1666. *November* 8. CARSE *against* CARSE.

No. 5.
Trustee must be kept *indemnis*.

Dr. Carse having taken a right of annual-rent out of Sir David Cuningham's lands, in the names and persons of Mark Carse of Cockpen, and Adam Watt, writer, and a comprising thereafter deduced, in their name, to the behoof of the Doctor, for some arrears of the said annual-rent, not only out of the lands out of which the annual-rent was due, holding blench or feu, but of other lands holding ward, Charles Carse, son and heir to the said Doctor, pursued the said Mark Carse and the heir of Adam Watt to denude themselves of the right of the said lands, conform to a back-bond granted by the said Mark Carse and the said Adam Watt, declaring the trust. In that trust, it was alleged for the defenders, that they were content to denude themselves, they being relieved of all hazard they might incur upon occasion of the said trust, and having that right in their person; and, to that purpose, did offer a disposition, bearing a provision, that the right should be burdened with the relief of wards, marriages, and ministers' stipends, cess, and other such hazards. It was answered, That the said disposition ought not to be clogged with such a provision, which would fright buyers from purchasing the said lands; and the pursuer was necessitated, and had presently an occasion to sell the said lands: And as to the incumbrances and hazards which the defenders should condescend upon, they should be purged: But as to the marriage of Adam Watt's heir, (which was condescended upon), there could be no hazard upon that account, in respect the comprising at the instance of Mark Carse and Adam Watt was the fourth comprising, which did only import a right of reversion, the first comprising, whereupon infeftment had followed, carrying the right of property. It was duplied, That if it should appear that the former apprisings are either null or informal, or satisfied, the fourth apprising would carry the right of property, and consequently the marriage.

The Lords found, That the pursuer should accept the disposition with the burden of the said relief; or, in his option, should secure the defenders by a bond with a cautioner, to relieve them.

Dirleton, No. 43. *p.* 17.

1666. *December* 22. TWEEDDIES *against* TWEEDDIE.

No. 6.
Presumptions of trust having been adduced, witnesses were admitted in corroboration.

Umquhile ——— Tweeddie of ——— having disponed his whole estate to his eldest son, at the same time, his son gives a bond to his mother, and her heirs, of 6000 merks. The mother being dead, the other five bairns pursue a declarator of trust against the heir, that this was the bairns' provision, put in the name of the mother, and offer to prove the same by the writer and witnesses inserted. It was answered, That trust was not so proveable, otherwise all rights might be inverted by witnesses, whose testimonies our law hath restricted to £.100. It was answered,

No. 6. That much more was to be attributed to witnesses inserted, upon whose testimonies the parties condescend, and confide, than to common witnesses; *2do*, Albeit witnesses were not receivable to prove trust alone, yet where there are strong presumptions concurring, they are admittable even to annul writs of the greatest importance, as is ordinarily used in the indirect manner of improbations; and here are strong presumptions, viz. that the father, at the time of this bond, did dispone to the defender, his eldest son, his whole estate, without a reservation of his own liferent, or any other thing, and there were five children beside, who had no provision; so that albeit this bond be conceived to the wife, her heirs and assignees, yet it cannot be presumed to be intended to have fallen back to the defender as her heir.

The Lords, in respect of the presumptions, were inclinable to admit the witnesses; but they ordained the pursuers, before answer to what could make a sufficient probation, to adduce such witnesses as they would make use of for astructing these presumptions and the trust.

Stair, v. 1. *p.* 418.

1667. *July* 14. SCOT *against* SCOT.

No. 7.

A party assigned a bond, and took a back-bond, bearing that the assignation was in trust. It was decided, that the assignation had been granted for the sole purpose of doing diligence.

Stair.

*** This case is No. 8. p. 11344. *voce* PRESUMPTION.

No. 8.
A trust-disposition of land having been granted to prevent the rigour of creditors, the person entrusted was found to have no right, in consequence of assignations he had taken, to receive more of the debts compounded for than he had truly paid.

1667. *November* 15. JAMES MAXWEL *against* ADAM MAXWEL.

James Maxwel, and the umquhile Lady Hiltoun, his spouse, having disponed their land to Adam Maxwel, James now pursues a declarator of trust, whereupon the Lords formerly ordained count and reckoning, that it might appear what Adam had expended upon the account of the trust. In which account Adam gives up certain bonds by James, whereunto he had taken assignation, against which, he could allege no more than what he truly paid out, in respect the time of the assignation he was entrusted by the pursuer. The defender alleged, *Non relevat*, unless it were alleged he was entrusted to compone for the pursuer's debts; but if it was only a trust of his land, and not a general trust of all his affairs, it could not reach these bonds; and albeit, upon the account of friendship or charity, the defender might be desired to take no more than he gave, there lies no obligation, in law or equity, upon him so to do, but he may demand what the creditors, his cedents, or any other assignee, might demand. The pursuer answered, That