tain's apparent heirs therein, and to whom no right was competent, supposing they had not renounced, Stair, B. 3. Tit. 2. § 46. No. 1.

Answered for the pursuer: 1*mo*, That as the property of these lands were, by the charters and infeftments before mentioned, vested in the pursuer's debtor, it was no doubt competent to his creditors to adjudge the same for payment of their debts; and, if no other destination appeared by the investiture, the only heirs from whom they could adjudge were the heirs at law, viz. the heir of line and the heir of conquest, who by the law were entitled to every heritable subject belonging to the defunct, where no other particular heirs appeared from the investitures to exclude them.

2*do*, Though in the dispositions of the above lands, granted by the Earl of Stair to his nephew, there is a substitution, failing heirs-male of his body, to the other heirs of entail contained in a bond of tailzie of his estate dated 21st May 1739; yet as no infeftment was ever taken upon that tailzie, so as it could be no title of possession of any lands whatsoever, it could not be incumbent on Captain Dalrymple's creditors to search after a personal deed, and go through a course of processes, exhibitions, &c. to recover it, before they could adjudge their debtor's estate. They were entitled to adjudge the same from his heirs at law, when there appeared no other destination in favour of any particular heir that could be known, either from the investiture of the defunct's lands to be adjudged, or from the investiture of any other estate whatsoever that could be found upon record.

3*tio*, The defender can have no interest to propone this objection, which will only serve to put the pursuer to the trouble of bringing a new process against him, upon the passive titles, to which his present allegation would subject him.

Was he to accept of the succession, in virtue of the destination to him as heir of tailzie, called by the deed 1739, he behoved to pay the debts due by his cousin Captain Dalrymple: Nay, his possession of the lands in question is an universal passive title, which must subject him to all his cousin's debts, in the precise terms of the statute 1695, if he is to be held the nearest apparent heir of these lands in terms of the investitures.

"The Lords sustained the objection to the pursuer's title, that the persons "charged to enter heir were not the heirs of investiture."

Act. *Ferguson.* Alt. *G. Brown.*

B. *Fac. Coll. No.* 196. *p.* 289.

1770. *February* 7.

JOHN MACNEIL of Rosebank, *against* JOHN BUCHANAN, Writer in Glasgow.

No. 2.
Formality and regularity of a

HUGH MACLAUCHLAN had adjudged the estate of Campbell of Torry for £159. 5s. and soon thereafter died in Jamaica, leaving an only daughter Mar-

No. 2. decree of constitution, and of a charge to enter heir.—The *pari passu* preference of the statute 1661, c. 62. applies to the adjudication of an adjudication.

garet. Margaret was served heir in general to her father; but surviving him but a short time, the right of succession devolved upon John Maclauchlan her father's brother, who never made up any title to his niece.

John had contracted debts; and his creditors not knowing, it seems, that Margaret had been served heir to her father, served John heir in general to Hugh, without taking any notice of Margaret; and two of them, viz. Alexander Grant, writer in Edinburgh, and John Macneil, in 1765, adjudged the adjudication upon the estate of Torry.

John Buchanan was creditor to Hugh Maclauchlan; and on the 20th July 1766, took a decree for his debt against John and his sister upon the passive titles, as representing their brother Hugh; and in order to complete his right, he used letters of special and general charge against John, charging him to enter heir in special and in general to Margaret, his niece, and also to Hugh his brother, or either of them who had right to the adjudication upon Torry. These letters were executed upon the 3d November 1766; and thereon Buchanan, on the 25th February 1767, adjudged the adjudication upon Torry.

A competition having ensued, it was evident that Grant and Macneil's adjudications were inept; and to supply the defect, Macneil used letters of general special charge against John to enter to his niece Margaret and his brother Hugh; and on the 18th February thereafter, within a year, however, of Buchanan's adjudication, he again adjudged the adjudication upon Torry.

Grant having clearly no right, the competition was maintained betwixt Macneil and Buchanan.

Pleaded for Macneil: That his own adjudication being unchallengeable, it was only necessary for him to shew that Buchanan's was defective; and which it appeared to be on the following grounds:

1*mo*, As Hugh Maclauchlan was Buchanan's debtor, his debt ought to have been formally constituted against his representative. For this purpose Buchanan had charged John to enter heir to his brother Hugh; which could be of no avail, John being neither his heir nor executor, but his daughter Margaret. He ought therefore to have constituted his debt against her while in life, or after her death against her uncle John: But as, instead of this, he had taken a decree of constitution against John as heir, and against him and his sister Marjory as executors to Hugh, the constitution was irregular and inept, and the adjudication led thereon must fall to the ground.

2*do*, Buchanan's letters of general special charge were dated and signeted the 23d October 1766; yet the decree of constitution therein narrated, and on which they proceed, was not extracted till the 29th of that month. As by the form of Court there was no decree till it was extracted, and as it was the grand decerniture alone which was the warrant of all diligence and execution that might follow, the letters in the present instance, as they proceeded, upon a false narrative, and in fact without any warrant, must fall, and the adjudication of course become null and void.

