

1683. February. JOHN MUIR *against* SCHAW of Grimmet.

IN a count and reckoning, at the instance of a second appriser against the first, whom he was not within year and day of, the pursuer pretending, that the defender was satisfied, and paid by his intromissions; it was *alleged* for the defender, That, since his entry to possess, the tenants in such and such rooms had not paid all the years' duties, although he had done reasonable diligence against them by horning and denunciation, and had raised caption, though he had not executed the same.

Answered for the pursuer: The defender ought to have poinded.

Replied: Comprisers are not obliged to poind.

Duplied: The defender having, in a competition, excluded the pursuer, he ought to do more than ordinary diligence.

THE LORDS found, That, seeing the defender excluded the pursuer, he ought to have poinded, unless he allege and prove, that the poinding would have endangered the laying the lands waste, though in the case of no exclusion, denunciation was a sufficient diligence.

Fol. Dic. v. 1. p. 237. Harcarse, (COMPRISING.) Na 287. p. 67.

NO 10.
What is sufficient diligence.

SECT. II.

Diligence prestable by Assignees.

1664.

BRUCE *against* MORISON.

SIR George Morison of Dairsey made an assignation to umquhile Mr Robert Bruce of Broomhall, to a sum of money contained in a bond granted to him by the Earl of Seaforth, Lord Sinclair, Lairds of Murkle, Lugtoun, and Blackburn; which assignation he did oblige himself to warrant at all hands, and that he should recover thankful payment of the sums assigned, otherways that he should pay to him what sums he should not recover from the debtors. Alexander Bruce, son and heir of Mr Robert, pursues registration of this assignation against Sir George, to the end he may have execution against him for warrandice and payment, payment not being recovered from the debtors. It was *alleged*, absolvitor, because the assignation being dated *anno* 1647, the clause of warrandice and repayment could import no such thing as repayment,

NO 11.
An assignation being granted with absolute warrandice in case payment was not obtained, and the assignee having done no diligence to recover payment, the Lords found the granter liable in payment.