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

the intent of his trust in his lands, being to preserve him from the rigour of his creditors, it was against the trust to the trustee to use the same rigour himself. No. 8.

Which the Lords found relevant, and ordained Adam only to get allowance of what he paid out.

Stair, *v.* 1. *p.* 485.

1669. *February* 6. RULE *against* RULE.

No. 9. Mode of proof.

Margaret Rule having made a consignation of certain bonds, and in general of all other rights, with a disposition of all her goods, to umquhile Robert Rule, her brother, who having named Mr. David Rule his executor and universal legatar, did, upon his death-bed, acknowledge that his sister's disposition was in trust to her own behoof, granted upon that consideration, that she being a bastard, unless she disponed in her *liege poustie*, her means would be confiscated by her bastardy, she thereupon pursues the said Mr. David Rule to deliver back her assignation, with her own writs. The defender alleged, The libel was no way relevant, there being nothing libelled but the defunct's acknowledgment of a trust, upon death-bed, and that offered to be proved by witnesses only; but, *first*, The trust behoved to be declared by a declarator, and not thus by an exhibition; *2dly*, Trust is only proveable *scripto vel juramento*, being a matter of so great importance; *3dly*, Some of the rights assigned and disponed are heritable, and nothing done upon death-bed can prejudge the defunct's heir thereof; *4thly*, An extrajudicial confession, without writ, albeit it were acknowledged, hath no effect, for it cannot be known *quo animo* such words might have been expressed. The pursuer answered, That the the trust might be very well libelled, with the exhibition; and albeit the defunct's confession would not alone be sufficient to prejudge his heir, yet it may very well stand as an evidence of trust, which cannot be astricted to probation by witnesses, but hath ever been found proveable by other evidences, especially where the person trusted is dead; and the pursuer condescends upon these evidences and adminicles of trust; *first*, *Communis famæ*; *2dly*, The assignation and disposition bears no reservation of the disponer's liferent, and yet she continued still in possession, and her brother (whom she trusted) never meddled, which he would not have done if the disposition had been for a cause onerous, or to his own behoof; *3dly*, He did solemnly, in presence of witnesses above exception, acknowledge the trust on his death-bed.

The Lords sustained the summons, and would not astrict the pursuer to prove by writ, or oath of party, but ordained witnesses to be examined *ex officio* anent the evidences and adminicles condescended on by the pursuer.

Stair, *v.* 1. *p.* 598.