answered, That the mutual contract not being *de natura feudi*, but at most importing an obligement not to renounce the feu, any personal deed before this superior's right, under the hand of his author, is relevant against him, as well as his author. No 38.

THE LORDS found the allegeances upon the back-bond relevant against the superior, though singular successor, it being granted of the same date with the feudal contract, and relating to a matter extrinsic to the nature of the feu; and so suffered the pursuer to renounce the same.

Fol. Dic. v. 2. p. 65. Stair, v. 1. p. 604.

*** Gosford reports this case:

IN a declarator pursued at Sibbald's instance against Brown, who had acquired the right of superiority of some acres of land which were holden feu, to hear and see it found and declared, that he being willing to resign the right of the said lands, ought to be free of the feu-duty in all time coming; the LORDS sustained the declarator, in respect that the lands were *ab initio* given in feu for the full duty thereof, and that the feu-duty being 20 bolls of bear, and converted to 10 merks the boll, the vassal had a liberty when he pleased to pass from the conversion; notwithstanding it was alleged that *refutatio emphyteusis* could not be sustained in law, it being *perpetua locatio et non feudum*.

Gosford, MS. No 114. p. 42.

1670. *July* 12. KENNEDY *against* CUNNINGHAM and WALLACE.

No 39.
A back-bond of trust found to qualify an apprising deduced by the trustee, and conveyed by him before infeftment to a singular sucessor, who was thereafter infeft, so as to found an exception to the debtor, that the apprising was extinguished by payment made to the entruster.

THERE being an apprising of the lands of Garleith, belonging to John Kennedy, at the instance of Edward Wallace; the said Edward by his back-bond declared that the apprising was to the behoof of William Wallace of Burnbank his brother, and obliges him to denude himself thereof in his favours; thereafter the said Edward assigns the comprising, and dispones the lands to Adam Cunningham, who stands infeft; and in a debate for the interest of this apprising, it was *alleged*, That Edward Wallace the appriser having by his back-bond declared, that the apprising was to William his brother's behoof, conform to his back-bond produced, the said William was satisfied by payment or intromission, so that the apprising is extinct. It was *answered* for Cunningham, That the allegeance is not relevant against him, who stands infeft as a singular successor, so that his real right cannot be taken away by any personal back-bond granted by his author, whereby he was not denuded; for though his author had granted assignation to the apprising, if it had not been intimated, a posterior assignation intimated, much more a disposition and infeftment, would be preferred

No 39. thereto; for albeit satisfaction of an apprising, by intromission with the mails and duties be sufficient to extinguish, even against a singular successor, though there was no resignation made, which the Lords had extended to any payment made by the debtor; yet this was never extended to any personal declaration of trust, or obligement to denude, which cannot be valid against a singular successor. It was *answered* for Kennedy, That apprisings and infeftments thereon, do differ from other infeftments, in this, that they require no resignation or re-sasine to extinguish them, but whatever may take away a personal right, either by intromission, payment, or compensation, will take them away even by exception; and what is relevant against the author, is relevant against the singular successor, except as to the manner of probation, that it cannot be proven by the author's oath, but by writ or witnesses; neither is there any odds as to this, whether there be infeftment on the apprising or not; so then if Cunningham were but assignee to the decreet of apprising, it would be relevant against him, that before his assignation his cedent had declared that the apprising was to the behoof of another, to whom the debtor had made payment; which declaration being instructed by writ anterior to the assignation, is valid against Cunningham the assignee, and whether he be infeft on this assignation and disposition of the apprising or not, as to this point, law and custom makes no difference, neither doth the case quadrate with an assignation unintimated, competing with a posterior assignation intimated, which might be preferred; but if the debtor made payment to the assignee, though he had not intimated it, it would extinguish the apprising, and no posterior assignation, though intimated, would make the debtor pay again; and in this case there is a real declaration of trust, which is most ordinary, when parties having small sums, assign them all to one who compriseth for all, and by several back-bonds, declares, that the apprising is to the behoof of the several creditors according to their sums, who have always rested therein, and have sought no further; and if this back-bond were not sufficient against singular successors, the appriser might at any time thereafter dispone and clearly exclude them.

THE LORDS found that the back-bond was relevant against singular successors, and that payment made to him, to whose behoof the apprising was deduced, was sufficient against a singulas successor, having right to the apprising, or lands from the appriser, after he granted his back-bond. *See* REGISTRATION.

Fol. Dic. v. 2. *p.* 64. *Stair, v.* 1. *p.* 692.

