time thereafter bargained with the party, sicklike as if he had never been inhibited at all. This allegeance was repelled, and the inhibition sustained, seeing the party was once lawfully prohibited, and there was no necessity that he should be prohibited over again at the time of the second publication against the lieges. This is to be marked. No 153.

Act. *Nicolson.* Alt. *Aiton.* Clerk, *Gibson.*

Fol. Dic. v. 1. *p.* 268. *Durie, p.* 310.

*** Summonses fall if not called within year and day; *See* Process.

DIVISION VI.

Execution of Charge to enter Heir.

1710. *June* 21.

Mr Patrick Strachan, Writer in Edinburgh, *against* The Magistrates and Town Council of Aberdeen.

No 154.
An execution of a decree *cognitionis causa*, wanted certain essential words. The execution found null; but not being challenged at the time, the adjudication following on it, was only restricted.

In the competition betwixt Mr Patrick Strachan and the Town of Aberdeen, for the mails and duties of the lands and fishing of Rutherstane, Mr Patrick founded on an infeftment granted to his father by Andrew Skeen of Rutherstane in *anno* 1674, and the Town claimed preference upon an expired adjudication.

Alleged for Mr Strachan; The Town's adjudication could not expire in prejudice of his right, being null and informally led, in so far as it proceeds upon a decreet *cognitionis causa*, against Christian and Margaret Skeens, as lawfully charged to enter heirs-portioners to their father and grandfather in the lands of Rutherstane, albeit they were never charged to enter heir. For the execution cites them, and their tutors and curators for their interest, 'to compear before the Lords of Council and Session at the day and place within contained,' which is only the style of a citation upon an ordinary summons: That, as it could not found a decreet of constitution, had no renunciation been produced, could not be the ground of a decreet *cognitionis causa*, bearing a renunciation to have been produced; a renunciation being mainly calculated to free the renouncer and his separate estate from his predecessor's debt.

No 155.

Answered for the Town; 1*mo*, The execution contains materially a charge to enter heir, in so far as it bears, 'That the messenger past at the command of 'the within written letters of general charge to enter heir, at the instance of 'the within-designed, and in name and authority within-exprest, summoned, 'warned, and charged them to compear before the Lords; and delivered an 'authentic copy of the said within letters of general charge to the parties per-'sonally apprehended, &c. 'And that this he did, after the form and tenor of 'the within letters, and according thereto in all points.' So that laying aside the superfluous words, 'summoned them to compear before the Lords,' &c. *quæ pro non scriptis habentur*, the parties could not be ignorant, that the true intent of the execution was to put them to enter heir or renounce. 2*do*, Such an objection is not now competent, not having been proponed by the parties compearing in the decreet *cognitionis causa*, but past from by their producing a renunciation. For, as the nullity of an execution upon a summons to compear, could not be objected at the instance of a creditor of the person cited, in case he compear, and suffer decreet to go out against him without proponing the nullity; so an apparent heir compearing in a process raised against him, as lawfully charged to enter heir, and giving in a renunciation, without objecting any nullity upon the execution in the charge, doth effectually exclude his creditors from afterwards objecting the same. 3*tio*, An apparent heir's renunciation produced, is as sufficient to found a decreet *cognitionis causa*, notwithstanding any informality in the general charge, as the production of his service as heir would be to procure a decreet of constitution against him, which could never be quarrelled, even for the want of a previous charge to enter heir, far less upon the account of any informality in such a charge, January 27. 1624, Inglis *contra* Drummond, *voce* Process; July 14. 1631, Blair *contra* Brown, *voce* Inducia Legales.

Replied for Mr Strachan; He doth not object that the execution of the general charge was informal, but that there was no such charge; and the execution produced not bearing a charge to have been given, the decreet *cognitionis causa* wanted a warrant. No consequence is to be drawn from the supplying defects of executions and citations by the party's compearance, and homologating the same, to the sustaining an apparent heir's compearance and renouncing to instruct that a charge was given to him in the terms of the act of Parliament. For citation to compear to answer to a libel is only designed to certiorate the party, that he may compear prepared to defend in the process, which end is sufficiently answered by his sisting himself without any citation, and proponing peremptory defences; and such executions are reckoned among the warrants of a decreet proceeding thereon: Whereas, the execution of letters of general charge to enter heir is not the warrant, but the ground and foundation of a decreet *cognitionis causa*. Besides, the execution questioned, though relative to letters of general charge to enter, cites the apparent heir to appear before the Lords; and yet the decreet *cognitionis causa* was pronounced by the Magistrates

of Aberdeen. 2*do*, The parallel betwixt the service of an heir, and his renunciation, doth not hold in the present case; because a charge to enter, when the heir is served, would be equally superfluous as a charge to perform what is already implemented; whereas, if no service be expede, nor other passive title fixed against the apparent heir, there is no other legal expedient to a creditor for getting access to the *hæreditas jacens*, than by charging him to enter heir. Nor is a renunciation without a charge sufficient to a decreet *cognitionis causa;* because it must be expressly libelled upon the execution of a charge to enter heir, and not upon the renunciation, which is produced only *in termino*, for protecting the party charged, and his estate, from a decreet of constitution; so that a decreet *cognitionis causa*, without a previous charge to enter heir, is a decreet without a libel, and consequently null. The decisions cited for the defenders have no contingency with the present case, for in both, the apparent heir was charged to enter. No 154.

