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;—1*mo*, Because the exception is in the terms of our former law, and so to be extended; whereas the statute is correctory; 2*do*, *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 execute 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;

and as to the residue, backbond was granted in Exchequer in the usual way, for the behoof of the other creditors. After the Lord Bowhill's death, which happened *anno* 1714, his representatives insisted in a process of exoneration, as to this right of trust; concluding, "That it should be found and declared, that the said donatar and his representatives were only accountable for what accrued from the gift during the donatar's life:" And this, notwithstanding that Sir James the rebel did many years outlive the donatar; and that the gift was to the donatar, his heirs and assignees; and that it was a proper trust granted for the behoof of others, as well as the donatar himself. No. 34.

It was contended for the creditors, That this gift of escheat was by no means to be considered as a personal mandate, or trust of such kind as to end with the mandatar, where the integrity and sufficiency of the mandatar is the principal thing in view. Here it was of no import to the creditors in whose person the right did subsist. It was enough to them if the donatar, or such who came in his place, were responsal. This right is a plain conveyance from the crown to the creditors, and others, converted into one man's person for the behoof of all; which was a necessary expedient for the better executing the right: And nobody can doubt, in the case of any conveyance to a person, his heirs, and assignees, of a common subject for the utility of all concerned, but that such conveyance being once accepted, must remain a charge upon the accepter, his heirs and representatives, till the end and uses for which the same was granted be fully accomplished. 2*do*, Admitting that the donatar could have relieved himself of the burden of executing the gift; that could only be done by a due notification to the creditors, while matters were yet entire: But it is submitted if this can now be done, after the profits of the said liferent-escheat have perished, or been diverted to other purposes. The pursuers neglecting the proper notification to the creditors, the creditors rested satisfied, that they were going on to perfect the work begun by their predecessor; they trusted to this, and most justly: The pursuers had their choice to prosecute the administration of the gift, or to notify to the creditors their refusal; and if neglectful, they forebore both, they alone can suffer by their neglect.

It was granted by the pursuers, That the gift of escheat was a mandate; but then it appears by the tenor of the back-bond, it was only *in rem suam*, or at most for such, with whose debts the gift was expressly burdened; but as to the creditors at large, whom the donatar neither did, nor was presumed to know, the donatar's representatives opponed the tenor of the back-bond; which says, "That the further benefit shall be converted and applied to the utility and behoof of the remanent creditors, at the sight of the Lords of Treasury," which will never infer either trust or mandate, betwixt the donatar and the creditors. He is not even taken bound at the instance of the Treasury to administrate, the clause importing merely, "That the donatar should have no right to more of the escheat-goods, than to satisfy the debts in the gift; and therefore, in the case of his intromission with more, that he should be accountable to the Treasury." The creditors might have applied for, and prosecuted a new gift of escheat, which would be a title of imme-

No. 34. diate intromission against the debtors, the preferable debts in the first gift being once satisfied; and even against the first donatar, if he had extended his intromissions beyond his title: But no action could be competent against the donatar himself, and far less now against his representatives, to compel them to continue their intromission beyond their own interest. Answered to the *second*, Since there is no title, there is no presumption that the donatar or his representatives would continue their intromission farther than in satisfaction of their gift: The creditors then had no reason to trust to this; and if they neglected to take out a second gift, the pursuers have their own argument to retort against them, That they alone ought to suffer thereby.

"The Lords found the representatives not liable in diligence."

Rem. Dec. v. 1. p. 91.

1729. *February.* OGILVIE *against* LYON.

No. 35.

A debt was assigned in trust, in order to lead an adjudication. The adjudication was led upon the trust-debt, and several others belonging to the trustee; but there being many preferable diligences, the trustee bought in one of them, and by virtue thereof got into possession. In a process at the cedent's instance against his trustee, to account for his intromissions, it was found, That the apprising purchased in by the trustee could not expire in his person in prejudice of the apprising led at his instance as trustee for the pursuer, but that the same must be understood as purchased in for their common behoof, the pursuer always being liable for his proportion of the money paid for the purchase.—See APPENDIX.

Fol. Dic. v. 2. p. 477.

1737. *June* 21.

BEATON of Kilconquhar *against* M'KENZIE of Fraserdale.

No. 36.

One purchased an estate, and took a conveyance to his author's disposition with procuratory and precept.

While a prisoner, in consequence of being engaged in the Rebellion 1715, his friends, in order to protect his estate, infeft his author.

Having returned home unattainted, he contracted debts, and conveyed to certain creditors the precept in security, ignorant that it had been exhausted. He died bankrupt; and these creditors applied to his author, from whom they obtained infeftment.

Other creditors brought a reduction, on the act 1696, of this act of the author, as a trustee who had alienated after his constituent had become bankrupt. The defence was, that the author was no trustee. The conveyance did not denude him of his personal right. He might have infeft himself, and made a second convey-