*** Gosford reports this case:

IN a reduction and declarator at the instance of Kennedy of Barleith against William Wallace of Burnbank, and Cunningham, to whom he disponed his right, upon this reason, that Wallace having been cautioner to Wallace of Carnhill for the pursuer, for the sum of 2500 merks, for relief of which cautionry, the pursuer had disponed to him a wadset of a part of his lands, which he did possess several years, the intromission of the rents whereof did extend to the whole sums for which

he was cautioner, and wherewith he did satisfy the cautioner; and yet notwithstanding he did take an assignation to the bond, in name of his own brother Edward Wallace, and did comprise both the wadset lands, and all other lands belonging to the pursuer, and caused his brother dispone the same to Cunningham, long after a back-bond granted by his brother to him, whereby he was obliged to denude in his favours; and therefore craved, that the debt contained both in the wadset and apprising might be reduced and declared null. It was *answered* for Cunningham, That he being a singular successor, and having acquired a right to the comprising from Edward Wallace, who stood heritably infeft in the said lands, any back-bond granted by the said Edward, being but personal, could not denude himself of his heritable infeftment, nor prejudge him, seeing he was not obliged to know the same, it being a private latent deed. It was *replied*, That a comprising is of that nature, that by our law it is extinguished by intromission, or a discharge, or by a back-bond, or declaration of trust, which are all but private deeds; a singular successor, albeit *bona fide* he be infeft upon the comprisèr's right, can be in no better condition than his author. THE LORDS having considered this case as being of a general concernment, sustained the pursuit founded upon the back-bond, and the cautioner's intromission, upon these reasons; 1*mo*, That there was nothing more ordinary, than that many creditors were in use to lead a comprising in the name of a person upon back-bonds, or a declaration of trust, which did secure them against all deeds done thereafter by the person entrusted, in respect of the nature of a comprising, which might be extinguished by a discharge or intromission; so that if this ground were taken away, then there would be a necessity, that every creditor, albeit for a small and inconsiderable sum, should comprise in his own name, and be infeft, otherways the person entrusted might prejudge him of his debt, or should be forced to cause him resign and infeft him, least he should dispone to another, or, by serving inhibition and raising of a reduction, should secure his interest; which would hinder all persons to accept of a trust; 2*do*, By our law and practice, comprisings are found to be such rights, that albeit infeftment follow, yet they may be extinguished by a discharge of the sums for which comprising is led, and in that they are different from rights of wadset, annualrents, or infeftments; for these are securities that cannot be taken away by personal rights, but by renounciations and resignations, whereupon infeftment follows. The reason of which difference is, that comprisings are but legal diligences, and infeftments taken thereupon are consequential to a decreet given by a messenger decerning lands, albeit of never so great value, to belong to a creditor for a small inconsiderable sum, which being truly satisfied or discharged, is in law most unfavourable, and so may be extinguished in a singular manner; whereas infeftments upon wadsets and other real securities, are founded upon contracts and dispositions subscribed by the parties themselves, bearing procuratories and precepts to denude the granter *omni habili modo*, and to seek the real right in the person of the creditor, and therefore cannot be divested but in that same

No 39.

No 39.

manner that the law allows. But if the case had been where a compriser having comprised for his own proper debt, and were infeft, and granted only a personal right by assignation, or a bond to denude, whereupon nothing followed, if, thereafter, a singular successor had acquired a real right, or had intimated a second assignation before the first assignee, in that case, posterior rights would be preferred, as being first complete; and the reason is, because, where a person's name is only entrusted, and gives a back-bond, and during the trust, suffers the true creditor to possess until the debt be satisfied, in that case, the law doth extinguish, and makes as if it were transferred in the person of the creditor, who did make use of his name, if the back-bond or declaration of trust was before his infeftment, it being then only a personal right; but if the back-bond or declaration be only granted after infeftment, the question would be more difficult where a third party acquires a valid right; and yet it seems that the decision will be alike in both cases, if it be made truly to appear, that the compriser's name was only borrowed from the beginning, and that he did declare so much under his hand before any right made to a third person, in respect that a right of comprising is singular of its own nature, and different from other real securities, as said is; and that, in our law and practice, it was never otherways found; whereas, if it were otherways, it would open a door to many indirect contrivances, and occasion vast charges and expenses for payment of a yearly duty by every petty compriser to the superior.

Gosford, MS. No 300. *p.* 129.

1672. *November* 20. WORKMAN *against* CRAWFORD.

No 40.
A back-bond of trust is not effectual against a singular successor, by infeftment in lands, unless he either knew of the back-bond, or paid no money for the purchase.

GEORGE WORKMAN pursues reduction of a disposition and infeftment granted by James Stirling to John Crawford, on this reason, that he having disponed the tenements in question to James Stirling, he gave him a back-bond of the same date, obliging himself to denude, being paid of the sums due to him, and yet Stirling contrary to his trust, had disponed the lands to Crawford; likeas the pursuer had declared the trust against Stirling, and had reduced his right, and therefore Crawford's right from Stirling behoved to fall in consequence. It was *answered* for Crawford, That long before any declarator against Stirling, he had acquired Stirling's right *bona fide* for onerous causes, and was not called to the declarator against Stirling; and albeit Stirling's back-bond was sufficient against himself, yet being but a personal obligement, not contained in the infeftment, it could have no effect against a singular successor being infeft.

THE LORDS found the defence relevant, unless it were replied that Crawford's right was without an onerous cause, or that he knew of Stirling's back-bond, when he received the right and so was partaker of the fraud.

Fol. Dic. v. 2. *p.* 65. *Stair, v.* 2. *p.* 121.