

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.

No 57.

* * Dirleton reports the same case :

IN a suspension of multiplepointing against Agnes Rome Lady Mouswell, and her children, and Douglas of Dornick, and the other Creditors of Mouswell; the said Lady desired to be preferred for an annualrent of 1000 merks yearly, wherein she was infest ; it was *answered* by the creditors, that she had right only to an annualrent of 800 merks yearly, having restricted herself to 800 merks, by a contract and agreement betwixt her and her friends of Mouswell. Whereunto it was *replied*, That the restriction was personal in favours of the heir of Mouswell, and *intuitu* of the obligements contained in the said contract ; that the friends should undertake the sums mentioned in the said contract *respective*, which they had not done ; and albeit it was *duplicated*, That the minute does bear a positive and absolute restriction, and renunciation of 200 merks, and that there is no provision or clause irritant in the minute, that if the obligements upon the other contractors were not fulfilled that the restriction should be void ; yet the LORDS preferred her for the whole annualrent, notwithstanding of the restriction foresaid ; which appears to be hard, seeing some of the creditors, who did compete with the Lady, were not contractors and obliged by the said contract ; and the foresaid restriction was not in favours of the creditors who were obliged by the said contract, but in favours of her son the heir ; and the benefit thereof doth accrue to his creditors who had comprised ; and does in effect redound to the advantage of the heir and his successors ; seeing the creditors will be the more easily satisfied, the burden of the Lady's liferent being restricted, as said is ; and the other creditors, who had not fulfilled their obligements, may be pursued for implement of the same ; and it is a great inconsequence, that because they had not fulfilled their part, that therefore the Lady's part which was fulfilled and executed, should become void ; and the pretence, that the restriction foresaid was *causa data non secuta* is of no weight ; seing the *causa* was the obligement of the creditors, which they might be compelled to fulfil.

Reporter, Hatton.

Dirleton No 208 A 170