

NO. 4. terminous heritor, but from the necessity of his situation. The ground on which the mutual gable stands is common, mutual, and indivisible; and therefore there is no room for the maxim, *inædificatum cedit solo*. The gable, in fact, was the property of Wallace the builder, till paid for; and till then he had a right to prevent Smith, or his trustee, from using it, or adjecting to it any building.

The Court altered the interlocutor of the Lord Ordinary; and found the pursuer entitled to retain the price or cost of erecting one half of the gable in question; and, on advising a reclaiming petition, and answers, adhered, 21st June 1808.

Lord Ordinary, *Craig*. Act. *Geo. Jos. Bell*. Alt. *D. Douglas et J. Harrowar*.  
Agent *Rich. Cleghorn & J. Os. Brown*. Clerk, *Ferrier*.

*J. W.*

*Fac. Coll. No. 57. p. 215.*

1808. June 22. WILLIAM MARTIN *against* JANET PATERSON.

NO. 5.  
Circumstances in which a reservation in a disposition entering the sasine, and making part of the investiture, did not constitute a real burden on the lands.

ON the 23d day of August 1785, Joseph Mundell conveyed his moveable funds to Messrs Gordon and Goldie as trustees. He likewise executed a disposition of his landed property in favour of his nephew, William Johnston, and his heirs, under burden of the sum of L. 800, payable to his trustees, to be applied in terms of the trust. After a narrative of love and favour, the disposition proceeds, "Likeas I, by these presents, with and under the reservations, burdens, provisions, and conditions under-written, give, grant, alienate, and dispone from me, and all others my heirs and successors, after my decease, to and in favours of the said William Johnston, his heirs, executors, and disponees whatsoever, absolutely and irredeemably, without any manner of reversion, redemption, and regress, All and Whole, &c. In which lands and others above disposed, I hereby bind and oblige me, my heirs and successors, duly and validly to infest and seise the said William Johnston and his foresaids, with and under the burdens, provisions and conditions after expressed."

The first of these burdens and conditions is thus expressed, "Providing always, as it is hereby expressly provided and declared, that the said William Johnston and his foresaids, by their acceptation, shall be bound and obliged to make payment to Thomas Goldie of Craigmuir, commissary of Dumfries, and John Gordon, farmer at Newbridge, trustees named and appointed by me, of the sum of L. 800 Sterling, to be by them applied in terms of a trust-right and conveyance executed by me in their favour, of even date with these presents, and that against the term of Whitsunday or Martinmas that shall be one full year after my

“ decease, with interest thereof from the first term of Whitsunday or Martinmas immediately subsequent to my decease, until payment, and a fifth part more of penalty in case of not due and punctual payment, as also to make payment to the persons after named of the yearly annuities under written, viz.” &c.

After enumerating these annuities, it is provided and declared, *2do*, “ That these presents are granted by me, with the further burden of the payment of the sum of L. 200 Sterling to each of the children lawfully procreated of the body of the said William Johnston, surviving him.” And it is further declared, “ That the subjects above disposed are in full of heirship, executry, or any other thing which the said William Johnston or his heirs can any ways ask by and through my decease, excepting so far as is provided in their favour by my said trust-right and conveyance, under which burdens, provisions, and conditions these presents are granted by me, and to be accepted of by the said William Johnston and his foresaids, and no otherwise.”

The precept of sasine ordains sasine to be given to the disponent in the lands; “ but always with and under the burdens, provisions, and conditions before specified, which are hereby appointed to be engrossed in the infestments to follow hereupon.”

On this precept infestment accordingly followed in the person of William Johnston, the disponent. In the sasine, the disposition and precept in the terms and under the burdens above mentioned, are at large engrossed. “ And Thomas Kerr in Daltonhook, as bailie in that part aforesaid, by virtue thereof, and of the office of bailiary thereby committed to him, gave and delivered heritable state and sasine, actual, real, and corporal possession, of all and whole the said three-pound land of old extent of Bengairhill and Bengair, &c. but with and under the servitude and privilege in favour of the purchaser of Upper Dermont, and the other burdens, provisions, and conditions before specified, to the said William Johnston, by delivering to him of earth and stone of the ground of the said lands, with all other necessary and usual symbols.”

