INTIMATION.

1676. *July* 6. SIR L. GORDON *against* SKEIN and CRAWFORD.

No 1.
Back-bond effectual without intimation.

IN a double poinding raised at the Earl of Seaforth's instance, against Sir Lodovick Gordon, Andrew Skein and Alexander Crawford, to hear and see it found which of them had best right unto the sum of forty thousand merks, due by virtue of a comprising of the estate of Lewis, belonging to the Earl, at the instance of Alexander Farquhar; it was *alleged* for Sir Lodovick, that he ought to be preferred, because he had undoubted right to the apprisings, in so far as Alexander Farquhar, in whose name it was led, did assign the same in favours of Gilbert Gray, who did transact with the Earl of Seaforth for that comprising; but the said Gilbert Gray, his right being only for payment of some debts and cautionries, he did grant a back-bond to his author James Farquhar, whereby he became obliged to denude himself, in favours of the said James, he being satisfied of his own debt and engagements; and which back-bond coming by progress in the person of Sir Lodovick, it was intimated to the said Gilbert Gray, being before any right to the comprising was settled in the persons of Skein and Crawford. It was *alleged* for Skein and Crawford, that notwithstanding they ought to be preferred, because they had right by disposition from Gilbert Gray, with consent of James Farquhar to the said apprising, and had intimated the same to the Earl of Seaforth, to whom Sir Lodovick, nor his authors had never made any intimation of their right; which being a naked back-bond granted by Gilbert Gray, long after the leading of the comprising in favours of James Farquhar, who was no way ereditor to the Earl of Seaforth, who was the common debtor; notwithstanding thereof the comprising itself might be lawfully disponed, as being a real publick right; Sir Lodovick as having right to the back-bond, hath only a personal action against Gilbert Gray, the granter, but cannot pretend to be preferred to the real right of the comprising, which is now standing in the person of Skein, by a disposition and intimation, which was the only *habilis modus* to transfer the right of the comprising, especially being with consent of James Farquhar, to whom the back-bond was made long after the leading

No 1. of the comprising, which puts him in far worse condition than creditors, who to save the charges of many comprisings, assign one of their number to lead a comprising against the common debtor's lands, upon back-bond, to be countable, or transfer their right to those to whom they granted back-bonds; seeing any who transact with the trustee, in whose name the comprising is led, may easily perceive the nature of his right, to be not only for his own debt, but as assignee to several other creditors, they may easily know their hazard, by enquiring at the granter of the assignation, if they have back-bonds; whereas in this case, where Gilbert Gray, the common author, in whose presence the heritable right of comprising stood, being never denuded of his real right by an assignation, or disposition, he might lawfully grant the same to Skein, whose right could never be prejudged by any private latent back-bond, which was not *habilis modus*. It was *replied* for Sir Lodovick, that he ought to be preferred, notwithstanding, because a naked comprising, whereupon no infeftment hath followed, being but a personal right and a legal disposition of lands, is of that same nature as voluntary dispositions, or mutual contract, bearing procuratory of resignation, whereupon no infeftment followed, which may be affected or disponed by private deeds in prejudice of all posterior rights before infeftment be taken, which is the constant practice, and agreeable to our fundamental law, especially in comprisings, and is upon a public account for eviting of infinite charges, to which the common debtor is altogether liable, if many creditors for inconsiderable sums, every one of them should be forced to lead a comprising so that a back-bond is always sustained as sufficient to affect the compriser's right; neither doth it alter the nature of the right, that the back-bond granted to Gilbert Gray was long after the leading of the comprising, and that for no debt of the common debtor's the Earl of Seaforth, and that it was never intimated to him; seeing the common author to both parties being Gilbert Gray, his assignation to the back-bond being first intimated, it did incapacitate him to grant a posterior disposition; neither was there any necessity to intimate to the Earl of Seaforth, who was only common debtor, but was not author of any right to the debt, which is here the only question. THE LORDS did find great matter of debate amongst themselves upon this case, which was renewed several days before they came to a sentence, they being all clear, that a back-bond before comprising granted by a trustee before infeftment upon a comprising, will affect the right in prejudice of a singular successor; but it being granted by one entrusted after the comprising to a creditor of his own for his own private debt, if it should be as effectual as in the first case, to prejudge a singular successor, but it being granted by one entrusted after the comprising to a creditor of his own, in the first case to prejudge a singular successor by disposition, albeit the back-bond was never intimated by the common debtor, was found a very difficult case; but at last they did find, that a compriser granting a back-bond to his own creditor, whether it be before or after the comprising, but certainly before infeftment upon the comprising, he could

