

The Court adhered.

Counsel for the Pursuer—T. B. Morison.
Agent—Andrew H. Hogg, Solicitor.

Counsel for the Defender—Sol.-Gen.
Asher, Q.C.—Cooper. Agent—James Wat-
son, S.S.C.

HOUSE OF LORDS.

Thursday, July 20, 1893.

(Before the Lord Chancellor (Herschell), and
Lords Watson, Morris, and Shand.)

COWIE v. MUIRDEN.

(*Ante*, vol. xxviii. p. 605, and 18 R. 706.)

*Personal or Real—General Disposition—
Annuity Declared to be a Real Burden—
Completion of Title by Notarial Instru-
ment—Titles to Land Consolidation Act
1868 (31 and 32 Vict. c. 101), sec. 19, and
Schedule L.*

In a general settlement a testator conveyed to his son his whole estate, heritable and moveable, "but declaring that this disposition and conveyance is granted and is to be accepted of under the following burdens, . . . which are hereby declared to be real burdens on the estate hereby conveyed." These burdens included, *inter alia*, an annuity of £35 in favour of the disponent's sister. The disponent completed his title by notarial instruments (in terms of Schedule L, sec. 19, of the Titles to Land Consolidation Act 1868), each of which, after setting forth the conveyance in the general disposition, and describing the several subjects in which the disponent was infeft, narrated at length the clause declaring the said authority to be a real burden. These notarial instruments were duly recorded.

Held (rev. the decision of the Second Division) that a real burden was created on the lands.

Expenses—Bankruptcy.

When the trustee in a mercantile sequestration engages in litigation, he is personally liable for costs to the opposite party.

This case is reported *ante*, vol. xxviii. p. 605, and 18 R. 706.

Jane Cowie appealed.

At delivering judgment—

LORD CHANCELLOR.—This action was raised by the respondent, who was trustee under the sequestration of the estates of Alexander Cowie, in order to have it declared that an annuity of £35 had not been validly or effectually constituted a real burden upon the heritable subjects described in the summons. In the year 1881 Thomas Cowie died, leaving a trust-disposition and settlement by which he conveyed to his son Alexander Cowie, the bankrupt, his whole estate,

heritable and moveable, real and personal, of which he should die possessed. The dispositive clause, after thus conveying the whole estate, proceeds in these terms— "But declaring that this disposition and conveyance is granted, and is to be accepted of, under the following burdens, conditions, obligations, and declarations, which are hereby declared to be real burdens on the estate and effects hereby conveyed." Then follows a statement of certain burdens, including among them the annuity of £35 per annum now in question. The heritable estate belonging to Thomas Cowie consisted of five subjects, and Alexander Cowie completed his title to those in the year 1882, in virtue of the general disposition to which I have alluded by expediting and recording notarial instruments in accordance with the terms of Schedule L of the Titles to Land Consolidation (Scotland) Act 1868. Each of these instruments set forth Thomas Cowie's title and infeftment, and the general disposition granted by him to which I have referred, and each of them narrated specifically and at length the real burdens purporting to be constituted, as I have said, by the general disposition and settlement. Each of these notarial instruments was duly recorded in the register of sasines, and the clause of annuity in favour of the appellant, declared to be a real burden on the disponent's right, was entered on the records.

The ground upon which it was contended that, under the circumstances to which I have referred, the annuity was not effectually constituted a real burden upon the heritable subjects, was that the title of Alexander Cowie was derived from a general disposition which did not contain a description of the lands to be affected. It is no doubt true that a real burden can only be constituted upon lands specifically described; but it is equally clear that even if lands specifically described in a disposition be thereby declared subject to a burden, that does not in itself make the burden a real one; it can only be made real by infeftment. Before the Titles to Land Act was passed, a disponent who was not an heir could only get infeftment in land conveyed to him in general terms by obtaining a decree in an action of adjudication followed by a charter of adjudication. By this process a real right was obtained to the lands specifically described in the charter; but this real right was subject to all debts which having been made a burden on the general conveyance by apt words in the dispositive deed, had been feudalised and become real burdens.

