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MURE, &c. *v.* MURE, &c.

plained of generally, in other respects with liberty to either party to apply to the Court, and to propose the further examination of James Niven as a witness, and the examination of any other person or persons as a witness or witnesses, to ascertain precisely what directions were given by Mrs Mure, as to cancelling the deed of 10th December 1805, and the true intent and meaning of such directions, and in case the Court shall think proper to permit such examination, the Court, in reviewing the said interlocutors, is to have such regard to the effect of such examination, as shall appear to them to be meet, and, after reviewing the same, to do in the said cause what shall be just.

For the Appellants, *John Clerk, John Blackwell.*

For the Respondents, *Sir Saml. Romilly, John Macfarlane.*

NOTE.—Ureported in the Court of Session.

1819.

THE DUKE OF ARGYLL, &c. *v.* LAMONT.

[Fac. Coll. Vol. xvii., p. 396.]

GEORGE WILLIAM, DUKE OF ARGYLL; JAMES FERRIER, Esq., his Commissioner; JOHN MACNEILL, the elder, and JOHN MACNEILL, the younger of Gigha; NEIL MACGIBBON, the elder, and WALTER MACGIBBON, the younger of Glasvar, } *Appellants;*

JOHN LAMONT of Lamont, Esq., . . *Respondent.*

House of Lords, 8th February 1819.

SUPERIOR AND VASSAL—MULTIPLICATION OF SUPERIORS.—Held that a superior who had, in giving his vassal a charter, included separate feus in one charter, was not entitled afterwards to sell the two superiorities separately, so as to multiply superiors on the vassal. Reversed in the House of Lords, and held that they might still be disjoined by a sale of the superiorities to two different persons.

The question in this appeal was, Whether the Duke of Argyll was not entitled to sell two superiorities of land belonging to him as distinct and separate superiorities, in consequence of having granted to the vassal in the lands, a charter including *both* in one title, in place of keeping them in different charters as formerly?

The Duke sold the superiorities separately to Messrs MacNeill and MacGibbon; and the respondent being vassal in the lands, brought an action of reduction and declarator to set aside the sale of these superiorities, namely, the lands of Kilfinan or Killinan and Mill of Auchaphour; and the lands of Cames, on the ground that by his titles, he had only one superior for both,—that he was not in law bound to have more than one superior over him, and that the vassal cannot be compelled to acknowledge more than one.

In defence, it was stated that there was no multiplication of superiors, as the two farms in question, had always been separate estates, and never consolidated; that the Duke of Argyll's commissioner, who granted the charter in question to the vassal, Mr Lamont, was only authorized to grant charters, conform to the tenor of the former charters, and that the charter in his favour in 1791, if disconform, was void, and that it contained a clause saving the Duke's right.

A supplementary action was added, and both actions having come before Lord Hermand, his Lordship pronounced this interlocutor:—"Having heard parties' procurators on the April 30, 1811.
"remit from the Court, repels the defences, sustains the
"reasons of reduction in these conjoined process; and finds,
"reduces, decerns and declares, conform to the conclusions
"of the libels."

The appellants gave in a representation against this interlocutor; and the Duke also brought an action of reduction of the charter 1791, so far as the lands of Cames were concerned, on the ground that Mr Ferrier, the Duke's commissioner, had no power to grant such a charter under his commission, which authorized him only to grant charters, *agreeably always to the tenor of the former charters*, &c. To this last action, the respondent conjoined a process of relief against Mr Ferrier, which actions having been conjoined, the Lord Ordinary pronounced this interlocutor:—"Having March 7, 1812.
"heard parties' procurators in these conjoined actions of
"reduction and relief, in the action of reduction at Mr
"Lamont's instance, against the Duke of Argyll and others,
"refuses the desire of the representation for his Grace; of
"new reduces, finds, decerns, and declares, conform to the
"conclusions of the libel; in the action of reduction at the
"instance of the Duke of Argyll, against Mr Lamont, repels
"the reasons of reduction, assoilzies the defender and
"decerns."

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THE DUKE OF ARGYLL, &C. *v.* LAMONT.

May 14, 1812. Nov. 26, 1812.

On representation, his Lordship adhered.

