the party were first charged; and, seeing *dolus nemini prodesse debet*, it must be reputed as if it had been made litigious before the charge.

The Lords allowed him to prove this prevarication of the messenger; and, in the meantime, before answer, allowed a probation of the qualifications of the concussion, and any alleviations to take them off; and declared it shall be *cum onere expensarum* if the suspender succumb in proving his reasons of reduction, and the fraud and force founded on, seeing the same are summarily admitted; whereas, in strict form, the letters ought to be found orderly proceeded in the suspension; reserving his reduction for repetition, as accords of the law.

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1698. *February* 18 *and June* 21. CUNNYNGHAM of CORSEHILL'S CREDITORS *against* CUNNYNGHAM of ROBERTLAND.

February 18.—IN the ranking of the Creditors of Cunnyngham of Corsehill, and Cunnyngham of Robertland, this important controversy occurred:—Corsehill's creditors claimed the lands of Robertland, because Corsehill, their author and debtor, stood publicly infeft therein under the Great Seal.

ANSWERED by the Creditors of Robertland,—Corsehill gave a back-bond declaring his right was but in trust; and Robertland continued the whole time, for the space of many years, in possession of his own estate, and was reputed heritor to the view of all the country; so the creditors of Corsehill could never lend their money on the faith of his being infeft in Robertland.

REPLIED,---A back-bond does affect a real right aye till infeftment pass; but, after that, it is reputed no more but a mere personal obligement, effectual against the granter and his heirs, but noways against his singular successors, who, seeing their debtor publicly infeft, are not concerned in any such trust; nor can they, *per rerum naturam*, know it, these latent back-bonds going to no register. See *20th June* 1676, *Brown* against *Smith;* and Stair's Instit. *b.* 3. *tit.* 1. *num.* 21.

The Lords observed a manifest *pugna* in this case betwixt the ἀκριβοδίκαιον and the ἐπιείκεια; the *strictum jus* on the one hand, and equity on the other; which was much properer for a parliamentary decision; therefore they deferred the hearing and determining it till June, that if a Parliament intervened they might apply. *Vol. I. Page* 826.

June 21.---The Lords advised the competition between the Creditors of Cunnyngham of Corsehill and Cunnyngham of Robertland, about the estate of Robertland, (mentioned 18th February 1698.) Corsehill acquires an old apprising on the lands of Robertland, and grants a back-bond, declaring the trust, and obliging himself to denude at the sight of some particular person. Corsehill was infeft, and the apprising expired in his person, without any order of redemption. Both of them being broken with cautionaries, the Creditors of Corsehill, who had also adjudged Robertland, finding their debtor infeft therein, pursue for the mails and duties of these lands. Robertland and his Creditors oppose, and urge that the trust is not only instructed by the back-bond, but is notour to all that country; and Robertland always continued to possess his own estate, and Corsehill never pretended any right to it.

ANSWERED,---Back-bonds are but personal rights, and can never militate against them who are singular successors to the granter. It is true, so long as an apprising or adjudication is current within the legal, and is not perfected and made public by infeftment, then such a private incomplete right as a back-bond may restrict, qualify, or affect it; but after a real right, whether voluntary by an absolute disposition, or legal by apprising or adjudication, is perfected by infeftment, and the legal expired, there it would subvert all the public records and securities of the nation, if a back-bond should meet the creditors or singular successors of that trustee who gave the back-bond; so the receiver of the back-bond has nothing but action against him whose faith he followed, and cannot affect the lands disponed or apprised, where it is completed by infeftment or expiration of the legal.

See Stair's Institute, *lib.* 3. *tit.* 1. Of Assignations, *num.* 21st; and *June 20th* 1676, *Brown* against *Smith*; and Mackenzie's Institute, Book 2. *tit.* 3. See also *5th February* 1678, *M'Kenzie* against *Watson*, where a back-bond of the date is sustained against an arrester. This case is an eminent instance where favour and equity plead one way, and strict law the contrary; and it were safer, that either latent back-bonds should operate against none but the granter and his heirs, or else to be ordained to be registrate as reversions, and to be effectual as real rights against all singular successors whatsoever, that the lieges may not suffer by splitting on rocks they could not foresee; otherwise no remedy is left but to recur on the personal warrandice of the granter, which, in process of time, through diligences done against him, may not be worth a sixpence; to which the only answer is,---*caveat emptor, qui scire debet conditionem ejus cum quo contrahit.* *Vol. II. Page* 4.

1698. *June* 28. SIR JOHN SHAW of GREENOCK *against* SIR JOHN HOUSTON of that ilk.

RANKEILOR reported the bill of suspension given in by Sir John Shaw of Greenock against Sir John Houston of that ilk, of a decreet-arbitral pronounced by my Lord Whitelaw, upon a submission entered into betwixt them, anent their rights on the estate of Maxwell of New Wark exposed to sale, and which of them should have it at the roup, and some other claims; wherein the arbiter assoilyied Greenock from the articles craved by Houston, and discharged Greenock to bid at the roup of the lands of New Wark; and, lest he should do it by an interposed person, decerned him to grant a reversion for himself and his heirs, that these lands should be always redeemable, from him and his heirs, by Houston, for sixteen years' purchase. The reasons of suspension were, 1*mo.* That to restrain him to bid at a common roup was *contra bonos mores*, against public utility, *et contra libertatem subhastationis fiscalis;* and was condemned in the case of *Sir Thomas Kennedy* and the *Lord Bargeny*, about the roup of Girvanmains, lately sold. 2*do.* The decreet is *ultra vires compromissi;* the discharging of Greenock's heirs to purchase New Wark being neither submitted nor submittable in itself, laying them under a perpetual servitude and interdict, exempting these lands from commerce *quoad* them.

ANSWERED,---*Esto* there were both hardship and iniquity in the case, yet now,