

whom he was tenant by payment of the rents, was not called, he being a compriser, and upon the comprising having charged the superior; which allegiance the LORDS having repelled, and having ordained Mr Roger to compear for his interest, he did resume the allegiance founded upon the comprising and charge against the superiors, and his possession of the rents. To which it was *answered*, That a comprising and charge without a sasine, as it could not furnish a title for an action of removing, no more can it defend the tenant in a removing; otherwise, a charge without further diligence, should be equivalent to an infeftment, which is a real right. It was *replied*, That a charge is equivalent to an infeftment as to the recovery of rents and duties; because, the superior being *in mora* and *in culpa*, that the compriser is not infeft, no voluntary infeftment granted by the superior to any other compriser can prejudice the first compriser, having done diligence; and though he cannot pursue a removing without an infeftment, yet he may defend the tenant from removing at the instance of a party, who though infeft, yet his right is not so valid; just as an apparent heir may defend a tenant, though he cannot pursue a removing.

THE LORDS found the allegiance relevant *in hoc judicio*.

Fol. Dic. v. 1. p. 140. Gilmour, p. 85.

No 100.
sion of the rents, having charged the superior, but not infeft, needs not to be called in a removing at the instance of a second compriser infeft.

1665. June 10. SIR ALEXANDER HOME *against* ———.

——— pursues for mails and duties of certain lands. It was *alleged* for the tenants, no process, because they offered them to prove, that they were tenants by payment of mail and duty to Sir Alexander Home their minister, before intending of this cause, and he was not called. *2dly*, Absolvitor, because they were tenants to the said Sir Alexander, who had a right of an apprising, and diligence thereupon, anterior to the pursuer's right. The pursuer *answered* to the first, *non relevat*, in an action of mails and duties; albeit it would be relevant in a removing. In which two actions the Lords have still kepted that difference, that in removings the heritor should be called, because thereby his possession was to be inverted; but, in mails and duties, the tenants might suspend on double pointing, and thereupon call both parties: Or, if a tenant did collude, the master might use the tenant's name, but double pointing could not have place in removings.

To the *second*, It is not competent to the tenants to dispute their master's right, which is to them *jus tertii*; but they should have intimate to their master to compear and defend his own right, who, if he will compear and produce his interest, may be heard.

THE LORDS repelled both defences, unless Sir Alexander compear and produce his interest.

Fol. Dic. v. 1. p. 140. Stair, v. 1. p. 281.

No 101.
Found in conformity with No 98. p. 2229. See No 104.