SECT. XX.

Consolidation of Property with Superiority.

1786. *March* 8. LILLIAS BALD *against* JANE BUCHANAN.

No. 91.

Consolidation of property and superiority not effected *ipso jure*, or without resignation *ad remanentiam*.

Whether a conveyance of property along with superiority, granted by the superior, who had only the *dominium directum*, and accepted by the vassal, be valid as to all other parties?

Prior to 1705, Archibald Buchanan of Drummakiln stood infeft in these lands, and in those of Cameron, all holding then of subject-superiors.

In 1705, he obtained the superiority of Cameron, by a disposition, which, it is to be remarked, comprehended likewise the property, excepted however from the clause of warrandice.

In the same year, he executed a deed, conveying the lands of Cameron, and assigning the disposition from the superior, in favour of himself in life-rent, and of William, and a certain series of heirs, in fee; reserving to himself full powers to alter, burden, or dispone. By virtue of the procuratory contained in the disposition thus assigned, resignation having been made in the hands of the Crown, a charter in the terms of this conveyance was passed under the Great Seal; and upon it infeftment followed.

In 1730, Archibald, in the marriage-contract of his son William, disponed to him, and a series of heirs somewhat different from that in his former disposition, the whole lands above mentioned; granting procuratory and precept. William took infeftment on the precept; but did not execute the procuratory.

William, who never entered into the possession, predeceased his father; leaving a son, Archibald, and a daughter, Lillias. He was likewise survived by a brother, Robert.

The last-mentioned Archibald, the younger, made up titles to Cameron, by special service, as heir-male to William, his father, and by infeftment on a precept from Chancery; and to Drummakiln, by sasine in virtue of precepts of *clare constat*, which he obtained as heir to his grandfather, Archibald the elder.

On the death of Archibald the younger, the succession devolved to his uncle Robert, who likewise made up titles as his heir by special service in the lands of Cameron, and precept of *clare constat* in those of Drummakiln.

Robert executed an entail of the whole estate in favour of Jane Buchanan, his natural daughter.

Of this entail Lillias Bald, the daughter of Lillias Buchanan, as heiress-at-law of William, instituted a reduction, on the following ground: That, by infeftment on the precept contained in the marriage-contract, William was vested with the *dominium utile* of the whole lands; and that the superiority of Cameron, which he held under the disposition dated in 1705, had never been consolidated with the

property; for which reasons the titles of Archibald the younger had been erroneously made up to Drummakiln, as if *in hæreditate jacente* of Archibald the elder, and equally so to the *dominium utile* of Cameron, since the bare superiority only could be carried by the infeftment on the precept from Chancery; and consequently that the titles of Robert, the entailer, were also inept. No. 91.

With respect to the lands of Cameron, there were three separate defences stated: *First*, That the two fees were consolidated *ipso jure*; *second*, That otherwise prescription would have had the effect of uniting them; and, *third*, That by confirmation the base fee might, at any rate, be still rendered public.

1*mo*, The defender pleaded: The superiority was in the person of William consolidated with the property *ipso jure*. The *dominium directum*, as the name imports, is originally and primarily the right of property; the *dominium utile* no more than a burden laid on that right by an obligation in favour of the vassal. Of consequence, when both these *dominia* unite in the same person, the obligation constituting the burden, like all other obligations in the event of *concursus*, is extinguished *confusione*; or, in other words, the *dominium utile* is *ipso facto* consolidated with the *dominium directum*.

It is true, that, for the security of third parties, such consolidation ought not to take place, if the acquisition from which it proceeds be not made known by public records; although our more ancient lawyers did not regard this precaution; thinking even a personal right to the property acquired by the superior sufficient, without registration, for an *ipso facto* consolidation; B. Supplicant, 21st June, 1634. No. 33. p. 6917. *voce* INFEFTMENT; 23d July, 1687, Ellis, No. 8. p. 3086. *voce* CONSOLIDATION. This error, however, was corrected, when the important uses of the records came to be more attended to; and a mere personal right was no longer held sufficient; but, in order to consolidation, it became requisite that the superior's right to the property should be perfected by sasine; Dallas's Styles, p. 567. See Spottiswood, *voce* SUPERIORS.

