

ANSWERED,—He lent his name to her diligence out of mere kindness, to hold in expenses. He has made no benefit by his right, but what he offers to communicate to her ; he made no voluntary transaction but what necessity compelled him to ; and, if he had not acquired these prior rights, she had got nothing ; and what he did was *utiliter gestum*, for the behoof of her and all the rest of the creditors, the design of such trusts being only to procure payment to the creditors in the readiest manner ; and therefore his sale of lands to that end was no prevarication nor breach of trust. And the decisions founded on are in a quite different case from this : For, there, they had voluntarily denuded themselves in favour of some confidant, to the behoof of the apparent heir, and so put them to debate with a *durior adversarius* ; but here he was under a necessity either to purge these prior rights, or to lose all.

The Lords thought there was a great difference betwixt voluntary transactions and this, which seemed to be necessary, and proved so beneficial and profitable to all his constituents. And though, in strict form, he should have intimated to her, by way of instrument, and required her consent to the agreement, yet, seeing that prior adjudication would have excluded them both, the Lords, before answer, allowed trial to be taken what was the value of the right acquired, and of the lands sold, and what she would have made of her adjudication if she had been assigned to her share of it : to the effect it might appear if the bargain he made was profitable or not ; and if she could crave any more but her share and proportion of the same, effeiring to her sum. *Vol. II. Page 252.*

1705. January 9. HARRY SINCLAIR of CARLOURY *against* ALEXANDER INGLIS and OTHERS, Tacksmen of Langton.

HARRY Sinclair of Carloury being infest in Cockburn of Langton's estate for security of 20,000 merks, and preferred in the decreet of ranking, and wanting a year's annualrent preceding Lammas, he gives in a petition to the Lords, craving a warrant against Alexander Inglis and other tacksmen, to pay him out of their tack-duty of 3000 merks, which they are obliged to pay yearly to the creditors.

ANSWERED,—That the crop 1704 was not, by their tack, payable till Lammas 1705 ; and he behoved to abide his time : And, for the rent 1703, they had counted for it, and had obtained a decreet of exoneration. REPLIED,—Their conventional terms, inserted at their own hand in their tack, could neither alter nor prejudice the terms of payment contained in the creditors' bonds : And, as for their exoneration, he was not called to it ; and they could not misken his right, which they knew to be preferable ; and so was null *quoad* him.

The Lords being straitened how far their tack could innovate or change the creditors' terms of payment, therefore, as a *medium*, they ordained the tacksmen to pay him two years' annualrent at Lammas next. By which he was cast a year behind in the payment of his annualrent due from Lammas 1703 to Lammas last 1704 ; and which is superseded to Lammas 1705 ; and so procrastinates his term of payment. But the Lords can no more prorogue and postpone the creditors' term of payment than they can antedate or anticipate it.

*Vol. II. Page 256.*