COLONEL ALLAN MACPHERSON of Blairgowrie, and Others, Creditors of the late Sir Samuel Hannay of Mochrum, Bart., and ARCHIBALD SWINTON, W.S., Common Agent in the Ranking of the Creditors, } *Appellants;*

RAMSAY HANNAY of Middlesex, Esq., *Respondent.*

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House of Lords, 6th May 1803.

REAL SECURITY—STATUTES 1621, c. 18, et 1696, c. 5—CONJUNCT AND CONFIDENT—DELIVERY OF DEED.—A party granted a real security to his brother, for a debt owing him, on which no infeftment was taken until after the granter's death. His death happened about three years after its date, when it was discovered that he was insolvent, and must have been so at the time of granting the heritable bond. In a ranking and sale of his estate, the creditors objected to this bond, on the ground of its being a fraudulent preference, granted by an insolvent, and to a conjunct and confident person. Circumstances in which these objections repelled, and affirmed in the House of Lords.

Sir Samuel Hannay of Mochrum, Bart., was proprietor of a landed estate in Scotland. He died in 1790 insolvent. The consequence was, that his landed property in Scotland was brought to judicial sale, by a process of ranking and sale; and the appellants were parties creditors, who had produced their grounds of debt in this action. In these processes of ranking they stated objections to an heritable bond for £20,000 granted by the deceased Sir Samuel Hannay to his brother, the respondent, in November 1787, previous to his death, on the ground that it was granted by Sir Samuel to a conjunct and confident person *in fraudem creditorum*, when he was utterly insolvent, and for the purpose of creating an undue preference. It was further stated, that the respondent was in the knowledge of Sir Samuel's circumstances; that he kept the heritable bond latent, and took no infeftment until the eleventh day after his death, when it was no longer competent for them to reduce this security, by rendering Sir Samuel notour bankrupt, in terms of the statute 1696, and therefore the appellants insisted that the respondent could not avail himself thereof as a preferable claim, to the prejudice of the creditors, but could only rank *pari passu* with them.

The question thereforo was, Whether, where a personal creditor obtains from his debtor an additional *real* security,

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which is not published by taking infeftment till after the death of the granter, who is then discovered to have been insolvent at the time of granting it, such a security can be set aside, at the suit of other creditors, as fraudulent?

There was no dispute about the real and onerous nature of the debt, although it was alleged that less was due to the respondent individually than £20,000, although more might be due to him and his other brothers jointly. The respondent contended that, at the time it was granted, he was ignorant of the real state of his brother's affairs. But, in answer, it was contended on the part of the creditors, that he was aware of his insolvency at its date; that this appeared from the whole circumstances. It was to be presumed, from changing the personal debt to a real security—from the letters of Sir Samuel, requesting that the matter be kept "privateand confidential, and kept separate and distinct from "every other matter;" and the bond was mentioned in his letters, "to secure my brother in the event of my death."

Mar. 11, 1800. The Lord Ordinary pronounced this interlocutor, "The "Lord Ordinary having considered these objections, an- "swers thereto for Ramsay Hannay, Esq., writings therewith "produced, replies for the creditors and common agent; "sustains the objections; finds that the respondent is not "entitled to the preference claimed; or, at least, that he "can be only ranked upon the heritable bond and infeft- "ment *pari passu* with the objectors, the personal adjudg- "ing creditors of the common debtor." But, on reclaiming

Jan. 17, 1801. petition, the Lords, of this date, "Alter the interlocutor "complained of, repel the objections stated to the interest of "the said Ramsay Hannay, in the ranking of Sir Samuel "Hannay's creditors, and remit to the Lord Ordinary to pro- "ceed accordingly."

Against this last interlocutor of the Court the present appeal was brought to the House of Lords.

