

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, *numerus* 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 obligation 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 disposed 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 decret of apprising; for if infetment 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 decret of *Donaldsone's creditors* beside me in 1664. *Vide supra*, anent the co-respectivity of counter obligations, *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

foresaid, as one of the debtors. He excepts, that *confusione tollebatur obligatio, eo ipso momento quo jus eschatæ erat ei devolutum et quæsitum*.

ANSWERED,—The debt became not extinct by confusion, unless the superior had declared the gift in his own name, for no sooner was the dominion of the escheat goods established in his person: before that, he has only *jus ad rem*, like an executor's right in the executry goods before a sentence. *Vide supra*, a pretty decision in *Mr Arthur Gordon's* case against *Irving of Drum*, on the 8th December, 1671, No. 288. And in gifting it, he should have specially reserved and excepted his own debt; like as if it had been extinct, yet it reconvalesced by the general assignation. Yet *quod semel mortuum est nequit iterum revivisci*. See anent the *Town of Edinburgh's* imposition upon the ale, and their getting up their contract anent it from the Lords of Session, in March, 1676; in another paper-book.

*Advocates' MS. No. 647, § 3, folio 303.*

1677. November 8. BARBARA GRANT against JANET CUTHBERT.

WHERE a bond is granted payable to a man and his wife, and the longest liver of them two; yet the Lords have several times found, and particularly in the case of *Gregorie Grant* and *Bailie Fraser*, that the husband, as *dominus bonorum*, is in the power and freedom to uplift and discharge without his wife, and that she has no right nor interest to quarrel the same. And yet, on the 8th of November, 1677, the Lords decided the contrary, in the case of *Barbara Grant*, relict of *William Neilson*, merchant in *Invernesse*, against *Janet Cuthbert*, relict of *Archibald Neilson*, son to the said *William*. The case was this:—*William Neilson* grants a bond for 400 merks to his son *Archibald*, and *Janet Cuthbert*, his future promised spouse, (before their marriage,) in liferent and conjunct fee, and to the heirs of the marriage in fee; *William*, in his testament, recommends to his wife, *Barbara Grant*, whom he names his executrix, to pay this sum. Accordingly, she actually pays it to her son *Archibald*, and recovers his discharge of it, but not the bond: therefore, after *Archibald's* death, she convenes *Janet Cuthbert*, his relict and executrix likewise confirmed to him, to exhibit and give her up that bond as satisfied and paid. The Commissary of *Inverness*, before whom it is pursued, decerns her to give it up. She suspends upon this reason, that the Commissary had committed iniquity in decerning her to give up that bond, upon the pretence that her husband had received payment thereof; because it being a bond granted by the father to his son, and to the suspender, his daughter-in-law, before her marriage, and being made payable to him and her in liferent and conjunct fee, and so she being provided to the liferent of it; the same could not be uplifted, discharged, nor disposed upon by the husband alone, neither ought she to be prejudged by their collusion; and the charger was *in mala fide* to pay it to the husband, without she had seen it re-employed.

Whereunto it was ANSWERED for the charger, that the reason ought to be repelled as altogether irrelevant; because the husband's taking of the bond payable to himself and wife in liferent and conjunct fee, could never so state her in the right of that sum, as to impede the husband from uplifting the money at his pleasure and discharging it; in so far as the dominion of the sum remaining still *penes maritum* and the last termination being upon his heirs, and the wife being under the