

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 Diligentia.*

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 infest 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-

suer before he was heir, was sustained by his subsequent service, which was drawn back to the time of the charge. In that cause, the LORDS inclined that the burdens lying upon the tailzied lands, and the bonds to infest men in the property thereof, or annualrents furth of the same, should be born by the heir of tailzie succeeding to these lands. SERVICE OF HEIRS.—TAILZIE.

*Fol. Dic. v. 1. p. 176. Haddington, v. 2. p. 2162.*

No 83.  
other ques-  
tions *contra*  
*executionem*,

1629. *January 15.*

L. CORSBIE *against* SHAW.

BRIEVES being impetrate by the Laird of Corsbie, for serving him heir to one of his predecessors, before the four macers, and the LORDS having joined four advocates with them, two nominated for the Laird of Corsbie, and two for Shaw, who compeared, and opposed the service; and being admitted for his interest therein, he being heritably infest in the lands, whereunto Corsbie craved to be served heir to that of his predecessor, who was infest therein; and he *alleging*, that that predecessor was a bastard, and so *she* could not have an heir, nor he be served as heir to him; and the assessors differing in judgment, and being of contrary opinions, and craving the Lords' advice therein, by their supplication given in for that effect, whereupon they being heard in presence of the Lords, the LORDS gave advice, that that allegiance should not stay the service; for they thought all that the exception of bastardy, by the 94th act of Parliament 6th Ja. IV, is ordained to be received against the service, ought to be understood of the bastardy of him, who impetrates the brief, and not of the predecessor, to whom the party desires to be served heir; specially in this case, and cases of antiquity, where the predecessor was deceast many years before, as in this case where he was dead fifty years before; for, if this exception of the predecessor's being bastard were received, it would be a way to stop all services.

No 84.  
An exception  
of the bas-  
tardy of a  
remote pre-  
decessor, was  
not received  
to interrupt a  
service.

*Act. Craig.*

*Alt. Neilson.*

*Fol. Dic. v. 1. p. 177. Durie, p. 415.*

1633. *July 16.*

LAWSON *against* SCOTT.

IN a transferring of a bond pursued by Mr John Lawson against Scott of Whitsleid, as heir to his father, it being *alleged*, That the pursuer had comprised certain lands and teinds for the same debt, and was in possession of some of the teinds comprised; the allegiance against the transferring was sustained, albeit it was *answered*, that it was only competent against the execution, but not in a transferring.

*Fol. Dic. v. 1. p. 176. Spottiswood, (TRANSFERRING.) p. 342.*

No 85.