Robert Middleton, Rector of St. Mary's in Colchester, - - - - - *Appellant*;
Lieutenant-Colonel John Balfour, - - *Respondent*.

Case 39.

2d *September* 1715.

Heritable and Moveable.—A father in 1641, upon his eldest son's marriage, settled an estate upon him and the heirs thereof, reserving a power to burden: the son was infeft, and half the marriage portion paid to the father; but the wife dying without issue, within year and day, the father granted a bond to the son to employ same for his benefit, or to restrict his power of burdening *pro tanto*; the eldest son also dying, the father settled the estate upon the second son, who, after the father's death, granted heritable securities with infeftment to creditors thereon in 1666, upon which apprisings were led in 1670. His son having taken up the succession as heir to his uncle, instead of his father (the second son); at the instance of creditors, the contract of marriage and infeftment were reduced by the Court of Session, but with a clause, that the half of the marriage-portion which had been paid should be a *real* burden upon the estate: this half was afterwards confirmed by the executor and adjudication taken in 1680. In a competition between the person having right to the heritable bonds and infeftments in 1666, with apprisings thereon in 1670, and the person having right to the half of the marriage-portion, the Court having preferred the latter, the judgment is reversed.

BY contract of marriage in April 1641, between Sir Robert Arnot, son of Sir James Arnot of Fairnie, and Elizabeth Bruce, daughter to George Bruce of Carnock, Sir James Arnot, in consideration of the said marriage between his son Sir Robert and the said Elizabeth Bruce, and of 16,000 merks to be paid by the said Bruce of Carnock, conveyed all his estate and lands of Fairnie to his son Sir Robert, and the children of the marriage by way of entail, reserving his own life-rent in part thereof, and a power of burdening the said estate with 16,000*l.* Scots, and upon this contract an instrument of sasine was taken. Mr. Bruce of Carnock, soon after the marriage, took effect, paid the sum of 8000 merks, half of the said 16,000 merks, to Sir James Arnot, the father: But Elizabeth Bruce died within year and day of her marriage without a living child, and the other half was not paid. Upon an agreement in January 1641-2, relative to this matter, between Sir James Arnot and Mr. Bruce, Sir James granted bond to Mr. Bruce of Carnock, that he would either employ the said 8000 merks, for his, Sir Robert's benefit, or diminish the power he had of burdening the estate *pro tanto*.

Sir Robert Arnot died soon after, and his father re-entered to the enjoyment of the estate; and afterwards executed a settlement thereof to himself in life-rent, and after his decease to James Arnot, his eldest son then living in fee.

Sir James Arnot and James his son having afterwards borrowed from Henry Wemyss, the appellant's grandfather, the sum of 4000 merk, did, by their bond dated 8th February 1650, bind themselves, their heirs, &c. to pay the same with interest at Can-

dlemas 1651 to the ſaid Henry Wemyſs, and in caſe of his death, to Iſabel Wemyſs and Margaret Wemyſs, his daughters, equally between them. Sir James Arnot having died before the ſaid debt, or any part thereof, was paid, and the ſaid Henry Wemyſs being alſo dead, James Arnot the ſon, on the 24th of May 1666, granted two heritable bonds for ſecuring payment thereof, one of them to John Middleton (the appellant's father, who had married one of Henry Wemyſs's daughters), and Margaret his wife, and the other to the ſaid Iſabel Wemyſs. Theſe bonds ſeverally bore, that the parties, at the earneſt requeſt of the ſaid James Arnot, were willing to ſuperſede payment of their reſpective halfs of the ſaid debt and intereſt, each half then amounting to 2108 merks, and therefore the ſaid James Arnot granted to each of the parties an annual-rent of 130 merks 10 ſhillings and 8*d*. Scots to be iſſuing and payable out of all his ſaid eſtate at Lammas and Candlemas by equal portions, with a penalty in caſe of non-payment. Upon theſe two bonds the parties were ſeverally infeſt. On the 13th of September 1670, Iſabel Wemyſs aſſigned to the appellant's father the ſaid heritable bond in her favour: And no part of the ſaid annual-rent being paid, the appellant's father and mother in their own right, and the appellant's father as aſſignee of the ſaid Iſabel Wemyſs, on the 25th of April 1671, obtained a decree of apriſing againſt the ſaid eſtate for the arrears of both the ſaid annual rents then amounting to 1508 merks.

