1681. *January* 20. BURNET *against* BURNET.

No 9.
The Lords found, That an appriser entering in possession, was not accountable for the rental, during the time he was disturbed by the debtor *via facti*, or *via juris*, but so soon as he returned to peaceable possession, he was accountable by a rental.

UMQUHILE Gavin Burnet writer, having apprised Burnet of Barns' land, above 20 years ago, pursues the tenants for mails and duties. Compearance is made for this Barns, who *alleged*, That this apprising is satisfied by his intromission, and so extinct: Whereupon count and reckoning being appointed, the auditor reported this point, Whether the apprisers should be countable for the whole rental of the lands apprised, whereof his father had taken decreet of mails and duties, and entered in possession of a great part, allowing him deduction of all just defalcations? It was *alleged* for the appriser, That he was only countable for his intromission; and albeit he took decreet, he cannot count since that date, seeing the debtor did hinder him to possess, by lifting the rent from the tenants, and raising suspensions; and seeing the question results in this, Whether the debtor should prove every year's intromission of the appriser, or that the appriser should prove every year's intromission of the debtor, by a special probation, as to every tenant, and as to every term; and albeit the common rule be, that where the appriser once enters in possession, he is presumed to continue the same, unless he prove that the debtor possest, and if there be other apprisers, he is obliged to continue his possession, and to count by the rental; but where the count is only with the debtor, who has interrupted his possession *via juris*, or *via facti*, and that unwarrantably, the debtor ought to prove every year's possession of the appriser, and not he of the debtor.

THE LORDS found, That the appriser entering in possession was not countable for the rental, but only by his several years' intromission, during that time he was disturbed by the debtor *via facti*, or *via juris*, but so soon as he returned to peaceable possession, he was countable by a rental, and presumed to continue his possession, till the same were interrupted by the debtor, allowing by defalcation what he could not recover by diligence.

Fol. Dic. v. 1. *p.* 237. *Stair, v.* 2. *p.* 838.

*** Fountainhall reports the same case;

A DECLARATOR of the expiration of a legal of a comprising. *Alleged* by the debtor, he was satisfied by the rents of the lands within the legal, by decreet against the tenants. *Replied*, He could not account according to the rental of that decreet, but only for his actual intromissions, because the defender litigiously suspended these decreets, and *via facti*, interrupted and debarred him. THE LORDS found these interruptions *via juris et facti*, being made by the debtor, were sufficient to liberate, except *quoad* actual intromission, ay and while it should be made appear, that he was again peaceably repossessed, but this was only sustained in prejudice of the debtor who interrupted, there being no other creditor compearing.

Fountainhall, MS.