

The Lords found, the irritancy not being declared, there was yet room for implementing the bargain, and purging the failyie, by paying what was resting *cum omni causa*.

*2do*, ALLEGED for Arnot,—That this apprising coming in the person of Earls-hall, the ancient debtor, not by way of renunciation, but of a formal transmission, it was a *jus superveniens*; and so could neither accresce to Sir William Bruce's apprising, which was led long before this acquisition, nor be carried thereby, not being in the debtor's person at the time.

ANSWERED,—Though the *jus accrescendi* takes rather place in voluntary rights than in legal judicial conveyances, yet the debtor can never obtrude this as a new purchase, and not affected by his creditors' anterior diligence; and inhibitions reach *bona acquirenda* as well as *jam quæsita*; and it were *contra bonam fidem* for a debtor to purchase in a comprising, and then tell his creditors he will exclude them because they had not specially adjudged or apprised that right.

The Lords found his transacting this right could not compete with his anterior creditors, who could not adjudge what he had not acquired at the time of their diligence against him; and that it was not competent for him to object it, seeing it was purchased with his own money, and to his own behoof, as was cleared by the two oaths and Arnot's backbond.

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1704. December 30. POOR AGNES WATSON against JOHN WOOD'S HEIR.

Poor Agnes Watson against the Heir of Mr John Wood, late minister at St Andrew's. Mr John Wood being a creditor to Carstairs of Kilconquhar, and being about to lead an adjudication, several other creditors disponded their sums to him, on his backbond, that they might be all included in one diligence; and, amongst the rest, Agnes Watson assigns him to 500 merks of principal owing to her, and takes his backbond to be countable and to denude, effeiring to her interest. Mr John finding the lands incumbered, and prior adjudications near expired, where he could not have the benefit of coming in *pari passu*, he sells a part of the lands; and with the price transacts and acquires in these preferable adjudications; and the other creditors, for whom he had done diligence, accept of a proportion of their sums, and agree with him; only the said Agnes pursues him to implement his backbond, and denude. He offers a disposition to the remainder of the lands unsold, with the burden of the prior rights he had made, and excepting them from the warrandice.

She OBJECTS,—I am not bound to accept any such disposition now; but you are simply liable for my sum, because you have violated your trust by alienating a part of the lands without my consent; and *res* is no more *integra*, seeing I have a proportional share of the whole lands adjudged, which you, by your alienation, have put out of your power to give me. Therefore, *loco facti impræstabilis, succedit damnum et interesse*, which is to pay me my debt, *cum omni causa*; as the Lords have oft found, 18th July 1672, *Watson*; and in 1695, between *Christian Salton* and *Andrew Crawfurd*; as also in the case of *Carmichael of Maulsley* and *Sir Charles Hay*; and, 5th January 1675, the *Earl of Northesk* against the *L. of Pittarow*.

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.*

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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.

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