

No 214.

against her as vitious intromitter, but it could not in law have affected her husband, might have been avoided by her confirmation, was extinguished by her death, and in no event would have benefited the pursuer, who is not creditor, but heir of Annandale.

“ THE LORDS repelled the reasons of reduction, and found that the defender was entitled to take an assignation to the bond in his own, or in a trustee's name.”

Reporter, *Justice-Clerk.* Act. *A. Pringle.* Alt. *Ferguson.* Clerk, *Murray.*
D. *Fol. Dic. v. 4. p. 45. Fac. Col. No 18. p. 36.*

1757. December 14.

JOHN WATSON, Writer in Edinburgh, against JEAN ERSKINE.

No 215.

A relict intromitting with her husband's effects in virtue of a general disposition, found liable only for actual intromissions.

ROBERT MEEK brewer in Dalkeith, by deed, bearing date 9th April 1739, “ For love and favour to Jean Erskine his spouse, and for the better enabling her to make payment of such debts as should be resting by him at his death, and defraying the expences of his last sickness and funerals,” conveyed to her, in general, all his moveable effects, of whatever kind; and, in particular, without prejudice to the said generality, he assigned to her a list of debts due to him by many different people, which are therein specially enumerated. This deed contains also the following clause. “ Declaring always, as it is hereby expressly declared, That the said Jean Erskine shall be bound and obliged to account to Patrick and Thomas Meeks, our children, for two thirds of the superplus, if any be, of the sums and subjects hereby conveyed, after payment of my just and lawful debts, and funeral-charges; and in case the said debts funerals, and other expenses, shall exceed the moveables hereby assigned, the said Jean Erskine is to be no further liable than for what she shall receive by virtue of this right and assignation.”

Robert Meek died within a few weeks after granting this deed; and the said Jean Erskine, his relict, in virtue of the conveyance in her favour, intromitted with his moveable subjects, and recovered part of the debts assigned to her. The remainder of them she alleged were old and desperate, and not worth doing diligence upon.

In the year 1740, John Watson writer in Edinburgh, a creditor of Robert Meek, obtained decret in absence, before the Sheriff of Edinburgh, against the said Jean Erskine, as representing her husband, without any proof of the passive titles, other than holding her as confessed; and upon this decret he first led an adjudication, and thereafter proceeded to point the moveable effects of the defunct which were in her possession.

In 1743, Jean Erskine raised a reduction of that decret; but the process was not properly insisted in till the year 1755; when it was urged for her, as a

sufficient ground of reduction of the Sheriff's decret, That it was in absence, and without proof of the passive titles ; and that she noways represented the said Robert Meek, her husband, excepting that she had got a disposition and assignation of certain moveable debts from him, by which it was expressly declared, that she should be no further liable, than for what she should receive in virtue of the said assignation ; upon which she was willing to account. And having exhibited an account of her intromissions with her husband's effects, she *insisted*, That she could not be further liable for her husband's debts than to the extent of her actual intromission. Having been reponed to her oath, upon the passive titles, she accordingly deponed, and acknowledged certain intromissions with the effects of her husband, in virtue of the foresaid assignation ; but no other passive title.

THE LORD ORDINARY, by his interlocutor, 21st of February 1756, " Having considered the disposition, with the pursuer's oath, found her accountable only *in valorem* of the effects of her husband, which she has acknowledged she has intromitted with."

John Watson reclaimed against this interlocutor, and *pleaded*, That the general rule of law was, That those who intromit with a debtor's effects, upon a title of possession sufficient to exclude others, are themselves bound to possess and intromit ; and to do diligence for recovery of the debts and effects *debito tempore*, so that they may not perish by neglect, to the loss of lawful creditors : That this rule obtained with respect to executors, who are the trustees of the law, and upon whom the inventory is a check against embezzlements ; and there was no reason why an universal disponee, against whom there is no such security, should be more favoured : That he did not insist, that the pursuer should be universally liable for her husband's debts, as having accepted of a general disposition ; though such was formerly the law of this country ; 3d December 1678, Wamphrie against Johnston, (*see APPENDIX*) ; but only that she should either be liable *in valorem* of the particular debts specially assigned to her, or should show, that she did exact diligence for recovering the same : That it would be a very easy method of disappointing creditors, if a debtor were allowed, by a deed *mortis causa*, to convey his whole subjects to his wife or children, declaring, that they shall only be liable for what they actually receive, of which there could often be no other evidence but their oaths ; so that they may embezzle as much as they please, without remedy, when it is in their power to take possession of all he leaves behind him, to the exclusion of his creditors : That the law does not allow a debtor so great a liberty of making his heirs liable for his debts or not just as they please ; nor was it in the power of any person to hurt his creditors, by adjecting such a clause to a deed, declaring, That his heirs or disponees should only be liable for what they received of his debts or effects.

Answered for the pursuer, The rigour of our ancient law, as to penal passive titles, is now happily softened ; and by a long train of decisions, it is now esta-

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.