

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*.
Clerk, *Ross*.

For Macneil, *P. Murray*.
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 ad-
judged.

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.

The Lord Ordinary " Found the letters orderly proceeded upon the charg-
" ers conveying to the suspender the bank shares which belonged to the de-
" ceased Adam Fairholm the common debtor, with such diligence as they
" have deduced to effect the same, and with warrandice from fact and deed."
The suspender then prayed the Lord Ordinary, to find that he had right to sell
the stock conveyed in ordinary form; and upon its being sold, to ordain the
bank to receive the purchaser in the same manner as in other sales of stock.
To this the chargers answered, that by their charter, they apprehended, they
could make no transfer but upon a conveyance by the proprietor, or in favour
of his executor, upon production of his confirmed testament; that no in-
stance had occurred where they had made a transfer upon an adjudication; and
that, of course, they were not at liberty to make such transfer, unless the sus-
pender could shew, that the bank stock in question was properly carried by the
adjudication.

The question, therefore, came to be, Whether or not bank stock was ad-
judgeable? And the case having been taken to report upon informations, it
was

Pleaded for the Chargers:

1^{mo}, By the statute 6. Geo. I. establishing the Equivalent Company, and by
the bank's charter of erection, it was in express terms declared, that the
equivalent and bank stock shall not be liable to any arrestments or attachments;
which was saying, in other words, that the same shall be liable to no kind of
diligence whatever, and that an adjudication thereof was of course totally inept.

As by the same authorities these subjects were declared to be personal or
moveable estates, transmissible to executors, and not descendible to heirs, it
was clear, that though they *could* be affected by creditors, an adjudication was
not the proper diligence. The only proper diligence for affecting the moveable
estate were arrestment and poinding, or, in case of the debtor's death, by a
confirmation as executor creditor; and no instance was known where a move-
able subject, descendible to executors, was, upon the death of the proprietor,
attachable by adjudication. On the contrary, even where there was a real *lien*,
it was not affectable by adjudication, as in the case of bygones due upon an in-
feftment of annual-rent, which were not affectable by adjudication, but by ar-
restment; and upon the death of the annual-renter, though the right itself
must be carried by adjudication, yet the bygones could only be carried by con-
firmation.

The charter of erection directed the method of assignment and transfer of
stock to be by an entry in the books of the company: It was farther provided,
that a proprietor might devise the same by testament; but in that case it was
provided that the executor should not transfer the same, or be entitled to receive
any dividend, till an extract of the testament was delivered to the company, and
an entry or memorandum of so much of the will as related to the said stock
was made in the books. As from thence it appeared that no transfer could

No. 3. be made of their stock *inter vivos*, but by the method directed in the charter, and by testament only in a certain mode also prescribed, it could not be doubted, that if stock had been understood to be transferable by adjudication, directions would have been given for using the same forms as in the case of a testament. But as no authority was given for recording a memorandum, or any similar notice of an adjudication, and as not a single instance had occurred in practice, the chargers did not think themselves at liberty to record any such memorandum in their books.

2do, Independent either of the statute or charter, the subjects in their own nature were simply moveable, descendible to executors, and of consequence not adjudgeable. The Royal Bank was a company, and the subjects belonging to it not the property of the different members as individuals, but of the company considered as a body politic; the right and interest of the members, individually, being a mere *jus crediti* against the company. The nature of the subjects made no difference; for whether they consisted of moveables or of lands and other heritages, the interest of the different members still fell to be considered as a mere personal claim against the company, in its nature moveable and descendible to executors. So it was determined in the case of Sir John Dalrymple, No. 48. p. 5478. where it was found that the shares of the Bank of Scotland were not heritable but moveable, and fell under the *jus mariti*.

3tio, To the suspender's argument, that it never could be intended to put bank stock so far *extra commercium* that it should not be in the power of the creditors to affect it by diligence; and as arrestment was debarred, it must be affectable by adjudication, as the only other diligence that could be used, the short answer was, that *incommodum non solvit argumentum*. But the difficulty admitted of easy solution. The compulsitor of personal diligence would, in most cases, be sufficient to compel debtors possessed of such funds to do justice to their creditors; as a man could not pretend to defraud them, as supposed, without submitting either to perpetual imprisonment or banishment. Nor was this the only instance where a man might be possessed of property unattachable by his creditors; the present case did not go much farther than authorised entails—an aliment, and the salaries of sundry offices were unattachable: Tacks, secluding assignees, have been found not adjudgeable; and all the public funds in England were, in the same manner as the stock of this company, exempted from diligence.

Pleaded for the Suspender:

Imo, Though unwilling to dispute the royal prerogative, he could not help expressing some doubt of the sovereign's power or intention, by any grant of this kind, either to invert the nature of property, or to dispense with the law; which, if the charter was to receive the construction given, would necessarily be the result. It required a special act of parliament 1661, c. 51. so far to change the nature of bonds and other obligations with clauses of annual-rent,

as to make them attachable by arrestment or any time before infestment, that being a species of diligence inconsistent with the heritable nature of the right.

