

1712. June 26.

Mr JAMES INGLIS *against* Dame MARGARET CHARTERIS and LORD ALEXANDER HAY, her Husband.

No 81.

It was objected against the proving of the tenor of a writ, that it was innovate and extinguished. The Lords repelled the objection *hoc loco*, reserving to the defender to be heard thereon in any action to be raised upon the decree of tenor, in case it should be obtained.

MR JAMES INGLIS of St Leonards pursues a proving the tenor of some writs against Dame Margaret Charteris, and Lord Alexander Hay of Lawfield her husband. The writs were an instrument of sasine of one Mr Patrick Kelly, taken on an heritable bond, granted by Mr Cornelius Inglis of Eastbarns in 1660, for 4600 merks to be lifted out of that part of these lands called Purvesdale. *Item*, A precept of *clare constat*, granted by Mr Patrick Inglis as superior, to Janet Kelly, daughter and heir to the said Mr Patrick Kelly. *Item*, A sasine following thereon. For astructing the tenor these adminicles are adduced: The extracts of the sasines out of the respective registers where they stand recorded: The heritable bond, their warrant: *Item*, A decret of pointing of the ground on these sasines; and a preference to the creditors of Eastbarns. *Alleged*, The documents were neither relevant, nor concluding; for, *1mo*, Though the principal sasines were produced, and on the clerk's table, (whereas here be only extracts) they are nowise probative, being merely the assertions of a notar, in whose power law never put the making up of real rights to lands; likeas, the precept of *clare constat* is null, not bearing the designation of the writer, though posterior to the 5th act 1681; for it only says, 'Wrote by one, servant to Archibald Nisbet,' without telling who this Nisbet was; and to condescend now that it was (Archibald Nisbet) writer to Signet, cannot be received, it being declared a nullity un-suppliable by the foresaid act. *2do*, The precept is given by Mr Patrick Inglis the debtor's apparent heir, and so is a passive title. *3tio*, It appears by Dr Oswald's oath, taken in this process, that the grounds of this debt were in the common debtor Mr Patrick's hands, and so *instrumentum apud debitorem* and presumed retired; though by a contrivance betwixt him and this pursuer, his brother, it was resolved to be kept up and revived, to debar true and lawful creditors. *Answered*, The adminicles produced were incontestably pregnant; for, though a sasine alone be not sufficient, yet, conjoined with other presumptions, it has been sustained as a good document. And as to the nullity in the *clare constat*, the designation seems abundantly to certify the writer; and *esto* it did not, yet being only in a step of the progress, and connection of the title, it is no way material: And as to the granter's being apparent heir, and colluding fraudulently with his brother, it is evident he did it by a singular title, viz. a base infestment clad with possession, preferable to the creditors' diligence: And it appears by a decision in Stair, Inglis *contra* the Tenants of Eastbarns, No 54. p. 1324. that he was upon that right preferred to Mr John Inglis of Cra-mond, an annualrenter infest in these same lands: And though it was *objected*, that he was not the true superior to give any precepts, he being denuded by apprisings and adjudications, yet this was repelled, seeing they were expired, and

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 allegiance 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 condescence 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