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1653 to infeft him, obtained decreet of mails and duties against the tenants; which being suspended upon double poinding, and Sir Henry and Sir Alexander competing, it was *answered* for Sir Alexander, the donatar, That he had possessed three years, and offered him to prove, that the rebel had possessed five years before, therefore craved the benefit of a possessory judgment; *2dly*, That he was preferable in point of right, in so far as he offered him to prove that the rebel was five years in possession before the forfeiture, which gives the King and his donatar complete right by the act of Parliament. It was *answered* for the Creditor, That he ought to be preferred, because there being no retour upon the act of Parliament, finding by the inquest that the rebel was five years in possession as heritable possessor, he can neither have the benefit of a possessory judgment nor stop the creditor's diligence, who found themselves upon the apprising against the father who stood publicly infeft, and there is no sufficient right in the rebel's person alleged nor produced. It was *answered*, That the five years possession might be proved by witnesses by way of exception; *2dly*, It was offered to be proved by an inquest conform to the act of Parliament.

THE LORDS found no benefit of a possessory judgment competent; neither would they sustain the five years possession by way of defence; but decerned, superseding extract until the 15th of July, within which time, if the donatar obtained the retour of an inquest, he should be heard thereupon.

The donatar further *alleged separatim* that the rebel was infeft by the father, which was sufficient to prefer him without an inquest. It was *answered*, *Non relevat*, unless he had been either publicly infeft, or by base infeftment clad with possession, before the superior was charged upon the creditor's apprising, which being equivalent to a public infeftment, is preferable to the rebel's base infeftment. It was *answered*, That the King or his donatar needed no possession, nor can be prejudged for want of diligence.

THE LORDS found the creditor's allegeance relevant.

Stair, v. 1. *p.* 375.

1668. *February* 6. MR GEORGE JOHNSTON *against* SIR CHARLES ERSKINE.

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Where neither infeftment had passed on an apprising, nor a charge against the superior, there was found not sufficient title for a possessory judgment.

THE lands of Knockhill being a part of the lands of Hoddam, did belong to Richard Irvine, and were comprised from Robert Irvine great grand-child to the said Richard as charged to enter heir to the said Richard, at the instance of Mr John Alexander minister at Hoddam; but no infeftment nor diligence against the superior having followed upon the said comprising during the said Robert's life; the Lord Lyon Sir Charles Erskine comprised from Mr James Alexander, son to the said Mr John, the right of his comprising, and obtained infeftment upon the said comprising in August 1666. The said Robert's two sisters and his sisters children, obtained themselves infeft as heirs to the said

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Richard their grandsire and fore-grandsire in June 1666. And upon a right from them, and their resignation, Mr John Johnston being infeft in October 1666, pursued for mails and duties. The Lord Lyon compeared and *alleged*, That he and the tenants ought to be assoilzied in this possessory judgment, because he and his authors had been in possession by virtue of the comprising at the instance of Mr John Alexander by the space of seven years, whereupon infeftment has followed. It was *answered*, That the allegeance is not relevant, unless he had said that he was in possession seven years by virtue of a real right, which cannot be said, the infeftment being late and of the date foresaid. It was further *alleged* by the Lord Lyon, That he ought to be preferred, because he was infeft upon the said comprising at Mr John Alexander's instance against the said Robert, as charged to enter heir to the said Richard; and his infeftment was anterior to the said Mr George's infeftment upon the resignation foresaid of the said Robert's sister and nephews retoured and infeft as heirs to the said Richard. It was *replied*, That no infeftment or diligence having followed upon the said comprising against Robert in his lifetime; his sisters and nephews might have served themselves heirs to the said Richard who was last infeft; and *de facto* was infeft as heir to the said Richard, before any infeftment upon Alexander's comprising; so that his author's infeftment being prior to the Lord Lyon's infeftment, the pursuer ought to be preferred; and as Robert, if he had been served special heir to his grandsire, if he had not been infeft, the next heir might have been infeft as heir to Richard; and an infeftment upon a right from them would have been preferable to a comprising against Robert; so in this case Mr George ought to be preferred; the special charge against Robert being only equivalent to a special service, and no infeftment having followed in the person of the said Robert or the compriser. It was *duplied*, That by the act of Parliament, James V. ch. 106. Parl. 7., it is declared that execution against the apparent heir being charged to enter heir should be equivalent as if he were entered, which is the certification in the special charge; and, upon a comprising, if Robert had been infeft, infeftment being taken *quocunque tempore* even after his decease, before any other person had been infeft upon a comprising or right from a next heir, the comprising against Robert would have been preferable.

THE LORDS found, That the benefit of a possessory judgment is only competent by virtue of a real right, and that a compriser cannot claim the same without an infeftment or charge against the superior, and repelled the first allegeance.

THE LORDS found the second allegeance relevant, and preferred the comprising in respect of the infeftment thereupon, before the infeftment upon the right from the heirs of the said Richard.

Fol. Dic. v. 2. p. 88. *Dirleton*, No 155. p. 62.