

1781.

(M. 10265.)

<p>ALLAN, &c. v. ROBERTSON, &c.</p>	<p>JANET ALLAN, Relict of JOHN CAMERON, late of Carntyne, and her Children, - MESSRS. ROBERTSON and Others, Creditors of RICHARD CAMERON, now of Carntyne,</p>	<p>} Appellants ; } } Respondents.</p>
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House of Lords, 15th May 1781.

REAL OR PERSONAL—PROVISIONS TO WIFE AND CHILDREN.—Circumstances in which held, that these had not been made real burdens on the estate conveyed.

Jan. 28, 1751. On the marriage of the appellant with John Cameron, her husband, they entered into a marriage contract, by which he bound himself to pay the appellant, in case of her surviving him, an annuity of £55. 11s. 1½d. per annum; and to the children of the marriage £3055 among them as provisions. And for the better security of these provisions to his wife and children, he “ gave, granted, and disposed his estate of
“ Carntyne and others, to her in liferent, for her security
“ only of the foresaid liferent, and in favour of the children
“ of this marriage, towards payment and security to them in
“ manner above expressed” of their provisions.

Sept. 28, 1771. The marriage took place thereafter, but no infestment followed on this deed, although it contained procuratory and precept of sasine. Several children were procreated of the marriage, and he then made additional provisions in favour of his wife and children, by three separate instruments of the same date. By the first deed he granted bond to his wife, providing an annuity of £100 per annum, free of all deductions. By the second, he granted bond of provision, giving £300 to each of his seven sons; and £600 to each of his three daughters. 3d, He executed a disposition, conveying his estate of Carntyne in favour of his eldest son Richard, providing that the said Richard should be bound and obliged “ to satisfy and pay all my just and lawful debts,
“ deathbed and funeral expenses; and also to make pay-
“ ment to Janet Allan, my well beloved wife, and his mo-
“ ther, of the liferent annuity provided by me to her by the
“ contract of marriage betwixt us, and that in terms of the
“ said contract; and also of a further yearly annuity of 800
“ merks, making in whole the sum of £100 sterling, payable
“ at two terms in the year, by equal portions, in terms of,
“ and conform to a bond of provision granted by me to her,

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“ of this date, and relative hereto ; and, likewise, to pay to
 “ the younger children procreate, or to be procreate of
 “ the marriage of me and the said Janet Allan my wife,
 “ the several sums provided by me to them, in a bond of
 “ provision executed by me, in their favour, of this date.”
 There was an obligation to infest “ *under the burdens, pro-
 “ visions, reservations, and power and faculty before written.*”
 Also, a procuratory of resignation, and precept of sasine,
 setting forth, “ Attour that Richard Cameron, my eldest
 “ son, and his foresaids, may be infest and seized in the
 “ lands particularly before disponed, *under the burdens, pro-
 “ visions, reservations, power and faculty before written, I
 “ hereby desire,*” &c. to give heritable state and sasine, &c. of
 all and whole the several lands, but always “ with and under
 “ the *burdens, provisions, reservations, power and faculty
 “ before written, here also held as repeated brevitatis causa,
 “ but are nevertheless appointed to be engrossed in the in-
 “ feftment to follow thereupon, otherwise the same to be
 “ void and null.*” The above bond to the wife set forth,
 “ *with the payment of which annuity I have burdened my
 “ real estate, disponed by me to Richard Cameron, by dis-
 “ position, of this date, and relative thereto;*” but there
 was no corresponding clause in the bond to the children.

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On John Cameron's death, Richard Cameron made up
 titles to his father by service, was infest in the said lands,
 upon a precept obtained from Chancery, proceeding upon
 retour of his special service. This sasine did not make
 mention of any burdens upon the lands, and the apparent
 object of making up the title in this way, was to avoid any
 such. But afterwards becoming insolvent in 1777, he took
 new infestment on the disposition of 1771, and in terms
 thereof, engrossed the burdens, under which it was granted,
 by particularly specifying the sums of money due to the
 appellants.

