

No 70.

Wherever an *universitas bonorum* is conveyed, it implies the burden of debts to the extent of the subject received, *quia bona tantum sunt quæ supersunt debitibus deductis*: Nor does it alter the case that it is in a contract of marriage: For although where the husband is only, *qua* such, bound for his wife's moveable debts, the obligation upon him ceases by the dissolution of the marriage, except in so far as he is *lucratus*, yet where he takes from the wife a disposition *omnium bonorum*, he becomes liable *tanquam quilibet*.

Kilkerran, (PASSIVE TITLE.) No 1. p. 366.

1740. February 19.

DRUMMOND against STEWART.

No 71.

A person who advanced money to a wife for defraying her first husband's funeral expenses, and carrying on a reduction of her former contract of marriage, brought an action for payment against the representatives of her second husband. Found, that the debt not being constituted against her husband *stante matrimonio*, his representatives were not liable unless proof was brought that he was *lucratus*.

THE pursuer having advanced certain sums of money to his niece Jean Chalmers, for defraying her first husband's funerals, and carrying on a process of reduction of her contract of marriage with him, brought a process for payment thereof against the Representatives of her second husband.

The defences were, *imo*, Prescription, the last article of the account being dated *anno 1710*, which; it was *pleaded*, was founded on the statute introducing triennial prescriptions in all actions of debts, or merchant accounts, and other debts not founded on written obligations; and that this case fell precisely under the words of the act, 'such like debts not founded on written obligations.' *2do*, That this claim being only a debt of the wife's, not constituted against the second husband *stante matrimonio*, could not be brought against him after the dissolution thereof, far less against his representatives.

*Answered* to the *first*, That the pursuer was no writer or agent, and run accounts with no body, neither was he a merchant; so that he could not be included either under the words or meaning of the act 83d, Parliament 6, James VI. It has indeed been justly found, that writers' accounts are comprehended in the general clause, because the laying out of money and managing processes, being their proper business by which they live, their accounts are not presumed to lie over; and indeed they bear a great resemblance to merchants' accounts; but the pursuer lives in the country on his estate, and concerned himself in the affairs of his niece, as her *negotiorum gestor*; and his case is much the same as that of a factor, who, in the course of his constituent's affairs, laid out money for merchant goods, or any other articles comprehended in that statute. In like manner, if a curator had laid out money in affairs of a like nature with this, and should neglect to have his accounts settled for five or six years after the expiration of his curatory, could it be pretended that he would lose what he could show he had laid out for his minor's behoof, to lawyers, writers, &c. by the prescription taking place against him. On the contrary, it would appear, that a curator could demand repetition of what he had laid out as above, at any time within the 40 years, before the statute 1696, otherwise there had been no use for that act, if a prescription of three years had formerly taken

place ; but the reason of the law is to obviate the inconveniency, both to minors and to curators, of having their accounts lying over their heads for 40 years ; and there appears no reason of a difference betwixt a curator, a factor, and a *negotiorum gestor*, in this particular.

To the *2d*, it was *answered*, That the whole expense laid out by the pursuer, was evidently for the profit of Mr Walter Stewart the second husband, who was benefited thereby ; and, as he was *lucratus* by the marriage, his representatives ought in so far to be liable, notwithstanding the debt was constituted against him *stante matrimonio*.

*Replied*, It can make no difference that the pursuer is no writer or merchant, for the act doth not consider the creditor, but the nature of the debt. If it be an account, or money laid out, without a written obligation, the law does not allow action for payment of the debt after three years, unless by writ or oath of party. Neither will the parallel betwixt factors and curators, their accounts not prescribing in three years, apply to the present case ; for factors have express commissions for what they do ; and their factories must regulate their accounting ; and curators have their office by the law, which is equivalent to the most express written factory. Nor is there any difference betwixt an agent and a *negotiorum gestor*. Every agent's account consists not only of money for his own pains, but chiefly in money paid to lawyers, clerks, &c. And yet it never was imagined that agents' accounts did not prescribe on that account. And, indeed, as most of the articles of this account are debursments in processes, which the pursuer pretends he undertook the management of for his niece, these fall directly under the denomination of agent's accounts. And with respect to the other articles, being the expense of the first husband's funeral charges, as the prescription has evidently taken place against the original creditors, the defenders can see no reason why it should not be good against the assignee ; which is putting the thing in the most favourable light for the pursuer, viz. that he had taken assignations to the several accounts paid by him. In which case, every defence competent against the cedent is competent against the assignee.

And, with regard to the *2d* defence, it was *observed*, That the husband was not *lucratus* by the money laid out by the pursuer ; however, as that might involve the defenders in a proof, which behoved to be attended with trouble and expense, they were willing to rest their cause chiefly on the first defence.

THE LORDS found, That the triennial prescription does not take place in this case. But found, That the pursuer cannot have action for the accounts pursued on, the debt not being constituted against the husband *stante matrimonio*, unless he prove the husband was *lucratus* by the marriage.

*Fol. Dic. v. 3. p. 281. C. Home, No 147. p. 252.*

\* \* See Kilkerran's report of this case, *voce* PRESCRIPTION.