

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,

which was horning; neither did Sir William ever insist any further than the first requisition.

No 6.

THE LORDS found that the first charge was sufficient, in this case, where the superior gave an infeftment before the expiring of the first charge, and before the second charge could be given, and thereby that a superior might prefer an appriser, though posterior to a prior, do what diligence the prior could. But they found, that seeing Sir William Dick had been silent, until his legal reversion was expired, and had not challenged the defender, who was in possession, and thereby had excluded him from the benefit of redemption competent to him, if he had been found to be but the second right within the legal; therefore the LORDS found Sir William Dick's apprising redeemable by Corsbie, within year and day, after the sentence.

*Fol. Dic. v. 1. p. 153. Stair, v. 1. p. 234.*

1769. June 22.

SIR JOHN GORDON of Invergordon, Bart. *against* WILLIAM FORSYTH.

MR FORSYTH was pursued for acting without a legal qualification as a commissioner of supply in the county of Cromarty.

It was *urged* for the defender, That he was duly qualified to act as a commissioner of supply at all the meetings held posterior to the 21st May 1765; that he had paid the penalty in which he had been found liable by the Sheriff of Cromarty for acting on the 30th of April preceding; and that having been assolizied by him as to subsequent actings, he was entitled to plead the *exceptio rei judicatae*.

THE LORDS, 18th December 1765, 'repelled the defence founded on the decret of the Sheriff of Cromarty, sustained the objection to the qualification of William Forsyth as commissioner, and found Sir John Gordon entitled to recover from him the penalty contained in the act of Parliament, for each of the times he acted as commissioner of supply without being duly qualified.' And, on the 15th of February, 1766, the COURT found it 'relevant for Sir John Gordon to plead collusion against the decret of the Sheriff of Cromarty, and allowed a proof; &c.

The proof of collusion was founded on Mr Forsyth's having acted as commissioner from solicitation, and contrary to his sentiments; on the process for recovering the penalty, having been brought by Mr Frazer of Ardochy, a person confederated with the defender; on the expenses having been defrayed by Mr Pulteney, and not by Mr Forsyth; and, on a receipt from the minister and elder, of their having received actual payment of L. 20 Sterling for the poor of the parish, when, at the time of signing it, they had not received a farthing.

No 7.

Collusion shown by circumstances, renders a decree null by exception.