No. 22. Balcomy's death, the custody of the writs was in place of a back-bond, it being in the power of the defender, and his predecessor, to destroy the apprising, with the grounds and warrants thereof; *3tio*, Lesmore, by a letter under his hand, a little time before the assignation, declares that Balcomy wrote to him and the Laird of ——— to advance 500 merks to him for acquiring that apprising, the said Laird of ——— being to advance the other 500; and he offered to come south, if his coming might do any service; which imports, that the advancing of that money was designed as a service to the family; whereas the taking of the right to his own behoof, had been a disservice.

Answered to the declarator: That no presumption can take away Lesmore's right, who stands publicly infeft in the registers; for although instrument *penes debitorem* in perpetual rights, whereon no registration or any other thing had followed, it were dangerous to extend that to real rights; and this right being expede in the year 1659, when apparent heirs might have safely acquired apprisings, there was neither reason nor necessity for trusting a third person without a back-bond; besides, a letter written by Mr. Robert the defender, to Lesmore, desiring Lesmore to (enter) him upon some rights acquired from the creditors, and he would be in his reverence for the entry, clearly imports, that he looked upon Lesmore as having the right of superiority, to which he had no pretence but by the said apprising, and that his right was not a trust; for then Mr. Robert needed not to have been in his reverence for the entry; *2do*, The heirs of Balcomy having denuded Lesmore of a right of trust to the teinds, they would likewise have denuded him of the other right, had it been a trust; *3tio*, Lesmore lived sickly for many years after his acquiring of the apprising, without any back-bond sought from him, or his oath required upon the trust; *4to*, When he was sick, he made over his right to the pursuer, and said it would be worth 20,000 merks to him, which a person of so great honour, and so kind to relations as he was, would not have done, had it been a trust.

The Lords found the trust not proved, and decerned the defender to exhibit.

Thereafter the defender offered to prove by persons *omni exceptione majores*, and some of Lesmore's own near relations, that he acknowledged the right to the apprising was in trust for the behoof of the heirs of Balcomy, except the 500 merks he advanced, and the annual-rents thereof; and these the Lords ordained to be examined *ex officio*.

Harcarse, No. 489. *p.* 134.

1696. *June* 19.

MR. ALEXANDER HIGGINS, Advocate, *against* CAPTAIN JOHN CALLANDER, His MAJESTY'S Master-Smith.

No. 23. Duties of a trustee. In the declarator pursued by these parties, the qualifications insisted on for evincing that the last disposition, made by Mr. Higgins, to Captain Callander, in

August 1685, was a trust, in so far as exceeded the debts due to himself, were founded on the declarator of recognition, where the Lords had found it was to the behoof of Captain Callander, and Higgins' creditors, *ad hunc effectum*, to secure them from any who should take a second gift; 2*do*, That, after the said absolute irredeemable disposition, Mr. Higgins had acted as heritor, by setting the tacks; 3*tio*, Captain Callander had, in his accounts given in, charged the expenses debursed by him in selling the victual of the lands disponed and managing the other affairs relative thereto, upon Mr. Higgins, which was a great evidence, that he looked upon himself only as Mr. Higgins' factor and trustee; 4*to*, By a back-bond, given by him to John Callander, in Borrowstounness, he, after the irredeemable right, obliges himself to do the same diligence for his right, against Higgins' person and estate, that he should use for his own; 5*to*, He was present at several trusts, and communings, where Mr. Alexander Higgins offered to set the lands, which he could not do if it had not been a trust; 6*to*, Long after the absolute disposition, they componed with the Earl of Panmure for a debt owing to him, and Captain Callander paid two parts of the sum, and Mr. Higgins the third, which evinces it could not be a final bargain; to all which, Callander opponed his irredeemable absolute disposition, pure and simple as any sale ever was, proceeding on a narrative of a count and reckoning, and a liquid precise and definitive price of 110,000 merks, and whereupon he has not only deponed that it was for his own behoof, without any trust or reversion, but also the communers and witnesses present, who fortify and adminiculate the same; and though his oath was not *deferente adversario*, yet it was taken by the Lords *ex officio*, who in a dark and dubious case, and a *semiplena probatio*, take the party's oath in supplement, so that *jusjurandum necessarium* is as well *litis decisorium* as *juramentum judiciale* is; *LL.* 1. *et* 7. *D. De jurejurando;* and as to the particular qualifications adduced to infer the trust, they were denied, and applicable to other causes, being but extrinsic and remote conjectures; and on such dark evidences men's properties ought not to be drawn in question. Replied, No respect ought to be had to his oath, for it was *res inter alios acta quoad* Mr. Higgins; 1*mo*, Because he did not compear and defend in that process; 2*do*, His creditors did not refer any such point to Captain Callander's oath; yet it has been several times decided, that where parties have upon oath affirmed the right was their own, yet upon extrinsic evidences it has been declared a trust; 1st March, 1623, Williamson against Law—See APPENDIX; 11th February, 1679, Forbes against The Lord Boyne, No. 19. p. 16178; *L.* 31. *D. De jurejurando.* The Lords thought the evidences and presumptions of trust very strong; yet, on the other hand, such exorbitant and implicit trusts were not so favourable as to deserve encouragement, being oftentimes used as blinds to intrap and defraud; and therefore wished there were an act for the future, that no trust should be otherwise proveable but by writ, or the intrusted party's oath, (which was accordingly rectified by the act 1696) and Captain Callander having, upon oath, denied any trust in this case, now to find it, were to leave a tash of perjury upon him; therefore the Lords thought Mr. Higgins' No. 23.

