

the money was the wife's, and that the signing of the discharge imported no donation of the money to the husband, and consequently the defender, who knew those circumstances, and who had so much interest in the wife, both by blood and by the contract, could not misapply the money. *3tio*, Neither makes it any alteration of the case, that the wife was debtor to the husband precisely in the like sum, because in like manner was the husband debtor to her for the employment of that sum for her liferent use, and consequently could never exact payment without performing his part.

“ The Lords found the defender could not, by any transaction with the husband, apply the money received by him from the wife's debtor, by virtue of the husband and wife's discharge, to the payment of the husband's debt, in prejudice of her liferent, without her own consent.”

Dalrymple, No. 122. p. 170.

1714. *December 2.*

DAVID JACKSON, Merchant in Perth, *against* The RELICT and CHILDREN of JOHN MONRO, &c.

The said Jackson, Monro, and others, in company, having sold a part of a loading of timber to the Lord Nairn's wright, for his Lordship's use, the wright draws a bill upon my Lord for the price, payable to Jackson, or order; which his Lordship accepts. The bill being indorsed to James Richardsson, Sheriff-clerk of Perth, as trustee for the behoof the Company, some creditors of one of them arrested in the trustee's hands; whereupon he delivered back the bill to the Company, and took them obliged to warrant him against the effect of these arrestments. The Company then delivered the bill to Monro, with a discharge thereof apart; whereupon the Lord Nairn pays the bill, and gets up his discharge.

Monro dying before clearance, the rest of the Company, who had not got their full shares of the Lord Nairn's money, insist for the same against his children; whereupon it was answered for them, That the question resolved in a trust, which was not proveable, after Monro's death, otherwise than by writ, the alleged trust being since the act 1696.

Replied for the pursuers: That the present case fell not under that act, but under the exception thereof; which provides, that it should not extend to indorsations of bills of exchange, nor to notes of any trading company. And the reason of the exception is plain; for if trust were not allowed amongst traders in bills of exchange, it would interrupt commerce.

Duplied for the defenders: That the exception in that act cannot rule this case, because that exception relates only to indorsations of bills of exchange; but here the question is not about an indorsed bill, but concerning the trust of a bill, which is not contended to have been indorsed to the trustee; and therefore does not fall under the said exception, which relates only to indorsations.

No. 32.

No. 33.

What trusts fall under the act 1696.

No. 33.

Triplied for the pursuers: That the exception ought to be extended, not only to indorsations, but to the notes of all Companies, whether erected by law or voluntary contract;—*1mo*, Because the exception is in the terms of our former law, and so to be extended; whereas the statute is correctory; *2do*, *Ex natura contractus societatis*, there is a mutual trust among all the members of the society, and the deed of one obliges the other; which obligation arises from the nature of the contract itself, and so deeds taken in the name of one of the society do accresce to all.

The Lords found, That this being a society in relation to a cargo of timber, and the bill being given for a part of that cargo, it did not fall under the act of Parliament 1696, anent trusts, but under the exception thereof.

In the foresaid action, the pursuers (for proving that the bill was paid to Monro, as trustee for the behoof of the rest) having produced a missive from the Lord Nairn, owning the receipt of the bill, and indorsation to the behoof of the partners, with a discharge apart by the pursuers to him, whereupon he paid the money; having also adduced witnesses, who deponed, “ That the bill was drawn on my Lord by his wright, for the price of the timber, and that there was a discharge signed by the pursuers, and it, with the bill, delivered to Monro, for receiving the money for the common behoof;” as also James Richardson, one of the children’s tutors, having produced the above receipt from the company to him, warranting him against arrestments; and, *lastly*, Monro’s relict having, upon oath, produced some receipts granted by the pursuers to her husband, of certain sums, in part payment of greater, due to them for their interests in the cargo; as also an account of the freight due to the skipper by the several parties, with an order subjoined thereto to pay the same, and that it should be allowed to him out of their respective shares;

The Lords found the above documents, with the discharge by the Society to the Lord Nairn, were sufficient evidents to instruct the payment of the bill to Monro, as trustee for the behoof of the society.

Act. Fleming.

Alt. George Mackenzie.

Clerk, Gibson.

Bruce, v. 1. No. 12. p. 18.

1724. February 21.

REPRESENTATIVES OF LORD BOWHILL *against* The CREDITORS OF GALA.

No. 34.

Action
against an
heir to exe-
cute a trust.

The affairs of the late Sir James Scot of Gala falling into disorder, it was thought convenient to take out a gift of his single and liferent-escheat in name of Lord Bowhill, one of his creditors; which gift, besides the debt in the horning whereupon it did proceed, was burdened with a considerable annuity for the maintenance of Sir James and his family, and likewise with the donatar’s own debt;