never thereafter grant a disposition, but with the burden of the back-bond; being moved upon these reasons, that it is a principle of our law, that personal rights before infeftment may be lawfully disponed by assignations or back-bonds; and that when back-bonds are granted they need not be intimated to the common debtor, unless it be to put him in *mala fide*, to make payment to one who hath a posterior right; but here the case being a double poinding, wherein the only question was who hath the first and complete right from one common author, it is undoubted that the back-bond being prior to the disposition will affect the naked comprising, which is a personal right, and of that same nature of a voluntary disposition, or a contract which can never be thereafter disponed in prejudice thereof. 2*do*, There is a great difference betwixt assignations to debts by bonds and dispositions of reversions, contracts of wadset or other real rights, or as to personal debts; the first intimation of a posterior assignation makes the right complete, and preferable to that which was not intimated; whereas, in assignations made of rights of land such as reversions, naked dispositions or comprisings whereupon the granter was never really infeft in the said lands, those that have first right in a double poinding ought undoubtedly to be preferred, as in this case; but the great thing to be considered by creditors is, if, upon a naked disposition and assignation, who shall first make the right complete, by obtaining themselves infeft publickly by the superior, which is the only way to settle the real right of the lands in their person, and the intimation to the common debtor is not *habilis modus*, he not being obliged to pay or redeem, but to one who hath a full right by infeftment, to disburden his lands by a renunciation. No 1.

Fol. Dic. v. 1. *p.* 482. *Gosford, MS. No* 873. *p.* 552.

*** Stair reports this case:

ALEXANDER FARQUHAR having led an apprising of the Earl of Seaforth's estate, he assigned the apprising to James Farquhar his brother. James transfers it to Gilbert Gray, who granted a back-bond, that being paid of the sums which were due to him, and for which he was cautioner for James and Alexander Farquhars, he should denude himself of the apprising in favour of James; James assigns this back-bond to Cornelius Neilson, who with consent of James's son, transfers it to Moor, and he to Sir Lodovick Gordon. The assignation of the back-bond was intimated to Gilbert Gray, but thereafter Gilbert Gray, with consent of James Farquhar, to whom he granted the back-bond, transfers the apprising to Alexander Skeen, who intimated his right and progress to the Earl of Seaforth. The Earl hath raised double poinding against Skeen and Gordon. It was *alleged* for Skeen, That he had the only right to the apprising, by a complete progress of assignations and translations intimated; and any right that Gordon had was only a latent back-bond, which Skeen was not obliged to notice or know, and which could neither affect his right, nor his author Gray's right,

No 1. neither of them being burdened therewith; and of superabundance he had the consent of Farquhar, to whom the back-bond was granted, and was not obliged to know that Farquhar had formerly assigned that back-bond, and that the assignation was intimated; for no singular successor is obliged by law, to any back-bond or writ of his author's, unless it be contained in his author's right; and if it were otherwise, it would marr commerce. And it is a great ground of fraud, to take separate back-bonds, and not to include the same in the assignation or disposition granted to the assignee; and therefore reversions, which are back-bonds, being *pacta de retrovendendo*, are only valid when they are registrated in a register appointed for their publication: And if any other back-bonds were to be taken apart, they should be intimated as assignations, or registrated as reversions; and nothing else should be valid against singular successors, but only the discharges granted by their cedents, or any qualification, restriction, or limitation in favour of the debtor, which is a discharge *pro tanto*. 2*do*, Though back-bonds granted to others might have effect as to personal rights and obligations, yet they could not burden or qualify assignations to dispositions of land or apprisings, which are not personal rights, but incomplete real rights; otherwise this inconvenience would follow, that if such back-bonds did once affect dispositions or apprisings, all our statutes for securing land-rights and singular successors, whereby our security exceeds any other nation, might be eluded and evacuated by back-bonds before infeftment. It was *answered* for Gordon, That of all rights whatsomever, as, and while they are assignable, the assignation may be qualified with the assignee's back-bond granted to any party before he be denuded, which is most consonant to law, and to the general principles of civil nations; for *nemo plus juris alteri tribuit quam ipse habet, et quisque scire debet conditionem ejus cum quo contrahit*. And in incessible rights, the assignee *utitur jure auctoris*, and is in no better case than the cedent; for an assignee hath only right to insist as procurator to his cedent, and not *proprio jure*; and therefore the form of assignation runs thus, *procurator in rem suam*, &c.; only our custom hath excluded the oath of the cedent, to prove against the assignee; but all allegeances against the cedent are relevant against the assignee, when otherwise probable than by the cedent's oath; as by the cedent's writ, witnesses, or presumption; and there is no place to consider inconveniencies *in consuetudine fixa et jure formata*, which an act of parliament can only cure; and therefore all assignations whatsoever are affected with the back bond of the assignee, which his posterior translation can never alter; and there is nothing more ordinary than for many creditors to assign all their debts to one person to comprise, and to give back-bonds, declaring the assignation to be in trust, which were never doubted but to be effectual, even against singular successors, whether granted before or after the apprising led, and any thing in the contrary would exceedingly disquiet and unsecure the lieges; and there is no speciality as to the back-bonds granted by apprisers themselves, or by their assignees; but whenever an assignation is in trust, a back-bond declaring the trust will be ef-

