[10*th July*, 1845.]

ALEXANDER ÆNEAS GRANT, and others, *Appellants.*

COLONEL ALEXANDER FINDLAY and JAMES GARDINER, *Respondents.*

Ranking and Sale.—Lien. It is for the Court to consider whether production of the title-deeds of the common debtors' lands will be beneficial to the general body of creditors, real as well as personal, and to order a sale of the lands with or without the production, according as it may be of opinion one way or the other.

WILLIAM MACKINTOSH was proprietor of the lands of Milbank, and others, yielding a free yearly rental of 91*l.* 13*s.* 5*d.*, valued to be worth for sale 2585*l.* 12*s.* 3*d.*, and burdened with heritable debt to the extent of 4400*l.* Macintosh was at the same time indebted in personal debts to the amount of 1599*l.* The first heritable debt was one of 2000*l.*, held by Mackenzie, and the second was one of 1000*l.*, acquired by the respondent, Colonel Findlay, from the original creditor by purchase for 60*l.* The personal debts were composed in part of a business account owing to the appellant Grant, amounting to 843*l.* 4*s.* 7*d.*, and of another similar account owing to Grant's correspondents in Edinburgh, Messrs. Roy and Wood, amounting to 139*l.* 7*s.* 3½*d.*

In the year 1833 Mackenzie executed a conveyance of his estates in favour of the appellant Grant, as trustee for his creditors; but attempts at obtaining preferences having been made, his estates were, in November, 1834, sequestrated under the Bankrupt Act, and Grant was chosen trustee in the sequestration.

In these circumstances the respondent Findlay, in August, 1842, brought a process of ranking and sale of the lands, in

which the usual interlocutor was pronounced, allowing proof of the bankruptcy of the common debtor, the value of the lands, and the burdens affecting them, and granting commission and diligence for recovery of the titles of the lands. Under this commission Grant was cited to produce the title deeds which were in his possession, but he refused to do so, on the ground that they were hypothecated in his hands for the business accounts due to himself and Messrs. Roy and Wood.

The decision of this claim of hypothec was postponed until after the election of a common agent should have taken place. The Lord Ordinary then remitted to the respondent Gardner, the common agent chosen, "to inquire into the facts, and to "report to the Lord Ordinary, *quam primum*, whether the "proceedings can be properly carried on without production of "the title deeds in this process, and how far the want of those "title deeds could be otherwise supplied, and what effect the "non-production of them in this process is likely to have upon "the sale, or the price to be obtained for the lands, keeping in "view the amount of the sums in the said accounts so claimed, "the amount of the heritable and other preferable debts secured "over the estate, and the rights and interests, both of the "heritable and personal creditors, and his opinion as to the "necessity or expediency of admitting the preference claimed "under the said right of hypothec, in order to obtain production "of these title deeds in process."

The common agent reported the facts which have been stated at the outset; and in regard to the title-deeds he reported, that as to one parcel of the lands they consisted of seven instruments, and *ex facie* gave a regular title; that five of them, including the original disposition, had been recorded, and could be supplied by extracts; but the two others, being dispositions, had not been recorded, and could not be supplied. And that as to the other parcel of lands the titles consisted of eleven instruments, which also gave *ex facie* a good title; that seven

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"The customary and regular mode of conducting such of them had been recorded, and could be supplied by extracts, but that the remaining four being all dispositions, and one of them, the original disposition, had not been recorded, and could not be supplied.

And after stating the probable effects of either course of proceeding, ordering the production of the title deeds, or dispensing with it, he further reported that he did not find any express authority requiring the production to be made in every case; but, on the other hand, many of the regulations in the Acts of Sederunt proceeded on the assumption that the title deeds were accessible in the process.

At this stage the respondent Findlay offered, by minute, to guarantee that the sum, reported by the common agent to be the value of the lands, should be offered at the sale, and to consign the amount in the meanwhile.

Upon receiving this report, the Lord Ordinary, considerin the question as one of considerable importance in practice, made *avizandum* with it to the Court, subjoining to his interlocutor the following note:—

"The present process of ranking and sale is brought by a "creditor who holds a *second* security for 1000*l.* over the "chief estate under sale. This security, it is said, he pur- "chased lately for the trifling sum of 60*l.* sterling.

