

1748. November 10.

SIR ARCHIBALD GRANT *against* ROBERT GRANT of Lurg, &c.

ROBERT GRANT having, in the year 1731, made a purchase of the estate of Tillifour, borrowed several sums from Grant of Lurg, and others, which he applied for payment of the price. Robert Grant had been employed by Sir Archibald Grant, as his factor upon the estate of Monymusk; this factory was, *anno* 1739, converted to a tack of the whole estate; and it was part of this bargain, that Robert should undertake the arrears due by the tenants, for which he granted to Sir Archibald an obligation for L. 800 Sterling. This was an unlucky transaction for Robert Grant by which he lost considerably. Finding Sir Archibald's claim swelling every year, and being apprehensive about his other creditors who had lent their money to discharge the price of his estate, he came to a resolution to secure them in all events upon his estate of Tillifour. This resolution he executed the 15th February 1733, classing these creditors in three several bonds, upon which he proceeded to give saine the same day; and it came out, upon proof, that the creditors knew nothing of these securities granted to them till afterward, and that it was Robert Grant's intention to secure them in a preference before Sir Archibald. This fact furnished Sir Archibald an objection, which he proponed, in a ranking and sale of Robert Grant's estate, viz. that these investments of annualrent were null and void upon several grounds. *1mo*, As being granted against the original law of justice. *2do*, Against the authority of the civil law, and the *actio Pauliana*. *3tio*, Against our statute 1621. And, *lastly*, Also against the statute 1696.

In *answer* to these grounds, it was premised, that there is nothing in our statutes nor practice to favour an objection against these heritable bonds, granted in security of just and onerous debts. The statute 1696 is quite out of the case. Far from being a notour bankrupt within sixty days of these bonds, Robert Grant continued in credit for a long time thereafter; and Sir Archibald himself, who makes the objection, took an heritable bond from him, 28th October 1734, more than a year and a half after these bonds. As for the statute 1621, it is a direct authority against the objector, because it is understood by that statute, and is established law, that bare insolvency deprives not any man of the administration of his own affairs, nor prevents him from paying or securing his creditors in what order he pleases. The only exception is, that after diligence by one creditor, the insolvent person cannot prefer any other; such preference being understood purposely done to disappoint the effect of the diligence.

If then there be any wrong to be the foundation of a reduction, it must lie upon the general head of fraud, to furnish a challenge at common law. And to make out this fraud, the following proposition must be maintained, That, after a man knows himself to be insolvent, it is wrong in him to do any deed to prefer one creditor before another; which, in other words, is maintaining that an insol-

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A person who dreaded that the consequences of an unfortunate transaction would render him insolvent, made out heritable securities in favour of certain of his creditors without their knowledge. Found ineffectual.

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vent person, knowing himself to be such, is barred by the common law from the management of his own affairs, from making payment to any one creditor, and from granting any one creditor a security. This doctrine has no foundation in the common law; because insolvency does not deprive a man of his property, nor of the administration of his property, of which payment or granting security are rational and ordinary acts. Nay, our statutes suppose a contrary doctrine; the act 1621, goes no further than to cut down a security granted to a creditor, in prejudice of a more timeous diligence used by another creditor; and it does not even cut down payment made after diligence; and the act 1696 supposes, when no diligence is done, as in the present case, that all acts of administration, such as sale, payment, security, &c. are good in law, unless executed within three-score days of notour bankruptcy.

Supposing there were any dubiety as to these points, other difficulties remain to be surmounted before the objection can be supported. In the *first* place, how does it appear that Robert Grant knew himself to be insolvent? The contrary appears from the deposition of the notary, the man he trusted, and to whom he would communicate his sentiments without disguise; he depones upon the conversation he had with Robert Grant, who told him, 'that he was resolved to give these securities to his other creditors, because there was a fund in the hands of the tenants of Monymusk sufficient to pay Sir Archibald;' and if this was his opinion, it can not be said that his granting a security to his other creditors was in him a wrong or immoral act.

