

*February 10, 1737.* “The Lords adhered to the interlocutor refusing the bill of advocacy, being of opinion that however bonds and lying money are moveables, yet here the only question is, what was the intention of the defunct by these words “*moveables and furniture lying in such a house,*” which was thought could only be understood household plenishing; and I cannot but mention one thing which occurred on this occasion. One of the judges having declared his opinion, that the above clause comprehended bonds, another asked in what place a *jus crediti* could be said to lie in this house, or elsewhere. The lying money was not subject to that ridicule; but still the intention was not found to comprehend it; and as to the decision, July 15, 1673, *Robson v. Robson*, where a clause of conquest of lands and annualrents, goods and gear, was found to comprehend bonds, suggested from the bench, it was not found to meet, for there, so appeared to be the intention. The only question was as to the medal, and I cannot say that any thing was spoke to as to that; it rather passed *in cumulo*.”

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1737. *June 7.* BROWN of Mollans *against* THE CREDITORS of MAXWELL of Newlaw.

IN the ranking of the creditors of Newlaw, it appeared that Brown of Mollans had right to two adjudications against the estate, the one of which had been led by one Robert Bowis, and the other by Maxwell of Munchies. Brown having made a claim to be ranked under these adjudications, objections were stated to both of them on the part of the other creditors.

To the adjudication by Bowis, it was *objected*, that the decret of constitution had been obtained against a minor, without proof of the passive titles, neither libelling on, nor bearing production of letters of general charge; and that though some others of the passive titles are libelled, none of them were proved, and therefore, that the decret of constitution is *funditus* void, as being without proof.

In support of this adjudication, it was

PLEADED by Brown, *1mo*, That there was now produced the letters and execution of general charge, of date prior to the decree of constitution, so that there was sufficient reason to conclude that the omission to mark the production of them, arose from a neglect of the extractors. *2do*, Supposing the passive titles were not proven in the decret of constitution, this ought not, in the circumstances of the case, to import a total nullity of the diligence.—The fact was said to be, that when the adjudication was led, other adjudications had gone out some months before; and that Bowis, the creditor by whom the suit in question was led, being in danger of being cut out of the *pari passu* preference, applied to the Court, representing the hazard he was in, whereupon their Lordships authorized the Ordinary to decern in the constitution. Supposing, therefore, no proof to have been brought of the passive titles, previous to the decree of constitution, it was still competent to support the decret by such proof.

ANSWERED by the creditors,—As to the *first* argument, it is impossible to say that the decret of constitution could be founded on the general charge now pro-

duced, since it is not only not produced in the constitution, but it is not even mentioned in the libel, or in the decreets. As to the *second* argument, it is not competent now to bring a proof of the passive titles, after the defender is dead, to support a constitution and adjudication deduced above 30 years before.

Lord NEWHALL, Ordinary, found that the constitution being against an infant, and no proof being led therein of the passive titles, nor so much as a general charge to enter heir therein produced, that the said decret was null ; and that though the letters of general charge and execution are now produced, the same does not supply the defect ; and, therefore, that the adjudication following on the said decree, was simply null, and could not subsist, even for a security.

To this interlocutor Lord HAINING, before whom the case was afterwards pleaded, adhered.

But, upon advising a petition and answers, “ The Lords found, that the general charge not being libelled on, could not be pled upon in support of the decret of constitution ; but in respect the decree passed on a special warrant, in order that the pursuer’s adjudication might come within year and day of a former adjudication, allowed Mollans to bring a proof of the other passive titles libelled, to support the decret of constitution.”

To the adjudication by Maxwell of Munchies, it was objected, *1st*, that though in the summons of adjudication, the letters of special charge are expressly libelled on, yet the decree does not bear production of them in the proper place. *2dly*, That as these letters of special charge are narrated in the decree itself, they do not appear to have been executed against the tutors and curators, but only against the minor.

In support of this adjudication, it was

PLEADED by Brown, in answer to the *first* objection, that the letters of special charge are not only expressly libelled on, but the decree itself bears that they were produced, and also that *executions* of the same were produced. As to the *second* objection, although it is not expressly stated in the decret that the letters of special charge were executed against the tutors and curators, yet the presumption is *quod omnia erant solenniter acta*.

ANSWERED,—The terms of the decret afford no proof that the letters had been executed against the tutors and curators ; and the maxim cited applies only to such formalities as are naturally presumed to be implied in every execution, and can afford no ground for presuming in a case like the present, that the tutors and curators of a defender were cited.

The Lord Ordinary “ sustained the objection against the execution of the letters of special charge, as narrated in the decret of adjudication, which does not bear they were executed against the minor’s tutors and curators ; and, therefore, found the said decret of adjudication null, *in toto*.”

But the Court altered this part of the interlocutor also,—“ As to the objection to the special charge, it was observed in the reasoning, that the production bore executions (in the plural) against the minor, which, by construction no way forced, might comprehend the execution against the curators ; and, upon the question put, to sustain the objection, to the effect to restrict or annul,—carried, by a narrow majority to restrict.—ROYSTON, MINTO, ELCHIES, &c. dissenting.”