No 19.

to the inhibition, Robert Davidson sold a house to Wilson's author, in part payment of which it was agreed the 500 merks bond should go; and for that reason, Wilson's author took no infeftment upon the bond, but took it upon the disposition, not knowing of the intervening inhibition.

Wilson's disposition being cut down by the inhibition in consequence of the above two interlocutors, Wilson next *insisted*, That he should at least be allowed to compete with Sellers upon the 500 merks bond, against which the posterior inhibition could not strike.

Answered for Sellers; As there was no infeftment upon the bond, it could not come in competition with him, a creditor-adjudger infeft.

Replied for Wilson; In equity, the bond should be sustained as if infeftment had followed upon it. The reason why no infeftment passed upon the bond was, that, immediately after, the bond went in payment for a disposition, upon which infeftment followed. The inhibition could never have struck against the bond, had infeftment followed on it; and Wilson's deception, in not taking infeftment upon that bond, which he had a right to have taken, and in lieu thereof, taking infeftment upon that disposition, which came in place of the bond, ought not to have the effect to cut him out of the validity of his bond; on the contrary, according to the principles of equity, it would appear, that his infeftment upon the latter should supply the place of infeftment upon the former.

"THE LORDS found Sellers preferable." *See* SERVICE AND CONFIRMATION.

Act. *Rae, Hamilton-Gordon, Fergusson.* Alt. *Jo. Dalrymple, Lockhart.*

J. D. *Fac. Col. No 39. p. 62.*

1771. *February* 28.

ALEXANDER IRVINE of Drum, *against* GEORGE EARL of ABERDEEN, and Others.

No 20.
Letters of general and special charge, being warrants, not necessary to be produced after twenty years.

IN the year 1765, the pursuer brought an action of reduction, improbation, and declarator, against the Earl of Aberdeen, and others; wherein he called for production of various writings and title-deeds. The defenders produced certain writings, which they contended were sufficient to exclude. A variety of procedure ensued. The COURT, on the 9th March 1769, found that the defenders were not bound to produce the writs and deeds called for; but upon an appeal to the House of Lords, that decree was, in March 1770, reversed, and the defenders "ordered to produce the rights and deeds specially called for."

The cause having returned to the Lord Ordinary, a condescendence of the writings required was given in, and the defenders expressed their willingness to produce the whole grounds of debt, adjudications, and conveyances thereof, which had been ranked upon the estate at the judicial sale; but insisted that they could not be compelled to produce general and special charges, exe-

No 20. cutions thereof, and other warrants of these decrees and adjudications; which, by the established law and practice of Scotland, no party was obliged to produce after the elapse of twenty years.

THE LORD ORDINARY, on the 21st January 1771, *inter alia* found, "That the defenders are bound to produce the general and special charges and other warrants of the decreet brought under challenge, in so far as the said charges and other warrants are specially called for, and are extant."

In a reclaiming petition, the defenders *pleaded*;

1*mo*, There could be no doubt that general and special charges were the *warrants* merely, not the grounds of the decrees of adjudication, and of course the prescription of twenty years applied to them. These were to be distinguished from bonds, contracts, dispositions, assignations, and such documents which related to the justice of the debt, and were properly the grounds of a decree; whilst charges, on the other hand, were nothing but preparatory steps of diligence, which every creditor had it in his power to take or procure without any trouble. The first, it was proper and necessary should be preserved; but it would be highly unjust and inexpedient to load parties with the necessity of preserving a variety of immaterial documents, which ought either to be objected to *tempestive*, when it was in the power of parties to remove the objection, or should for ever be secured against all challenge.

2*do*, It being unquestionable therefore, that letters of general and special charge were the warrants only of the diligence, the application of the law of prescription could not be contraverted. It was a general rule in all questions of prescription, that after the prescription was run, and the right thereby once fairly lost or established, there was no place for enquiry, whether the debt was justly due or not, or whether the right was fairly acquired. Upon this principle it was, that by the law of Scotland parties were not bound to preserve the warrants of their adjudications, decrees, and other diligences, beyond the space of twenty years. There was the highest justice that there should be some limitation to secure rights from being cut down by casual loss or abstraction of executions; twenty years was deemed a competent time; and if no challenge was brought within that period, the law held the diligence to be regular and formal. When the law accordingly did not require the preservation or production of these writs beyond the prescribed period, it would be adverse to every principle of justice, that the defenders should be obliged, at the request of other parties, to produce these, if extant, merely to furnish an objection against themselves to cut down their own rights.