"The property in question is rented at only 90*l.* per "annum, and there are *four* securities on it, extending in all "to 4500*l.* If these be unobjectionable, they will obviously "far more than *exhaust* any probable price to be got for the "lands, and leave no reversion to the personal creditors.

"In this view, the second heritable creditor states that he "does not wish to recover the titles, as, if he took them out of "the hands of the agent unto whom they are *hypothecated*, "the price would be subjected to a deduction, amounting to "nearly 1000*l.* sterling for the law accounts claimed by the "agent. He therefore insists that this ranking and sale shall

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" proceed without any *exhibition or examination* of the common " debtor's titles to the subjects under sale.

" This appears to the Lord Ordinary to be a novel and " very questionable form of proceeding. Lord Murray, (acting " for the Lord Ordinary during his indisposition,) very " properly directed the common agent to make a *report* as " to the circumstances of this particular case bearing on the " question. A very distinct report by him accordingly has " been put in, and it is now for the Court to determine " whether they can sustain the motion made by the pursuer, to " allow this process of judicial sale to proceed *without the titles*.

" The general rule is supposed to be clear, that, in a " process of ranking and sale, the title-deeds of the whole " properties under sale must be produced in an early stage of " the cause. The reason for this is well explained by the " common agent in his report, and is manifest on a short " consideration. The titles of the common debtor are abso- " lutely necessary, not merely for the satisfaction of pur- " chasers, but for enabling the common agent and the Court " to adjust the subsequent order of ranking. Till exhibition " of the titles, *non constat* that any of the securities are unob- " jectionable. The titles of the common debtor afford the " only satisfactory means of ascertaining the validity of the " real creditors' security, who pursue a ranking and sale, as, if " there be any flaw in the debtor's title, it may affect every " security that he has granted. Accordingly, it is expressly " provided by the Act of Sederunt, 23d November, 1711, " sec. 3.,—' That, after a process of sale is *raised*, the pursuer " ' shall have diligence granted him *against all havers of the* " ' *writs of the debtor and bankrupt's estate and lands*, to the " ' effect the same may be timeously exhibited in the clerk's " ' hands.'

" The customary and regular mode of conducting such " processes being thus fixed, the next question which occurs " is, whether the pursuer is entitled to make an *exception* of

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" the present case, and to have the sale carried through under " the authority of the Court, *without exhibition of the titles?* " The grounds on which the pursuer has urged this demand " deserve consideration.

" *First*,—He brings into view the *great amount* of the " accounts claimed by Mr. Grant, and alleges that these will " absorb nearly the whole free *balance* left for him as a " secondary creditor. There is reason to think, from the " common agent's report, that the amount of the balance " which the hypothec will cover is considerably exaggerated " by the pursuer. But, be it great or small, it is obvious " that, if the production of titles be dispensed with in the " present case, a similar course must be sanctioned in every " future case where any creditor pursuing a ranking and sale " finds it convenient to ask it. The Lord Ordinary, there- " fore, doubts if a rule of Court, salutary and proper for " the protection of the public, in perhaps nine-tenths of " the cases in which processes of this sort are resorted to, " ought to be departed from, because it may be attended with " some hardship in an isolated case, on the holder of a post- " poned security.

" *Second*,—The pursuer next referred to the case of Bell " against Gordon's trustees, in 1838 (16, Shaw's Reports, " p. 657), in which it was found that a creditor might proceed " to sell subjects *extrajudicially* under a clause of sale in his " bond, without exhibition of the titles, which, as here, were " hypothecated for a large account to intending offerers; and " the pursuer added, that he also had a clause of sale in *his* " bond, under which he could have sold the subjects extra- " judicially. But the reference to that precedent appears to " the Lord Ordinary to afford one of the strongest pleas " against the pursuer in the present case. If he could have " exposed these lands to sale extrajudicially under a special " clause in his bond, why did he not take that course? He " must evidently have supposed that the judicial process of

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"ranking and sale gave him some great and peculiar advan-
" tage; and indeed it is not easy to anticipate or to calculate
" what may be the extent of that advantage. It may be that
" the estate will sell for a fourth, a third, or one-half *more* on
" the title given in a process of ranking and sale than what it
" will fetch when exposed by a bondholder, without a progress
" of writs.

