he, within the legal, was not fully divested, but he might enter and receive the vassals.——THE LORDS found the tenor sufficiently made up by the writs produced; yet so as he behoved to take it as it stood, with the pretended nullity in the *clare constat.* And found the objections on the collusion, and its being retired, not competent against the tenor; but reserved them by way of reduction.

No 81.

Fol. Dic. v. 1. p. 176. Fountainhall, v. 2. p. 744.

1713. *July* 7.

The CREDITORS of JAMES HAMILTON, younger of Orbistoun, *against* JAMES HAMILTON of Dalziel.

No 82. Found as above.

IN a process at the instance of the Creditors of young Orbistoun against James Hamilton of Dalziel, and Others, for proving the tenor of a disposition granted by the deceased William Hamilton of Orbistoun, elder, to his only son;—THE LORDS repelled the allegeance proponed for the defenders, That the disposition, whereof the tenor was craved to be proved, was innovated by contract entered into at Cramond, betwixt old and young Orbistouns, *hoc loco;* reserving to the defenders to be heard thereon after the tenor is proved, and allowed them to give in a condescendence of the qualifications, that the disposition was cancelled and retired by old Orbistoun, and to prove the same before answer.

Albeit it was *alleged* for the defenders, That if the writ, whereof the tenor is offered to be made up, hath been innovated and altered, a proving the tenor cannot proceed. Because, then the pursuers have no interest, and a party having no interest cannot pursue; action being *jus persequendi quod sibi debetur*, not competent vagrantly to every person having a mind to insist, but only to such as can shew their interest in what is acclaimed. Nor is there any difference in this matter betwixt a proving of the tenor and other actions; on the contrary, proving of tenors being extraordinary remedies, are not to be admitted till every thing objected against the pursuer's interest be discussed. So in exhibitions *ad deliberandum* (which like this is a preparatory action for a separate process) it is a good defence, that the defunct was denuded, whereby the pursuer's interest ceased, and there can be no further step made till the import of that defence be tried. Every accessory process must be determined by the same rules as the principal process, if insisted in, would: *Finis dat formam negotio*, he that hath right to the end, hath right to the means that lead to it; and *e contra*, one that hath no right to the end, ought not to be admitted to use the means to attain what is the right of another: Consequently, what is relevant against the principal conclusion, is relevant against the accessory of proving the tenor. Were a renunciation of the disposition under young Orbistoun's hand produced, his creditors could not proceed in proving the tenor till the renunciation were discussed: Now, innovation hath the same effect in law, as a discharge or

No 82.

renunciation; and the Lords are always in use to restrain humour of parties in putting others to unnecessary charges, by sustaining the common exception, *frustra probatur, &c.*

In respect, it was *answered* for the pursuer, That they are not obliged to plead their interest, or dispute the import of the pretended innovation, until their right instructing the same be complete, and in the field, which they are bringing in by proving the tenor; this regularly should meet with no opposition, being of the nature of a transferring *in statu quo*, prejudicial to no party: For if the writ, whereof the tenor is to be proved, was good and effectual, the party leased by accident should have it redintegrated by the assistance of justice; and if it was exceptionable, it will be so still after proving the tenor, and all defences against it entire. The instance of an exhibition *ad deliberandum*, is foreign to the purpose: For none can deliberate about a succession where there is nothing to succeed to. Whereas a person may justly prove the tenor of a writ though innovated; seeing innovated writs are not always extinct, but continue still good evidents with the burden of the innovation, February 5. 1675, Binnie *contra* Scot, *voce* Innovation. Again, a discharge or renunciation could not stop process of tenor; because, the tenor of writs may be proved for other effects than for obtaining implement or performance. Besides, a discharge is not the same with an innovation, the first being a direct extinction of a right, and the other an extinction implied only. The Brocard, *frustra probatur, &c.* is misapplied; for the pursuers, without any humour, decline to dispute the point of innovation, till they be *in pari casu* with the defenders, by having their right complete in their hands, which they are prosecuting upon their own charges, without any trouble or expense to the other party.

Fol. Dic. v. 1. *p.* 176. *Forbes, p.* 696.

SECT. XX.

Exceptions, Whether Proponable *in Cursu Diligentiæ*.

1611. *February* 19. Fairlie *against* Ld. of Blair.

No 83.
An obligation was transferred *passive* against both heirs of line and tailzie, reserving the benefit of discussion and

A contract, whereby the old Laird of Blair was obliged to infeft Fairlie of Over Minock, was decerned to be transferred against the heirs both of line and tailzie, without discussion, reserving their defences against the execution. In that cause it was found, that a charge to enter heir being raised and execute before year and day was sufficient, if the last day of the 40 was after year and day. It was found that a charge to enter heir, execute at the instance of a pur-