As soon, therefore, in such a case, as the superior takes sasine, to which registration is essential, his superiority, *eo ipso*, is consolidated with the property. In this matter our lawyers seem to be agreed. Dirleton, indeed, treats it among his Doubts, *voce* CONSOLIDATION; but it is only as to the propriety of a superior giving sasine to himself, which at that period was much questioned. Lord Stair, too, states infeftment by the superior as the only thing necessary for consolidating in his person the property with the superiority; B. 2. Tit. 2. § 7. B. 3. Tit. 2. § 23. And to those opinions the general practice of the country has been conformable.

It is likewise admitted, that when the two rights happen to be devised to different sets of heirs, this may be an obstacle in the way of consolidation *ipso facto*, as indeed it may indicate a contrary intention in the author; though, as Dirleton observes, prior to the actual division of succession, a kind of consolidation will subsist, *loc. sup. cit.* A resignation *ad remanentiam*, therefore, may be deemed necessary to hinder the eventual separation; and this is all which is meant by the observation

No. 91. of Lord Bankton, B. 2. Tit. 2. § 12. or that of Mr. Erskine, B. 3. Tit. 8. § 81. But, in the present case, the heirs under the disposition in 1705, and under the contract of marriage in 1730, are truly and substantially the same.

After all, perhaps, the above argument may be deemed superfluous. By the charter which the superior granted in 1705, both property and superiority are conveyed jointly as one fee. Now it is evident, that as to all the world, except the vassal, the full right to a feudal subject is in the superior; and to his unlimited disposal of it the vassal alone is entitled to object. In such disposal, in the present instance, the vassal, by his own act, has formally acquiesced. That charter, therefore, is to be regarded as the source of Archibald the elder's right; and thus the fees, not being separated, do not require or admit consolidation.

Answered: There is no ground for the plea of consolidation. The superiority and the property of lands are in their nature separate estates of fee, and as such may be held by different tenures. Sasine is essential to the transmission of both, as resignation *ad remanentiam* is the extinction of one by its being sunk in the other. The indispensable necessity of these forms is established; Craig, Lib. 3. Dieg. 1. § 6.; Stair, B. 2. T. 9.; Bankton. v. 2. p. 145.; Erskine, p. 287, 288. And the propriety of them in preventing *ipso jure* consolidation, is evident from several examples; such as those of property holding feu uniting with the superiority subject to wardholding, and of an unlimited property being consolidated with an unentailed superiority.

It is true, an incongruity was at one period imagined in the idea of a superior's giving infeftment to himself; and without first infefting himself, he could not resign *ad remanentiam*. Other expedients, however, were proposed; such as, decreets of consolidation, and retours, expressing that the property was to be consolidated with the superiority *ad perpetuam remanentiam;* all of which tend to show, that consolidation was never understood to take place *ipso jure*. In this manner, the more ancient authorities quoted appear to be really adverse to the defender's doctrine.

In the present case, the argument against *ipso jure* consolidation is enforced by specialties.—1. William obtained the superiority by infeftment on the Crown-charter in 1706. Archibald, his father, continued his vassal. In 1731, William took a base infeftment from his father, thus creating an intermediate superiority in the person of the latter. This mid-fee, then, is an impediment which must prevent the union of the paramount superiority and the property. 2. The destination of succession in the charter is different from that in the contract of marriage. 3. It is absurd to suppose an intention in William to consolidate the unlimited property with a superiority subject to revocation.

As for the supposition of the two fees being united in the superior's disposition, not even the most express and formal deed, under the hand of the vassal, could have the effect to extinguish or convey the feudal right that is in him; much less his implied, or express, consent to a deed of the superior.

