No 17. tions of an adjudication.

passive titles, any further than by the production of a general charge mentioned in the decreet, but which was not now produced, on the contrary certification was obtained against it. 2*do*, There are other titles mentioned in the decreet, such as a service and confirmation; but against these likewise certification was obtained. 3*tio*, The apprising proceeded upon a special charge, but the decreet did not mention that it was produced to the inquest; and certification was also obtained against it.

General charges need not be produced after twenty years.

Services and confirmations are writs *in publica custodia*; so there can be no presumption of fraud, in consequence of the certification, on the supposition that they had been fraudulently kept up.

It was *answered* to the 1*st*, That there was no necessity of producing charges to enter heir after 20 years, no more than summonses or other executions, as was found Brown against Home, No 7. p. 5169. To the 2*d*, That Netherwood had no title to reduce the service or confirmation; and besides, these writs were in *publica custodia*, which cuts off the presumptive falsehood introduced by the certification, upon the supposition that the writs were fraudulently kept up, and that they would appear to be forged if produced. To the 3*d*, it was *answered*, That the decreet of apprising was a special charge, the whole of the apprising being one execution by the messenger, and it narrates a special charge to have been given; and therefore there was no necessity to mention it again in that part which relates to the proceedings of the Court of apprising itself; nor is there any necessity of producing it now after 20 years, more than there is for producing a general charge; these are small pieces of paper which are easily mislaid or lost, and therefore the law dispenses with the production of them after a long period of time.

'THE LORDS repelled the objection founded on the want of the general charge, retour and confirmation; but found, that the want of the special charge was a sufficient ground to cut off accumulations; and remitted to the Ordinary to determine how far the apprising ought to subsist as to the penalty.'

Reporter, *Lord Polton*. Act. *Boswel*. Alt. *Ch. Areskine*. Clerk, *Dalrymple*.
Fol. Dic. v. 1. *p.* 354. & *v.* 3. *p.* 253. *Edgar, p.* 112.

1725. *November* 26.

No 18. Executions of general and special charges not necessary to be produced twenty years.

SIR WILLIAM COCKBURN *against* The CREDITORS of Thomas Calderwood.

IN the competition betwixt these parties, about a subject in Mortonhall's hands; Sir William's interest was an adjudication led by Dr Hay, against a principal debtor; and the debt being shortly thereafter satisfied and paid by Sir William's predecessor as cautioner, the adjudication was conveyed *anno* 1720, out of the *hæreditas jacens* of the Doctor, by a process at Sir William's instance against his representatives. It was *objected* by his competitors, That the adjudication is null, 1*mo*, Because it proceeds upon a decreet of constitution, wherein the passive title is a general charge to enter heir, and yet the executions of the general charge not produced. 2*do*, It proceeds against an appa-

rent heir, as specially charged to enter heir to his predecessor, and yet no special charge or execution produced. No 18.

It was *answered* for Sir William, That general and special charges are of the nature of warrants, which are usually left with the clerks of process; and custom has introduced a prescription of 20 years, in favours of parties, that they are not to be answerable for warrants after that time; and a most equitable prescription it is, that one for ever be not liable for the negligence of others. 2*do*, Were it even so, that general and special charges are not to be considered as warrants, but as grounds, and presumed to be in the possession of parties themselves; (however far the want of the instruction of any step of diligence might operate against the party user of the diligence, who ought to have all in his possession;) the case of singular successors is more favourable, who have frequently difficulty to recover their author's papers. And here Dr Hay's writs were in so great disorder, that Sir William was even forced to take second extracts of the bond and adjudication; which points at a fair account, why he never came to be master of these general and special charges. And it was concluded to be extremely hard, if diligences shall be found null, especially in the persons of singular successors, after so long a time, there being not only 20, but almost 40 years elapsed, since the date of the adjudication; and all for the falling by of an instruction of a common step of diligence, which every creditor has it in his power to do without any trouble; and which no creditor is presumed therefore to neglect.

In reply to the *first*, The following argument was made use of, to show, that general and special charges are not warrants, but grounds. The distinction betwixt grounds and warrants, must either be with relation to the Judge, who pronounces the sentence, or the clerk who makes out the decreet. With relation to the Judge, all those that are commonly reckoned grounds, bonds, bills, &c. are the warrants of his sentence; so that it can only be with relation to the clerk, that the distinction is made; and these are called warrants, which the clerk ought to keep as vouchers of his extracts; and all that can be necessary for that end, is the summons, to shew the nature of the process; the deposition of witnesses, for the proof; and the minutes, for the sentence; which without more, must be full authority for clerks to extract any decreet. In this view, general and special charges can no more be reckoned warrants, than hornings, arrestments, inhibitions, or any other extrajudicial step of diligence; or even than bonds or bills, which indeed are all of them warrants to the Judge; but his sentence, instead of all of them, sufficient warrant to the clerk. And accordingly the custom runs, that seldom (if ever) are general and special charges left with the clerks, but taken up by parties with their other grounds.

Replied to the *second*, It is enough for the creditors to say, that Sir William Cockburn's progress wants two mid-couples; and that either these mid-couples never were, or at least are liable to objections, sufficient to annul the whole progress. This objection is undoubtedly good against every mortal, who pre-

No 18. tends any interest in the progress, singular successor as well as author. It is indeed possible that the general and special charges might have been duly executed and fallen aside by accident; but since it is also possible they never were, or were not legally done, which is the same upon the matter, the creditors ought not to lose an objection, that possibly may be competent to them; and their competitor ought not to have a possibility of being made better by the loss of his own writs.

Duplied, The accidental falling aside of Sir William's papers, ought in reason to give no more benefit to Sir William's competitors, than to himself. What then must be concluded? Just this, the Judges will consider upon whose side the greatest weight of presumption lies, and determine accordingly, *scil.* Whether it is most probable that these executions were legally done, and fallen aside by accident, or that they were never done, or not done legally. And when the dispute is brought to this shape, it will be no difficult matter to point out, upon whose side lies the strongest presumption, if it be certain that not once of a thousand times, are any of these common and usual steps of diligence neglected altogether, or executed with any substantial informalities; when at the same time, the *casus amissionis* is condescended on, a probable account given, how by the lapse of many more than 20 years, these executions might have fallen aside.

'THE LORDS found, that the want of the executions of the general and special charge, after 20 years, is no nullity or ground of reduction.'

Fol. Dic. v. 2. p. 254. Rem. Dec. v. 1. No 63. p. 122.

1757. *July* 6. DAVID WILSON *against* WILLIAM SELLERS.

No 19.
A party, in possession of letters of general charge, which had been the grounds of an inhibition, refused to produce them after 20 years. Found he was entitled to refuse.

IN the year 1669, Robert Davidson granted a bond to his father Henry, and his sister Agnes, in which he 'grants him to have borrowed and received, really 'and with effect, in numerate money, from Henry Davidson his father, and 'Agnes Davidson his sister, the sum of 600 merks Scots; which sum of 600 'merks money foresaid, he thereby binds and obliges him, his heirs, *&c.* 'thankfully to refund, content, pay, and again deliver to the said Henry 'Davidson and Agnes Davidson; and failing them both by decease, to any 'person the said Henry Davidson pleases.'

Some months after, Henry Davidson granted a bond for 1000 merks to his daughter Agnes, and soon after died.

Upon Henry Davidson's death, Agnes is said to have raised letters of general charge in that same year 1669 against Robert to enter heir to his father. She likewise, in the same year, obtained letters of inhibition against Robert; which inhibition mentioned the letters of general charge, but not the bonds.