Dic. v. 1. p. 597. Stair, v. 1. p. 475.

1675. December 23.

CREDITORS of the LAIRD of MOUSWELL against The LADY MOUSWELL.

IN a double pouding, raised at the instance of Tenants of the Lady's conjunct-fee lands of Mouswell, it being *alleged* for the Lady, That she ought to be preferred as to the annuity of 1000 merks yearly, wherein she stood infest; it was *answered*, That she could only seek preference for 800 merks; because, by a minute betwixt her and the friends who were creditors, she had engaged, for relief of the debts of the family, to restrict her liferent to 800 merks only. It was *replied*, That the minute of agreement was opposed, bearing that she had only done the same for the standing of the family, having then a son, who was since dead; and the friends having undertaken the payment of the debt for the subsistence of the family, which is now extinct, and the estate sold, the creditors, and others who have acquired right thereto, can never crave the benefit of that restriction, which she had only granted *tutorio nomine*, and with personal respect to her son, who was then apparent heir of the family. It was *duplied*, That the creditors now in competition being great losers, and have no way of relief as to a great part of the debts, but by the said restriction, they ought to have the benefit thereof, in so far as it ought to be extended to their debts, which they had undertaken and satisfied; albeit the minute of agreement was not fully performed by others who were bound for them.—THE LORDS having seriously considered the minute, bearing expressly that the cause of the Lady's restriction, did find, that unless the whole obligations contained in the minute were performed, the Lady ought to be preferred to her whole annuity; and that she could not be restricted in favour of some contractors, seeing thereby the family was not preserved; and that it was but a small provision for her and several daughters, who were not otherways provided.

Fol. Dic. v. 1. p. 507. Gosford, MS. No 829. p. 523.

No 55.

No 56.

A relict renouncing a part of her liferent, for maintenance of the family, by contract with the friends, who became bound to undertake to satisfy creditors for the subsistence of the family, and yet they disposing of the estate, or suffering creditors to evict it, the Lords found the renunciation null, and that the relict had still right to the whole, even as to those friends who paid their parts, the whole debt not being paid, nor the family preserved, which was the only end of her renouncing.