

No 214.

blished, That any colourable title is relevant to elide the passive titles ; and that even a general disposition of moveables, though without confirmation, is sufficient to defend against vitious intromission. If there is no pretence for subjecting the pursuer to an universal passive title, neither can she be liable farther than *in valorem* of her intromissions, when, by the express conception of that deed which was the title of her intromission, she is declared to be accountable only for what she should intromit with. There is no medium between these two extremes, of being universally liable, or liable only *in valorem* of the actual intromissions ; unless something special could be alleged, from the tenor of the writing under which she intromitted, which obliged her to exact diligence, and, *in panam* of her neglect, made her answerable for the whole debts. The pursuer was not in this case to be considered as trustee for the creditors, and as such bound to exact diligence ; she was assignee for behoof of herself and children, *quoad* the surplus value of the subjects, after payment of the debts ; and it would have been highly unjust to have subjected her to the necessity of doing exact diligence, which, as to many of the debts, could have been of no use, though it must have required a great expense. Her right did not bar the defender from having access to the funds themselves. He might have confirmed himself executor-creditor, and would thereby have been preferable to her. But although he first adjudged, and then pointed most rigorously, yet he considered any further diligence as to no purpose ; and having left the pursuer to make the best she could of these old debts, under the title of her assignation, she can only be accountable for what she actually recovered in terms of that deed.

“ THE LORDS adhered.”

Act. Lockhart.

G. C.

Fol. Dic. v. 4. p. 45. Fac. Col. No 67. p. 113.

1770. December 12.

ANNE MARTIN, Spouse to JAMES MARNOCH, Pursuer, against JAMES GRAHAME in Livingston's Yards, Defender.

No 215.

Passive title, if incurred by accepting a general disposition, burdened with payment of debts.

IN 1764, the succession to the estate of Mulderg opened to Mrs M'Culloch, who had that year executed a disposition of all her heritable and moveable estate, and, particularly, an adjudication of the estate of Mulderg, for L. 10,186 Scots, in favour of James Grahame, her cousin, reserving her own liferent of the premises, and a power and faculty, at any time in her life, *etiam in articulo mortis*, to bequeath or devise L. 200 Sterling, by a writing under her hand, to any person she might think fit ; declaring also, that these presents were granted and accepted by the said James Grahame, under burden of the payment of all her just debts, and of the said sum of L. 200, if the faculty should be exercised.

Mrs M'Culloch had been under obligations to the pursuer ; and, on the 29th October 1764, she granted a bond, binding and obliging ' her heirs, executors, and successors, at and against the term of Martinmas 1765, to pay to the said Anne Martin, for her liferent use, and to the said William Marnoch, his heirs and assignees in fee, the sum of L. 50 Sterling, with L. 10 penalty, in case of failzie.' No 215.

In December 1764, Mrs M'Culloch executed another disposition, whereby she conveyed to James Grahame the adjudication which she held over the estate of Mulderg, reserving her own liferent, and discharging the faculty to bequeath L. 200, in so far as concerned the said adjudication, &c. Mrs M'Culloch having soon thereafter died, James Grahame disposed of her household-furniture, and intromitted with what effects she left ; and the pursuer having brought an action against him, as representing Mrs M'Culloch, for payment of sundry bills accepted by her for cash, &c. furnished her, and for payment of the bond for L. 50, Mr Grahame at first denied the passive titles, but at length allowed decret to pass against him for the bills.

As to the conclusion for payment of the bond, the Lord Ordinary, upon advising memorials, pronounced an interlocutor, finding, " That the defender having accepted of a general disposition from the deceased Margaret M'Culloch, of all her heritable and moveable subjects, pertaining, or that shall pertain to her at the time of her decease, under a reserved power to bequeath and devise the sum of L. 200 Sterling to any person she might think fit, and under the burden of all her just and lawful debts, contracted, or to be contracted, is bound to pay the sum of L. 50 Sterling, contained in a bond thereafter granted by the said defunct to the pursuer, Anne Martin, in liferent, and to William Marnoch, her son, in fee, with annualrents and penalty, in terms of the said bond."

In a reclaiming petition, James Grahame *pleaded,*

That he ought not to be personally liable in payment of this bond ; for, as he had not hitherto taken any benefit from the disposition mentioned, he could not be held as having accepted of it, so as to subject him in a passive title, or bind him personally to pay the granter's debts. As in this case, he had only accepted a disposition to a particular subject, burdened with debts and a reserved power, he, of course, represented the granter only in the subject disposed ; and hence he did not thereby incur an universal representation, nor could be further liable than *in va'orem* of that subject. He was precisely in a case similar to that of an executor confirmed, who was not allowed to be distressed beyond the amount of the inventory ; Dictionary, *voce* DILIGENCE ; or to that of an heir served *cum beneficio inventorii*, liable only to the value of the heritage given up ; Stair, 8th December 1675, Thomson *contra* Creditors of Thin, No 6. p. 3593. ; 2d December 1662, Clerk *contra* Clerk, No 207. p. 9887. ; 28th November 1738, Creditors of Crichen, No 17. p. 5348. As an heir *cum beneficio* could not be personally decerned against beyond his intromissions, so

No 215. neither should he in the present instance ; and all that could be demanded of him was, that he should grant an assignation to the adjudication, in terms of the conveyance in his own favour.

The pursuer *answered*,

The petitioner's doctrine, that he could not be found personally liable for this bond, would overturn the doctrine of the law as to passive representation altogether ; for, upon the same principles, no one who succeeded to an estate would be bound to pay his predecessor's debts, till he had intromitted with as much of the rents as was sufficient for all demands, or had, at a distance of time thereafter, sold the estate for that purpose. The argument drawn from the situation of executors-creditors and heirs entered *cum beneficio inventarii*, could not aid the question ; the rules, as to these, were introduced for the benefit of the creditors ; it would be hard to make them personally liable where they had not intromitted ; but this had no resemblance to the case of the petitioner, who, knowing his risk, had willingly accepted a disposition, with all the burdens it contained.

It was agreed upon the Bench, That the acceptance of a disposition, under the burden of debts, &c. created a passive title ; but as the rigour of passive titles was now much relaxed, a doubt was entertained, if the defender could be made liable *ultra valorem* of his intromission. As these were not fully explained, a remit was made to the Lord Ordinary, to hear parties farther thereon.

Lord Ordinary, *Pitfour*.

For Martin, *S. Fraser*.
Clerk, *Kilpatrick*.

For Grahame, *Rae*.

R. H.

Fac. Col. No 58. p. 172.

Bona fide, intromission with the effects of a defunct. *See* BONA ET MALA FIDES.

Disposition to the apparent heir reserving the granter's liferent, and a power to alter, if it will infer a passive title against the donee. *See* FACULTY.

Penal passive titles, *an transeunt in hæredes?* *See* PERSONAL and TRANSMISSIBLE.

Disposition to the heir, *post contractum debitum*, if probative of its onerous cause. *See* PROOF.

Intromission by tutors, if it will make a passive title against the pupil. *See* TUTOR and PUPIL.

See APPENDIX.