fiar, as appears by *l.* 58, *De Usufr.* Now, in money and houses, and other subjects which yield continual profits, *dies cedit* every day the money is lent or the house let. The annualrents of the money fall due *de die in diem*, notwithstanding the payment of them may be delayed to a longer day; and, therefore, as in this case annualrents were due to Selkirk for every day till he died, notwithstanding the conventional term was Whitsunday or Lammas thereafter, they behoved to be *in bonis mobilibus defuncti*, and so go to the executor. And this is agreeable to the principles of the civil law, *l.* 26, *De Usufr.*;—and, as there are no decisions in point in this affair, ought likewise to be the rule of our law.

The Lords found, That the executor had only right to the annualrents for the conventional terms preceding the Earl's death, and not for the time betwixt the last preceding term and the Earl's death. The *ratio decidendi* seems to be simply, that there was no more due at the Earl's death, because, by the conception of the bonds, the annualrent did not fall due, *de die in diem*, but only twice a-year. Add to this, that the creditor, by taking an infeftment of annualrent, had accepted of the rents of lands for the interest of his money. Now rents of land only fall due twice a-year, and this reason weighed once so much with the Lords, that in the year 1737 they found that the legal terms of Whitsunday and Martinmas, and not the conventional terms, ought to be the rule in these annualrents, as well as in the rents of lands.

N.B.—As to what was said that the *dies cedit*, or rents begin to be due at the legal terms, and that the *dies venit* at the conventional, that is not so easily understood. The origin of this rule I take to have been the custom of making one half of the rents payable at the sowing of the crop, and the other half after it was reaped, which by degrees passed into a law, as it was fit to have a general rule in that case.

In those things that continually yield fruit, such as money and houses, the argument seems to hold, for, there, *dies cedit* every day, however long the exaction may be delayed. And we do not know how the Lords would have decided if the bonds had been excluding executors without any infeftment; especially if the term of payment was past, when, by the style, annualrent is due *yearly, termly, and continually*, aye and while the sum is unpaid.

1740. *June* 26. Sir John Maxwell *against* Alexander M'Millan.

[Elch., No. 5, *Superior and Vassal*, and No. 4, *Suspension*; Kilk., No. 4, *Superior and Vassal*; and C. Home, No. 280.]

Sir John Maxwell held the lands of Cathcart and Goldenlees blench of Blair of that ilk, who disponed the superiority to Alexander M'Millan, and he, upon his author's resignation, expede a charter under the seal of the Prince, of whom Blair held the lands. Before M'Millan infeft himself upon this

charter, he raised a brief of division of the old extent of these lands, in order to ascertain, 1*mo*, The proportion of old extent that belonged to his lands, separate from that of Holms, which formerly made a part of the barony of Cathcart and Goldenlees, and belonged to another, both property and superiority; 2*do*, The proportion of old extent that fell to the particular tenements and possessions composing the foresaid lands of Cathcart and Goldenlees. Upon this brief a service is expede; but, before it could be retoured, Sir John offered a bill of suspension, craving, that the retouring, recording, and extracting the said service, should be stopt, for these two reasons:—1*mo*, That the only evidence the inquest proceeded on, was a charter in 1671, bearing the barony of Cathcart and Goldenlees to be a twelve and a half merk land, and another charter in 1703, bearing the lands of Holms to be a merk land; which is no evidence at all, since a retour is the only proof of an old extent. 2*do*, Mr M'Millan has assigned the precept of sasine in his charter to three different persons, giving to each of them such a part of the lands as by the verdict of the inquest was found to be a forty shilling land, and reserving to himself as much as corresponded to that extent; thereafter he and his assignees were infeft, by which means there are four votes made out of one blench superiority, and the vassal, who held only of one superior, now holds of four; which is a hardship he cannot be subjected to.

The reasons of suspension were debated on the bill, and the Ordinary on the Bills took the debate to report.

It was argued for Mr M'Millan,—1*mo*, That a suspension of a retour is a form unknown in our law; that the known method of setting aside a retour, is by an assize of error, and sometimes, as an extraordinary remedy, a reduction before the Lords is allowed; but a suspension of a retour was never before heard of. 2*do*, The vassal has no interest to quarrel the retour, since, if there is any error in it, he cannot be prejudiced thereby; whereas the superior has an immediate interest, as he is primarily liable to pay taxation, according to his old extent; and, as in the retour of heirs to the superiority, the old extent must be ascertained, Act 56, 1475, otherwise the retour will be null. 3*tio*, With respect to the splitting of votes, there is no law known to hinder it: besides, that it seems to be a little out of the vassal's way to be so solicitous about the qualifications of electors of members of parliament, especially of those who are his superiors. And 4*to*, As to the division of the superiority, whatever argument may be brought against it from the principles of the ancient feudal law,—yet, upon the footing feus are with us, there can be little difficulty in the matter. Feus were anciently donations for military service, and implied a variety of obligations of protection and fidelity; whereas, now, both superiority and property are the subject of commerce, and as they may be bought, there is no reason why they may not be sold, either in whole or in part; the vassal can divide his property into as many parts as he pleases, why then should not the superior have the same liberty with respect to the superiority?

