1671. *July* 28. MURRAY *against* The EARL of SOUTHESK, and OTHERS.

No 7.
A first appriser, excluding others, is liable *in exactissimam diligentiam.*

JAMES MURRAY having right to an apprising of the estate of Sir James Keith of Powburn, led at the instance of Mr Thomas Lundie, pursues thereupon for mails and duties. Compearance was made for the Earl of Southesk and posterior apprisers after year and day, who *alleged*, That by the act of Parliament 1661, betwixt debtor and creditor, it is provided, That the Lords of Session, at the desire of the debtors, may ordain apprisers to restrict their possession to as much as will pay the annualrent, the debtor ratifying their possession; and now the posterior apprisers having apprised *omne jus*, that was in the debtor, craved that the first appriser might restrict himself to his annualrent, and they preferred to the rest of the duties. It was *answered*, That this was a personal and peculiar privilege in favours of the debtor, that he might not unnecessarily be put from his possession, and which he might make use of against all the apprisers, if there were a superplus above the annualrents, and it is upon condition that the debtor ratify the appriser's possession, which is not competent to a posterior appriser, in whose favour this clause was never meant; but there is a special clause for posterior apprisers, being within year and day, to come in *pari passu*; neither can the posterior apprisers have any interest, because the superplus will satisfy the first apprising *pro tanto*.

THE LORDS found the foresaid privilege peculiar to the debtor; but found that the first appriser, seeing he excluded the rest, behoved to compt from this time as if he had possessed the whole.

Fol. Dic. v. 1. *p.* 236. *Stair, v.* 1. *p.* 769.

1681. *January* 14.

JOHN MUIR, Writer to the Signet, *against* SHAW of Grimmelt, &c.

No 8.

ONE appriser offers to prove another paid within the legal, in so far as he had taken a decreet for mails and duties against the tenants of the whole lands, and ought to count conform; seeing, by this decreet, others having real rights compearing and competing on their said rights, were excluded from intromission. THE LORDS found John Muir liable to count according to that decreet, seeing others were excluded, except he can instruct he did diligence against the tenants, and could not recover payment.

Fol. Dic. v. 1. *p.* 237. *Fountainhall, MS.*

*** The same case is reported by Stair, No 13. p. 301.