

1702. *July 30.* The LADY CRAIGLEITH, CAPTAIN STEWART, and the REPRESENTATIVES of Mr WILLIAM MONYPENNY, *against* The MAGISTRATES of the TOWN of EDINBURGH.

MR William Monypenny being creditor to the deceased Sir William Nicolson of that ilk *proprio nomine*, and likewise as trustee for the Lady Craigleith, and others, who had assigned debts to him upon his backbond to denude and retrocess; Nicolson's estate being exposed to roup, the purchasers, Dalmeny, Pennycook, and Dunglass, consigned a great part of the price in the Town of Edinburgh's hands, to be made forthcoming to the creditors, conform to their preference and ranking, at 3 per cent. in the terms of the late Act of Parliament: and Mr William Monypenny having called for some of the money, he got £400 sterling from the Town of Edinburgh; but, in regard he had not yet procured the Lords' warrant, nor formally conveyed his rights to the purchasers, they took his bond, with Colonel Erskine as cautioner for the sum, as if it had been borrowed money. The Lady Craigleith and others pursuing the Town, on Mr Monypenny's backbond, for their share of the money, it was ALLEGED for the Town, they must have compensation for the said L.400 sterling, paid to Mr Monypenny, upon the faith of his preference in the decret of ranking; and they were not bound to know what latent backbonds he had granted to them, they not being intimated to the town till long after the payment.

ANSWERED,—Compensation could not take place in this case; *1mo*, Because backbonds do qualify and affect personal rights whereon no infestment hath followed, albeit not intimated; *2do*, He being only their trustee, no compensation can be craved of the sums due to them, but only of what was owing to himself; *3tio*, The Town of Edinburgh being only depositaries and consignataries of the money, they have no title nor interest to propone compensation; *4to*, The Town did not rely on the faith of his ranking and preference, but took his bond of borrowed money.

REPLIED,—Though he was trustee by a backbond, yet that was unknown to the Magistrates till it was very lately intimated to them. *2do*, They would not have lent him the money, had it not been in contemplation of his share he was to draw of the price; and seeing compensation operates *ipso jure, et primo momento* of the concurrence of the two debts, it here existed and took place before the intimation of the back-bonds.

The Lords repelled the compensation, and found it could not take place here against the intrusters. See Stair, *Institut. lib. 1. tit. 13. sec 7. et 8; and 24th January 1672, Boylston against Robertson*, where the trustee is found *dominus*, and his creditor arresting is preferred to the intruster. *Vol. II. Page 157.*

---

1702. *July 30.* The LADY HALGREEN *against* BURNET of MONTBODDO and his TUTOR.

BURNET of Montboddo and his Tutor against the Lady Halgreen. Rait of Halgreen having sold some lands to Burnet of Montboddo, his Lady, being infest therein, pursues for maills and duties after his decease; wherein