No 24. cannot be taken away by way of exception of nullity, but must be reduced.

the defender, That he had been in possession, by the space of 20 or 30 years, by virtue of a title and feu-charter, with precept of sasine following thereupon. To this was *answered*, That the author of the defender's title long before had made resignation of the right and title in favour of the pursuer's author, and so being denuded of the property of the said lands, could not thereafter make disposition to any other person; and so the feu-charter alleged by the defender was null of itself, given and made *a non habente potestatem*. To this was *answered*, That the defender's title, with so long continuance, and not interrupted, could not, however it was, be taken away by way of exception, but behoved to abide reduction. The matter being reasoned among the LORDS, some were of that opinion, that the nullity of the title might come in by way of exception, according to act of Parliament, and the last practique admitted betwixt John Carnegy and one Gairne: *Alii Dominorum in contraria fuerunt opinione*, that the defender's title, with long possession following thereupon, could not be holden as null of itself, or null of the law, but behoved to be declared null, et differentia ponebant inter hoc quod est ipso jure nullum, et quod est decreto judicis annullandum argumento et similitudine sententiæ a judice latæ; nam si sententia contineat manifestam ineptitudinem, aut sit contra jus constitutionis, non opus est reductione, et est ipso jure nulla, ut habetur, C. Quando provocare non est necesse, L. 2. Secus si sic lata contra jus litigatoris et nullitas non fuerit manifesta ut in predicta, L. 2. THE LORDS, after long reasoning, for the most part, pronounced, that, in respect of long and continual possession, he ought not to flit and remove, the title standing unreduced. Dominus favorabiliorem existimabat rei causam propter longissimam temporis possessionem, licet de jure Scotiæ non admittitur præscriptio, nisi in casibus in actis Parliamenti expressum nominatis, tamen uti habetur longissimi temporis possessio 30 aut 40 annorum cum titulo justo, præscriptio procedit, et via actionis, et non exceptionis, jus litigantis tollitur.

Fol. Dic. v. 2. *p.* 89. *Colvil, MS. p.* 304.

No 25. The Lords refused to receive a reason of reduction, nor would they receive the summons *incidenter*, against an heritable right, by virtue of which the defender had been seven years in possession.

1663. *January* 17. POLLOCK *against* ANDERSON.

THE deceast John Anderson, by his second contract of marriage, is obliged to provide his conquest to the heirs of that marriage; and he conquests a room to himself in liferent, and William the eldest son of the first marriage in fee; whereupon they are both infeft by charter and sasine flowing from the Marquis of Douglas, from whom the land was purchased. The said John being debtor in a bond of L. 1000 to Arthur Pollock, who charged Christian Anderson to enter heir to her father William, who was successor *titulo lucrativo post contractum debitum* to his father John, in so far as the land was thereafter purchas-

No 25.

ed to his father in liferent, and to his son in fee; and therefore the said Arthur having pursued the said Christian *ut supra*, it was *alleged*, That William the son was not successor *titulo lucrativo* to his father, because the charter grants the receipt of the price from his son; and the reason why the father was liferenter was, because he had a prior rental standing in his person, who, conform to the charter, paid the feu-duty to the Marquis superior; likeas, it was offered to be proven, *per testes omni exceptione majores*, that the son did *de facto* pay the price. It was *answered*, That the father, being liferenter, must be presumed to be purchaser.

THE LORDS found the allegeance relevant, notwithstanding of the reply.

And it being proven, both by the charter and famous witnesses, that the son being major paid the money;

They assoilzied the defender from the passive title.

And because it was *alleged*, That the sasine was given by the father to the son only *propriis manibus*, without an adminicle, though confirmed by the Marquis, the original charter being, in the first place, given to the father heritably, and in the same charter mention being made of a resignation made by the father, in favours of himself in liferent, and his son in fee, for sums of money paid to the superior by the son, which resignation was not shown;

THE LORDS nevertheless sustained the infeftment, clad with the above seven years possession, reserving action of reduction as accords of the law.

Fol. Dic. v. 2. p. 89. Gilmour, No 66. p. 49.

1700. *February* 28.

SIR HARRY INNES of that Ilk *against* The DUKE of GORDON.

No 26.

A wadsetter who had been long out of possession, pursued the grantei's apparent heir in a declarator, that his wadset was a real and preferable right, and for mails and duties against the present possessor. The defender craving benefit of a possessory judgment, the defence was sustained as to mails and duties, but not against the declarator.

INNES's grandfather being co-cautioner with the Marquis of Argyle for the Marquis of Huntly, and being distressed, he was forced to pay the debt, and take assignation thereto; and, while Argyle possessed Huntly's estate, he gave Innes a wadset out of Huntly's lands in 1655, for security of that debt, after the restoration in 1661. Huntly, as having right to Argyle's forfeiture, dispossesses Innes of the wadset lands. This Innes, as representing his grandfather, pursues the Duke of Gordon in a declarator, that his wadset was a real and preferable right on the estate of Huntly; and likewise pursues mails and duties against the Duke, as present possessor of the lands. *Alleged*, Absolvitor, because I have possessed seven years by virtue of infeftment, and so must have the benefit of a possessory judgment ay and while my right be reduced.—THE LORDS sustained the defence *quoad* the mails and duties, but found it not good against the declarator.

Then the Duke *alleged*, Innes's right was prescribed by the negative prescription of *non utendo* these forty years past. *Answered*, This could be proponed by none but he who had a right, and was only good *quoad* bygones;