The question which is to be determined in the present case is, whether where a title is completed, not in the manner which was alone available prior to the Titles to Land Act, but in the manner which is provided for by the enactments contained in that Act, the title obtained by the appropriate instruments in the form prescribed by Schedule L can be and ought to be effectual to make burdens, which by appropriate words are declared to be burdens in the dispositive clause of a general conveyance,

real burdens. This depends upon the construction of the 19th section of the Titles to Land Consolidation Act 1868. That section provides that "where a person shall have granted or shall grant a general disposition of his lands, whether by conveyance *mortis causa* or *inter vivos*, or by a testamentary deed or writing, and whether such general disposition shall extend to the whole lands belonging to the grantor, or be limited to particular lands belonging to him, with or without full description of such lands, it shall be competent to the grantee under such general disposition to expedite and record in the appropriate register of sasines a notarial instrument in, or as nearly as may be in, the form of Schedule L hereto annexed; and on such notarial instrument, or any similar notarial instrument, expedite in virtue of any Act of Parliament hereby repealed being so recorded, such grantee shall be in all respects in the same position as if a conveyance of the lands contained in such notarial instrument had been executed in his favour by the grantor of the general disposition." The schedule referred to in that clause, which gives the form of the notarial instrument, prescribes that it shall be stated that there was presented a disposition (specifying the disposition or instrument), which had been recorded in the register of sasines, by which a certain person was infeft in the lands, and then describing the lands or other subjects as they are described in the disposition or instrument; and the schedule contains this clause—"If the deed be granted under any real burden, or condition, or qualification, add here, 'but always under the real burdens,' &c."

Now, it appears to me that the design of this statute was to provide a simpler method of completing titles than that which had been heretofore in use, and that where the dispositive clause in the general conveyance purports to subject the land conveyed to certain real burdens, it is only right that the notarial instrument should follow the terms of the dispositive clause, including the declaration of these real burdens. I can see nothing in the statute or in the schedule to point to another conclusion; and inasmuch as the former method of making up titles is in no way put an end to, it would certainly be strange if a disponee by making choice of a particular method of making up his title should be able to obtain a real right in the land free from any burden, whereas by making it up in another way he could only obtain a real right subject to the burden. I cannot think that there was any such intention in the Legislature when this statute was passed, and I confess I cannot myself feel any difficulty in giving to it the construction contended for by the appellants.

The difficulty chiefly felt in the Court below, which led, I think, to this decision, arose from the authority, or the supposed authority, of the case of *Williamson v. Begg*, May 12, 1887, 14 R. 720, as determining the question which now comes before your

Lordships for consideration. *Williamson v. Begg* was treated as having decided that the statute to which I have referred, and the schedule in so far as it related to the statement of the real burdens, only applied where the disposition was specific as well as general. I do not think that any such point was decided in the case of *Williamson v. Begg*. That case was an action brought by a person to whom certain rights had been given under a disposition, to recover damages against a law-agent who had been concerned in making up the title, on the ground that he had been guilty of a breach of duty in not having had it made up in such a form as to constitute this obligation a real burden, whereby the person who had the right to the obligation had been damaged. In *Williamson v. Begg* the words which purported to declare that these obligations should be real burdens were not contained in the dispositive clause; and it was of course incumbent upon the pursuer in that case to make out that if the defender had done his duty the result would have been to create this obligation a real burden. He failed, to my mind, to establish any such duty on the part of the law-agent. The dispositive clause was set out in terms in the notarial instrument, but in that dispositive clause was not contained the language which it was suggested created the real burden; it was found in a subsequent part of the disposition. Therefore under those circumstances the foundation upon which the claim of the pursuer was rested entirely failed. It is quite true that in the judgment of the learned Lord President observations have been found which do appear to indicate an opinion on his part such as I have alluded to, that the provision in the schedule—the statement of the real burdens—is only applicable where the disposition is specific as well as general. With all respect, I have already given my reasons for differing from the view of the Lord President; and I do not find in the judgments of any of the other learned judges language which indicates that they were resting their judgments upon such a ground.

I have only to add that I have carefully perused the judgment of Lord Rutherford Clark in the Court below, and that I entirely concur in all that that learned Judge has said.

LORD WATSON—The late Thomas Cowie by *mortis causa* settlement disposed and assigned to his son Alexander the whole estate heritable and moveable belonging to him at his death, subject to certain provisions which he declared to be real burdens on the estate and effects thereby conveyed. One of these provisions was a free annuity of £35 payable to his daughter, the appellant, during her lifetime.

After the death of the testator, Alexander Cowie, as his general disponee, completed titles to various heritable subjects in which the deceased had been infeft, by expediting and recording notarial instruments in terms of section 19 of the Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict.

c. 101, sec. 19), and relative Schedule L. In all of these instruments the appellant's annuity was inserted at length, and declared to be a real burden upon the lands specifically described, in the same language which the testator used in making it a burden upon his general conveyance.

