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assignation duly intimated, before the Rebellion. Patrick Steill assigned several bonds due to him by the deceased Robert Deans, merchant in Edinburgh, to Mr. John Cameron, in trust, who obtained decree of constitution and adjudication against the representatives of Robert Deans, and transferred the whole rights, with Steill's consent, to Mr. Walter, before the Rebellion, under back-bond to hold count to Steill for what he should recover. Mr. James Smith, as donatar of the escheat, pursued Mr. Walter for £.539 Scots recovered by him of Robert Dean's effects.

The Lords found, That Mr. Walter, being creditor to the rebel before the Rebellion, and having obtained payment by virtue of the right from Cameron, whose assignation from the rebel was intimated before the Rebellion, he had right to retain in compensation of the sums due to himself *pro tanto*, and therefore preferred him to the donatar; albeit the translation from Cameron was not intimated to the representatives of Robert Deans before the decree of general declarator of the escheat; in respect the intimation of the assignation to Cameron effectually denuded Patrick Steill, and put the debtors *in mala fide* to pay him, who had only an action on the back-bond against Cameron to retrocess, with which the debtors were no manner of way concerned. Nor was there any necessity for Cameron's translation in favours of Mr. Stirling to have been intimated, in order to denude the first cedent, but only to secure against Cameron's uplifting or assigning *de novo*; for the assignation to Cameron (though in trust), being transferred with the cedent's consent, was equivalent to a discharge of the trust, and an effectual conveyance to Mr. Stirling of the effects assigned to operate retention, how soon they came into his hand, against the donatar.

Forbes, p. 641.

1714. *December* 8. JULIAN OSBURN *against* MR. HENRY OSBURN.

No. 32.
A discharge of a bond due to a wife, being signed by her husband and her, and put into the hands of the wife's brother, at whose instance execution was provided to pass against the husband, and by whose consent the wife's liferent was to be secured, and the

By contract of marriage betwixt Julian Osburn, with consent of Mr. Henry Osburn, her brother, on the one part, and James Stewart of Schawood, on the other, Julian is obliged to pay to her husband 3500 merks in name of tocher, and she is provided to the yearly annual-rent of the said tocher in liferent, and that how often the money shall happen to be uplifted, it shall be re-employed for her liferent use, with consent of her brother, at whose instance execution was to pass for implement of the contract.

The said Julian was creditor to Sir William Cunningham of Capringtoun in the sum of 3500 merks principal, which she did not by the contract assign, nor did the contract mention the same, but only obliged herself to pay the like sum *ut supra*.

Capringtoun, the debtor, being willing to pay the money, there was a discharge granted both by the husband and wife, and lodged in the hand of the said Mr. Henry Osburn, who received the money, and the husband being debtor to Mr. Henry

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brother having applied a part of that money for payment of a debt due by the husband to him, he was found liable to the wife for her liferent right of the whole sum.

Osburn in 3200 merks, so much of the said sum received from Capringtoun was applied to pay the husband's debt.

The husband being deceased, the wife pursues Mr. Henry Osburn, her brother, either to instruct that the money was employed for her liferent use, or otherwise to pay her the annual-rent thereof during her life, upon this ground, that he being trusted with the discharge to the debtor, and thereupon having received the money, the wife had the same right and interest in the money when it lay in his hand as when it lay due by the debtor, and the defender, who was her trustee, could not apply her money otherwise than for her own behoof.

It was answered: There was no trust in the matter in favours of the pursuer, with whom he had no communing on that subject, but with her husband only, from whom he had received the discharge, signed by both; and he did receive it expressly *eo intuitu*, that he might apply the money, when received, for his own payment, as is easily presumed, and also does appear by a declaration granted by the husband, acknowledging that he had received from the defender 3200 merks, which he obliged him to allow and repay out of the sum of 3500 merks, due to the said James as his wife's tocher, which the defender was to receive from Capringtoun, and to retain in his hands till payment; and there being no probation against the defender that ever he received the money or discharge, but his own acknowledgment, the fact must be taken as he acknowledges it; and albeit he was consenter to the marriage, and execution to pass at his instance, yet there lay no obligation upon him to use execution against the husband, or see the re-employment of the money; but that was *meræ facultatis*.

It was replied: That the money was the wife's originally, and did so continue when it was received by the defender, which he could not alter by any transaction with the husband; for supposing the fact as is represented, that he received the discharge from the husband, and that upon a communing or agreement to apply the money, when received, for payment of the husband's debt, yet that was unwarrantable for any body to do, especially for one who had so much trust from the wife as to have married with his consent, and her liferent to be secured by his advice, and execution to pass at his instance; for though it be not alleged that he was bound to do diligence, or to concern himself in the re-employment, if he had not been concerned in the uplifting of the money; but seeing the wife's money was uplifted by him, upon her discharge and her husband's, and lodged in his hand, it was contrary to his trust to have done any deed in relation to that money in prejudice to her liferent, for he was at least obliged to do nothing to her hurt. *2do*, The wife's trusting the discharge in the husband's hand did not in the least prejudge her right, because, if the husband had uplifted that money, he was bound to have re-employed it for her liferent use, wherein if he had failed, the wife would indeed have been in the case of a common creditor, though he had taken the same species, and paid his debt to the defender; because money is a *fungible*. But in as far as the husband did not uplift the money himself, but gave the discharge to the defender, that he might receive it, then the defender could not but know that

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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.

No. 33.
What trusts fall under the act 1696.

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.