3*tio*, The legal proposition maintained was not a new one, but had been repeatedly decided. In the case, 1675, Brown *contra* Home, No 7. p. 5169. it was found, 'That a decreet being pronounced twenty years ago, the defender was not bound to produce that part of the warrants of the decreet which useth to remain in the clerk's hands, viz. summons, execution, supplement, and *charge*, to enter heir.' In Cockburn *contra* Creditors of Calderwood, 26th November 1725, No 18. p. 5182., it was found, that the want of the

executions of the general and special charge, after twenty years, was no nullity or ground of reduction. A similar judgment was given in the 1741, in the competition of the Creditors of Maxwell of Newlands, in regard to an adjudication led against the estate of Cutler of Oroland, No 15. p. 5181. In the case, Willison *contra* Sellers, No 19. p. 5184., it having been objected to a decree of adjudication, proceeding on a ground of debt secured by inhibition, that the letters of general charge were not produced, and though it appeared that the party really had them in his possession, the objection was repelled. No 20.

Answered; 1*mo*, There appeared to be no reason for considering these charges to enter heir as of the nature of *warrants;* they were certain forms necessary to connect the heir with the predecessor, and were in effect a species of legal service and retour. When a summons of adjudication set forth, that one was entered heir to his predecessor, as appeared from his retour, that retour was certainly produced and founded on, not as a warrant, but as one of the grounds of the process; and it did not occur that a general or special charge, founded on in the same manner, could be upon a different footing.

The warrants of a process were the summons and executions, the minutes and interlocutors, which remained for ever in the clerk's hands as vouchers of the decree; but the documents produced by the party as grounds of the proceedings, were in a different situation; the party was entitled, and always did take them into his own custody when the decree was extracted; and in practice, general and special charges were constantly taken up among the other grounds of debt.

If these charges were to be considered as warrants, the defenders had no title to the custody of them; as they ought to be in the custody of the clerks of Court, where the pursuer would have access to see them. Hence, whether they were considered as grounds or warrants, they must, at any rate, be brought to light; in the one case, the defenders must deliver them up to the clerks; and in the other, they were bound themselves to produce them.

2*do*, In whatever light these writs were regarded, no reason could be assigned why they should not, if extant, be produced. If indeed they happened to be lost, the prescription of *rite et solemniter actum* might, after a long lapse of time, take place; but if the truth itself, by inspection of them, could be come at, that presumption, like all others, must give way to contrary proof. If the law had positively established a *prescription* as to general and special charges, by the lapse of twenty years, it would be sufficient; but there being no statute, it was much doubted if the decisions of the Court could in this respect supply the place of the Legislature.

3*tio*, The decisions founded on were not at all in point. In the first, Brown *contra* Home, No 7. p. 5169.; the reason given for the judgment was, because the different warrants mentioned 'used to be left in the clerk's hands,' which was a mistake in fact; as charges, by uniform practice, were delivered to the party. In the second, Cockburn *contra* Creditors of Calderwood, No 18.

No 20. p. 5182., there was no finding that the letters of charge were warrants; it did not appear from the decision that the charges were extant at all; and it mentioned the executions only, not the charges themselves, which were not required to be produced. In the last, Wilson *contra* Sellers, No 19. p. 5184., there were several special circumstances which took it out of the common rule; the inhibition and general charge had been produced in a process between the authors of the same parties in 1705, when every objection and defect was stated and overruled; so that the Court was of opinion, that after the question had been once thoroughly canvassed, it would have been improper to allow investigations of the same nature *in infinitum*.

Contrary judgments also had been pronounced. In Russel *contra* Dick, No 3. p. 5166., the defender, in an improbation of a comprising, was obliged to produce the executions and warrants thereof, though it was twenty years since the date; because the clerk was a private person named by himself, for whom he was bound to answer, and from whom he might take up the warrants. And in the case, Strachan *contra* Creditors of Edzel, No 10. p. 5172., the present question was decided in point, and the exception to the prescription inserted in these words, "Unless it be offered to be proved by the defender's oath, that they (viz. the warrants) are still extant and kept up by him."

THE LORDS were almost unanimously of opinion, that general and special charges were to be considered as *warrants* merely; that a party, after twenty years, was not obliged to produce them; and that this rule admitted of no distinction, whether they were extant or not.

The following judgment was pronounced: "In respect that the general and special charges called for, are not the grounds, but the warrants of the decrees of adjudication, which the defenders are not obliged to produce after twenty years; they therefore find that the defenders are not bound to produce either the said general or special charges, or any other warrants of the decrees." And upon advising a reclaiming petition with answers, they adhered.

Lord Ordinary, *Gardenstone*. For Irvine, *Ilay Campbell, Crosbie, J. Fergusson*; For Earl of Aberdeen, &c. *Lockhart, Macqueen, Sol. H. Dundas*. Clerk, *Kirkpatrick*.

R. H. *Fac. Col. No 85. p. 247.*