

\* \* \* Spottiswod reports the same case :

In the action betwixt William Brown's Creditors and his Executors, the LORDS would not prefer one of the creditors to another, notwithstanding that their diligence was not all alike, and that some of them had obtained decreets, which were not respected, because the executor had not opposed them, whereas he had made opposition to others, that had done as great diligence as they, and hindered them ; otherwise it should have been in the executor's power to prefer one creditor before another.

No 4.

*Ibid*, There being more debt than the defunct's goods would extend to, so that of necessity there behoved to be a proportionable defalcation of every one of their debts, yet the LORDS preferred the poor of the kirk of Biggar, (unto whom the defunct was owing 600 merks) to have their whole sum without defalcation, as being a more privileged debt than the rest.

Sicklike, the defunct being obliged to his wife by contract of marriage, to infest her in an annualrent of 600 merks ; THE LORDS preferred her to all the rest of the Creditors.

Farther, the debts being some of them upon bond, and others upon accounts whereof some were subscribed by the defunct, and others were only written in his compt-book, but not subscribed by him ; THE LORDS made them in a like case, that had bonds and subscribed accounts ; but for them that were only founded upon unsubscribed accounts, they thought it hard to admit them equally with the others who had a lawful surety made them according to the laws of the country ; yet they proving the real delivery of the particulars contained in the said accounts unsubscribed, and giving their suppletory oath that they rested yet unpaid ; they found that they all should come in equally.

Sicklike, the defunct being only cautioner in some bonds for John Maxwell of Shaws ; THE LORDS found that the Creditors might seek their sums of the cautioner's executors, as well as any of his principal creditors, they always assigning to the remanent creditors their relief of the principal John Maxwell. See PRIVILEGED DEBT.

*Spottiswood, p. 77.*

1632. January 31.

FERGUSON against M'KENZIE.

Two comprisers being infest in their debtor's lands, and the tenant who was pursued by them both for the duties thereof, suspending upon double pointing, wherein the two comprisers being heard to dispute upon their rights, infestments and comprisings, and who of them should be preferred to the other ; THE LORDS preferred the first compriser, albeit last infest by the superior, to the last compriser, who was first infest, although he who was first infest, was by virtue of his right in possession of the lands ; in respect not only he, who was last infest, was the first compriser, but also by reason that before this other party's com-

No 5.

A compriser having charged the superior before another's comprising was led, and the superior having suspended the first, and freely entered the second without a charge,

No 5.  
the first was,  
nevertheless,  
preferred, in  
respect of his  
diligence, al-  
tho' the other  
was infeft and  
three years in  
possession.

prising was perfected, he had charged the superior to infeft him, and which charges he had suspended, and thereby delayed the charger, and gave in the mean time a voluntary charter to the posterior compriser; which voluntary deed done after the first compriser's diligence, and no possession obtained thereon, THE LORDS found, ought not to prejudge the prior compriser's lawful diligence; but they drew back his said posterior infeftment, to the time of his said prior diligence, and preferred him therein to the other party.

Clerk, *Gibson*.

*Fol. Dic. v. 1. p. 153. Durie, p. 616.*

\* \* \* Spottiswood reports the same case, giving the defender the name of Davidson :

In an action for mails and duties sought by two comprisers, whereof the one had comprised and charged the superior before the other's comprising, yet the superior having suspended the first compriser, and holden him off three years, whereas he gave infeftment to the last freely without a charge, who by virtue thereof was in possession three years before the first got infeftment; THE LORDS preferred the first compriser in respect of his diligence, notwithstanding of the other's infeftment, and three years possession.

*Spottiswood, p. 53.*

1664. December 3.

The LAIRD OF CLERKINGTOUN *against* The LAIRD OF CORSBIE.

No 6.  
Found incon-  
formity with  
the above.

SIR WILLIAM DICK having apprised some lands, holden of the town of Irving, and charged the Magistrates to receive him; the Laird of Corsbie having comprised the same lands, some days after, was received by the town, the next day after Sir William's charge; and about a month after, Sir William was also infeft. Clerkingtoun having right from Sir William, pursues Corsbie, first, for mails and duties; Corsbie was found to have the benefit of a possessory judgment, by seven years possession, and thereupon was assoilzied. Now Clerkingtoun insists in a reduction on this reason, that he having first apprised, and charged the superior, they colluded with the defender, and gave him a voluntary infeftment, the next day after his charge; and therefore his infeftment, though after, ought to be drawn back to his charge and diligence, and he preferred. The defender *answered*, That the reason ought to be repelled, because the weight of the reason is the pursuer's diligence, and the superior's collusion, which hold not, because all the diligence Sir William Dick did, was the first charge upon the letters of four forms, which bear only with certification, that in case of disobedience, letters of horning would be direct *simpliciter*, and this is no more than a premonition, and put no obligation upon the superior, until the second charge,