

1792. January 31.

ROBERT GRAY *against* WALTER FERGUSON.

MR. GRAY obtained from John Cleland a feu-right to a piece of ground, in which he took sasine in January 1753.

Having built a house on it, he, in September, 1753, got from Cleland another feu-right to an adjoining piece of ground; and in this deed the following clause was contained; "That nothing should be built on the contiguous property towards the north, so as to interrupt or prejudice the lights or prospects of the said Robert Gray's house." On this, however, infeftment did not follow till February 1757.

In December 1753, three months after the date of the second feu-right, the author of Mr. Ferguson acquired from Cleland that contiguous property towards the north, by a feu-contract, on which he was infeft in March 1756, almost a year before sasine was taken on the conveyance which constituted the servitude. Nor was any notice taken of it in the last mentioned feu-right.

No act of possession followed, nor was there room for any during many years. At length, in 1791, when Mr. Ferguson was proceeding to build on the ground, an interdict was applied for and obtained by Mr. Gray for stopping the work, as contrary to his right of servitude. In opposition to this claim of servitude, it was

Pleaded: Servitudes, it is true, may be constituted without infeftment. But, on the other hand, in respect to singular successors, a mere latent deed is by no means sufficient for that purpose. Possession is ever indispensably necessary; either preceded by an express grant, or continued during the years of prescription; Stair, B. 2. Tit. 7. § 1; Ersk. B. 2. Tit. 9. § 3.

This rule applies indiscriminately to servitudes, whether positive or negative. The latter indeed, while nothing occurs tending to contravene them, may not, like the former, be capable of actual use or possession; but they admit what in the Roman law is termed *quasi* possession. The right may be engrossed in the title-deeds and infeftments, of both the servient and dominant tenements; or it may be established by a declarator. It ought more especially to be inserted in the infeftments of the servient tenement, that it may appear on record for the benefit of those who may purchase that tenement, or lend money on the security of it.

This the proprietor of the dominant tenement can easily effect, so as to render it binding upon singular successors, by requiring the seller, when the intended purchaser is known, to specify the servitude in the disposition; and, at all events, he can, by an action, and an inhibition on the dependence, oblige the owner of the servient tenement to insert the servitude in his titles, and to infeft himself on these.

Of the opposite doctrine, the consequences would be truly alarming. The complete security which our law affords to creditors and purchasers in respect of land-

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A negative servitude granted by a written contract, effectual against a singular successor, without registration, or any previous visible exercise of the right.

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ed property, is one of its highest honours. In general this depends on our records. But as there are burdens on lands which cannot be learned from these, the law is careful otherwise to notify their existence. Thus positive predial servitudes may be constituted by private contract, without infeftment or registration; but, in order to render them effectual against singular successors, possession, a means of information no less perfect than any record, is indispensably necessary. The case of tacks is another instance of the same kind. But were negative servitudes to require no notification by the records, while in their nature they are incapable of visible possession, there would be a burden imposed on lands, of whose existence the law had provided no means of being apprized; and such an one as might totally annihilate their value. No instance of this can be stronger than the present, where, apart from the purpose of building, the subject in question is of little value.

Publication by the records, therefore, seems essential to the validity of negative servitudes; though infeftment may not be always necessary, as the same end may be served by inserting in the register of sasines, the bond or other deed by which this servitude is created. Accordingly many instances of that kind, as well as of infeftments in servitudes, appear on record.

Answered: In order to constitute any predial servitude, nothing more is necessary, than the consent, on the one hand, of the owner of the servient tenement expressed in writing; and, on the other, such a possession, or exercise of the right, as it is capable of.

Servitudes may likewise be constituted by prescription; in which case it is true, the mere enjoyment or use of negative servitudes, such as that of light and prospect, would not be sufficient, without hindering the owner of the servient tenement to use his freedom; Stair, B. 2. Tit. 7. § 9. But when the servitude is founded on a grant, then such use or enjoyment is amply sufficient. Ibid.

It has been admitted, that infeftment is not necessary. Of this, however, the unavoidable consequence is, that publication by the records is no less unnecessary; for it is to the validity of infeftment alone that registration is essential. And if such be the state of the law, all questions respecting the expediency of recording deeds imposing servitudes are out of place here; because it is the Legislature alone which can make a new law. As to the extraordinary mode proposed, of compelling registration by an action, and an inhibition on the dependence, it is enough to observe, that the law requires no such proceeding.

Mr. Erskine accordingly maintains, that "negative servitudes, *e. g. altius non tollendi*, or *non efficiendi luminibus*, are accounted effectual against the singular successors of the granter, without use, by the bare agreement of parties." B. 2. Tit. 26. § 35.

The Lord Ordinary sustained the claim of the negative servitude; and on advising a reclaiming petition and answers,

The Court adhered to that interlocutor.

A second reclaiming petition having been preferred, and followed with answers, was also refused. No. 14.

Lord Ordinary, *Hailes.* For Mr. Gray. *Solicitor-General, A. Campbell.*

Alt. Lord Advocate, *Dean of Faculty, Hay.* Clerk, *Home.*

S. *Fol. Dic. v. 4. p. 280. Fac. Coll. No. 202. p. 424.*

## SECT. II.

Difference between Servitudes and Personal Rights.—Servitude implies a proper Dominant Tenement.—Servitude to a Barony.

1682. *March.*

Mr. ANDREW WILSON *against* WAUGH and WHITE.

No. 15.

THE Laird of Ardross having built a church at the Ely, and localled a stipend to it upon several parts of his lands by a private mortification, which was quarrelled by a singular successor, after the minister had been above 40 years in possession;

The Lords found, That the mortification not being made by appointment of the commission, nor secured by infeftment, it could not affect the defender's lands, but in proportion with the whole ancient barony; to which the defender condescended, (though not obliged for any part in strict law) the lands not being disposed to him with any such burden. And the mortification being constituted by way of grant, obliging the mortifier and his heirs, &c. and not by a real right, the Lords would not sustain it as real by possession like a servitude.

*Fol. Dic. v. 2. p. 373. Harcarse, (INEFTMENT) No. 590. p. 164.*

1686. *January.* PETER *against* LADY ECCLES.

No. 16.

FOUND, That a bond of thirlage to a person's mill, for payment only of outsucken multure, being clothed with possession, was a real servitude against the granter and his singular successors.

*Fol. Dic. v. 2. p. 373. Harcarse, (SERVITUDE) No. 850. p. 242.*