

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.

No 7.

The pursuer *contended*, That, if the prosecution was not brought for the serious purpose of recovering penalties, if it was intended as a defence against an action to be brought at the instance of a real pursuer, the whole transaction must be collusive, and the penalty decerned for devised for the purpose of screening the defender.

To qualify a person to act as a commissioner of supply within any county or stewartry in Scotland, and to protect him from the penalties, he must, by act 5th Geo. III. 'be infest in superiority or property, or in possession of lands in such county or stewartry, to the value or extent of L. 100 Scots per annum, or be eldest son, or heir-apparent of the person so infest,' &c. The qualification of the defender is a feu-disposition, dated 21st May 1765, on which infestment was taken the 22d; but no instrument of sasine was extended till the 19th July thereafter.

The disposition was only a nominal and trust-right, without any intention of a real alienation, and intended solely as a collusive transaction to protect from the prosecution of penalties. *2do*, The infestment taken on the 22d of May is unavailable, the law acknowledging no infestment, except a *regular* instrument, executed and extended agreeable to the forms of law.

*Pleaded* for the defender, That the penalty of L. 20 Sterling, in which he was found liable by the Sheriff-substitute of Cromarty, was actually paid on the 16th of August 1765 into the hands of the minister of the parish, where it still remains; and the reason for the receipt being granted of a prior date, was, that the minister, of that date, had obtained an obligatory missive for payment of that penalty towards public or pious uses; that, though the decret of the Sheriff had thus taken effect, and no good reason occurred why a second penalty should be inflicted for the same offence, yet immediate payment was offered to the pursuer of the L. 20 penalty, with such expenses as had been incurred on account of the defender. Though the defender, upon the 30th of April 1765, acted without a legal qualification, not the least prejudice arose therefrom to any mortal; he served no political job, and did hurt to no person breathing.

Whether the defender, on the 30th of April, acted by the instigation of Mr Pulteney, or would have espoused his side against Sir John Gordon, cannot now be determined; whatever his intentions were, he had no opportunity of carrying them into execution; and it is trifling beyond measure, to attempt to prove a man's intention by inference and vague conjecture. The action before the Sheriff by Mr Frazer of Ardochy, for recovering from the defender the penalties he had by law incurred, had nothing in it collusive; the sentence pronounced by the Sheriff was not milder than the law required; nor is there the vestige of evidence of any concert or agreement, whereby the penalty was not to be inflicted, or not to be paid; the action was prosecuted *usque ad sententiam*, and the sentence put in execution. A collusive process, is that in which a prosecutor and defender agree to conduct the action in such a manner, that the defender shall be acquitted, or that a different judgment shall pass from what

otherwise would have been pronounced, had the action been fairly carried on ; *Voet in tit. de prævaricatione*. Where two persons offered themselves at one and the same time to prosecute a popular action, the rule in the civil law was, *prætor eligat idoneiorem ; l. 2. ff. de popularibus actionibus*. Sir John Gordon was the person who named the defender a commissioner of supply, and he has carried on all his political operations in Cromarty by means of a set of nominal commissioners, who have neither property nor possession within the county. These circumstances do not point him out as the person to be preferred to Mr Frazer for recovering the penalties ; they seem rather to bar him *personali exceptione*.

In the case of Duff of Hatton *contra* Farquharson of Coldroch, in 1757,\* the objection of collusion was over-ruled, though the circumstances were much stronger than what occur in the present case. It is immaterial to inquire, whether the defender has received any rents out of his lands or not. The law does not require actual possession of the lands ; it is enough to be infeft in them ; for the act of Parliament allows the alternative either of being infeft or in possession.

THE LORDS ' found the collusion pleaded by the complainer clearly proven, and therefore repelled the defence founded upon the decret of the Sheriff of Cromarty, and sustained the objection against William Forsyth his qualification as a commissioner of supply for that county ; and found the complainer entitled to recover from him the penalty contained in the act of Parliament for each of the times specified in the complaint when he acted as a commissioner of supply, without being duly qualified.'

Upon a reclaiming petition and answers, ' the LORDS adhered.'

Act. Solicitor Dundas.  
P. C.

Alt. Ilay Campbell.

Clerk, Kirkpatrick.  
Fac. Col. No 100. p. 183.

See FRAUD.

See APPENDIX.