If the sovereign in a charter of lands should be so ill advised as to declare them a moveable subject, and attachable by arrestment, such a charter would be held as a void and ineffectual grant. This charter carried the matter much farther; for though this corporation was rendered capable of purchasing lands and hereditaments to any extent, and was accordingly possessed of a valuable land estate, yet these being, it was said, part of the stock, were not only declared moveable and descendible to executors, but, what was still more extraordinary, arrestment, the legal diligence for attaching moveables, was barred; and, according to the charger's construction of the word *attachment*, every other species of diligence excluded. But the word *attachment* was plainly synonymous with *arrestment*; and arrestment only being discharged, every other species of legal diligence must be allowed. This was evident from the following consideration. Executors creditors were not barred from attaching the stock after their debtor's death: Now it would certainly be a very extraordinary construction, that should allow the subject to be carried in that event, and should at the same time exclude every species of legal diligence at the instance of the very same creditors, whilst the debtor was in life; or, in other words, that it was only by the debtor's death that his creditors could get payment.

2do, Bank stock being of a complex and heterogenous nature, comprehending subjects both heritable and moveable, yet being a *jus incorporale*, and having *tractum futuri temporis*, ought, upon the common principles of law, to be descendible to heirs in preference to executors; to be carried by service rather than confirmation, and consequently more properly affectable by adjudication than arrestment. Many cases accordingly occur, where subjects, of their own nature moveable, such as bonds secluding executors, heirship moveables, &c. might be carried by adjudication and by service.

But although the subject was not considered as strictly heritable, and that no form of diligence hitherto devised could reach it, neither arrestment as barred by the charter of erection, nor adjudication as introduced by the statute 1672, in respect that by the charter the stock of this company was declared to be a moveable estate descendible to executors; it did not from thence follow that the creditor was to have no redress. It was against general principles that the estate of a debtor should be placed without the reach of his creditors; and as every wrong must have a remedy, the Court was called upon, and by the *nobile officium*, was authorised to adopt some other method for attaching the subject, and giving the benefit thereof to the creditors. For that purpose, accordingly, none occurred to be so proper as the very adjudication which, in this case, had been obtained. Nor did it vary the case, that the mode of transference appointed by the charter was, by an entry in the company's books, in name of the assignees; for upon the principles assumed, as an assignment by the act of

No. 3. law was in every respect equal to a voluntary assignment, the assignee was as well intitled to have the transfer entered in his own name, in the one case as in the other.

3tio, If the Court was to deny effect to the legal diligence of creditors upon a subject of this description, the most iniquitous consequences might follow. The most notorious bankrupt had nothing more to do than to vest his effects in bank stock, and set his creditors at defiance. Expediency might suggest the propriety of not subjecting stock to arrestment, on account of the distraction the affairs of the company might sustain by a multiplicity of arrestments, forthcomings, &c. whenever any of their members became insolvent; but it could not possibly be intended that every other species of diligence should be precluded.

The Court pronounced the following judgment: “ Find the letters orderly proceeded upon the charger’s conveying to the suspender the bank shares which belonged to the deceased Adam Fairholm, the common debtor, with such diligence as they have used to affect the same, and with warrandice from fact and deed; and find, that in consequence thereof, the chargers are bound to receive the suspender or his assignee as in Adam Fairholm’s place, with regard to the said shares, in the same manner as they are in use to do in other sales or transactions of their stock.”

Lord Ordinary, *Pitfour*.
Clerk, *Home*.

For the Royal Bank, *Macqueen*.
For Fairholm, *Lockhart*.

R. H.

Fac. Coll. No. 20. p. 46.

1770. July 25.

JOHN THAIN, Advocate in ABERDEEN, *against* Sir WILLIAM MONCRIEF of Moncrief

No. 4.
Process of adjudication cannot be stopped or delayed by a multiplepounding raised by the debtor, doubly distressed for the debt adjudged for.

Thain having led an adjudication against Sir William Moncrief for a debt which was a real burden upon the estate, Sir William objected, that as he was distressed by other creditors claiming the same debt, who had used arrestments in his hands, the adjudication either should not be allowed to proceed, or that procedure therein should be sisted till the issue of a multiplepounding he had brought into Court; in order that, by having it ascertained who had best right to the debt, he might pay with safety.

This was opposed by the adjudger; who alleged it would be a novelty in the practice of the Court to stop a decree of adjudication, on the pretence of third parties having a better right than the person vested in the debt on which the adjudication was demanded; and referred to the Dictionary of Decisions, *voce* ADJUDICATION, 15th Nov. 1666, Cheyne *contra* Christie. No. 7. p. 192.