Certain partial payments of the sums with which the disposition was burdened were made by Mr Johnston; but at his death there remained a balance of L. 240 Sterling, besides interest.

Previous to his death, Mr Johnston executed two deeds, by one of which he granted to his widow, Mrs Paterson, a liferent over a certain part of the lands, in which she was infest *propria manibus*; by the other, he conveyed his whole property to his eldest son, under the burden of certain provisions to his children, which were declared to be real liens on his lands.

In the mean time, the pursuer, Martin, paid up the balance due to Mandell's trustees, and acquired right to the debt and security held by them.

NO. 5. Having constituted the debt against Joseph Johnston the eldest son and heir of William, he then led an adjudication, and brought an action of mails and duties against Johnston, his tenants, and Mrs Janet Paterson the widow, insisting, that the sums contained in Mundell's disposition to William Johnston were real and preferable burdens. The Lord Ordinary (Craig) decerned in terms of the libel.

The cause then came before the Court by petition and answers.

Argument of the defender.

To realise a lien on lands, it is necessary that the burdens be directed against the lands themselves, and not merely be imposed on the disponent. Unless this be done, the appearance of such a debt in the investitures is insufficient. See Bankton, B. 2. p. 653, ; 19th July 1780, Allan, No. 78. p. 10265.

In numerous cases similar to the present, the mere specification of the burden has been found insufficient; 18th May 1792, Steuart against Home, No. 11. p. 4649.

In the present instance, although the burden is specified, and declared to be a condition of the disposition, yet it is no where declared to be a *real lien* on the lands.

Argument of the pursuer.

If the obligation was laid on Johnston and his heirs alone, it is not real or effectual against his onerous or rational deeds. If it is directed against the lands, and rendered obligatory against onerous singular successors by entering regularly into the investiture, the pursuer must be preferred. That the burden was meant to be real, is clear from the whole tenor of the deed.

In the dispositive clause, the lands themselves are disposed *under the burdens, reservations, &c.* which necessarily infer a real burden. The obligation to infeft is qualified by a reference to these burdens. In a subsequent part of the deed it is declared, that *these presents are granted with the further burden.* There afterward follows a clause wherein it is declared, that *under these burdens, provisions, &c. these presents are granted by me, and to be accepted by the said William Johnston, and no otherwise.* This is the very form of expression pointed out by Erskine, B. 2. Tit. 3. § 49. to denote a real burden.

The law does not require any specific *formula* of words, or any *voces signatæ*, to constitute a real burden. It is sufficient that there be an explicit declaration of the disponent's will, that it shall be real, and that intimation be made to the lieges by insertion in the investiture. All this has been accomplished in the present instance, in the manner pointed out by Lord Bankton as sufficient for the purpose, in the very passage which the defenders have quoted in their support.

A majority of the Court differed in opinion from the Lord Ordinary ; and observed, that, without requiring any technical form of expression for the

constitution of a real lien, it is necessary that the intention to impose a burden on land by reservation, should be expressed in the most explicit, precise, and perspicuous manner. In a clause by which onerous singular successors are to be affected, there must be no room for ambiguity; but the present instance admits of a doubt; and, therefore, the obligation in favour of Mundell's trustees ought not to be held as constituting a real burden in competition with Mrs Johnston's infeftment.

The following interlocutor was pronounced, (4th March 1808,) "The Lords having advised this petition, with the answers thereto, alter the interlocutor reclaimed against; prefer the petitioner upon her infeftment produced, to the rents in question in the hands of the tenants, and decern; but find no expenses due; and supersede extract till the first sederunt day of May next."

On advising a reclaiming petition and answers, the Lords adhered, (22d June 1808.)

Lord Ordinary, *Craig*.

Act. *Geo Cranstoun*.

Alt. *Rob. Corbet*.

*A. & W. Douglas*, W. S. and *H. J. Wylie*, Agents.

Clerk, *Pringle*.

*J. W.*

*Fac. Coll. No. 58. p. 217.*