Pleaded: 2*do*, The necessity of resignation *ad remanentiam* would, at any rate, be here superseded, and the union effected, by the positive prescription. A charter

and infeftment, purporting in terms a full conveyance of lands, though intended to convey the superiority only, is nevertheless a good title for the prescription of the property; for, after prescription has taken place, there is no room left to inquire what may have been the original nature of the title; Earl of Dunmore *contra* Middleton, No. 171. p. 10944. *voce* PRESCRIPTION; Miller *contra* Dickson, No. 170. p. 10937. IBIDEM. No. 91.

Answered: William's possession is not to be ascribed to the charter, as that was a defeasible right, but to the contract, which vested him with the absolute property; otherwise prescription, instead of *adjectio dominii*, would become *detractio dominii*. Besides, if the heir under one of the titles had right to plead possession on that footing, the heir under the other title might urge a similar claim. But, in fact, the possession of Archibald must be understood as held by virtue of the infeftment of property, agreeably to the decisions in a variety of similar cases; Marquis of Clydesdale *contra* Earl of Dundonald, No. 3. p. 1262. *voce* BASE INFEFTMENT; Smith and Bogle *contra* Gray, No. 89. p. 10803. *voce* PRESCRIPTION; 22d November, 1768, Kempts *contra* Russell. See APPENDIX.

Replied: If a person has held a subject under two titles, either he himself or his successors may attribute his possession to one or other of them as they choose. Here the Crown-charter and infeftment formed a sufficient prescriptive title; and it is absurd to suppose, that it should become insufficient, in consequence of another equally good title existing along with it. Indeed, after the course of the long prescription, every document judged essential to the right is presumed to have been taken; and of course resignation *ad remanentiam* will, if deemed necessary, be here presumed to have been made, and the instrument to have perished by the injury of time.

Pleaded: *3tio*, Though William did not indeed execute the procuratory contained in his contract of marriage, and the infeftment taken by him is accounted *de me*, yet he had the right of obtaining the superior's confirmation, which would render the holding public. This right has been transmitted by service successively to Archibald younger and Robert, and to the defender by the entail in question. By expeding confirmation, therefore, she can at once obviate the plea of the pursuer.

Answered: With respect to the *dominium utile* of Cameron, both Archibald II. and Robert died in the state of apparency; so that having no right to that fee, they could transmit none by service; and the right of confirming belongs only to the person who takes the base fee. Besides, the general service alluded to was in the character of heir-male, which plainly could not carry the right of an heir of provision under the marriage-contract; Edgar *contra* Maxwell, No. 14. p. 14015. *voce* REPRESENTATION; Rose *contra* Rose, No. 51. p. 14955. *voce* SUCCESSION. And, farther, could it have carried the procuratory, it would still not have reached to the property, a special service and infeftment being necessary to this; so that nothing but a mere blanch superiority under the contract would have been transmitted.

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Replied: A service as heir to a specific subject includes every character in which the party may succeed to such subject; Bell *contra* Carruthers and Dormant, No. 16. p. 14016. *voce* REPRESENTATION; and therefore, in this case, the character of heir-male would comprehend that of heir of provision.

With respect to the lands of Drummakiln,

The defender pleaded: The possession held by Archibald the elder, combined with that of Archibald the younger, and of Robert, have extinguished the infeftment of William. After the contract of marriage in 1730, on which infeftment was taken by William only, who never attained possession, these lands continued still to be possessed by Archibald the elder, whose title of possession, and which only, if called to it, he could have produced, was the old infeftments which he had obtained from the subject-superiors. On that title he, together with Archibald the younger, and Robert, who connected themselves with it successively by service, having held the possession for more than forty years posterior to the date of the contract, without any regard to the infeftment which followed on it, the title is now secured by the positive prescription, and cannot be affected by the last-mentioned infeftment.

