

(EXTINCTION.)

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.