But supposing, for argument's sake, that Robert Grant knew himself to be insolvent, it will not follow that he did wrong in preferring his other creditors before Sir Archibald; for he owed them this preference in common justice, as the very estate upon which he gave them preference, was purchased with their money. On the other hand, it was a hard bargain which Robert Grant had unluckily engaged himself in with Sir Archibald; and if he was conscious, which for ought appears is the case, that he faithfully applied to Sir Archibald's behoof whatever he drew out of his estate, it would have been unjust to have preferred Sir Archibald upon the land-estate, or to have brought him in *pari passu* with these creditors; so that Robert Grant did the honest and fair thing, when he secured these creditors upon his land-estate, which was purchased with their money, and who trusted their money with him upon the faith of that estate.

But, in the *third* place, supposing Robert Grant to have acted wrongously, why is this wrong to be turned against the creditors who had no accession to it? It is not *alleged* that they knew of Robert Grant's insolvency; it appears by letters in process, that some of the creditors, Grant of Lurg in particular, were demanding their money; and there is a letter by Robert Grant to Lurg, 1st September 1732, in answer to one craving payment, wherein he promises payment of half of Lurg's sum at Martinmas, and the other half at Whitfunday; adding, 'but if you are positive shall get the whole.' Lurg therefore, when he got the real security delivered to him, considered this as no more than a piece of justice done him by

his debtor; that, since he had failed in his promise of payment, he had done what was the next best, viz. to give him a security.

What remains only to be obviated is, the authority of the Roman law, which the objector in vain calls to his aid. It is very true, that, by the *actio Pauliana*, securities given by a bankrupt to one or other of his creditors preferring them before the rest, are rescinded; and the authority cited proves this and no more: but then it is as true, that the *actio Pauliana* did not arise till the debtor's effects were sequestrated, a *curator bonis* named, and the creditors put in possession. The *actio Pauliana* was given by the prætor; and the prætor's edict, which is contained in the first law, *Quæ in fraud. creditor.* expressly mentions the creditors to be in possession. Justinian describing the *actio Pauliana* in his institutes, *lib. 4. tit. 6. § 6.* makes it an express condition of giving the action, that the bankrupt's effects be in possession of the creditors: And accordingly the established definition or description of this action given by all commentators is, '*Actio in factum competens creditoribus in possessionem missis, vel curatori bonorum adversus possessores fraudis conscios, ad res in fraudem creditorum alienatas cum omni causa restituendas.*'

'Found the heritable bonds of corroboration were fraudulent, devised and made with intent to prefer the creditors therein named before Sir Archibald Grant; and therefore reduced the heritable bonds so far as to subsist only and be ranked *pari passu* with Sir Archibald.'

In this case a distinction ought to be made betwixt ordinary acts of management, levying rents, uplifting and paying debts, granting securities, &c. done in the prosecution of a man's affairs; and extraordinary acts, such as granting a preference to one set of creditors before another, when a man has no other prospect but bankruptcy. Insolvency merely is no objection to the first; because such acts are done with a view to carry on affairs, and in the hopes of better fortune; and therefore are not only innocent but commendable. The second, though not properly a fraud, is a moral wrong; because, in effect, it is bestowing upon one creditor what ought to be given to all: and such moral wrong cannot be supported by a court of justice: it must be reduced, and no person allowed to take benefit by it.

Rem. Dec. v. 2. p. 167.

*** Lord Kilkerran mentions the same case thus: :

GRANT of Tillifoull being debtor to Sir Archibald Grant in a large sum, formed a scheme for disappointing him of his debt. He was in debt above what he was worth, and, without the privity of his other creditors, he executed three several heritable bonds, in each of which he comprehended a variety of creditors, containing precepts of sasine in general for infefting them, which bonds were all written at the same time, the hand employed sitting up the whole night, and

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being enjoined secrecy ; and next day the infeftments were taken without the privity of the creditors.

Of these bonds, Mr William Grant, as trustee for Sir Archibald his brother, pursued reduction upon the head of actual fraud ; and prevailed.

The only question was, How the creditors, who might acquire, though *ignorantes*, could be affected by the fraud of their debtor, to which they were not accessory ; but, to this the answer was, That, by their accepting of the deeds, they became *particeps fraudis*.

On this occasion, there was some reasoning among the Lords upon the construction of the act 1621 ; wherein they agreed, that the words *necessary causes* in the act 1621 are in practice thus understood, That there be a previous obligation to grant the deed : That though the words *true, just, and necessary causes* would appear as they stand to be conjunctive, they have always been considered as *disjunctive* ; so that if either the deed be granted in consequence of a previous obligation, or, though there be no such previous obligation, if the deed be granted for a true and just cause, it is not reducible.