To this it was ANSWERED,—1*mo*, As to the method of application by suspension, it was necessary in this case, as it was then vacation, and it may be the more easily allowed, as there is a process of reduction of the retour presently depending. 2*do*, The interest of the vassal is visible; for, though the superior

is liable *primo loco* for the taxation, yet he has recourse against the vassal in proportion to the extent of his lands, and it is as necessary that the old extent should be mentioned in the retour of the property as of the superiority, and an error in either case will equally annul the retour. *3tio*, Though there may be no express law against dividing of baronies into several votes, yet where that is done only with a view of creating votes, it is certainly against the spirit and meaning of the law; and whoever would take the trust-oath upon such a divided vote would be perjured* in an infamous degree. *4to*, It would be a very great hardship, if the superior could, by dividing the superiority, create as many superiors to the vassal as he pleased; by which means he would be liable to so many processes of non-entry, and so many other casualties falling by reason of different superiors; he must be at the expense of so many charters and sasines instead of one, which he had by his original feudal contract; and he must run so many different precepts against his superiors, if they refuse to enter him; in a word, he would be subject to so many other inconveniences, that in many cases it would be better for the vassal to give up his feu than hold it in this manner. It is laid down as a maxim, in the books *de Feudis, Vassallum non cogi pro uno feodo duas fidelitates facere*; and *B. 2. l. 55*, § 1, where the division of feus is treated of, this is added as a necessary requisite, *Ita tamen ut pro uno feodo vassallus plures dominos habere non compellatur.* And this doctrine is supported by the authority of our best lawyers, particularly Craig, *Dieg. 2, Book 2, versus finem,* where he lays it down as a certain rule, that the superior cannot divide the superiority, because thereby the condition of the vassal is rendered worse; for the same reason he cannot interpose a superior betwixt him and the vassal without the vassal's consent. This is agreed on by all our lawyers, and applies strongly to the present case, as it seems more inconvenient to hold of many superiors than to have one interposed. For this reason likewise, by our law, when heirs-portioners succeed, the superiorities fall to the eldest, and the reason given for it by Stair, Craig, and M'Kenzie, is, *ne deterior fiat vassalli conditio* by the superiority being split and divided; and upon these principles we have a decision, *July* 30, 1678, *Lady Luss* against ———. Nay, so strict is our law in this matter, that, even in favour of creditors adjudging, it does not admit a division of the superiority: in that case, Stair says, that the vassal need only take infeftment from the appriser that has the greatest interest, *B. 2, Tit. 4, p.* 17, though many specious reasons could be urged for a division in that case, which will not apply to this.

As to the argument drawn from the vassal's being empowered to divide his property into as many parts as he pleases, it is well known that there lies no direct action against the superior to force him to receive one vassal in place of another, either in whole or in part: he can only be obliged to it by the indirect method of adjudication, which is introduced by particular statute in favour of creditors, and cannot be extended to consequences, especially where there is not a parity of reason.

The Lords unanimously passed the bill: they all seemed to think that the vassal had an interest to see that his land should not be overvalued. Lord Kilkerran gave it as his opinion that a charter was no sufficient evidence of a forty

* These were Arniston's words.

shilling land; and Lord President, Lord Dun, and Lord Arniston, were all of opinion that the superior could not divide the superiority without the vassal's consent.

1740. *June* 20. DUNCAN CAMPBELL *against* CHARLES WEIR, and the Sheriff and Procurator-Fiscal of Lanark.

CHARLES Weir, procurator in the Justice of Peace Court of the shire of Lanark, was, by the sentence of the Lords, declared incapable of acting as agent or procurator before any court in Scotland, imprisoned for a month, and condemned to pay the pursuer's damages and expenses, for having fabricated an execution of a charge, upon a decreet of the Justices, against Campbell, to which he got a constable and two witnesses to put their names, and upon which he arrested and detained the said Duncan Campbell in prison.

The Lords apprehending, from some facts that came out in the examination of this affair, that Weir, the sheriff-substitute, and Buchanan the procurator-fiscal, had colluded with Charles Weir, in so far as to endeavour to screen him from punishment, ordered *ex officio* inquiry to be made into the matter. The fact, with respect to them, is shortly this:—The fiscal, *ex proprio motu*, without any application from the private party, who was satisfied with a warrant he had got from the bailie of the regality for apprehending Weir, applied to the Sheriff for a new warrant, not only against Weir, but against the constable and witnesses. This warrant he obtained, and executed in the most rigorous manner against the constable and witnesses, by carrying them most violently, from Hamilton, where there was a sufficient prison, to Ruglen; but, as to Weir, he allowed him to remain in his own house, under the custody of the Sheriff-officers. This being the fact, notwithstanding it was alleged that the prison in Hamilton belonged to the bailie of the regality, whereas the prison of Ruglen was the King's prison, and in the head burgh of the shire, and that Weir was not put into the tollbooth, because the Sheriff was in doubt whether he should not admit him to bail, for which he had given in a petition; yet the Lords found, that the procurator-fiscal had colluded with Weir to screen him from justice, and therefore condemned him to pay six pounds in name of fine, and expenses of the complaint, and the President severely reprimanded him. And the Sheriff-substitute was likewise reprimanded, though more gently, because, notwithstanding there was no direct evidence, yet there was some presumption that he was in the plot with the fiscal, to deliver Weir from justice; and because he ought to have a stricter eye over the officers of the court, and taken more care how his warrant was put in execution. The warrant itself, in this case, was not altogether legal, as it was conceived, it being to commit to *any* sure prison, whereas it should have been to commit to the *next* sure prison.

I shall relate here, *propter contingentiam causæ*, a decision of the like nature against Wilson, procurator in the Sheriff-court of Glasgow, July 12, 1740. This Wilson was condemned to pay £50 sterling to the complainer, Buchanan, for da-