tion which, though credited by the freeholders, Mr Knight would have been allowed to refute by a proof in the Court of Session. No 189.

THE LORDS, by a considerable majority, found that a new claim was unnecessary.

For Mr Knight, *Lord Advocate, Buchan Hepburn, Geo. Fergusson.*
Alt. *Dean of Faculty, Wight.*

C. *Fol. Dic. v.* 3. *p.* 426. *Fac. Coll. No.* 289. *p.* 444.

*** See, in the Appendix, the case of Lord Woodhouselee, on the subject of this Section, decided in the Summer Session 1804.

SECT. VIII.

Splitting the Superiority.

1741. *June* 9. Sir JOHN MAXWELL *against* M'MILLAN. No 190.

FOUND, That a superior could not, without consent of his vassal, split the superiority among more superiors. *See* SUPERIOR and VASSAL.

Fol. Dic. v. 3. *p.* 426. *Kilkerran,* (SUPERIOR and VASSAL.) *No* 4. *p.* 529.

*** C. Home reports this case.

THE question betwixt these parties resolved in a neat point of law, to wit, whether the superior of lands holding blench, could split or divide his right of superiority without consent of the vassal?

Sir John the vassal brought a declarator, to have it found and declared, That the superior could not; and *pleaded,* That it has been universally held by our lawyers, as well ancient as modern, that a superiority is indivisible. It is laid down as a maxim in our feudal law, *non cogitur vassalus, pro uno feudo duas fidelitates facere,* see *lib.* 2. *tit.* 55. § 1. *Cujacius,* Book I. *De feudis.* Craig, *lib.* 2. Dieg. II. § 18. And that it arose from this principle, that, when heirs-portioners succeed in the heritage of the ancestors, superiorities and their casualties are not divided, as the other particulars of the heritage, but the eldest portioner alone succeeds without any division; for this very reason, lest the condition of the vassal be rendered worse, should the superiority be split among several heirs-portioners. If it were allowed to multiply superiors, numberless inconveniences would arise. A sub-vassal is liable to many casualties, from the accidents which befal his immediate superior, his death, delinquincies, &c. If he is subjected to twenty superiors instead of one, he must be involved in as

No 190. many questions with respect to those casualties, as he hath superiors, when the different events fall out; or suppose this should not happen, he must be at the charge of a number of different infeftments, instead of one, when it is necessary to renew his right, or otherwise be subjected to as many processes of non-entry; or, if his superiors should refuse to enter him, he must run precepts against every one of them; and if they should happen not to be entered themselves, he must pursue declarators against them all before he can establish a right to his feu. These hardships, in many cases, might be so heavy, that it would be more eligible for the vassal to give up his feu, than to submit to them. And as a superior cannot divide his superiority, neither can a vassal voluntarily dispone his feu without the superior's consent, either in whole or in part, so as to compel the superior to receive the purchaser as his vassal. The heir of the vassal may run precepts; but there is no form of process known in our law, whereby a singular successor can directly compel the superior to enter him. The law indeed in favours of creditors, has given them a remedy, by apprising and adjudication, to affect their debtor's estate; and thereupon, by legal diligence, to proceed against the superior to enter the creditor *faciendo prout de jure*; but, from none of the statutes relative thereto, can any inconveniency arise to the superior, but rather an advantage, by having an opportunity of taking the land to himself at a competent avail, or, in his option, a year's rent for entry of the new vassal; but, if any inconveniency should arise to the superior, it is believed, that even this bout-gate way of stating the purchasers as creditors, so as to carry on adjudications, would not avail, *e. g.* If a feu-holding, for which the vassal paid L. 10 of feu-duty, should, by diverse alienations of small parcels, be split into 100 parts, so that each of the vassals should be only obliged to pay pence for pounds, the superior, upon showing cause, would not be obliged to divide the superiority, or the feu-duty attending upon it, into such small *reddendo's* as would not be worth levying; but each of these parcels divided at first by the voluntary act of the vassal, without consent of the superior, would be subject *in solidum* to the payment of the superior's feu-duty, leaving recourse of relief to the vassals paying, against the remaining co-vassals in the same feu. And this principle is so strongly ingrafted in our constitution, that, in the case where a superiority falls to many singular successors, by apprising or otherwise, the vassal needs only take infeftment from the appriser having the greatest interest; at least this doctrine is laid down by Lord Stair, B. 2. tit. 4. § 17.

Pleaded for Mr M'Millan, &c. the superior, That anciently when feus were understood to be granted from the sole favour of the superior, neither the one nor the other could alienate without consent, as is evident from *lib.* 2. *feud. tit.* 55. *pr.* § 1. though even then it appears, that in some cases feus were divisible. But ever since they became the proper subject of commerce, both superior and vassal are considered to have very different interests from what was competent to them by the ancient feudal customs; and, therefore, the vassal

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can either sell or gift, not only without, but contrary to the will of the superior; and, upon the same principle, the superior can dispose of the superiority, without consent of the vassal. A vassal may alienate the whole or a part, either directly or indirectly, upon which the superior must grant infeftment, though it cannot be denied, that it is prejudicial to the superior to receive partial vassals in the fee; and if this holds with respect to the vassal, it is not easy to discover upon what principle the same rule should not hold with respect to the superior, his obligation to the superior not being stronger than the counter-obligation of the vassal to him. The superior is understood to have feued out his lands at a lower rate, in respect of the reserved superiority; and it is known to be the case, that even in a blench holding, one can sell his lands at a higher rate, than he can feu them out to be holden of himself blench. Besides, as a superiority may be purchased for money, it is as much the superior's estate, as the feu is the vassal's, and as the vassal may multiply vassals, why should not the same thing be allowed to the superior? To illustrate this, put the case, that the superior's whole estate consists in a superiority, yielding yearly L. 1000 *per annum*, that he contracts L. 500 of debt; and that the creditors bring an adjudication; will it be said, that such a creditor is not under the regulations of the statute 1672, that he must not bring a special adjudication in terms of the statute? may not the debtor, complying with the rules of that act, save the rest of his estate from being adjudged? and will not such special adjudication expire, and evict the part of the superiority adjudged? The statute makes no distinction, whether the debtor's estate consists in superiority of lands feued out, or in the feu of such lands. In the case where no purchaser offers, the act 1681 directs the estate to be divided amongst the adjudgers, without distinction what kind of an estate belonged to the debtor, whether property or superiority; which, upon the pursuer's plan, is impracticable. Again, in the case of adjudgers within year and day, who is the vassal's superior? as the statute has put them upon the same footing. In the next place, though the defender's right is a superiority *quoad* the pursuer, yet *quoad* the Prince, the immediate superior, his right is a right of property, a feu. Now, if the pursuer's doctrine holds, where there are many intermediate superiors, there can be no partial alienation of any of them, no adjudication could go against them in terms of the statute 1672; that statute could only refer to the vassal entitled to the natural possession of the lands. And, with respect to any inconveniency that may arise from the multiplying charters and sasines, the law does not regard that, when the relief is not augmented; no more than in the case where the vassal divides his feu amongst many different hands, which always puts the superior to more trouble in levying his feu-duty; see Voet. in his digression *de feudis*, No. 103. July 30. 1678, Luss, *voce* SUPERIOR and VASSAL.

THE LORDS found the superior could not convey the superiority to different persons without the vassal's consent.

C. Home, No 169. *p.* 284.