

No 38.

him, but a preparatory step to an action upon the passive titles, without any conclusion of payment ;

In respect it was *answered*, It is true, when inhibition is used upon a general charge, it doth not suffice, that the letters of charge bear only in general, That the charger had diverse and sundry claims ; but they ought to mention the debt, for certiorating the lieges, as to the sums in prejudice whereof they were not to contract with the inhibited person, which is done in this case. *2do*, John Robertson, having, upon the charge to enter heir preceding the inhibition, refused to renounce, and suffered thereafter a decret upon the passive titles to pass against him, he is understood to have been heir *retro* from his predecessor's death ; and the inhibition raised and executed against him is the same in law as if it had been raised upon his own personal bond ; he being in all respects *una et eadem persona cum defuncto*. Therefore it was, That *July 5. 1623. Kirkwood contra Belshes, No. 80. p. 7017.*, the Lords sustained an inhibition against the apparent heir, though neither charged to enter, nor decerned upon the passive titles, in regard he entered heir *ex post facto*. *3tio*, A charge to enter heir is considered as the commencement of a process, in so far as it renders the matter litigious, and interrupts prescription. Again, if a creditor who hath charged his debtor's apparent heir to enter, could not secure himself by inhibition, the charge would alarm the heir, and put him upon methods to disappoint it. *4to*, It is more convenient to use inhibition upon a general charge, than upon a summons of constitution ; partly, for that the inhibition upon a summons would fall therewith if the summons ly over year and day without insisting ; partly, because a general charge may be executed against an apparent heir within the *annus deliberandi*, and inhibition thereon secures against his deeds in the *interim*.

Fol. Dic. v. 1. p. 472. Forbes, p. 669.

1714. *November 22.*

CREDITORS of ROSEHILL *against* CREDITORS of the deceased Mr WILLIAM THOMSON.

No 39.
An inhibition raised before a summons was executed, found null.

MR WILLIAM MOIR having raised summons upon the passive titles, against John Ross of Rosehill, as representing his father, dated the 8th, and signed the 9th of May 1693, and (before executing thereof) raised also letters of inhibition, containing arrestment, dated the 11th, and signed the 12th of the said month and year foresaid ; Mr Moir assigned the debt and diligence to Mr William Thomson writer to the signet, who obtained decret in absence against John Ross, and then adjudges. This having occasioned a competition betwixt his creditors and the other creditors of Rosehill, Mr Thomson's creditors crave

preference upon the said inhibition, as being prior to the contracting of the other's debts. No 39.

Answered for the creditors of Rosehill, That the inhibition was null, as proceeding upon a false narrative (viz. as the said summons and action duly executed, shewn to the LORDS, has testified,) in so far as there was no summons executed, and consequently no depending process the time of raising the inhibition. *2do*, A decision was alleged in a parallel case, 19th July 1706, where, in a competition of the Creditors of Strichen, *voce* LEGAL DILIGENCE, the LORDS found, that a libelled and signeted summons, before it was executed, did not make a depending action; and therefore did not sustain arrestments raised and executed upon the summons on the passive titles against Strichen's children.

Replied for Thomson's creditors, That whatever of old has been the practice, yet for a long time it had been customary to raise general letters of inhibition and arrestment in the way now quarrelled; by which custom, the lieges are made to believe they act warrantably; so that here (if in any matter of form) the brocard should hold, *communis error jus facit, et consuetudo optima legum interpretres*. *2do*, A plain inconveniency would otherwise follow with respect to persons at a distance, where the executed summons must be returned before the letters of inhibition can be taken out; nay without this, the very executing of a summons were the mean to put the debtor upon ways to elude it. *3tio*, In Strichen's case, some of the arrestments were laid on prior to the execution of the summons.

Duplied for Rosehill's creditors, That no custom could introduce an abuse, or authorise a practice contrary to law; that it was law and stile formerly, and the common stile to this hour, cannot be controverted; and if the LORDS had designed otherwise, they would have allowed the writers to the signet to have altered their stiles in the case of inhibitions on depending processes; but the continuing the stile makes the executing still essentially requisite, previous to the raising the letters of inhibition; and what was law formerly must still continue, unless repealed. *2do*, Common bills whereupon letters are directed, do pass of course *periculo petentis*; and if they proceed upon a wrong narrative, the will of the letters can take no effect, as proceeding upon *obreption*. *3tio*, The argument from the inconveniency, is of no force, as proceeding *ab incommodo*, which can never authorise a practice contrary to sense, law, and stile. *4to*, As to the above cited decision, the above allegiance did no way influence it; for, the sole *ratio decidendi* was, that a libelled and signeted summons did not make a depending action.

THE LORDS sustained the nullity objected against the inhibition, as proceeding without a warrant; the summons whereupon it is founded, not being executed the time of raising the inhibition.

Act. Horn.

Alt. Sir Walter Pringle

Clerk, Sir Ja. Justice.

Bruce, v. 1. No 9. p. 13.