

(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.

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1681. *January 14.* SCHAW against MUIR.

SCHAW of Grimmat having apprifed 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.

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presume that he hath lifted from all, by his decreet, and that he was not impeded; and if, by fraud or collusion, he hath neglected some of the tenants, or suffered the common debtor to lift the rents, *sibi imputet*, he must account for them as if he had lifted them.

Which the LORDS found relevant, and found the defender liable to account for all the tenants contained in his decreet, unless he instruct how he was excluded; but as for the common debtor's possession by his own labourage, which the posterior apprisers might visibly know, there was nothing alleged to be in the decreet concerning the common debtor, and so nothing was determined as to that point, but that the defender was to be accountable for all the tenants contained in his decreet, lying contiguous in one tenement, whereof the possession of the greatest part was acknowledged.

Stair, v. 2. p. 833.

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An adjudication, through informality, being reduced to a security, the intromissions had, *medio tempore*, are imputed in extinction thereof.

1720. January. WALKER against MACPHERSON and FORRESTER.

AN adjudication of a tenement, by progress in the persons of Macpherson and Forrester, having been restricted to a security, at the instance of John Walker, merchant in Edinburgh, because more was adjudged for than was due; the pursuer contended, That the adjudication was extinguished by the defenders and their authors intromissions, even those had after the legal reversion of ten years; because the adjudication having been found only a right in security, and the legal still open, it must be extinguishable by intromission, whether the original creditor intromit, or his singular successor; for such is the nature of rights in security and payment.

The defenders *pled*, That possession having been attained after the legal was expired, the *fructus bona fide precepti et consumpti*, while they had reason to believe themselves proprietors *unaccountable*, could not be imputed to extinguish the principal sums in their adjudication; which, in this case, would be particularly hard, because if they be bound to account, it must be by a rental; and, meantime, possessing *tanquam domini*, they have neither preserved vouchers nor documents of public burdens, reparations, wastes, bankrupt tenants, &c. to diminish the same. If, then, the pursuer's plea obtain, no man shall ever possess quietly or securely upon an adjudication; for it will not be said, that the law ties an adjudger to keep accounts of his actual intromissions, dead, waste and poor for ever; and yet no man can be secure, but minorities may interrupt for a long time beyond the course of prescription, during which, an adjudger, or purchaser of an estate from an adjudger, (and many estates in Scotland, have no other foundation,) shall not know whether he is master of an opulent estate, or if he is not worth a shilling in the world.