

(EXTINCTION.)

No 10.

by him, must first be imputed to the annualrent of both the sums, and then to the stock of the first.—It was *alleged* for Auchinleck, That the intromission could only be attribute to the first apprising; *1mo*, Because by that right the appriser entered in possession, and cannot invert his possession to a third party's prejudice. *2do*, The first apprising *est potior jure*; for if the two apprisings were in different persons, he that had the second, could never attain possession against the first. *3tio*, *In dubio solutio est imputanda in duriores sortem*, and therefore to the first apprising; for if imputation be made to both, the first apprising will not be satisfied within the legal, and the debtor's right will be taken away, which is most unfavourable. *4to*, The appriser, as he did not possess by the second apprising, for he could not, because the first apprising carries the right of property, and the second carries only the right of reversion.

THE LORDS found the possession was only to be attribute to the first apprising, and not to the second, while the first were satisfied.

The next point was, that it was *alleged* the appriser had sold a part of the lands within the legal; and therefore the worth of these lands ought to be allowed in satisfaction of the sums.—It was *answered*, That the appriser could not dispo-
 ne the lands simply, but only his right of apprising, which would still be re-
 deemable from his assignee, as well as from himself.

THE LORDS found, That he was not accountable for the whole value of the lands dispo-
 ned, but for what sums he actually received for the lands dispo-
 ned, to be proven *scripto vel juramento*.

The next point was, as to the prices of the victual, whether the fiars, or great-
 est prices were due.

THE LORDS allowed the debtor to prove the greatest prices, and also to pro-
 duce the fiars, reserving to themselves the modification; next, as to the rental,
 the appriser desired a joint probation, especially it being in the Highlands, where
 the witnesses are suspect.

THE LORDS would not grant a joint probation, but ordained the probation to
 be by witnesses above exception.

Fol. Dic. v. I. p. 2E. Stair, v. I. p. 580.

1677. June 26. MALLOCH against the RELICT of David Boyd.

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In reckoning
 for intromis-
 sion, a com-
 priser stated
 expence of
 defending his
 right. This
 disallowed;
 but found, he
 might retain
 out of any

A SECOND compriser having pursued a declarator, that the prior comprising was
 satisfied by intromission; and the defender having, in the count and reckoning,
 given in an article of debursments for prosecuting and defending of proceses
 concerning his right; the LORDS found, That as to the extinguishing of the
 comprising upon the account of intromission, the expences in deducing the com-
 prising and obtaining infestment, were only to be allowed; but not any other
 extrinsic debursments: But the comprising being extinct and satisfied, if there

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were any surplus of mails and duties, for which the compriser was to be accountable, he might retain, off the first end of the same, such as were profitably expended, not only in relation to his own, but the pursuer's right.

Newbyth, Reporter.

Fol. Dic. v. 1. p. 21. Dirleton, No 458. p. 222.

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surplus in his hands, expense of supporting the right, by which the competing compriser was benefited.

1680. *March* YEOMAN of Dryburgh against GRAY of Innerichity.

THE heir of an appriser of ward-lands, having paid 4000 merks as the avail of a marriage which fell by his predecessor's death; his intromissions with the mails and duties were ascribed to it; at least he was found to have right to repete the same off the debtor, before the apprising could be extinguished.

Fol. Dic. v. 1. p. 21. Harcarfe, (COMPRISING.) No 307. p. 75.

No 12.

1681. *January 14.* SCHAW against MUIR.

SCHAW of Grimmat having apprised the lands of Sheill, pursues John Muir, a prior appriser, for declaring his apprising extinct and satisfied, in so far as he had, upon his apprising, taken a decreet of mails and duties, against all the tenants for certain years, and in all time coming; and by virtue thereof had uplifted the mails and duties.—The defender *alleged*, That he was only accountable for his actual intromission, at least for the rental of such parts of the lands, as he once entered in possession of by uplifting of the duties; for it is a known principle, that apprisers are not obliged to intromit, and are only liable to account for the rent of those rooms that once they begin to possess.—It was *answered*, That this ground is not controverted, where apprisers attain no possession; but, where they take decreets for mails and duties for all time coming, they thereby attain a civil possession, and no other apprisers being posterior, have any remeid, but are as effectually debarred by the decreet, as if they had been in possession, and had competed and been excluded; for no law nor reason can oblige any person to pursue the tenants, where he knows he cannot prevail; and whatever might be pretended as to distinct tenements, and distinct lands, that one appriser taking decreet against the whole tenants, and lifting the rents only of some baronies and tenements, and abstaining from the rents of other whole tenements distinct and distant, where posterior apprisers might have pursued the tenants of these distinct tenements, and thereby forced the first appriser, either to possess that he might be satisfied, or to suffer them to possess; yet here there is but one small tenement contiguous, and if the first appriser, possessing the most part, omitting any of the tenants, the pursuers were not obliged to enquire therein, but might warrantably

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An appriser, taking a decreet of mails and duties, against the whole tenants of an estate lying contiguous; found liable to account for the whole rents, whether he actually levied them or not, unless he could shew he had been prevented.