No 6.
the nullity was, that it proceeded upon an infeftment of kirk lands not confirmed, which can produce neither action nor exception.

tinual peaceable possession of the lands libelled these thirty-four years by past; therefore the pursuer, this decreet standing, cannot pursue removing. And the pursuer *replying*, That the decreet cannot be received to stay this removing, except that the defender would allege some right by virtue whereof he bruiks, and by virtue whereof the sentence was obtained; which, if he will allege, he will oppone a nullity in law, viz. that it is an infeftment of kirkland not confirmed, which can neither produce action nor exception. Likeas John Stuart, now Laird of Coldingham, and author of this pursuer's right, compeared and concurred with this pursuer, and adhered to this reply, and assisted the pursuit, against whom no decreet is obtained.——THE LORDS found, in respect of the said decreet, clothed with so long possession, obtained against this pursuer's goodsire, to whom he was heir, and pursued by him *hoc titulo*, was standing unreduced, therefore that the pursuit could not be sustained, notwithstanding of the said reply of nullity, which is not receivable by exception or reply; for it was not found necessary that the defender should except upon his right, so long as the said decreet, clothed with so long possession, stood unreduced: And the LORDS respected not the superior's concourse, to sustain a pursuit of removing at another party's instance, he not being pursuer.

Act. ——. Alt. *Nicolson.* Clerk, *Scot.*

Fol. Dic. v. 1. *p.* 169. *Durie, p.* 652.

SECT. II.

Is Reduction requisite of Decrees of Apprising?

1627. *February* 24. COUPER *against* M'MARTIN.

No 7.
The Lords refused to take away a standing comprising *ope exceptionis*, though it was for an heritable debt never made moveable by a charge.

WHEN comprisings are led against apparent heirs that will not enter, there must two charges be used, a general and a special. The first is *præparatoria actionis*, and is *contra personam;* the last is *præparatoria executionis*, and is *contra fundum:* For the general charge is to make a man enter heir to his father, &c. that sicklike action may be had against him, as against his father, &c. and this makes the party, charged to enter heir, to come in place of his father, and is the ground of the sentence of registration, &c. following thereon. After the obtaining of a sentence against him, as lawfully charged to enter heir, then the special charge is used, charging him to enter to such and such lands, after which charge comprising followeth. And this order in charging must be kept in all comprisings; so that the special charge cannot go before sentence be re-

covered against the party charged to enter heir, because it is a part of the execution of the sentence, which cannot precede the sentence itself. This was found between John M'Martin and Andrew Couper, who were striving upon priority of diligence, who should be first infeft by the Earl of Cassilis, superior of the lands which they had both comprised, wherein Andrew Couper's comprising being prior was not sustained, in respect he had used both the charges, viz. general and special, before the sentence, and so against the inviolable custom observed in such cases. No 7.

In the same action, Andrew Couper's comprising being challenged as null, because the ground of it was an heritable bond, never made moveable by a charge, (which was a plain nullity of the law, and took away the comprising *in solidum*;)——THE LORDS would not take away the comprising standing *ope exceptionis*, but found it behoved to be reduced.

The like found between the Lord Balmerino and Gilbert Elliot of Stobbs, 10th July 1634.

Fol. Dic. v. 1. *p.* 169. *Spottiswood, p.* 43.

1662. *July* 10. JOHN KER *against* KER of Fernilee, and Others.

No 8.
An adjudication being challenged as following upon a charge to enter heir, the person charged not being the nearest heir, this was found competent to the nearer apparent heir without reduction, tho' infeftment had past upon the adjudication.

JOHN KER having granted a bond, whereupon he being charged to enter heir to several persons his predecessors, and having renounced, their lands were adjudged; John took assignation to the adjudication himself, and pursued the defenders for exhibition of the rights and evidents of the lands, and delivery thereof. The defender *alleged* absolvitor, 1*mo*, Because the pursuit being upon the pursuer's own bond, now again assigned to himself, *confusione tollitur obligatio.*

THE LORDS repelled this defence.

2*do*, Absolvitor, because the pursuer can have no interest upon these rights proceeding against him, as apparent heir to these predecessors, and now assigned to him, because there were other apparent heirs, specially condescended on, nearer of blood. The pursuer *answered*, *Non relevat*, to take away his infeftment, which behoved to be reduced. 2*dly*, *Non competit* to the defenders, unless these nearer apparent heirs were compearing for their interest. The defender *replied*, That the infeftments having obtained no possession, and having proceeded only upon a charge to enter heir against the pursuer by collusion; it was competent by exception, seeing there was no service, nor possession, nor any thing done that the nearest heirs were obliged to know; and it was also competent to the defenders not to deliver the writs to any having no right thereto, they being liable to deliver them to the nearest heir of the true owner.

THE LORDS repelled this defence against the exhibition, reserving it to the delivery, in which they found it competent to the nearer appearing heirs, without reduction.

Fol. Dic. v. 1. *p.* 169. *Stair, v.* 1. *p.* 124.