

## D I L I G E N C E.

## S E C T. I.

## Diligence prestable by Apprisers.

1625. July 2. KINCAID *against* HALIBURTON.

**E**VEN after the act 6th, Parl. 1621, an appriser is only liable to account for actual intromissions, and not for what he might have intromitted with; for he is not bound to intromit with any more than he pleases, or to do diligence.

No 1.

*Fol. Dic. v. 1. p. 236. Durie.*

\*\*\* See This case, No 1. p. 314.

\*\* The like was decided in a case, Tutor of Balmaghie *contra* Maxwell, 16th January 1634, No 2. p. 283.

1629. December 23. JOHN DICKSON *against* YOUNG.

Two comprisers contending which of them should be answered of the money and tacks after the redemption of the lands comprised by them, (for the lands comprised were under reversion, and were redeemed, and the sum whereupon the same was redeemable, was found to come in place of the lands to them, who should be found to have best right by comprising), the first compriser being in possession of the lands before they were redeemed, and the second *alleging*, that the first comprising was extinct by intromission with the duties of the lands, which satisfied the first compriser's sum, which was referred to his oath, and he deponing that the first year of his entry to the lands, the same was waste, and he plenished the same, and reaped no profit at all of the land but was a loser of a part of his own stock by the evil season, and the neighbours' goods which did eat his corns and grass, and that he set the same thereafter for a

No 2.

If an adjudger enter into possession of the lands adjudged, he becomes liable for the rent *qua* tenant, and he has no claim upon the debtor tho' he should be a loser by his possession.

No. 2. yearly duty paid by his tenants, to whom he set the same therefor; the other compriser *alleging*, that the first year should be allowed according to the farm which he received, and for the which he set the lands the years thereafter, seeing it was but a casualty, to make gain or disadvantage to any, in the first year of his plenishing. THE LORDS would not allow any thing to the first compriser for the first year, wherein he declared that he was plenisher, and was a loser.

Act. *Stuart & Cheap.*

Alt. *Nicolson & Craig.*

Clerk, *Scot.*

*Fol. Dic. v. I. p. 236. Durie, p. 478.*

1636. February 11. COLQUHOUN *against* L. BALVIE.

No 3.  
In a competi-  
tion among  
creditors, he  
who was pre-  
ferred *primo*  
*loco*, was  
bound *ad ex-*  
*actissimam di-*  
*ligentiam* for  
recovery of  
his payment,  
that way  
might be  
made for the  
succeeding  
apprisers.

Two comprisers contending for the mails and duties of the lands comprised, and the L. Balvie, who was brother to the Laird of Luss, (which L. Luss his lands were comprised by both these creditors), being preferred, in respect of his priority of comprising and infestment; the LORDS found, that he ought to do *exactissimam diligentiam*, for recovering of payment from the tenants, and possessors of the lands comprised, whereby he might be satisfied of his debt, for which he had deduced comprising, that after his payment there might be place to the second and subsequent compriser, to recover payment in the second room; and found, that it was not enough to give the prior compriser such preference, that he should not be holden, to do all diligence possible to recover his own satisfaction, and to suffer either the tenants to become bankrupts, or to connive and suffer his brother, the L. Luss the common debtor, to uplift the duties of the lands, and thereby to make his own comprising, and the legal reversion thereof to expire; but that he was holden, as said is, to do *summam diligentiam*, to obtain his own payment, notwithstanding that by the act of Parliament, he *alleged*, he was only liable to count for his actual intromission, and not for that wherewith he might have intromitted; seeing he alleged, that the second compriser had an ordinary remedy in law, viz. the benefit of redemption by virtue of the legal, which if he used not, it was his own fault; which allegiance was repelled, and it was found he ought to do all lawful diligence, as said is; and if he did it not, afterwards then when the matter should be again drawn in dispute betwixt the parties, the LORDS would consider thereof; that in case he did not what he might, they would take order, that thereby the second compriser should not be prejudged, by his wilful omission, collusion, or negligence.

Act. *Gilmor.*

*Fol. Dic. v. I. p. 236. Durie, p. 794*