The appellants then reclaimed to the First Division of the Court, contending that there was no ground for holding that the two feus had been consolidated; whereupon that Division of the Court pronounced this interlocutor: "The Lords "having resumed consideration of this petition, and advised "the same with the answers thereto, they refuse the desire "of the petition, and adhere to the interlocutors complained "against: Find the petitioners liable to the respondent in "expenses,"* &c.

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* Opinions of the judges:—

LORD BALMUTO.—"These feus were originally distinct. The superior, without consideration of any sort, threw them into one charter; and so far did him a great favour, but still keeping the *reddendo* distinct. In so doing the superior did not part with his privilege of again separating and disposing of them."

LORD BALGRAY.—"I differ. It is true the vassal could not have compelled the Duke to put these feus into one charter. But, in fact, Mr Ferrier did so; and the Duke for fifteen years takes the feu-duties under that charter. He must, therefore, be held as the Duke's vassal. As commissioner, Mr Ferrier had power to renew rights in *any form*, though not to grant new feus. Now, being once possessed of a feudal investiture, the vassal is entitled to rest on it, as a consolidation of the several feus made with consent, and by the will and act of the superior. If the vassal were now to insist for separate charters of these feus, the Duke is not obliged to give them. If that be good on the one side, it must be so on the other. The favour of law is with the vassal. He is entitled to the advantage of an oversight even, if there is no fraud on his part."

LORD PRESIDENT HOPE.—"I agree with Lord Balgray. The separate *reddendos* must remain separate, unless in case of a barony. As *reddendos* often are so various, it seems necessary to keep them distinct. They are always kept up till the end of time, as in the famous Lennox *retours*. This, then, is one individual charter, homologated by the Duke. In truth, unless the Duke meant to consolidate for the future, his charter had no meaning, and he did no favour. What good deeds Lamont did to the Duke we don't know; I cannot say whether it was a gratuitous deed or not."

LORD ARMADALE.—"I agree with Lord Balmuto. Superiors cannot divide one original and simple feu. But here the feus were distinct, and were thrown into one charter, to save expense only, and without any view otherwise to alter their situation."

The Court having been divided in pronouncing this interlocutor, the appellants presented another reclaiming petition, contending, 1st, The question regarded two separate feus, not united. 2d, That therefore there was no consolidation of these feus. 3d, That the Duke's commissioner had no powers to consolidate these two feus. 4th, The want of consent from the Duke. 5th, The want of consideration; and, 6th, That no approbation or homologation on his part had taken place; and it was also discovered at this stage, that no sasine had followed on the Charter 1791 in favour of Mr Lamont, and a sale of the *dominium utile* of the lands of Kilfinan, by Mr Lamont to Mr Cathcart, had taken place.

Feb. 18, 1813.

The Court pronounced this interlocutor: "Alter the interlocutor reclaimed against, in so far as relates to Messrs "MacNeill and MacGibbon; sustain the defences for them "in the actions at Mr Lamont's instance, assoilzie them from "the conclusions of the libel and decern; find them entitled "to expenses; and with respect to the actions at Lamont's "instance against the Duke of Argyll and Mr Ferrier, remit "to the Lord Ordinary to hear parties' procurators further, "and to do therein as to him may seem proper."*

(The opinions of the Bench being equally divided, Lord Hermand was called in.)

LORD HERMAND.—"I am clear for adhering."

Hume's Coll. Session Papers, vol. cxv.

* Opinions of the Judges:—

LORD GILLIES.—"There were substantial reasons formerly for the rule as to multiplying superiors, because it doubled the very onerous services of the vassal, but these are inapplicable now. *Separatim*. These two persons bought these superiorities *bonâ fide*, without any knowledge of this new charter to Lamont, which I observe was not then (if yet) followed with infeftment. Till sasine it is not *ultra vires* of the superior to sell those superiorities. Lamont had not, therefore, a completed feudal right under the charter in regard to one of these feus. The state of his right is not intrinsically or really altered. It is just the common case of a double-right and the first grantee infeft. So that, without going into the question of union of the two feus, I am for sustaining the defences for MacNeill and MacGibbon on that ground. The other matter of the union can only be tried if Lamont shall persist in an action of damages against the Duke, for selling the superiorities."

