

1777. July 30. Dame MARY WIGHTMAN, and Others, *against* WILSON.

No 52.

WILSON, in his contract of marriage, settled on his wife a jointure of L. 100, and the disposal of L. 500, to be distributed by her among her children, and failing them among her relations, as she should think fit. On the other hand, she conveyed to her husband, in the contract, her whole effects, which are computed to be worth at least L. 700 Sterling. The marriage dissolved, by the death of the wife, without issue; but she had exercised the faculty in the contract, and disposed of L. 500 to her uncle and his heirs, who sued the husband for the same. *Urged* in defence, That the pursuers were barred *exceptio- ne doli*; for the faculty had been granted on the faith of the wife's property amounting at least to L. 700, and it was denied that it had amounted to L. 200. *Answered*, The obligations were not co-relative, and that the faculty was valid though the husband had not received a farthing.—THE LORDS found, *imo*, That the provisions to a wife in a contract of marriage are presumed to be made in consideration of the marriage, not of the tocher, unless the words of the contract expressly bear so; and, *2do*, That the wife's whole estate being conveyed to her husband, and computed to amount to L. 700, the presumption in law is, that it did amount to that sum; and, as the husband acquiesced in that valuation during eight years that the marriage subsisted, that presumption cannot now be taken away, at the distance of eighteen years, by any proof or contrary presumption; and therefore they found the defender liable. See APPENDIX.

*Fol. Dic. v. 4. p. 17.*

1787. March 6.

ELIZABETH BUCHANAN, and JAMES HAMILTON her Trustee, *against* ARCHIBALD SPEIRS, and PETER BOGLE.

By a settlement executed by the father of Elizabeth Buchanan, a considerable sum of money was conveyed to a trustee, to be liferented by his widow, and to be divided, at her death, among such of the children as were then alive.

Elizabeth Buchanan, in her marriage-articles, assigned to her husband, by way of tocher, 'all her title and interest under her father's settlement;' while he, on the other hand, became bound 'to lay out the tocher, and so much more as would amount to L. 4000, in favour of the children of the marriage, and likewise for securing to Elizabeth Buchanan, in case of her surviving him, an annuity of L. 160.'

Afterwards a part of the liferented funds was lent out to the husband of Elizabeth Buchanan, Archibald Speirs, and Robert Bogle, on their granting a bond payable to the trustee. This money was wholly applied to the husband's

No 53.

A husband having become bound in his marriage-contract to employ a certain eventual provision, assigned to him by his wife, in security of her jointure, she was found entitled, while the sums so assigned were yet *in medio*,

No 53.  
and even in a  
question with  
his creditors,  
to insist that  
they should  
be preserved  
entire, so as  
to secure the  
provisions  
promised to  
her.

use; and, after the death of the liferentrix, the sums due by the bond above mentioned having fallen to the share of Elizabeth Buchanan, and her husband having become insolvent, an action was instituted by her, and James Hamilton her trustee, against the co-obligants, who were at the same time creditors to the husband to a great amount.

*Pleaded in defence*; If the sums in question had continued in the possession of the trustee, or had been lent out by him to a stranger, it may be admitted, that neither the husband of Elizabeth Buchanan, nor his creditors, could have insisted for payment, while the obligations he had come under to her remained unfulfilled. But these sums have long ago been placed in the hands of the husband himself; and to authorise a wife, in a question especially with her husband's creditors, to recover money already intromitted with by him, would be to convert what is on her part merely a personal claim, into a real or hypothecary right. Nor can the circumstance of the bond granted by the husband and his cautioners have any influence on the right of the wife. This was at the time a proper measure; because, while the liferentrix survived, it was uncertain to whom the money might ultimately belong. But after her death, the right having been united with the possession, in the person of the husband, every such claim as the present must be excluded.

*Answered*; It is now a fixed point, that a wife, in security of the conditions stipulated in her marriage-contract, may not only retain such of the sums assigned in name of tocher as her husband has not uplifted, but that, when he has become insolvent, she may prevent his creditors from attaching them while in the hands of a third party; 20th January 1781, Partners of the Woolen Manufactory at Haddington *contra* Elizabeth Gray, No 12. p. 9144.

There is no solid ground of distinction between the present case and the one just now quoted. The husband having granted the bond, is truly in the same situation as any stranger to whom the money might have been lent. And although, if he had been in affluence, the trustee would not have been allowed to demand payment from him or his cautioners, for the purpose merely of being able again to surrender the money to him, it is evident, that, in the circumstances which exist, such a measure is not only justifiable, but absolutely necessary.

THE LORDS found the defenders liable in payment of the sums sued for.

And they adhered to this judgment, after advising a reclaiming petition and answers.

By a subsequent interlocutor, the principle of which did not differ from that of those formerly pronounced, the LORDS found the defenders entitled to retain, on giving security to the extent of the sums sued for, for payment of Mrs Buchanan's annuity, when it should become due.

A petition was afterwards preferred by Elizabeth Buchanan and her trustee; in which it was *urged*, That the defenders should be obliged to give security

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.