It is material to notice that in the settlement the burden is amply introduced as qualifying the words of disposition. If the testator had in the dispositive clause described any particular lands, it would have attached to these lands. So also if the testator had executed special conveyances in terms of the notarial instruments expedited by his son, it would have constituted a valid incumbrance upon the lands conveyed. Upon that point I entertain no doubt, and it was not disputed by the respondent's counsel.

Alexander Cowie's estates were sequestrated, and the respondent, who is trustee in the sequestration, brought this action in order to have it found and declared that the annuity has not been validly constituted a real burden upon the bankrupt's land. The Lord Ordinary decreed in terms of the conclusions of the summons, and his interlocutor was affirmed in the Inner House by a majority of two Judges against one.

All the learned Judges were of opinion that this case is directly ruled by *Williamson v. Begg*, 14 R. 720, decided by the First Division in 1887, which they accepted as *res judicata*, to the effect that no real burden which a general conveyance proposes to impose, however apt the language in which it is expressed, and however intimate its connection with the words of conveyance, can be specialised and feudalised by means of a notarial instrument under the Act of 1868. The Lord Justice-Clerk (Macdonald) indicated that but for that authority he would have decided in favour of the appellant. Lord Rutherford Clark was very strongly of opinion that the decision of the First Division was wrong. Lord Trayner was the only Judge who approved of the decision in the sense in which it was accepted.

I am by no means satisfied that the question arising for decision in this appeal was really decided by the Court in *Williamson v. Begg*. The action in that case was at the instance of the annuitant, who claimed damages from the law-agent by whom the titles of the disponent were made up, in respect of his failure to make the annuity a valid burden on the lands. In other respects the circumstances of that case and the present are very similar, with this important difference, that in *Williamson v. Begg* the annuity was not in apt terms made a real burden by the general conveyance, and would not have constituted a valid burden if the conveyance had been special. The disponent was therefore under no obligation to convert into a real, that which his author had only made a personal burden.

From an examination of the report I infer that the decision of the Court in *Williamson v. Begg* went upon these two

grounds—(1) that the declaration relating to the pursuer's annuity merely gave rise to a personal obligation, and was ineffectual to create a real burden in any conveyance; and (2) that the disponent in making up the titles of the disponent was not employed by, and therefore owed no duty to, the pursuer. I do not doubt that either of these reasons was sound and in itself sufficient to sustain the judgment. With the first two paragraphs of the late Lord President's opinion I agree. But I think Lord Rutherford Clark is warranted, by the terms of the third paragraph, in ascribing to that eminent Judge the doctrine that the direction in Schedule L, with respect to the insertion of real burdens, only applies in those cases where the conveyance is special as well as general, and the burden has already been duly imposed upon lands specially described. Lord Mure's judgment does not necessarily imply his concurrence upon that point, and my noble and learned friend opposite (Lord Shand) takes no notice of it in his opinion, which proceeds on the view that the declaration merely created a personal obligation on the disponent, which he was not bound to convert into a real burden, there being no condition or declaration that he should do so. Lord Adam's concurrence in the result at which his brethren had arrived does not, in my opinion, express his assent to all the views of the Lord President.

Apart from the authority, real or supposed, of *Williamson v. Begg*, the point does not appear to me to be attended with any difficulty. Until the passing of the Titles to Land (Scotland) Act 1858 (21 and 22 Vict. c. 76), sec. 12, which was repealed by the consolidating statute of 1868, a disponent who was not the heir could not get infestment in land generally conveyed to him except by obtaining decree in an action of adjudication directed against the disponent's heir, followed by a charter of adjudication. The effect of his pursuing that course was not only to give him a real right in the lands as specifically described in the decree and charter, but to feudalise, as a real burden upon those lands, every debt which had been duly made a burden upon the general conveyance. The object of the legislation of 1858 and 1868 was to provide an alternative and less cumbrous method of vesting feudally in the disponent the estate and interest conferred upon him by the general conveyance. It can hardly have been the intention of the Legislature to give the disponent who avails himself of that method an absolute and unqualified estate in cases where his author has by his words of disposition only given him a limited or qualified right. Yet that is the practical result of what the majority of the learned Judges have held to be the law applicable to this case.