Nor can it be justly objected, That as Archibald the elder's life-rent was reserved by the contract, his possession ought, in consistency with that deed, to be ascribed to this life-rent right, and construed as the possession of the fiar. For the prescription pleaded tends to give full effect to the destination of succession created by the contract; and thus, instead of being averse to it, is its support.

Answered: To prescribe against his own obligation, which was contained in the marriage contract, would have been fraudulent in Archibald the elder. In fact, he did it not, as his life-rent was his only title of possession, and therefore his was, in the construction of law, the possession of the fiar; as was found in the case of Dundonald, quoted above. But, at any rate, the positive prescription would not avail, unless the negative could also be pleaded against the obligation in the contract of marriage, the rendering of which effectual the pursuer is entitled to insist on against every representative of Archibald the elder, or of his heirs.

Replied: There is no necessity for pleading the negative prescription of the obligations in the marriage-contract, under which the pursuer can have no *jus crediti*, being only an heir whatsovever. That contract has already had full effect in favour of Archibald the younger, and of Robert.

The cause was taken to report by the Lord Ordinary; and the Court appointed a hearing in presence.

The following interlocutor was afterwards pronounced:

"The Lords having resumed consideration of the mutual informations, and having heard parties procurators thereon, they sustain the reasons of reduction."

And to that judgment, on advising a reclaiming petition, with answers, the Court adhered, by the following interlocutor:

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" Find, That the superioriority of Wester Cameron, vested in the person of William under the infeftment 1705, and the property, vested in his person under the infeftment 1730, remained separate and distinct estates, and that therefore the property could not be carried by the special service and infeftment that was afterwards expede in the person of Archibald the younger; in respect that no resignation *ad remanentiam*, consolidating the property with the superiority, had been expede in the person of the said William;—therefore repel the plea of consolidation, and also of prescription and confirmation, and other defences stated for the petitioner."

Reporter, *Lord Justice-Clerk.* Act. *Mat. Ross, A. Campbell.*
Alt. *Lord Advocate, Rolland, Blair, W. Craig.* Clerk, *Sinclair.*

S. *Fol. Dic. v. 4. p. 315. Fac. Coll. No. 266. p. 408.*

*** This case was appealed. The House of Lords, " 3d April, 1787, ORDERED, That the appeal be dismissed, and the interlocutors complained of be affirmed."

1803. *July* 7. SIR JAMES COLQUHOUN, Petitioner.

No. 92.
The superiorities of an entailed estate cannot be sold for redemption of the land-tax.

By act 42d, Geo. III. C. 116. authority is given to the proprietors of land estates to redeem their land-tax, the consideration for which is to be so much capital stock in the public funds as will yield an annuity or dividend exceeding the amount of the land tax by one tenth. Section 61. enacts, " That where any heir of entail in possession of an entailed estate in Scotland, &c. means to sell part of the said estate to purchase the land-tax of the estate, in terms of this act, it shall be competent and requisite for him, her, or them, to apply by petition to the Court of Session, stating the amount of the land-tax payable out of the said estate, what part of the estate it is proposed to sell, and the rent or annual value of that part of the estate; and praying the Court, upon the allegations on these points being proved to the satisfaction of the Court, and it being shewn that the sale of the part of the estate proposed to be sold will not materially injure the residue of the estate remaining unsold, and that the part so proposed to be sold is proper (considering all circumstances) to be sold, for the purpose aforesaid, to authorise such sale to proceed, in manner herein after enacted; and the Judges of the said Court are hereby authorised and required to order such petitions to be intimated upon the walls of the Outer and Inner-House of the said Court, in common form, for ten sederunt days, and also to be advertised weekly, for two weeks successively, in the Edinburgh Gazette; which intimation and advertisement shall be a valid and effectual intimation, and advertisement, and service, to all intents and purposes, as much as if the said petitions had been personally intimated to, or served upon, all persons having, or pretending to have, any interest