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.

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.*

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

House of Lords, 17*th 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

1781.

CRAIG
v.
DOUGLAS, &c.

share for sale, whereupon the directors agreed to purchase the same for the behoof of the Company, and the appellant went to their bank-office, wrote a letter offering to sell his share for £400, with interest from the 15th May 1772, which sum he empowered the bank to retain, to extinguish *pro tanto* his cash account. The bank returned a letter accepting of his offer, and agreeing to place the price in extinction of his cash account. This was done accordingly, by an entry in the appellant's bank book, in the handwriting of the Company's accountant, thus:—

Dr. Messrs. Douglas, Heron, and Co. in account with Mr. James Craig, Baker. *Cr.*

1772.				1772.	
June 9.	To my share of the Co. stock, with interest since 15th May last, per agreement,	£401	7 5	June 9. By bal. of last acct.	£506. 16s.

The Company of Douglas, Heron, and Company, had three branches; one in Edinburgh, one in Ayr, and a third in Dumfries. There were also three sets of directors. And the resolution of the Company, in regard to purchasing shares, provided "That it should be left to the *whole directors*, when "any proprietor means to sell out, either to admit a transfer "to the person to whom he proposes to sell, or otherwise to "purchase his share for behoof of the Company, and that all "such transferences shall be regularly entered and reported "to the next general meeting." The proposed transfer only came before the consideration of the Edinburgh directors, and not the *whole*, and no report was submitted of the transfer to the next general meeting.

In a few weeks after thus disposing of his share, the Company was thrown into difficulties and confusion by a money panic, and the question was, Whether the sale was finally concluded, so as to exempt the appellant from liabilities as a partner? The Company maintained that he was still liable as a partner—that the sale was not concluded, and that at the time of the sale the Company was bankrupt. In answer to this, it appeared that the bank went on doing business from 9th June 1772 to the spring of the year 1773, and that the reason why the transfer was not granted in the interval, arose from more important engagements calling their attention away from this matter; but, on 2d February 1773, this transfer, at the request of the directors, was signed by him, and handed over; and a settlement of the

transaction entered in the bank books, and reported at the next meeting thereof, the minute of which sets forth the same, and nothing was further heard of the transaction, until 1779, when the present action was raised against the appellant.

The Lord Ordinary assoilzied him from the conclusions of the action. But, on reclaiming to the Court, the Lords pronounced the following interlocutor:—" Find that no Dec. 8, —— " bargain was completed between the Company of Douglas, " Heron, and Company, and the defender; and therefore he " still continues a partner of the said Company; and remit " to the Lord Ordinary to proceed accordingly." On re- Feb. 7, 1781. claiming petition, the Court adhered.

Against these two last interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The share which the appellant had in the Company of Douglas, Heron, and Company, having been sold several years previously to the date of this action, and the sale made in the most fair and deliberate manner with this Company, upon condition, expressed in the deed of transfer, that the Company were to relieve him of all the copartnery engagements, he cannot be obliged to restore the price then paid, or be subjected to any of the losses or debts due by the Company, as still an existing partner. And this action is no better than an attempt to set aside the sale because the Company concerns have turned out unsuccessful. There was no fraud—no unwarrantable or collusive dealing in the transaction. Every thing was fair and open, and concluded with the Company itself by its directors and managers, duly authorized so to transact, by a resolution of the general body of shareholders or company. Nor will it avail to assert that there is now no evidence of the agreement in May 1772; and to assert that when the transfer was completed in February 1773, the Company was bankrupt; because, 1st. The want of written evidence of the transaction in May 1772 is owing to its being given up and cancelled on delivery of the transfer in 1773; and, 2d. There exists no proof of bankruptcy at the time. The stop in June 1772 being merely a temporary expedient, the Company went on immediately for years thereafter. It is equally untenable now to object to the form of the transaction, founded on the directors having no powers to purchase without the consent of the whole directors, because the resolution was not so framed as to make the power

1781.

CRAIG
v.
DOUGLAS, &c.

to depend on the consent of the whole. It was not necessary, in addition to the consent of the Edinburgh directors, to get also the consent of the Dumfries and the Ayr directors. It was enough that the general resolution authorized and empowered each body of directors within their districts, to buy up such shares.

Pleaded for the Respondents.—The appellant must remain a partner, subject and liable to all its responsibilities, unless he can show that he has been liberated therefrom in the manner prescribed by the rules and regulations of the Company. That has not been done here, because the transfer stock was destitute of that evidence of completed sale, which was, in terms of the laws of the Company, requisite to make it binding on the Company. It was not in the power of the Edinburgh directors alone to bind the Company without the consent or approbation of the other two branches—namely, of Ayr and Dumfries. The resolution of the Company of 1770 was, "That it should be left to the *whole* directors, "when any proprietor means to sell out, either to admit a "transfer to the person to whom he purposes to sell, or "otherwise to purchase his share for behoof of the Com-"pany, and that *all such transferences shall be regularly en-"tered and reported to the immediate subsequent general "meeting.*" This was not done neither in regard to the consent of the *whole* directors, nor in reporting the transfer to the general meeting as there prescribed, and consequently the transfer was not binding on the Company. This strict rule is the more imperative, because in June 1772, when this transaction was thus entered into by the Edinburgh directors, the Company was insolvent, which insolvency, operating as a dissolution, necessarily superseded and suspended the resolution regarding the Company buying up shares.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be *reversed*, and that the defender (appellant) be assoilzied.

For the Appellant, *J. Dunning, Robert Blair.*

For the Respondents, *J. Wallace, Dav. Rae.*

Note.—This case not reported in the Court of Session.