No. 2.

Pleaded for Buchanan:

1mo, The letters of general charge and summons of constitution against John and his sister Marjory, as representing Hugh after Margaret's death, was a proper diligence; for as Margaret had died soon after she was summoned, he had never got the debt constituted against her. It remained Hugh's debt; and in constituting that debt against John, he could only be charged to enter heir to the debtor. As Buchanan however learned, after his debt was constituted, that Margaret was the last person vested in the adjudication, he raised a special general charge against John to enter heir in that subject to Margaret, and thereon obtained his adjudication; which, after Hugh and Margaret were dead, was the only legal way of carrying the subject.

2do, The decree of constitution had been pronounced and put up in the minute-book on the 22d July 1766; and it could be extracted in ten days thereafter. In fact, it had been extracted at the date of the charge; but though it had not been extracted at all, there was nothing to hinder the charge from being raised; for as soon as it was pronounced, and in the minute-book, it was a decree on record; and as such could be set forth in the bill of special charge, the fiat of which required no production. Indeed, the raising of special charges, whenever decree was pronounced, before they be read in the minute-book, or can be extracted, is often necessary to bring adjudgers within year and day.

3tio, The *pari passu* preference introduced by the statute 1661, *c.* 62. had no relation to the present question. All the regulations of that enactment related to the consequence of the first effectual adjudication; and in the most express terms it declared what was understood to be such, viz. an adjudication upon infeftment, or where diligence for obtaining infeftment had followed. As no infeftment therefore or diligence for obtaining it had followed upon any of the adjudications in question, and as indeed they never could be rendered effectual in that respect in terms of the statute, the enactment did not apply; and hence they must be preferred according to priority of date, February 1729, Sir John Sinclair *contra* Gibson, No. 14. p. 243. In the instances where a contrary decision had been given, infeftment at any rate might have followed; which was not the case here.

The following judgment was pronounced; "Sustain the objection to the "interest produced for Alexander Grant, that the adjudication led by him "against John Maclauchlan, as charged to enter heir to his brother Hugh, and "not his niece Margaret, was void and null, so far as concerns the adjudication "obtained by Hugh against the estate of Torry; and sustain the like objection "to Captain John Macneil's first adjudication of that subject produced. Repel the objections of the decree of constitution, and letters of general special "charge at the instance of John Buchanan against John Maclauchlan; and "therefore prefer Captain John Macneil and the said John Buchanan *pari passu* "upon the subject in question."

In a reclaiming petition, Buchanan chiefly pressed the point as to the inapplicability of the statute 1661; but it was observed from the Bench, that it ex-

No. 2. tended to all adjudications whatever; and was an act so favourable to creditors, that the Judges never would give it less effect than it was intended to have. The petition was refused without answers.

Lord Ordinary *Hailes*. For Macneil, *P. Murray*.
Clerk, *Ross*. For Buchanan, *J. Dalrymple, Maclaurin*.

R. H. *Fac. Coll. No.* 18. *p.* 41.

1770. *February* 14.

THE ROYAL BANK OF SCOTLAND *against* ADAM FAIRHOLM OF GREENHILL.

No. 3.
Stock of the Royal Bank, may be adjudged.

BY an act passed in the 6th year of George I. establishing the Equivalent Company, it was enacted, that the equivalent stock shall be deemed to be personal or moveable estates; shall go to executors or administrators; and shall not be liable to any arrestments or attachments.

The Equivalent Stock is the foundation of the Royal Bank; and by the bank's charter of erection, it was provided that the shares or interests of the several proprietors shall be deemed to be personal or moveable estates; shall go to executors or administrators; and shall not be liable to any arrestment or attachment.

By the same charter, the proprietors were authorised to make by-laws; and by one of these it is declared, That no proprietor who is debtor to the bank shall be allowed to transfer his stock, or any part thereof, but in presence of a court of directors; to the end such court, if they shall think fit, may stop such transfer until such proprietor finds security to the bank for what he owes.

Adam and Thomas Fairholms, merchants in Edinburgh, and Adam Fairholm of Greenhill, their cautioner, were bound to the Royal Bank in a cash-account, upon which in 1764 there was a balance due the bank £3000, besides interest. Adam Fairholm the younger was at the same time proprietor of bank stock to the amount of about £1900.

The affairs of Adam and Thomas having gone into disorder, the bank obtained a decree of adjudication against Adam, adjudging from him £1002, &c. being his share of stock, with the calls thereupon; and declaring, that the said adjudication and transfers to be made by the bank should be as good and effectual for vesting and transferring the said stock as if a transfer in favour of the bank had been obtained by Adam Fairholm himself. But as the bank entertained great doubts if this was a proper title upon which they could expose this stock to sale, and make a valid transfer, whereby they might so far operate payment of the debt due to them by Adam Fairholm, they called upon Mr. Fairholm of Greenhill the cautioner to pay up the balance of the cash-account; and as it was a new and leading question, it was concerted that Greenhill should suspend the charge, upon the ground that he could only be liable for the balance after deduction of Adam's stock, which had been adjudged.