Fol. Dic. v. 3. p. 49. Kilkerran, (BANKRUPT.) No 9. p. 55.

* * * The same case is also reported by D. Falconer :

ROBERT GRANT of Tillifour having been factor on Sir Archibald Grant's estate of Monymusk, took a tack thereof ; and at the same time purchased from the heritor a right to the arrears in the tenant's hands.

He was also indebted to several persons, and finding his circumstances in disorder, conceived a design of preferring his other creditors to Sir Archibald ; and for this purpose executed three heritable bonds in their favour, gave them infeftment without their knowledge, and when the time was near expired, registered the sasines.

The balance due to Sir Archibald being settled on a submission, he also infefted him ; and a ranking of his creditors, and sale of his estate, being pursued, Sir Archibald objected to the preference of the other creditors as fraudulent.

Pleaded for the creditors, There is no ground in law on which their preference can be reduced : The debtor was not under diligence, so as to be disabled from granting it by the act 1621 ; nor was he bankrupt in the sense of the act 1696 : And if the civil law is pleaded upon, it is to be observed that the *edictum Paulianum* required the creditor were *missus in possessionem* of his debtor's effects.

Pleaded for Sir Archibald, If it appear that this preference was given with a fraudulent intention, it is reducible at common law, as sundry dispositions *omnium bonorum* have been reduced. Here the debtor, without being prest by his creditors, contrived, and by himself executed, the scheme for preferring them, by granting infeftments on the only estate he had ; and though the creditors were not originally concerned in the fraud, it is fraudulent in them now to insist upon the preference.

THE LORDS found, that the infeftments were fraudulently granted by Tillifour, with intent to postpone Sir Archibald Grant, a lawful creditor; and reduced the same, to the effect of bringing him in *pari passu* with the other creditors. From the words of the interlocutor *vide* Grant against Grant, *voce* INFESTMENT.

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Reporter, *Shualton*.For Sir Archibald Grant *A. Macdowall & W. Grant*.Att. *H. Home*.Clerk, *Murray*.*D. Falconer, v. 2. p. 9.*

S E C T. X.

The Onerosity of Provisions in Favour of a Wife.

1635. June 19.

WALKER against POLWARTH.

UMQUHILE Patrick Walker being married upon one Polwarth's wife, betwixt whom there were bairns procreate, he gives a bond *stante matrimonio* to Henry Polwarth, brother to his wife, and to her behoof, for payment of 2000 merks, she not being provided to any liferent or conjunct-fee, or any other benefit or means of maintenance by her husband; at the time of giving of the which bond, the defunct was debtor to fundry creditors, by fundry bonds, preceding this bond given to his wife, in more sums of money than all his goods or means extended to; thereafter, after his decease, the relict and the creditors contesting in a double pointing, raised by the executors of the defunct, which of them should be answered of the defunct's goods, which were not sufficient to pay the half of his debts:—The creditors *alleged*, That the bond given to the wife could give her no right to any of the saids goods, seeing the same were given to her long after these bonds, at which time he could do no deed to their prejudice, he being then in effect a bankrupt, seeing then he had not so much gear as might pay his debts, whereby he could not give to his wife any thing, but *deductis debitis, et post solutum æs alienum*; and so this being *donatio inter virum et uxorem*, and for no lawful onerous cause, it cannot be respected against them; and where the relict opposed that it was given for her maintenance and living, she having no other thing whereupon to live, and receiving no other provision, and that it is in effect *donatio propter nuptias*; they *answered*, That it is not *donatio propter nuptias*, because there is no contract of marriage can be shown betwixt them; likeas she gave no tocher nor other benefit to her husband, and so of law and reason can seek no recompence of his goods; for *dos et donatio propter nuptias in jure paribus passibus ambulant, et equaliter regulantur*: Notwithstanding whereof this allegation proposed for the creditors was repelled, and the relict was found ought to have her proportion with the rest of the creditors, according to the free goods in

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A bond granted after marriage, for a suitable liferent to a wife, by her husband, insolvent at the time, was sustained in competition with creditors, whose bonds were anterior. The wife was allowed to rank proportionally, although there was neither contract of marriage nor tocher given. Her claim arose *de jure nature*.