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. No 25.

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;

No 26. seeing, where no right is shown, the possession is presumed to be merely precarious and by tolerance. *Replied*, The Duke had right, not only by the gift of forfeiture, but also as come in Bailie Robert Fowles's place, who had apprised the estate of Huntly, the right whereof the Duke had acquired. *Duplied*, As to the voluntary right from Robert Fowles, offered to prove it paid by intromission after his acquisition, conform to the act of Parliament 1661, declaring it so redeemable; and as to the forfeiture, by the laws then standing in 1655, when the wadset was granted, it was expressly declared, that no forfeitures should prejudge either creditors or vassals; and though these acts of Parliament, from the year 1640 till 1660, are rescinded, by the great rescissory act in 1661, yet there is an express *salvo* and reservation in the end of that act of the rights of private parties, and so cannot be extended to cut off Innes's wadset; likeas the same is renewed again by the act of Parliament in 1690.—Yet that act has no retrospect to bygones. 3*tio*, The Marquis of Argyle's forfeiture is plainly null, the minutes not being signed by the Chancellor or President of the Parliament; and though the reductions of dooms of forfeitures past in Parliament can be no where tabled but there, yet when the Duke subjects his gift of forfeiture to the Lords, by founding on it, they may cognosce on its nullities, as they did on a decreet of the commission of Parliament in favours of a minister, 16th January 1663, Earl of Roxburgh, No 62. p. 7328.; at least, it was *urged* that the reduction of the forfeiture might be summarily remitted to the Parliament. But the Lords resolved first to hear how far the *salvo*, in the rescissory act 1661, extended, ere they would enter on the consideration, whether they would remit the reduction of the Marquis of Argyle's forfeiture to the Parliament, yea or no.

The time of the reasoning of this cause, the Duke being at the bar, he claimed the privilege of entering within the bar of the Inner-house while his cause was under debate, and instanced that it had been so granted to the Duke of Hamilton. All being removed till the Lords might advise and deliberate on the Duke's desire, they found, that, by a printed act of sederunt, 16th December 1686, all were secluded from coming within the bar while the Lords were in judgment; and the Lords having sent one of their number to acquaint the Duke with their resolution, his Grace acquiesced therein; and any who had entered before, it was by connivance, or their contingency to the Blood Royal.

Fol. Dic. v. 2. *p.* 89. *Fountainhall, v.* 2. *p.* 93.

SECT. V.

In what Subjects Possessory Judgment takes place.

1627. *March* 15. EARL of GALLOWAY *against* TAILFER.

No 27. IN a removing pursued by the Earl of Galloway against Tailfer; *excepted*, That he had a rental for him and his heirs of the same lands. *Replied*, He offer-