Section 19 expressly provides that a notarial instrument, in the terms prescribed by Schedule L, shall, when recorded, place the disponent in the same position as if a conveyance of the lands therein specified had been executed in his favour by the grantor of the general disposition, and had

been followed by an instrument of sasine duly recorded. Tried by that test, the notarial instruments expedé by Alexander Cowie effectually constitute the appellant's annuity a real burden upon the lands therein particularly described. The question is therefore narrowed to the single issue whether the words constituting the burden were warrantably introduced into these instruments. To that issue I can only see one answer. The words of disposition in the general conveyance must be repeated in the notarial instrument; and if these words are qualified in the general conveyance, the qualification must appear in the notarial instrument. Any other construction of the statute would defeat the purpose which it was meant to serve. Then the schedule at the end of the dispositive clause gives this direction—"If the deed be granted under any real burden, or condition, or qualification, add here, 'but always under the real burden,'" &c. The deed referred to is the general disposition; and the direction places beyond doubt what to my mind would be sufficiently clear without it, viz., that the notarial instrument was meant to repeat the very words of disposition used in the general conveyance, with all the burdens and conditions by which they are qualified.

I shall only add that I concur in every word of Lord Rutherford Clark's reasoning upon the construction and effect of the statute. I accordingly concur in the judgment which has been moved by the Lord Chancellor.

LORD MORRIS—My Lords, I concur.

LORD SHAND—It seems to me to be of considerable importance in this case that the precise question to be determined should be ascertained and defined.

Alexander Cowie, the bankrupt, in whose right the respondent, as trustee on his sequestrated estate, maintains the present action, was the donee under the general disposition and settlement of his father the late Thomas Cowie. That deed did not convey the testator's lands by any special description of them, but did convey the "whole heritable estate" belonging to the testator, and as part of the dispositive clause it was declared that the conveyance was granted under the real burden of the annuity given to the appellant. The donee in completing his title by notarial instrument, recognised the validity of the real burden in so far as he could do so; for after setting forth the various titles under which his father held different lands, and giving the special descriptions of these, he embodied in the instrument the full terms of the dispositive clause of the general settlement, including that part of it which declared the annuity to be a real burden on the lands. In this way the real burden, by the act of the general donee, entered the register of sasines, by which at least full notice of it was given to anyone proposing to have any dealings relating to the lands. In this state of the title the only question to be determined is, whether the terms of the general conveyance as the

first step in the constitution of the real burden, warranted the second step of feudalising it, by infestment or registration under the notarial instrument. The decision in effect is, as expressed by Lord Wellwood, that the real burden was not effectually constituted, because there was no proper warrant for the act of the notary in expeding and recording the notarial instrument.

Their Lordships in the Court of Session have, I think, all held that this question was, in effect at least, decided by the case of *Williamson v. Begg*, in the decision of which I took part. I think this is not so, and I further think that this conclusion has been formed by the omission to observe one important fact, which appears from the report (14 R. 720). In that case there was a clear defect in the first step towards the constitution of a real burden, for the declaration founded on was no part of the dispositive clause. This is expressly stated by the reporter, and having had an opportunity of seeing a copy of the deed, I find that at the end of the dispositive clause, and before any mention of real burdens, these words were interposed—"And I hereby nominate and appoint the said Thomas Beveridge to be my sole executor." It is true the learned Lord President in the earlier part of the first part of his opinion referred to the absence of any special description of the lands, in the view, as I think, of more fully discussing what would be the effect of a notarial instrument under the statute, which he does in the third paragraph; but his Lordship added—"But there is a further reason why this declaration cannot receive effect. It cannot be followed by infestment. The only way of effectually constituting a real burden is to insert a provision to this effect in the dispositive clause, so that it shall enter the sasine." And his Lordship goes on to say with reference to this point—"But I do not think that in the end it was seriously contended that the declaration had the effect of creating a real burden"—meaning obviously that it was not contended that the deed was so expressed as effectually to form the first step in the constitution of a real burden, to be completed by a recorded notarial instrument.