The ſaid James Arnot died, leaving the eſtate much incumbered with debts, and was ſucceeded by his ſon James. This James, for the purpoſe of getting the eſtate free of theſe debts, ſerved himſelf heir in ſpecial to Sir Robert, his uncle, who had been infeſt in the eſtate in virtue of the marriage-contract. And thereupon the Lord Burleigh, and other creditors of James the ſon, brought an action before the Court of Seſſion, to have the ſaid ſettlement of the eſtate upon Sir Robert by the marriage-contract reduced and voided upon this reaſon, that the eſtate being conveyed to Sir Robert by Sir James his father *intuitu matrimonii*, and that marriage being diſſolved within year and day without a living child thereof, the right fell, and the eſtate returned to the grantor. James the grandſon oppoſed this action; and it was contended, that if the eſtate returned to Sir James the grandfather, it ought to be with the burden of 8000 merks, part of Sir Robert's Lady's marriage portion, and which Sir James had obliged himſelf to employ for Sir Robert. The Court, in 1678, reduced the marriage-contract and conveyance of the eſtate to Sir Robert, with the burden of the ſum of 8000 merks to be paid to them who ſhould be found to have the beſt right thereto; declaring the foreſaid ſum of 8000 merks to be a real burden affecting the lands, and preferable to any debt or burden poſterior to Sir James's bond; and that the repreſentatives of the ſaid Sir Robert Arnot might adjudge the lands, and were preferable to all other creditors of the ſaid Sir James Arnot the father, or James the ſon poſterior to the bond.

George Arnot, third ſon of the ſaid Sir James, afterwards confirmed himſelf executor to his eldeſt brother Sir Robert; and

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in a competition between him and James Arnot the grandſon and heir at law, (Sir Robert's nephew), the Court of Seſſion, in 1680, decreed the ſaid ſum of 8000 merks to belong to the executor; And on the 11th of January 1683, George Arnot obtained decree of adjudication of the ſaid lands as a ſecurity for the ſaid ſum of 8000 merks.

This debt of 8000 merks, and ſecurities of the ſame, were afterwards acquired by the Lord Burleigh (who before had ſeveral appriſings and claims upon the eſtate); and he accordingly entered to the poſſeſſion of the eſtate. On the 10th of December 1684, Lord Burleigh conveyed all the appriſings, heritable ſecurities, adjudications and other ſecurities he had upon the eſtate to the reſpondent who entered to and poſſeſſed the eſtate by virtue thereof.

The father of the appellant having died, he became entitled to the ſaid two annual rents which had been granted to his father and mother, and to Iſabel Wemyſs his aunt, which, with the arrears thereof, amounted to a great ſum of money: And in 1712, near 35 years ſince the Lord Burleigh and the reſpondent had entered to the poſſeſſion of the ſaid eſtate, he brought his action againſt the reſpondent before the Court of Seſſion, in order to have the poſſeſſion of the eſtate granted to him for ſatisfaction of his ſaid debts, contending that the claims of the reſpondent were fully ſatisfied by receipt of the rents. And the reſpondent brought an action of ranking and ſale againſt the appellant and the other creditors upon the eſtate, that their reſpective claims might be examined, the eſtate brought to a ſale, and the price applied towards diſcharging the prior incumbrances.

Theſe actions came to be heard together, and it came to be a queſtion (which is the ſubject of the preſent appeal), whether the ſaid debt of 8000 merks, to which the reſpondent had acquired right, and which by decree of the Court of Seſſion in 1678 was found to be a real burden upon the ſaid eſtate, and preferable to all debts contracted by James the ſon, and for which an adjudication was obtained in 1683; or the debt claimed by the appellant, was preferable upon the eſtate. The appellant made an objection, that though the reſpondent contended that this debt of 8000 merks was a real one, yet his only title to it was through an executor. Parties were heard before the Lord Ordinary, and his lordſhip, on the 5th of February 1714, "Repelled the appellant's "objection againſt the reſpondent's title to the bond and ſum "therein; and found that George Arnot was *habili modo* veſted "in the right thereof, the ſaid decree of reduction bearing that "ſum to be only a real burden upon the ſubject, ſo that as to "the creditor it continued moveable: And found, that notwithſtanding the adjudication at George Arnot's inſtance in 1683 "was poſterior to the appellant's appriſing, yet the ſame muſt be "drawn back *ad ſuam cauſam*, viz. the bond granted by Sir James "Arnot to Bruce of Carnock for the behoof of Sir Robert "Arnot, his ſon-in-law, of the 8000 merks advanced by Carnock "to the ſaid Sir James as a part of the portion with his daughter, "in the terms of the contract of marriage: Therefore and in