" By the operation of a decree in a ranking and sale, all
" prior incumbrances are wiped off; the grounds of debt, in
" so far as legally preferable, are assigned to the creditors in
" corroboration of their title, and posterior securities are ex-
" tinguished—none of which advantages are obtained in an
" extrajudicial sale by a bondholder; and the short question
" which the Court have to determine is, whether the Court
" will give a creditor the great advantages thus conferred by
" a decree in the process of judicial sale, without a strict
" compliance with all the salutary rules of Court framed for
" the purpose of expiscating the titles both of debtor and
" creditors, and of insuring an ultimate appropriation of the
" price to those whose securities are legally unimpeachable?

" The Lord Ordinary must add, that if the rules of Court
" regulating the forms of this important process are to be
" dispensed with in any case, he has great doubt if a party
" like the pursuer, who confessedly acquired his claim for a
" mere trifle, *after the bankruptcy of the debtor*, should be
" viewed as a creditor entitled to such a boon."

On the 20th July, 1842, the Court pronounced the following interlocutor.

" In respect—1. That the common debtor does not in this
" case appear to state any objection to the non-production of the
" titles: 2. That the titles of the heritable property included in
" the ranking and sale were in the possession of the personal
" creditors, and of the trustee on the sequestrated estate of the
" common debtor, for several years before the said process of
" ranking and sale was instituted, and that they had thus a

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"full opportunity of considering the state of the said titles, "and of bringing forward any objections thereto by which the "preferences of the heritable creditors might have been set "aside: 3. That, on the report of the common agent, it ap- "pears that the value of the estate, at the highest computation, "will not pay off the heritable securities affecting the same: "4. That no statement has been made that there exists any "objection to the common debtor's titles by which the personal "creditors could derive any benefit from their production, or "be enabled to reduce any of the heritable securities: 5. That "the effect of ordering production of the titles would in this "case only be to enable the trustee in the sequestration, who "has a hypothec over the same, and who is stated to have a "right of recourse against the personal creditors, as his em- "ployers in the business, for which he holds the titles to be "hypothecated, to obtain payment out of the price of the lands "at the expense of the heritable creditor, who is the pur- "suer of the ranking and sale, and that such result would, in "the circumstances of the case, be unjust to the said pursuer, "Colonel Findlay: 6. That Colonel Findlay has, by a minute "lodged in process, 'guaranteed that the estimated value of "'the lands under sale, mentioned by the common agent in his "'report, being 2585*l.*, should be offered therefore if the same "'are exposed to sale without production of the titles, and that "'the pursuer was willing to consign in the Royal Bank, or in "'such other bank as the Court might appoint, the said sum "'of 2585*l.*, being the amount of the said estimated value, in "'order to secure that a sum to this extent shall be available in "'the ranking:' 7. That, according to the report of the com- "mon agent, it appears that the estimated value of the estate "is not likely ever to pay off the debt to which Colonel Find- "lay is in right; and that, in such circumstances, the pursuer "of the ranking and sale insists that he shall be allowed to pro- "ceed in the process, although the titles are not produced: "And *lastly*, in respect that there is no incompetency in allow-

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" ing the sale to proceed, although the titles are not produced, " —Find it to be unnecessary to pronounce any opinion on the " general point to which the report of the common agent re- " lates; refuse to pronounce any order for the production of " the titles of the common debtor; ordain the ranking and sale " to proceed, and the articles of roup to be framed in such " terms as not to imply any obligation to deliver or make " forthcoming the titles; reserving, in the event of the estate " not being sold, to the parties interested again to apply to the " Lord Ordinary, if they can show that the sale has failed owing " to the non-production of the titles; and reserving all other " questions which may arise after the sale between Colonel " Findlay and the personal creditors."

The cause then proceeded in the usual way, and in the course of the subsequent proceedings the common agent ascertained the lands to be worth 2894*l.* 10*s.* 9*d.*, at which sum they were ordered to be exposed to sale by an interlocutor of 9th February, 1843.