fectual against any singular successor, so long as the right assigned remains but a security, and not an absolute right by infeftment; for infeftment once being upon such rights, no assignation thereof made after infeftment, yea no assignation thereof before infeftment, hath any effect; but that assignation only that becomes a part of the infeftment. For instance, if an irredeemable disposition were assigned, and the assignation intimated, and it were thereafter assigned to another, if the posterior assignee were infeft, the prior assignation intimated, would have no effect, much less any back-bond. And albeit apprisings and infeftment thereon, before the legal expire, have been accounted hard and rigorous securities, needing no resignation, but becoming void by satisfaction, by payment, intromission, or compensation, and have never the privilege of an irredeemable infeftment, till they be expired; so that during that time back-bonds by apprisers, or their assignees, granted before infeftment, may be valid against singular successors, during the legal; yet no others are effectual, but become void; and it is not at all strange, that that which is effectual against an incomplete real right, may cease to be effectual against the same right, when complete by infeftment; and therefore reversions of rights by infeftment, are declared null, except they be registrated, which shews they were effectual before, even against singular successors, and real rights, who could not know them by inspection of the right itself. No 1.

THE LORDS found, that the back-bond granted by Gray the assignee, to the apprising, was effectual against Skeen, Gray's singular successor by translation, though he had intimated it to the Earl of Seaforth, to whom the back-bond was never intimated.——*See* PERSONAL and REAL.

Stair, v. 2. p. 440.

*** This case is also reported by Dirleton:

IN the case, Alexander Crawford against Sir Ludovick Gordon, the LORDS thought the point in question, viz. Whether or not a back-bond being granted by the compriser, the time that he did receive an assignation, whereupon he comprised, or by a person having gotten a disposition, did affect the said rights, not only as to the granters of such back-bonds, and their representatives, but likewise as to singular successors; and if the same should be found to affect, if it did affect only while the said right was personal, and before infeftment, but not after?

THE LORDS thought the said point to be of that importance as to the consequence and interest of the people, that it was recommended that they should have their thoughts thereupon, to the effect that the same may be decided with great consideration; and accordingly, this day, the case being fully debated among themselves, it was carried and found by plurality of votes, That such back-bonds do affect, even as to a singular successor, though *extra corpus juris*; and albeit they be granted after the receiving of such rights; and that they af-

No 1. fect comprisings, even after infeftments have followed thereupon, during the legal, but not after. Divers of the LORDS did argue and vote against the said decision, and in special, A. I. C. N. B. S. T., upon these grounds; *1mo*, A singular successor does not succeed *in universum jus* as an heir, but only *in jus singulare*; and if the said *jus* be simple and pure, without any quality *in corpore juris*, any extrinsic quality or deed may bind the granter and his heirs, but not the singular successor, who neither can, nor is obliged to know and take notice of any quality that is not in the right. *2do*, The quality of a right is an accident of the same, and *accidentis esse est inesse*; so that, in law, where the same is not *in corpore juris*, it doth not affect the right as to singular successors. *3tio*, Upon the considerations foresaid, reversions, and bonds for granting reversions, do not militate against a singular successor, unless they be in *corpore juris*, or registrated; and though there be an express statute to that purpose, yet it doth not follow *a contrario*, where there is no statute, back-bonds should affect; seeing the said statute is made conform to the common law, and is declaratory as to reversions, being then most in contemplation of the parliament; but doth not derogate from the common law in other cases. *4to*, Back-bonds are upon the matter reversions, and do oblige only to make a retrocession in favour of the cedent, and cannot operate more than if a formal retrocession were made in favour of the cedent, which could not prejudge a singular successor, unless it were intimated. *5to*, It would be an irreparable prejudice to the people, and to singular successors, who, finding a right pure without any quality, are *in bona fide* to think that they may securely take a right thereto, and yet should have no remedy, if, upon pretence of back-bonds, and deeds altogether extrinsic, their right may be questioned. *6to*, As to the pretence of the prejudice to the people, viz. That they are in use to grant assignations, in order to the deducing of comprisings thereupon, and may be frustrated if the back-bond should not affect the same, it is of no weight, seeing they trust the assignees; and it is their own fault, if they trust persons that do not deserve trust; and they have a remedy by intimating the back-bonds, which upon the matter are translations, whereas a singular successor has none. *7mo*, That such back-bonds should affect comprisings, not only before, but after infeftment during the legal, but thereafter should cease to qualify the same; it seems to be inconsistent with, and against the principles of law.—*In præsentia.*

Dirleton, No 374. *p.* 183.

*** The like was decided 4th January 1668, Forbes against ———, *voce* PERSONAL AND REAL.