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" regard the decreet of reduction of Sir Robert's contract of " marriage, and infeftment bears to be with an expreſs burden " and condition of paying the ſum contained in the ſaid bond, " which muſt be underſtood *cum omni cauſa*, preferred the reſpon- " dent by virtue of the ſaid adjudication, for the ſaid principal " ſum of 8000 merks, and intereſt thereof, ſince leading of the " ſaid adjudication and in time coming upon the lands therein " contained, and price thereof in caſe of a ſale, and that prior " to the appriſing founded on by the appellant." The appellant gave in a repreſentation, and after anſwers for the reſpondent, the Lord Ordinary, on the 19th of February 1714, " adhered to the " ſaid former interlocutor." The appellant afterwards re- claimed, and the reſpondent having anſwered the Court on the 11th of June 1714, " adhered to the Lord Ordinary's interlocu- " tors as to the 8000 merks principal money, but remitted to the " Lord Ordinary to have parties procurators as to the intereſt " ſince the decreet of adjudication led for the ſaid ſum, and to " determine or report as he ſhould ſee juſt." A ſecond reclaiming petition was given in for the appellant, and anſwers for the re- ſpondent, the Court, on the 30th of June 1714, " adhered to " their former interlocutor and refuſed the deſire of the petition."

Entered, 21 June 1715.

The appeal was brought from " the interlocutory ſentences, or " decrees of the Lord Polwarth the Ordinary in the cauſe of the " 5th and 19th days of February 1714, and from ſo much of the " interlocutors of the Lords of Seſſion of the 11th and 30th " days of June 1714, as affirms theſe interlocutors of the 5th " and 19th of February."

Heads of the Appellant's Argument.

Though the bond founded on by the reſpondent was prior in date to the heritable bonds on which the appellant claims; yet the ſaid bond being only perſonal, it could not, unleſs appriſing had been obtained prior to the date of the ſaid heritable bonds, preclude the appellant from the enjoyment of the ſaid annual- rents, which, by the heritable bonds and infeftments thereon, were real rights immediately affecting the ſaid eſtate. Even if they had not been real rights, affecting the ſaid eſtate, yet the reſpondent's adjudication in 1683, being more than ten years poſ- terior to the decree of appriſings obtained by the appellant's father in 1671, it could not bar the appellant's right, for by the unqueſtionable law of Scotland ſuch appriſings after 10 years give an abſolute right to the eſtate ſo appriſed to the excluſion of all ſubſequent rights.

The bond granted by the ſaid Sir James Arnot for the 8000 merks for the uſe of Sir Robert his ſon, when his marriage hap- pened to be diſſolved, was but a perſonal obligation: It was granted at the deſire of Bruce of Carnock to whom the money ought to have been repaid, but he being willing to give it to his ſon-in-law took it for his uſe; and this bond did not affect the eſtate till the adjudication was had thereon in 1683. Before this time the herit- able bonds in the perſon of the appellant had been granted, and

infeftment taken thereon, and the appellant's father had uſed his real execution by appriſing againſt the ſame. That the bond for 8000 merks was merely perſonal, appears further from the aſſignment thereof by George Arnot the executor of Sir Robert, under which the reſpondent claims: For if it had been a real right to affect the ſaid eſtate, it would have belonged to Sir Robert's heir and not to his executor, and of conſequence the ſaid George Arnot could not have had a right thereto, nor made a good grant thereof.

With regard to the decree of the Court of Seſſion in 1678, nothing therein could alter the nature of the thing ſo as to make that bond a *real*, which was only a *perſonal right*; nor could this this decree affect the appellant, ſince neither his father nor he were parties called or appearing thereto. Nor ought this decree to be conſtrued otherwiſe, than that the ſaid eſtate would be ſubject to this debt, after the appellant's and other prior incumbrances were paid. But, however, nothing in the decree, which was poſterior both to the heritable bonds and to the decree of appriſing under which the appellant claims, and made between other parties, can prejudice the appellant's right; and his father had great reaſon to think himſelf ſafe, when no real incumbrance appeared on the ſaid eſtate from the *public records*, which are a great ſecurity by the law of Scotland, and would be wholly fruſtrated if in this point the reſpondent ſhould prevail.