*Pleaded for the Appellant.*—The security is reducible at common law, 1. Because it is established by the whole facts and circumstances of the case, and which are not disputed, that Sir Samuel Hannay, at the time of executing the bond in question, was utterly insolvent, and really, though not publicly, a bankrupt. It was therefore a gross fraud in Sir Samuel to attempt to create a preference in favour of his brother over all his other creditors. That he knew, and was well aware of the impropriety of what he was doing, is proved by the injunction of secrecy imposed upon Mr. Loch

in his letter, directing the heritable bond to be prepared; and Mr. Loch, had he been alive, might have been material evidence on this subject; for that Mr. Loch believed it to be a secret, and an unjustifiable transaction between the brothers, appears plainly from the following excerpts of letters written by that gentleman to Mr. Johnstone of Carnfalloch, and which letters came into the hands of the common agent in consequence of a production made by Mr. Johnstone, in a question in this ranking.

" I don't know how things stood when you went from this ; " but, as far as I can judge, Sir Samuel has left his matters " in a very unhappy situation. Exclusive of the large ba- " lance to the brothers, there is at least £50,000 to other " people, and I am afraid not £2000 to answer it. Several " very unjustifiable transactions appear, which nothing but " a most direful necessity could have occasioned. You " know, I suppose, Ramsay has a security over all the pro- " perty in Scotland for £20,000 ; but as no infeftment was " taken upon it till after Sir Samuel's death, I imagine it " will not exclude Lady Hannay, though I think it will be " good against other creditors."

In another letter he says, " Ramsay's security is to be " challenged by the creditors at large, but I hope it will " stand the test. The weak side of it is this : It now ap- " pears, *I am afraid past a doubt, that Sir Samuel was in-* " *solvent at* the time he granted it,"—" he granted the secu- " rity under the strictest injunction of secrecy to his agent " who wrote it, and it was delivered to his brother, by whom " it was kept with equal secrecy till Sir Samuel's death." 2. It was also equally manifest that the respondent was in the knowledge of his brother's circumstances. He had taken the chief charge of remitting the whole money from India ; and he could not but know the extent of the sum for which Sir Samuel was debtor to those interested under Colonel Hannay's will. The money was remitted as the proceeds of Colonel Hannay's estate, (a deceased brother), to be divided under his will among his surviving brothers. He also knew the difficulties which Sir Samuel laboured under before the Colonel's death, arising from his connection with a mercantile speculation. He saw too, the extravagant and profuse style in which he was living, and the circumstances attending the whole transaction. 3. The respondent has brought no proof that the bond was delivered to him in the lifetime of Sir Samuel. It was kept latent—made not to

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appear on the record, and this solely in order to deceive creditors, and disappoint them after Sir Samuel's death. He must prove not only onerosity, but that the deed was delivered while the granter was solvent. Here that has not been done. No infeftment was taken; and delivery, in the most favourable view, could only be conditional—the condition being to keep it secret until after his death. 4. Even supposing it were proved that the bond was delivered in the lifetime of Sir Samuel, there is evidence arising from the conduct of the parties, and the circumstances of the case, that it must have been subject to the condition of keeping the transaction concealed, and of not taking infeftment until Sir Samuel's death. It was as a security, in the event of his death, that Sir Samuel desired it to be made. It was to be kept private. Being intended by the granter, who had urgent reasons for concealment, only as a security in the event of his death, and of a private nature, it follows that it would be delivered only as such to the receiver, who had no less cogent reasons for secrecy. Its publicity would have destroyed Sir Samuel's credit. Secrecy therefore was the foundation of the whole transaction, and its inseparable ingredient during Sir Samuel's lifetime. If the bond was delivered, it must therefore have been only on condition that no infeftment should be taken upon it. 5. The deed was also granted to a near relation, and to a conjunct and confident person, which of itself is sufficient to set it aside. Lord Stair says, (B. 1, tit. 9, § 12,) "Generally latent "rights among confident persons, are reducible by posterior "creditors." And Bankton and Sir George Mackenzie say the same. Even where deeds are not latent, they are not suffered to give a preference to conjunct and confident persons. Several decisions have so laid it down, Kinloch *v.* Blair, 18th Jan. 1678; Scrymgeour *v.* Lyon, 28th Jan. 1696; Moncrief *v.* Lockhart, 13th July 1698, Fountainhall. But as to this challenge, at common law, all creditors, whether prior or posterior, are on an equal footing. 6. The heritable bond was further reducible as falling under the statute 1621, c. 18, at least in so far as regards those creditors whose debts were contracted prior to the granting of the bond in question, as an alienation "to a conjunct and confident per-"son, without true and necessary causes, and without a just "price truly paid." It was further reducible under the act 1696, c. 5, as extended by 23 Geo. III. c. 18, as granted by an insolvent, in order to give an undue preference.

