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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, *sciz.* 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.

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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.

After this, Robert made up titles to some houses belonging to his father, and sold them; one of which came, by progress, into the hands of David Wilson.

Henry Davidson never assigned to Agnes his half of the 600 merks bond, nor did she make up any title to it upon her father's death; but she conveyed away the whole of the 600 merks bond, and likewise the 1000 merks bond; and they came both by adjudication into the person of William Sellers, who was infest.

William Sellers brings a reduction of David Wilson's disposition, on the head of Agnes Davidson's inhibition against Robert, the disponent; but in this process he did not produce Agnes's letters of general charge, though called upon to do it, and not denying that he had them.

*Objected* for David Wilson; That as the inhibition proceeded upon the letters of general charge, and upon them solely, it is as necessary that these letters, being the sole ground of the inhibition, be produced, in order to support the inhibition, as it would have been to produce the bonds themselves, if the inhibition had proceeded upon them.

*Answered* for Sellers; It is a general rule of practice, That the production of such letters cannot be called for after twenty years.

*Replied*; The rule applies only to the case where, after a certain time, a person has not the letters to produce, but not to the case where he has the letters, but will not produce them. In the former case, the law pardons the not production of them, because, *post tantum temporis*, there is a presumption they may have been accidentally lost; but where that presumption ceases, it would be perverting the very intention of the law, to turn into a hardship against one person that remedy which was only intended to relieve from such hardship another. The remedy is only applied when a remedy is needed, when there is a loss; but it cannot be extended to a case where no remedy is needed, where there is no loss. Equity supports the one; but as only the consciousness of a defect can be the motive of a party's refusing to produce, who can produce, the same equity cannot be pleaded by him.

As the dispensation pleaded by the pursuer has been produced, not by statute, but by courts, it cannot go the length to give a person the benefit of a prescription, total and unlimited. For though a statute may introduce a prescription, after the running of which persons shall be safe, either who cannot or will not produce; yet such an extension is beyond the power of a court of justice; which is indeed entitled to help out the common law when it would involve a hardship, but not to thwart its course when it would involve none.

“THE LORDS found no necessity upon Sellers to produce the letters of general charge.”

*Objected* for Wilson, *zdo*, Sellers could not found upon Agnes Davidson's conveyance of the 600 merk bond, further than to the extent of one half of the 600 merks; because Agnes herself had no right to more than one half of

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that bond, seeing Henry was liable in one half, and she only fiar of the other; and therefore she required to be served heir in general to Henry, in order to carry his half.

*Answered* for Sellers; Henry was fiar of the whole, and Agnes only substituted to him, which was presumed from the relation betwixt the parties; and consequently no general service or other title was needed in the person of Agnes, as being a *nominatim* substitute.

*Replied*; The general rule of law is, That when a sum is taken to two persons, those two persons are each fiars for their half; and their halves fall by their deaths to be taken up by their respective heirs or nearest of kin.

It is true, that though this is the rule in general, certain presumptions create certain limitations of it. When the sum is taken payable to husband and wife, there the husband, as *dignior persona*, is fiar; because, if the sum is his own, or if another gives it, in the one case he is supposed to have taken, and in the other to have got it to himself; and yet even this limitation, by the later law, is subject itself to exceptions.

On account of the same presumption, when, in a marriage-contract, or in an obligation relative to a marriage, both the father and children are named fiars, there the father will be accounted fiar alone; because it is supposed he has taken or got the security, so as to serve himself in the mean time, reserving a *spes successionis* to his children after his death.

In these cases, the law hath made a stretch, and departed from the general rule; not, however, on account of the connection betwixt the parties, but on account of the presumption arising from the husband's being the *nobilior persona*, in the one case, and from the general views of mankind in settlements, in consequence of marriage, in the other.

When such presumptions, therefore, do not take place, the general rule, as in the present case, ought to prevail; and the presumption which might arise from the circumstance here of the connection betwixt father and daughter, is removed by the circumstance of the narrative in the bond, that Robert had received the money both from Henry and from Agnes: For as it is a very possible case, that Agnes may have had the one half of this small sum of her own, perhaps left to her in a legacy, the father and daughter, creditors in the bond, are no more to be considered as fiar and substitute, than if they had been absolute strangers to each other. The presumption arising from their relation, as father and daughter, is balanced by the presumption arising from their being, as appears, joint creditors, by the receipt of one half of the money from Agnes. Therefore the law is left to take its common course, and to follow its above-mentioned general rule.

“THE LORDS found, That there was no necessity for a general service, to establish the right to the 600 merk bond in the person of Agnes Davidson.”

In the year 1668, prior to the inhibition, Henry Davidson had granted an heritable bond for 500 merks to Wilson's author. In the year 1670, posterior

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.

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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.

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 condescence 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, exc-

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Letters of general and special charge, being warrants, not necessary to be produced after twenty years.