An appeal was then taken against the interlocutors of the court in the name of Grant in his individual character, and as trustee in the sequestration; of McKenzie, the creditor in the first heritable bond; and of McArthur, one of the personal creditors.

The Lord Advocate and *Mr. Turner* appeared for the appellant.

Mr. Stuart and *Mr. Anderson* for the respondents.

LORD CAMPBELL.—My Lords, when this case is properly understood, I do not think it is attended with any difficulty.

With regard to the interest of Mr. Grant, as depository of the deeds, I think that he has no *locus standi* whatever, and his counsel very properly admitted that. Indeed, they could not very properly deny it—and at the same time retain the high degree of credit that belongs to them. As far as he is

the mere depository of the deeds, whether the sale was extra-judicial or judicial is wholly immaterial; and it was decided in the case of Bell *v.* Grant, where there was an extra-judicial sale, that a passive lien, (and this is nothing more,) cannot be set up against the transaction. Then there is Murdo Mackenzie, Esquire, he cannot appear because he has no interest. I cannot help speculating that in Mr. Grant's other capacity as trustee for the creditors, along with Dr. Peter Macarthur, who is one of the personal creditors, they do not care much for their advantage, but they wish to do a good turn for their friend Mr. Grant, and to try to enable him to make active his passive lien. However, here they are, and we must regard Mr. Grant as the trustee for the personal creditors—and we must regard Dr. Peter Macarthur as a personal creditor who interposes in this case.

Now they can have no right to complain of the interlocutor appealed against, unless there be an universal and inflexible rule, that wherever there is a process of ranking and sale, the personal creditors may compel the production of the deeds, so that the depository of the deeds may be paid off, and must be paid off, before the incumbrancers on the land. That is the proposition which has been contended for by the appellants, and it is the only proposition that will enable them to maintain the appeal.

Well, my Lords, we are to consider whether there be such an universal and inflexible rule? There has been no Act of Parliament produced for it, and no decided case. There are passages in books of practice which are perfectly consistent with the notion, that it is optional with those who are interested to demand the production of the deeds or not. It would appear, from what that most learned and excellent judge, so much to be respected, Lord Cunninghame, says, that it has been usual to produce the deeds upon ranking and sale, and I know it will continue to be usual, because, generally speaking, com-

paring the amount of the debt with the value of the property, and considering the damage that would be sustained by the sale of the property without view of the title-deeds, I have no doubt it may be the interest of those concerned that the deeds should be produced, and that the hypothec should be satisfied. But, however that may be the case, it does not follow that there is any rule of law which entitles any creditor to come and insist upon it.

Upon the whole, although there are some reasons adopted in the interlocutor, upon which I think I cannot place reliance, yet there are reasons enough disclosed to induce me to come to the conclusion, that the Court was perfectly right in refusing the order for the production of the deeds. I think they had a right to make this reference, to see whether it was for the advantage of the creditors; and, looking to the facts that are disclosed in the report, it is clear to my mind that it would not be for the advantage of the creditors.

I need not, my Lords, travel over those facts minutely. They show that it is better for the creditors that Mr. Grant should be allowed to retain those deeds, without satisfying his lien upon them, than that, satisfying his lien upon them, he should be called upon to produce the deeds. And that as far as the real incumbrancers are concerned, it is quite clear the production is not for their advantage.

But it has been urged by the Lord Advocate, and with colour of reason, that the personal creditors have an interest to see whether those securities that appear to be incumbrances upon the real estate can be supported or not. But he has admitted, generally speaking, that it must be a very limited and contingent interest, and of very little value, compared with the interest which the real incumbrancer has, which might be defeated by saying that, upon any speculative notion of a personal creditor for the value of forty shillings, he should be entitled to require that the deeds should be produced, and that the hypothec

should be satisfied; beeause it would lead to this monstrous injustice, that, on account of some speculative notion of any personal creditor for a small amount, he may insist in every instance upon the deeds being produced and the hypothec being satisfied, although that hypothec should be of a much larger amount than the whole value of the real estate. That, I think, is contrary to all principles of justice and equity, and I think it would be very inexpedient to lay down such a rule. I think it is much better to leave it discretionary in the Court to say whether the case is made out in each particular instance for calling for the production of the deeds or not. Generally speaking, it will be very easily determined, even without any judicial reference; but if it be doubtful, I think it may be a fit course to pursue to do what has been done here, namely, to refer it to the common agent to state the facts, and to ascertain whether it is for the benefit of the creditors in general that the deeds should be produced and the hypothec satisfied or not; or whether it is more for their advantage that a sale should take place without the deeds even being produced.

