

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 consignatories 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

Montboddo compeared, and offered to prove she had judicially renounced her liferent in these lands : but she having replied, That it was only consigned in terms not fulfilled to her, and so never a delivered evident ; and sundry witnesses being examined thereon, the Lords found the renunciation was never delivered, and so preferred the lady. But the tenants suspending again upon multiple-poining, Montboddo craved to be preferred on an old wadset-right he had acquired in, and whereto the lady had consented. She ALLEGED, *1mo.* No regard to this interest, because it was competent and omitted in the first decret, where, in a competition on this same subject, and betwixt the same parties, the lady was preferred.

ANSWERED,—*1mo.* That preference was only for any thing then seen, without any declarator or conclusion against Montboddo, in which case competent and omitted is clearly foreign to this matter ; *2do.* Montboddo was then minor.

The Lords repelled the lady's allegiance, and found it yet receivable ; *2do.* The lady contended, that, Montboddo having first acquired the infeftment of annualrent, and then the right of property, the *just nobilius* of the property did wholly absorb and extinguish the annualrent, which was but a servitude, and they were incompatible.

ANSWERED,—It was an undoubted principle, That purchasers might make use of all the rights in their person against third parties competing with him, as separate distinct rights, even without a reservation ; but much more where it is expressly provided, as here, that the irredeemable disposition shall not prejudice the heritable right.

The Lords also repelled this objection, and found no confusion in this case, but that he might found on any of the rights in his person.

Then, *3tio.* ALLEGED for the lady,—She must have the benefit *actionum cedendarum* : You standing infeft in more lands than those I liferent, if you be preferred, you must assign me, for my relief to the other lands, after the payment of your own annualrent.

ANSWERED,—Whatever favour might be in ordaining one to assign in the ordinary cases which emerge, Montboddo can never be decerned to do so in his circumstantiate case, because that were to assign against himself, he having purchased in the irredeemable right ; and so it would evidently tend to his own damage and detriment, and to make him put weapons in his adversary's hands.

REPLIED,—Though I consented to that infeftment, yet it was *intuitu* and in contemplation that I saw sufficient lands behind for my security, beside what would pay the annualrenter ; and, by your acquiring the property, you have lessened my fund.

The Lords thought this point deserved to be heard in their own presence.

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1702. November 17. DANIEL ARTHUR and PATRICK COUTTS *against* ARCHIBALD COCKBURN.

DANIEL Arthur and Patrick Coutts against Archibald Cockburn, merchant in Edinburgh, for payment of 500 crowns contained in an accepted bill.