No. 23. interest sufficiently salved, if Captain Callander should yet instruct, that he has paid the price contained in the disposition, and that the lands sold at that time were worth no more in buying betwixt man and man; and allowed either party a conjunct probation of the rental and value, and that the price was exhausted and fairly counted, so that no advantage was taken of Mr. Higgins: Only there was one article, whereof the price was made up, viz. 9,000 merks, allowed by Mr. Higgins to Captain Callander, for managing his affairs; the Lords took notice of this as somewhat too large and extravagant, and thought when they should compare the price paid with the value of the lands, this article might very well admit of a defalcation.

1697. *December* 17—.The famous declarator of trust betwixt Mr. Alexander Higgins, advocate, and Captain John Callander, about the lands of Craigforth, mentioned 19th June, 1696, was this day advised; and the Lords, on the whole qualifications adduced, found there was an exuberant trust so far as to import a reversion, that Higgins might redeem the lands from Callander on paying him the sums justly resting, and that their redeemable disposition was but a *color quæsitus*, for *artis est celare artem.* All but four of the Lords found it to be a reversion, and were much moved with the accounts given in by Captain Callander himself, whereby after the second irredeemable disposition, he charges Higgins with the expense of the infeftment, of selling the victual, &c. Then it was argued, that Callander ought only to count for the maills and duties from this date. Answered, He must count and reckon from his disposition in 1685, with retention only of the annual-rents of the sums he stands creditor to Higgins; so as he gets his annual-rents, so Higgins must get his rents, whereof there will be an excrescence in respect of the great improvements of the lands by liming, and otherwise. Replied, You ought not to reap the benefit of Callander's meliorations. Some of the Lords thought his irredeemable disposition should be reputed of the nature of a proper wadset, so as not to be countable for the rent, else you send them to an ocean and labyrinth; but the vote carried by plurality, that he should count *ab initio* for the rents of the lands, and deduct only his annual-rents from the same. Some thought it had been reasonable for the Lords to have limited a term (such as a year from the date of this interlocutor, or the like) within which Mr. Higgins might redeem and pay Callander his money, and not cast the reversion perpetually open; but others urged, the count and reckoning behoved to proceed, which could not be stinted or finished within so short a time.

1698. *November* 30.—In the tedious cause, mentioned 16th December, 1697, between Mr. Higgins and John Callander; the Lords, after a debate on bill and answers, stated the question anew, Whether Mr. Callander's disposition being so far found a trust, as to import a reversion, if he must be accountable for the rents (getting allowance of his annual-rents) from the date of his right ay till redemption, or if he was simply unaccountable. The Lords, by a plurality of seven against

six, found him not accountable *medio tempore*, but must have the rents for his annual-rents ay till Mr. Higgins should redeem them, by paying the 110,000 merks of the price. Two of the Lords did not think him accountable from the date of his right, but only from the citation in Mr. Higgins' declarator of trust, which interpelled his *bona fides*; whereon a new difficulty was started, to what class they were to be reduced, whether to the vote of accountable, or unaccountable, or be reputed *non liquet*, as to the state of the vote; or if it was not a medium betwixt the two extremes, unaccountable till citation, and accountable after it. No. 23.

On the 16th July, 1699, the Lords, by the plurality of one vote, found Mr. Callander not accountable from the citation, but only from redemption; whereupon Mr. Higgins gave in his appeal and protest for remeid of law to the Parliament.

Fountainhall, v. 1. *p.* 721, 803, *and v.* 2. *p.* 21.

1697. *February* 18.

SIR ROBERT GRIERSON of Lag *against* The EARL of ANNANDALE.

No. 24.
Presumptions of trust.

Sir Robert Grierson charges the Earl of Annandale for payment of £.10,000 contained in his grandfather's bond in 1654, with the annual-rents since. The defence was: The Earl of Hartfield, my grandfather, in security of that debt, gave Lag a disposition to his hail moveable estate; and Lag, of the same date, delivered the Earl a factory blank in the factor's name (which empowered the Earl to fill up any body he pleased in the blank) to intromit with the moveables; so that the factor Hartfield named, giving a receipt of as much of the moveables disponed as extended to the £.10,000 bond, was always master of extinguishing the said debt by payment or compensation, at his pleasure; which evinces the bond has been originally a trust contrived to palliate the Earl's moveables from poinding, who was then, (in Oliver's time) in bad circumstances with the Government, and under great debts, especially considering that none would then have lent him £.10,000 on his single bond; and it has been now latent these 40 years, and never entered into the list, either of Lag's debts or Annandale's; and when Lag claimed other sums owing him by this family, he never mentioned this. Some of the Lords were not fully convinced of the pregnancy of these grounds, especially seeing the bond was two years prior to this disposition and factory, and that there was long minority in Lag's family, and the bond was amissing, which occasioned its lying so long over: And it was moved, that trial might be taken before answer to expiscate what farther light might be given in this affair: But the plurality carried that the factory, with the negative presumptions of taciturnity, were sufficient to instruct this bond was merely a trust and contrivance to save the Earl's moveable from his creditors.