The Lords sustained the nullity objected against the execution of the general charge to enter heir, as a sufficient ground to restrict the Town's adjudication to a security for their principal sum and annualrents.

Fol. Dic. v. 1. *p.* 268. *Forbes, p.* 412.

*** Fountainhall reports the same case:

Lord Minto reported Strachan and the Town of Aberdeen. Mr Patrick Strachan and the Masters of the Mortifications in Aberdeen, competing for the rents of the lands and fishing of Skeen and Rutheryston, both being infeft, the town craved preference on an expired adjudication. Strachan repeated a reduction on these nullities, 1*mo*, That the decreet *cognitionis causa* proceeds on a charge to enter heir, the execution whereof is absolutely null and informal, being only a citation to compear before the Lords of Session, which is quite extrinsic to the nature of such a charge, and wants these essential words, 'that 'he charges them to enter heir within 40 days, conform to the act of Parliament, with certification, that sicklike execution shall pass against him, as if he 'were actually entered.'—*Answered*, The ignorant messenger has mingled in some useless and superfluous words, but that can never viciate the execution, which bears to proceed on letters of general charge, and summons them 'to the effect within written,' which must comprehend what is wanting, *et superflua non nocent;* 2*do*, This objection was only competent in the decreet *cognitionis causa;* but it is so far from being proponed there, that a renunciation is produced, and so purged the passive titles; and they being the only contradictors in that process, and passing by the dilator, it becomes *res judicata* against all the world; and the like had been sustained Inglis *contra* Drummond, *voce* Process; and Blair *contra* Brown, *voce* Inducia Legales.—*Replied*, He did not urge this nullity to take away and annul their adjudication *in toto*, but only to cut off an odious legal, with the accumulations and penalties, and to restrict

No 154. it to the principal sums and annualrents, for which he was content it should subsist and stand as a security; and this being allowed, then he offered to prove it was more than satisfied by their intromissions these many years bygone.—— The Lords, by plurality, found the execution of the general charge to enter heir null; yet not being quarrelled at the time, they found it could not annul the adjudication *in toto*, but only restrict it, and cut off the legal and accumulations.—Then Strachan *alleged* he behoved to be preferred to the Town, because he stood publicly infeft before the leading of the adjudication.—*Answered*, Skeen, your author, was legally inhibited at our instance before he granted your heritable bond; and it is not competent now to offer to purge the debt of the inhibition, because on the ground of it there is an apprising led, and expired; and the Lords found, on the 24th February 1666, Grant *contra* Grant, *voce* Inhibition; that where a comprising is led on the ground of an inhibition, and suffered to expire, you cannot offer to pay the sum in the inhibition.—*Replied*, That an inhibition is but a prohibitory diligence, and does not *funditus* take away the right, as was lately found against Langton's Creditors; and therefore, if you insist on the inhibition, it is always purgeable; and if you recur to the expired comprising, then I am prior to it, and you cannot draw back your comprising to your inhibition, so as to exclude my infeftment which intervened, as a *medium impedimentum*, betwixt the two, to hinder their conjunction, and it was so found after debate on the 9th of February 1683, Trotter *contra* Lundy, *voce* Inhibition; and though this be *in terminis* contradictory to the first decision, yet being the last, it was more to be followed, which sundry of the Lords inclined to do; but in regard it was a point of great importance, and fit that a standard should be fixed, they resolved to hear it in their own presence. Mr Strachan had sundry other objections, as that the Magistrates of Aberdeen were pronouncers of the decreet *cognitionis causa*, and being parties, could not be judges.—*Answered*, They had no further interest than as patrons to the mortifications, and might as well judge in it as they do among their burghers; 2*do*, He alleged his summons of reduction and improbation interrupted the expiring of the legal, being raised within the ten years; and though the execution be without that time, yet it will be found within, if you discount the year at the Revolution, and the adjournments of the Session in Parliament time, which, by express acts, are to be deducted from all short prescriptions.—*Answered*, His reduction could never interrupt, because he does not particularly call for the production of this adjudication with its grounds and warrants.—*Replied*, The general clause calling for all rights of and concerning these lands is sufficient; and their libels, that the whole writs are false and feigned; but these points were not decided at this time.

Fountainhall, v. 2. p. 578.