For these reasons, my Lords, I think the interlocutor complained of is not liable to the objection made. I will not travel into all the reasons given, for I think there are reasons enough given to support the judgment below, and therefore, my Lords, my humble motion is that the interlocutor be affirmed.

LORD COTTENHAM.—My Lords, if there had been shewn to be an established law in Scotland, that, under the circumstances of this case of ranking and sale, where there are creditors who have a claim upon the land, and others who are merely personal creditors, the Court have no choice, but are compelled, upon the application of the personal creditors, to make an order to pay off the debt and redeem the deeds held by the agent or the attorney as security for the debt, it might not be for this House to overturn a practice and law so proved to exist, however

the House might regret that such a rule was established, because the injury to the creditors, and the sacrifice of property that it would produce, is observable from the state of the figures as they appear upon the report in this case.

It appears that the debts affecting the land amount to 4400*l.*, and the estate is valued at 2585*l.*, and the highest value put upon it by the appellant himself is 2882*l.*; he says he had been offered 2900*l.* for it, but the sum estimated is 2882*l.* So that here is property not worth 3000*l.* only worth 2882*l.*, with debts upon it apparently affecting the land to the amount of 4400*l.*, and the deeds are held by the agent who claims a lien upon them for a debt of 1000*l.*, and this House is called upon to overturn the interlocutor of the Court of Session, and to insist that the deeds should be redeemed, which can only be done by paying this 1000*l.* to the agent before the property is realised, in order to pay the creditors,—that is to say, to redeem an estate charged to nearly double its value you must pay 1000*l.* before you can begin to deal with the property at all. Anything more destructive to the interests of the estate can hardly be suggested than these figures demonstrate.

But then it is said, and it is the only suggestion necessary to be considered, that although these personal creditors, if the real debts are established, have no interest whatever in the property, because there would be evidently nothing left for them, they may possibly succeed by inspection of the title-deeds, in showing that some of these real securities are not valid. A very distant and a very forlorn hope, if by so doing they are to cut down the real security so as to let loose any part of the property for themselves, seeing that can only be done by paying the 1000*l.*, or whatever may be the amount of the agent's demand. Before they can begin this investigation more than one-third of the value of the whole estate is to be thrown away, in order to enable these parties to commence that inquiry.

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It turns out there is no authority for this to be produced in the law of Scotland; but that, as one might suppose, the same principle which regulates the practice of Courts of Equity in this country, regulates the practice of the Court of Session. The Court of Session, exercising its jurisdiction in matters of ranking and sale in Scotland, is authorized to adopt such course as appears most beneficial for the interests of those among whom it is administering the property; and the Court of Session has, in this instance, adopted that course. The Court of Session has referred to the agent for the purpose of inquiring into the circumstances, and from these circumstances it clearly appears that, in order to effect the object of the appellant, a great sacrifice of property must take place, and that it is for the interest of all parties concerned, that a sum of money, very nearly equal to the whole estimated value of the estate, which had been tendered by one of the parties concerned, should be taken, unless somebody should bid more. That, at all events, has secured for the benefit of the creditors that the property should not be sacrificed by paying 1000*l.* to a party who cannot enforce it, and whose only security is retaining the title-deeds till some person shall think right to come forward and require the production of them. I should have very much regretted if I had found there was any rule of law in Scotland interfering with this wholesome exercise of discretion. None such has been produced; and I entirely concur in the opinion that has been pronounced by my noble and learned friend, that this interlocutor ought to be affirmed.

Ordered and adjudged, That the petition and appeal be dismissed this House, aud that the interlocutors therein complained of be affirmed with costs.

SPOTTISWOODE and ROBERTSON—G. and T. W. WEBSTER, Agents.