the woman, because then *vestita viro*, though the bond was *juramento vallatum. Vide infra, No.* 4, in *Barbara Grant* and *Cuthbert's case.*

Advocates' MS. No. 647, *folio* 302, *margin.*

1677. *November.* ANENT TRUSTS AND BACK-BONDS.

THIS case was started among the Advocates,—A man assigns a bond owing to him by a certain person in favours of another, to the effect that other person may thereupon do diligence, lead a comprising, and then denude; and that other person who is the trustee, feoffee, or fidei-commissary, to whom it is conveyed, grants a back-bond, declaring the trust, and obliging to denude. The trustee, either voluntarily, or upon legal diligence, transfers this bond, and apprising following thereupon, in favours of another party, not him by whom he was entrusted; or the right of it is adjudged or apprised from him by some of his creditors legally, who found the right of it standing in his person, and they become infeft upon their diligence, and dispone and assign it to another, and he to a fourth; and so it passes amongst many hands, and to sundry singular successors. Now, the question is, The first person that intrusted him, and to whom the back-bond clearing the trust was granted, or his heirs and assignees, getting notice of this conveyance clearly to his defraud and prejudice, made by one in whom he put confidence, if he may not raise a declarator of the trust, founded on the back-bond, against these singular successors: (for that he will prevail against the granter of the back-bond and his heirs, there can be no imaginary doubt:) and if the trust be so connexed to the thing trusted that it is inseparable from it, and follows it, *licet transierit per mille manus*, as *accidens reale*, or if it be only a personal obligement that affects not *rem ipsam realiter. Vide infra*, [No. 722, *February* 6, 1678,] *Hector Mackeinzie's case.* Either the back-bond is of the same date, and before the same witnesses, and relative to the disposition of the thing trusted, or it is of a different date. If it be of the same date, it is *pars contractus et pactum incontinenti adjectum*, and may seem to affect the thing disponed; but if it be of another date, then it cannot be pretended to. 2*do*, Either he in whose person the disposition and right was trusted, transferred it to another for onerous causes, or without it. If the third party, who is the singular successor, has acquired it gratuitously, he may the less grudge and complain to have the trust to meet him, and affect and follow the thing disponed. But if he be an assignee for a cause onerous, and not *particeps fraudis*, knowing nothing of the back-bond, it is not so easy to comprehend how the back-bond or trust can be obtruded or declared against him, so as to clog his right; for what was there in law to put him *in mala fide* to bargain and contract with that person whom he found to have the sole and undoubted right of the lands or bond standing in his person? How could he, without divination, know it was only a trust, and that there was a back-bond; there having been no intimation of it made to him, no inhibition served upon it to put the lieges *in mala fide*, or to ascertain them there was such a thing? And if such latent deeds were regarded, there could be no commerce nor freedom in bargaining anent rights. Yea, though the back-bond were registrate, yet that cannot be esteemed a sufficient intimation, since that registration is not *necessitatis*, but only *actus meræ voluntatis;* and the lieges are not bound to search for it, be-

cause there is no law enjoining the registration of such back-bonds as necessary, and so no law obliges one to take notice of him. Where a man gets an assignation to a bond, and puts his assignation in the register, that will not be such an intimation as will hinder another party from taking a second assignation to that same bond, and from being preferred if he intimate first, notwithstanding the registration; for registration is not, by our law, a sufficient way of intimation, unless where a special statute has declared and determined it shall be so, as in the case of registration of seasines by the act of Parliament 1617. *Vide supra, 25th February*, 1671, *numeris* 154 and 155; *item, 1st December*, 1671, *Crightons* contra *Caruthers*, No. 275. Next, it may be considered, how the tenor of the back-bond is conceived; if it be only *in nudis terminis* of an obligement to denude *per verba de futuro*, or if it bear words actually dispositive *per verba de presenti;* for if it bear, "and by thir presents dispones," then it may be alleged that such a back-bond affects the real right, and follows it.

It may be objected, why may not a back-bond, though latent, as well affect the right of the disposition given in trust, as a discharge or intromission equivalent to the value will annul an apprising, against the singular successor assigned to that apprising? For how shall the assignee know when he sees a valid and legal apprising disponed to him, that his cedent has either by a clandestine writ under his hand, discharged and renounced that apprising, or has uplifted as many of the maills and duties as will pay his apprising, and sums therein contained? Yet these two, either a discharge or intromission, will evacuate the comprising even in the person of the assignee.

To this instance it may be answered, that the cases are not alike; for an apprising is only a subaltern and parallel security, that can consist with the debtor's own real right in the lands, and is only accessorian to the principal obligation of the debt; which being satisfied and removed, the other falls in consequence, especially where there is no more but a decreet of apprising; for if infeftment hath followed thereupon, then a discharge is not the *habilis modus* to take it away, but there must be a renunciation of it, and that must be registrate within 60 days, conform to the act of Parliament 1617.

And it is a special singularity in our law that has allowed that way of extinction of apprisings with us, which is not to be stretched nor extended beyond its limits to other real rights, or to the case of a disposition and a back-bond. See Stair's System, *Titulo, Apprisings*, in the case of *Waterton, Pitfoddells*, and other creditors of *John Donaldsone;* see the scroll of that decreet of *Donaldsone's creditors* beside me in 1664. *Vide supra*, anent the co-respectivity of counter obligements, *December*, 1672, *The Lyon* and *Arthur Forbes* about the *Lord Salton's* escheat, No. 377. *Advocates' MS. No.* 647, § 2, *folio* 302.

1677. *November.* ANENT CONFUSION.

THERE is a superior, or a lord of a regality, who is debtor to his vassal. This vassal goes to the horn. The superior, or lord of the regality, gifts the escheat for a sum of money. The donatar, in his special declarator, pursues the superior, or lord