LORD ARMADALE.—"The feus and the services are still kept distinct in the new charter."

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The respondent then reclaimed, and in consequence of the death of some of the judges, it came to be advised before

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LORD CRAIG.—" I am of the same opinion."

THE LORD PRESIDENT (HOPE).—" I was at first for the interlocutor as I then understood the facts. But I find now, that Lamont is not yet infeft, so that in competition with the two purchasers, Lamont cannot prevail. There is, no doubt, an ulterior question of warrandice against the Duke, but that is not here, and has never been heard before the Lord Ordinary, so I am for altering as to MacNeill and MacGibbon, with expenses, and remit to the Ordinary to hear on the question of warrandice."

Hume's Collection of Session Papers, vol. cxix.

LORD GILLIES.—" These feus were distinct formerly. It was supposed the Duke of Argyll, by the entail of his estate, would not have power to sell these superiorities. Therefore he did not object to accommodate his friend, Mr Lamont, by putting these two superiorities into one charter.

" There is some thing very like an error *in substantialibus*, therefore, here, but, perhaps, that is not sufficient to set it aside on that ground.

" There seems to have been no infeftment on the charter to Lamont. It is, therefore, only a *nudum pactum* according to Craig, from which the granter might resile. But still, nobody looking at the records could know any thing of this charter. Until Lamont was infeft, the Duke was not barred from granting these feus to the defenders, for until infeftment, that was not *ultra vires* of the Duke.

" Perhaps the pursuer may bring an action against the Duke, but I suspect he will not make much of this. A charter or a disposition not clothed with infeftment, cannot affect the right of third parties."

LORD BALMUTTO.—Same.

LORD ARMADALE.—Same. " They are not mixed, but stated as separate feus in the charter."

THE LORD PRESIDENT.—" As there was no infeftment in the person of Lamont, I now think the interlocutor wrong. If he had been infeft, it might have been very different.

" The damages may be remitted to the Lord Ordinary."

Campbell's Session Papers.

At advising, 23*d June* 1813,

Mr MACKENZIE said, " The case reported by Elchies, No. 9, superior in vassal, I think is a case in point, and seems to offer a strong answer to the plea, that the right was personal, because there it was found, that the personal clauses were binding on the purchaser."

three judges, Lord Succoth declining, in consequence of relationship to Mr MacNeill. By a majority of two against one this interlocutor was pronounced: "Alter the interlocutor "reclaimed against, and in the action of reduction at Mr "Lamont's instance, against the Duke of Argyll and others, "reduce, decern, and declare in terms of the conclusions of "the libel; and in the reduction at the instance of the Duke "of Argyll against Mr Lamont, repel the reasons of reduc-"tion, assoilzie the defender, and decern: Find the respond-"ents liable in expenses to the petitioner, appoint an account "thereof to be given in, and remit to the auditor to tax the "same, and to report; and supersede extract until first box-"day, in the ensuing vacation,"* &c.

Against these interlocutors the present appeal was brought by the appellants to the House of Lords.

Pleaded for the Appellants.—1st, The rule of the feudal law, that the vassal cannot be compelled to acknowledge more than one superior for one feu, does not apply in this case, where there are two feus granted at different times to different persons, for payment of different feu-duties and casualties which have passed through various vassals by separate titles, and have only been included in one recent charter, granted, not for consolidation, no such form as to superiorities being known or practised, or even spoken of, but for other purposes. 2d, Suppose such form of consolidation was competent, Mr Lamont is not in a situation to avail himself of it, for this reason, that he is not the Duke's vassal, he not being infeft in the lands of Kilfinan, one of the feus; it is therefore impossible, that these lands, *in hæreditate jacente* of the last vassal, Mr Lamont, can unite or consolidate with the lands of Cames, which stand vested in the person of Mr Lamont, as vassal. 3d, The single charter in which the lands were so included, was not granted by the Duke of Argyll, but by his commissioner or steward, who had no power to grant a charter different from former charters, and in particular, no power to give the vassal what did not

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LORD HERMAND.—"The case from Lord Elchies seems decisive."

THE LORD PRESIDENT.—"I come now back to my first opinion, and was misled formerly by a specialty mentioned by Lord Gillies, in which I now think there was nothing."