Heads of the Reſpondent's Argument.

The obligation for the payment of the 8000 merks granted by Sir James the grandfather, did never affect or charge the fee in Sir Robert's perſon; but upon Sir Robert's death it affected and charged the reverſion of the fee to the grandfather, and thoſe claiming under him, ſo that they could not enjoy the eſtate, but charged with this ſum.

Upon the diſſolution of the marriage, all things behoved to remain as ſecurities and pledges for one another, till there was a full performance by both parties of the marriage-contract; and if it was a real charge upon the eſtate it muſt be preferred to the appellant's, and all other debts contracted afterwards.

The rule is not univerſal, that all real rights are to be found upon record. For there are ſeveral real rights conſtituted by infeftments, where the conditions are not expreſsly mentioned: For, a wife infeft for a jointure, if the marriage diſſolve within year and day, will retain her jointure till her portion be repaid, though there be no ſuch quality in the infeftment: Excambion is likewiſe a real burden without infeftment, which indeed comes very near the preſent caſe. Nor can this be any uncertainty to creditors becauſe not recorded; for the infeftment to Sir Robert was recorded, and no body would purchaſe the eſtate or lend money upon it, without knowing how Sir Robert was diveſted of that eſtate, whereby they would know that this debt was a charge upon the ſame.

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The appellant made objection, that if this were a real burden upon the eſtate, it could not go to the executor. But the intereſt of all real debts goes to executors, and ſo do annuities, and yet they are real burdens and really ſecured: And the Court of Seſſion in 1680, after finding this debt of 8000 merks to be a real burden, decreed the right thereof to the executor; and it is *jus tertii* to the appellant to make this objection, ſince the heir does not queſtion the conveyance.

This debt being by the Court of Seſſion in 1678 found to be a real debt upon the eſtate, preferable to all the debts of James the ſon, Lord Burleigh, who was a conſiderable creditor, was neceſſarily obliged, in order to ſecure himſelf, to purchaſe this debt. It would be to render the decrees of the Court of Seſſion very precarious (which are at preſent looked upon to be the beſt title for a purchaſe) if they were to be overturned, after almoſt forty years poſſeſſion under them.

Journal, 2 September 1715.

After hearing counſel, *It is ordered and adjudged that the ſaid interlocutors of the 5th and 19th of February* 1714, *and ſo much of the ſaid interlocutors of the* 11*th and* 30*th of June* 1714, *as affirms thoſe interlocutors of the 5th and 19th of February be reverſed; and that the decree of appriſing of the 25th of April* 1671, *obtained by the appellant's father, and the appellant's demand in reſpect of the annuities granted by the deeds of the 24th of May* 1666, *ought to have preference of and be ſatisfied out of the eſtate in queſtion before the* 8000 *merks claimed by the reſpondent.*

For Appellant, *Spencer Cowper. Rob. Raymond.*
For Reſpondent, *J. Jekyll. Will. Hamilton.*

Caſe 40. Fountainhall, 27 March 1707. Forbes, 24 July 1713.

James Hamilton of Dalziel Eſq. - - *Appellant;*
The Principal, Maſters, and Profeſſors of the Univerſity of Glaſgow, - - *Reſpondents.*

9th *May* 1716.

Superior and Vaſſal.—Act of Parliament 1469, c. 36.—An univerſity having acquired righ to an adjudication of lands, held in ward, for a debt due to them, the Court found that the ſuperior muſt enter the univerſity, or pay the debt to the extent of the value of the lands: but upon appeal the judgment is reverſed; and it is ordered, that the ſuperior ſhould admit ſuch proper perſon for vaſſal as the univerſity ſhould nominate.

Bona fide Poſſeſſion.—The ſuperior, notwithſtanding the reverſal, is obliged to account for the rents ſince the charter was offered to him by the univerſity, he having deduction of his caſualties as if the old vaſſal then entered.

Coſts and Expences.—Expences of the Court below, and 30*l.* coſts of appeal, given to the *appellant*.

ON the 9th of June 1687, Elizabeth Herbertſon, widow, obtained a decreet of adjudication of the lands of Shields and Burngrains, belonging to her creditor Mungo Niſbet, who held theſe lands of the appellant in Ward holding. Mrs. Herbertſon after-