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On his bankruptcy, the estate of Carntyne and others was
 brought to a ranking and sale; and the appellant and her child-
 ren having previously obtained decree, for the annuity to her-
 self, and provisions to the children respectively, sued out
 an adjudication thereon, and claimed that the estate might
 be preferably burdened with the payment of the annuity
 and interest of the provisions to the younger children. The
 question was, Whether the disposition of 1771, in favour of
 Richard Cameron, did create a *real burden* on the estate, so
 as to entitle to such preference?

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The Court, on report of the Lord Ordinary, of this date, pronounced this interlocutor, “ find that the provisions to the said widow and younger children, are not real burdens on the estate of Carntyne; and, therefore, refuse the petition.” And, on reclaiming petition, the Court adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—In order to constitute a real burden upon lands, the law of Scotland requires no particular form of words. It is enough, that the granter has expressly conveyed the subject, under condition of the special burden mentioned. Here the subject, as well as the grantee, is charged with the burden of the annuity and provisions, and in such a way, that the deed and the record may give notice to all who deal with him, that the property is thus preferably charged. These burdens are appointed to be engrossed in the infestments to follow thereon, under the condition of nullity. The respondents say, that had such expressions as these been used, “ that this disposition is granted with and under the burdens,” &c.; or if to the obligation to pay, there had been added, “ which debts shall be real burdens on the said estate,” there could be no doubt that a real burden would have been created. But the words here are equally strong, because he conveys to Richard Cameron, “ *with and under certain burdens.*”—He obliges himself to infest *under the same burdens*, and his precept of infestment is under the same burdens, with an express injunction, to engross these burdens specifically, in the infestment to be taken thereon, on pain of nullity. Infestment was taken thereon in 1777, specially enumerating these burdens, and the particular sums of money due the appellants; and it cannot impeach the validity of this infestment, or the real security thereby effected, that between the date of the disposition, and that of the infestment, the disponee had become bankrupt.

Pleaded for the Respondents.—The appellants are here endeavouring to establish an illegal preference over the estate of Richard Cameron, in fraud of his just creditors. The provisions in question were not made real burdens on the estate. The disposition of 1771 did not create any such real burden, and of course the infestment which followed six years after its date, could not do so. According to the law of Scotland, two things are requisite, in order to create a

real burden, 1st, It must be expressed in the deed, as a real burden on the *lands*, and not to create merely a personal obligation, or condition of payment directed against the grantee; 2d, It must be specially engrossed in the procuratory of resignation, or precept of sasine, which are the warrants for infeftment; and also in the instrument of sasine or infeftment itself. No unknown or indefinite incumbrance can exist as a real security,—every real security must be made manifest from the deeds themselves. And this especially in a question with creditors, and those who only claim family provisions under a disposition, in which no such burdens or incumbrances appear. The infeftment which followed, specifying burdens that are not enumerated in the disposition, was therefore inept, as exceeding and going beyond its warrant.

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After hearing counsel, it was
Ordered and adjudged that the interlocutors complained
of be affirmed.

For Appellants, *Henry Dundas, J. Dunning.*
For Respondents, *Ilay Campbell, J. Anstruther.*

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JAMES CRAIG of Edinburgh, - - - *Appellant;*
MESSRS. DOUGLAS, HERON, and Co. - - - *Respondents.*

House of Lords, 17th May 1781.

SALE—COPARTNERY—LIABILITY.—Circumstances in which a sale of stock, completed and carried through by one body of directors and not the whole, was held to liberate the partner, who sold his stock to the Company, from all liability as a partner, though by the rules of the Company, the transfer behoved to be submitted to the whole three bodies of directors, and though the Company was insolvent at the time.

The appellant was originally one of the partners or shareholders of Douglas, Heron, and Company, bankers, Ayr, holding one share of £500 thereon. And it being a law of the Company, in order that any shares of stock offered in the market for sale by the shareholders, might be bought in by the Company, that the Company should have the first option of buying up the shares, to prevent a total discredit of the stock, the appellant gave intimation to the directors in Edinburgh of his intention to advertise his