Professor Bell in his *Principles*, section 920, states—"The burden must be declared in the dispositive clause," and there is abundant authority for this. The notary completes his duty by embodying that clause, with any mention of burdens which it contains, in the notarial instrument. The principle to be applied must be the same, whether the matter interposed between the dispositive clause and the declaration intended to create the real burden be expressed shortly in a few lines or should occupy pages of the manuscript. In either case the interjected provision or provisions prevent the subsequent declaration from forming part of the dispositive clause of the deed. Accordingly, such recollection as I have of the case, after the lapse of upwards of six years, confirmed

by the terms of the report, is, that the pursuer, unable to say the deed was effectual to form in itself the first step in the creation of a real burden, yet maintained that it was clear the testator meant to do what he had failed to do, and that in some way the defender, as the law-agent completing the title, was bound to give effect to this intention, and to see that the legacy in the pursuer's favour was made a real burden on the lands. The deed contained no terms of obligation on the general disponee to constitute a real burden, and no condition that by acceptance of its benefits he should become bound to do so, and my opinion was and is that in these circumstances the mere ineffectual attempt by the testator to create a real burden did not infer such an obligation, and that at all events it could not confer any obligation on the law-agent there sued. If the judgment of the learned Judge, Lord Mure, and of myself, and the general concurrence of my learned brother Lord Adam, be read in the light of what I have now said, I think it becomes apparent that the rubric of the report is correct in stating as merely "Opinion (per the Lord President)" the *dicta* by his Lordship, which have been so fully discussed in the House and in the Court below. I think it is clear that his Lordship's views as so expressed were not the ground of decision of the case, and were not necessary as grounds even of his Lordship's judgment.

On the question itself, which now I think occurs for decision for the first time, I agree with the views of my noble and learned friends. I have already adverted to the fact that the disponee has himself recognised the validity of the real burden, or at least has by the mode of making up his title accepted the lands expressly under the real burden which by his act now qualifies his absolute right on the record. I should be very unwilling to hold that in such a case the disponee's own interpretation of the effect of the general disposition, and his election (even were it an election only and not an obligation) to make the burden real by registration, would not be effectual. I agree with my learned brother Lord Rutherford Clark in the view which he thus expresses—"He made up his title in such a form as he thought would be effectual to make the burden real. The question is whether the form was sufficient for that purpose, and that question cannot, in my opinion, depend on the rights or obligations of the grantee, but on the legal effects of the title which he has actually made up."

This view is sufficient for the decision of the case. But I must add that I also agree in holding that a general disponee who obtains his right by a conveyance in apt terms, qualified or restricted by a declaration that the general disposition is subject to real burdens, is bound to give effect to this declaration, and can be required to do so by having these burdens entered in the register of sasines; and adopting the reasons stated by your Lordships and by

Lord Rutherford Clark in his carefully reasoned opinion, I also hold that this can be effectually done by a registered notarial instrument under the statute, in the mode adopted in the present case.

On the question of costs, WILSON, for the respondent, submitted that costs should only be given against the respondent *qua* trustee.

LORD WATSON—The trustee must litigate at his own expense. That has been decided again and again.

MR WILSON—He has a judgment of two Courts in Scotland in his favour, and I should submit that the case of *Williamson v. Begg* justified his proceeding.

LORD WATSON—If he chooses to litigate he must see that the creditors back him, or he must sue himself personally.

LORD SHAND—Quite so.

The House reversed the decision of the Second Division and allowed the appeal with costs.

Counsel for the Appellant—T. Shaw—Greenlees. Agents—Keeping & Gloag, for A. Lawrie Kennaway, W.S.

Counsel for the Respondent—John Wilson—Le Breton. Agent—Andrew Beveridge, for Welsh & Forbes, S.S.C.

Monday, July 24.

Before the Lord Chancellor (Herschell), and Lords Watson, Macnaghten, Morris, and Shand.)

MACDONALD AND ANOTHER *v.* HALL AND OTHERS.

(*Ante*, vol. xxix. p. 465, and 19 R. 567.)

Succession—Antenuptial Contract of Marriage—Provisions for Grandchildren, whether Onerous or Testamentary—Subsequent Trust-Disposition and Settlement by the Husband—Power to Increase Wife's Provisions.

A husband by an antenuptial contract of marriage disposed his whole estate, heritable and moveable, to his wife in *liferent* and to the child or children of the intended marriage, and the issue of the bodies of such children, whom failing to his own heirs whomsoever in fee, under a declaration that if there was no child alive at the dissolution of the marriage the wife's *liferent* should be limited to £150. There was no trust created by this deed, and the husband retained his whole estate in his own possession until his death. He died, predeceased by his only child, and survived by his wife and one grandchild, leaving a trust-disposition and settlement executed a few years before his death under which his wife was given the unrestricted *liferent* of