* It is stated in the Faculty Collection, that the case was decided on the general question of law.

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formerly belong to him, *i.e.*, the right to insist in his present challenge. If there could be a doubt on this subject, it could only be resolved by the tenor of the original charters, and these, surely, give no support to what is here demanded. 4th, No consent was asked or given, either by the Duke or his steward, to grant a charter such as Mr Lamont construes his one to be; no agreement of the kind was proposed or spoken of; and no consideration paid or offered for such a grant. The parties could not have done such a thing if they had even agreed, because they could not disunite the lands from the baronies to which they belonged, and make a new creation of them, no subject being possessed of such a power. 5th, No sasine having followed upon the charter 1791, the rights of the appellants, Messrs MacNeill and MacGibbon, who purchased the superiorities on the faith of the records, and stand duly infeft, cannot be affected by that latent charter. They are secure and made preferable by the Act 1693, c. 13.

Pleaded for the Respondent.—It is a fundamental principle in the law of Scotland, that a superior cannot multiply superiors upon his vassal. This is so invariably true, that it may be legitimately argued, that when a vassal acquires from the superior separate feus at different times and in different parts, that would not authorize or entitle the superior to split the superiority, and oblige his vassal to hold of different superiors. After the charter granted to the respondent in 1791, which clearly and unequivocally united the two feu rights into one feu, it was *ultra vires* of the Duke to disunite them and sell them to two distinct superiors. The Duke's commissioner must be presumed to have had the consent of the Duke to the charter so framed; and this is still more to be presumed from the late and the present Duke having homologated this charter, by receiving the feu-duties of Kilfinan and Cames *in cumulo* for a period of many years.

It was ordered and adjudged that the said interlocutors complained of in the said appeal be, and the same are hereby reversed: And it is further ordered that the interlocutor of the Lords of Session of the 18th February 1813, in the said appeal mentioned, in so far as relates to Messrs MacNeill and MacGibbon, be, and the same is hereby affirmed, excepting in so far as finds them entitled to their expenses: And it is hereby declared, that in consequence of this judgment reversing the in-

terlocutors complained of in the appeal, the remit to the Lord Ordinary to hear parties' procurators further, be superseded.

1819.

THE DUKE OF ARGYLL, &C. *v.* LAMONT.

For the Appellants, *Wm. Adam, John Connell, Geo. Cranstoun.*

For the Respondent, *J. H. Mackenzie.*

1819.

CAMPBELL'S TRUSTEES *v.* CAMPBELL.

The TRUSTEES of the late Duncan Campbell of Glendaruel, Esq., . . *Appellants;*

ALEXANDER CAMPBELL of Ballochyle, Esq., *Respondent.*

House of Lords, 18th February 1819.

PROPERTY—RIGHT OF FERRY—USAGE—GRANT.—The respondent claimed a right of ferry from Dunoon to the opposite shore of the firth of Clyde, which he stated he had possessed both by immemorial usage, and by express grant, for a period of 150 years undisturbed. This right included the Kirn, and points elsewhere on the Dunoon side. The appellant had no express grant of ferry; but as Kirn was within his property, he chose to erect a public ferry there, contending that a proprietor of one barony cannot by law prevent the erection of another ferry over the same water beyond his bounds. In an application for interdict (injunction), held the respondent entitled to prevent the erection of such ferry. Affirmed in the House of Lords.

Attached to the respondent's property in that district of Argyll called Cowal, there is a right of ferry between the village of Dunoon and the opposite shore of the Clyde. This right he enjoyed by a series of charters granted by the Argyll family from 1658 downwards, which expressly conveyed the right of ferry, and he had exclusively possessed this right until very recently, that the late Mr Campbell of Glendaruel had attempted to participate in the profits of the ferry, by establishing a rival ferry at the Kirn, Dunoon, for transporting cattle, goods, and passengers for hire.

The respondent presented a petition to the sheriff for interdict, upon which, after due discussion, the sheriff pronounced this interlocutor:—"Having advised the petition and debate, Sept. 25, 1812.
"together with the whole charters produced, interdicts, pro-
"hibits and discharges John Black and Duncan Campbell
"of Glendaruel, mentioned in the petition, and all others
"employed by them or either of them, from ferrying any