intromission might have been sustained, or a dative *ad omissa et male appretiata* taken, which can be of no effect now, the goods being disposed of, and the executrix insolvent. It was replied, That it is an unquestionable principle, that parties may be heard on a reduction in the second instance against decrees in absence; and the common style is, "That if they had appeared, they would have alleged, and now do allege," &c. which nothing can exclude but prescription, and though it be not so favourable after so long a time and progress of rights, to reduce the same, and might infer that the reducer should satisfy the whole expenses of that progress, yet that cannot exclude lawful defences; but it cannot be pretended, that if a party decerned in absence would produce a discharge, but it would reduce the decree at any time within prescription, and all the diligence founded thereon would fall in consequence, though the right had gone through an hundred hands for most onerous causes; the defect of the ground being, that the decree was in absence, is effectual against all singular successors, for *bona fides non patitur ut idem bis exigatur*, which holds as well in this case as in the case of payment and discharge; for if the executrix was exhausted, she had made payment of all she was due as executrix; and if she must pay this sum after she is exhausted, it would be double payment; and in this case there is not so much as favour, for though there was a decreet in 1646, and though the sum decerned did bear no annual-rent, which might have been helped by a horning upon the decreet, yet nothing followed till the apprising 1659; and since no possession was attained upon the said apprising, but is now sought, the executrix having still remained in possession by her life-rent right, of the tenements apprised, and it is not debated, but after her decease the apprising will be effectual.

No. 21.

The Lords, before answer to the point of trust, ordained the parties to count, to know whether the executrix be exhausted, for they did not find exhausting excluded by the length of time alleged, or the progress to singular successors.

Stair, v. 2. p. 753.

1686. *January.* GORDON *against* LEARMONTH.

No. 22.
What facts amounting to evidence of trust?

In an exhibition at the instance of Mr. William Gordon, advocate, against Mr. Robert Learmonth, apparent heir of Balcomy, wherein the pursuer called for an apprising, and the grounds thereof, led by ——— against the estate of Balcomy, and assigned to Gordon of Lesmore, the pursuer's father, who stood thereon infeft; the defender repeated a declarator of trust of the said right, upon these grounds; 1*st*, It is not probable that the pursuer's father, who was son-in-law to Balcomy, would acquire such an apprising for a small sum, and suffer it to expire without using an order; 2*do*, The whole writs were always in the possession of George Learmonth, the last apparent heir, and now in the hands of Mr. Robert the present heir-apparent; and Lesmore's assignation being granted after Lord

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