*Pleaded for the Respondent.*—A party obtaining a security upon land is under no positive or legal obligation to publish it, by taking infeftment or registering his sasine within any given time. Regard for his own safety alone can induce him to do this, in order to protect himself against posterior conveyances or securities upon the same subject gaining a preference. But he may act otherwise, if he chooses to incur risks, and allow other creditors to gain such preference. Registers are not intended to give information *generally* of the circumstances of *persons*, but merely of the state of the *particular property*, to put those who deal with the proprietor, on the faith of that property, in safety, as they can be affected by nothing which does not appear on the record. The creditors objecting here are mere personal creditors, and creditors adjudgers. It is clear they did not deal on the faith of the record, or of the state of the property. They go upon the personal security of the granter. At all events, they cannot complain against him for having neglected to obtain himself sooner infeft, when it is obvious that, by such negligence, he alone could suffer injury, inasmuch as such neglect gave other creditors, and even them, an opportunity of gaining a preference to themselves, and cutting off all preference from him. It is therefore exceedingly disingenuous in them to talk of being deceived, or induced to give credit upon the faith of the real estate, when no steps were taken by them to affect that estate. Such, it is humbly conceived, is the law; and it makes no difference whether the alienations are voluntary or for valuable considerations. It is alike immaterial to refer to the statutes 1621, c. 18, and 1696, c. 5, for they have no application to the circumstances of this case. Because, in regard to the first mentioned act, in order to bring the present case under it, it was necessary to make out that the security was not granted for a *true, just,* and *necessary cause.* This has never for a moment been attempted, and could not be attempted, because the security here was granted as an additional real security to one previously a personal creditor. Besides this, the appellants would have to make out that they were creditors of Sir Samuel *at the date* of the security in question, which they have not done, and cannot do. And, in regard to the second named act 1696, it is clear only that it strikes against deeds giving partial preferences to creditors on the eve of the debtor's bankruptcy. But bankruptcy is here made the condition of the act, so much so, that it proceeds

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to define what shall be held to be bankruptcy. There must be diligence against him. He must be imprisoned, &c. But nothing of all this took place here. So that neither of these statutes apply. And the circumstances of the origin of this debt by the one brother to the other, is so clearly established, as to preclude all notions of fraud, and all objections on the ground of being conjunct and confident.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellants, *Wm. Adam, Wm. Alexander.*

For Respondents, *Henry Erskine, John Clerk, David Cathcart.*

NOTE.—Unreported in the Court of Session.

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[Fac. Coll. XIII. App. No. 8.]

JAMES MARSHALL, Writer to the Signet; WILLIAM TELFORD, Esq., Cashier of the Stirling Banking Co.; Messrs. CAMPBELL, THOMSON, and Co., Bankers in Stirling; and WM. PATERSON, Merchant there, Creditors of JAMES STEIN, late Distiller, &c. } *Appellants;*

JAMES STEIN, . . . . . *Respondent.*

House of Lords, 27th May 1803.

BANKRUPT—DISCHARGE—NO OBJECTION THAT THE BANKRUPT IS RESIDING IN A FOREIGN COUNTRY—COMPETENCY OF APPEAL.—In this case, the bankrupt, fourteen years after his bankruptcy, and when he was residing in Poland, to which country he had removed after his bankruptcy, presented a petition to the Court, with the usual concurrence of creditors in number and value, for his discharge. Some creditors appeared, and objected that he was not entitled, as a resident of another country, to sue for his discharge here; and that he had not accounted for the great deficiency in his assets as compared with his debts. The Court of Session repelled these and other objections. In the House of Lords this was affirmed. 2. No objection was stated to the competency of the appeal; but Lord Eldon thought it would be more expedient that the jurisdiction in bankruptcy were final.

A sequestration was awarded of the estate of James