prepared to verify his objections instanter; and it was contrary to law, to demand terms for proving.

After hearing counsel,

It was ordered and adjudged that the interlocutors therein complained of, be and the same are hereby reversed; and that the defender be assoilzed.

For the Appellant, *Mr Thomson, John Leach, William Erskine.*

For the Respondent, *Sir Saml. Romilly, John Clerk, James Moncreiff.*

NOTE.—Unreported in the Court of Session.

JOHN RUTHERFOORD, Esq., . . . *Appellant;*

Dr WM. SOMMERVILLE, Deputy Inspector of Army Hospitals, ... *Respondent.*

House of Lords, 8th June 1818.

This was the separate appeal, alluded to in the preceding case, taken by the other defender, John Rutherfoord; but as it arose out of the same circumstances, and the same action and judgment pronounced in the Court below, it is unnecessary to detail these here.

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby reversed, and that the defender be assoilzed.

For the Appellant, *Geo. Gos. Bell, Geo. Cranstoun.*

For the Respondent, *Sir Saml. Romilly, John Clerk, James Moncreiff, Henry Cockburn.*

NOTE.—Unreported in the Court of Session.

JAMES OCHTERLONY LOCKHART MURE, Esq. of Livingstone, a Minor, and Mrs HENRIETTA MORRES, his sole Curatrix, } *Appellants;*

JOHN RAE MURE and Mrs MARION LOCKHART, Spouse of John Smith, residing at Gatehouse of Fleet, the son and daughter of Mrs Jean Mure, late of Livingstone, } *Respondents.*

House of Lords, 9th June 1818.

DEATHBED—CANCELLED DEED.—Power was given by an entail

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to the heirs of entail, to provide their younger children with provisions, and to affect the estate with the same, equal to three years' rents. The respondents' mother granted bond to them, her younger children, and affected the estate with payment of the same. She died four years thereafter. While on deathbed she had executed a second bond, in precisely the same terms as the former, only giving the heir a longer time to pay. The previous deed was at same time cancelled. The heir of entail challenged the deed executed on deathbed. (1) Held that it was competent to look at the first deed, in order to support the second, as there was no evidence that Niven had authority to cancel the first in the way he did; and, therefore, that the second deed was not reducible, on deathbed, and not prejudicial, but more favourable to the heir. (2) Held, that she had no separate estate out of which to provide for the younger children.

In 1754, Robert Mure, Esq. of Livingstone, executed a strict entail of the said estate and others, in favour of Adam Mure, his only son, and the heirs of his body; whom failing, in favour of his daughter, Mrs Jean Mure, and the heirs of her body.

By this entail, power and liberty was given "to the said "Adam Mure, and to the other heirs of tailzie above men- "tioned, in case they have no other separate estate, real or "personal, than the lands and barony and others above dis- "poned, to provide their younger children with such pro- "visions as they shall think proper, not exceeding three "years' rents of the estate," &c.

Adam Mure succeeded to the estate after the death of his father, the maker of this entail; and upon his death without issue, Mrs Jean Mure, his sister, succeeded as next heir of tailzie.

She was twice married, having issue of both marriages.

In 1805 she executed a bond of provision in favour of the respondent John Rae Mure, her son, and Mrs Marion Lockhart, his sister-uterine, her only surviving younger children, burdening the estate with a provision equal to and not exceeding three years' rent of the estate.

She died on 18th May 1809, and the only document found in her repositories after her death, in the way of a settlement, was a bond of provision in favour of the said John Rae Mure, and her daughter, Mrs Marion Lockhart, dated seventeen days before her death, and purporting to be of the precise same tenor and contents as the former bond of provision, only giving the heir in possession of the estates a longer time to pay it, namely, five years instead of three years after her death.

In executing this last bond and deed of settlement it was alleged that she had given instructions to her agent to cancel the previous deed; and that after he went home, he cancelled it accordingly, by tearing away her name from the deed.

The appellant, the heir of entail succeeding to the estate, brought a reduction of the bond of provision, in so far as it burdened the entailed estate on the ground:—1st, That having a separate real estate, she had no power so to burden; and, 2d, That the said bond and assignation was granted by the said Mrs Jean Mure in favour of the defenders on deathbed, to the prejudice of the appellant as heir of entail.

In defence to the action it was pleaded:—1st, That Mrs Jean Mure at the time of her death, or at the time of making the above deed was not possessed of any real or personal estate of her own, that could bar exercising the power allowed by the entail to provide for younger children; and, 2d, That the pursuer (appellant) had *no interest* to pursue the present reduction, because, that the said Mrs Jean Mure, had exercised the faculty of providing for her younger children by a bond of provision executed by her in *liege poustie*, and that the said bond of provision was a subsisting deed, when she executed the bond of provision now sought to be reduced, and stood at her death, and still stands, "unrevoked; "and, therefore, the bond of provision now sought to be "reduced, being of the same tenor as the previous bond, "excepting as to the term of payment, cannot be set aside as "granted *in lecto* to the prejudice of the grantor's heir, but "was for his benefit."

A diligence and warrant was granted for the recovery of the former bond of provision, which it appeared was in the hands of Mr James Niven, the writer who drew it out, and who had also been sent for to execute the second bond of provision before her death.

Having been cited as a haver, James Niven appeared and deponed as follows: "Deponed and exhibited an assignation "and bond of provision made by the late Mrs Jean Mure of "Livingstone, in favour of John Rae, her second son, and "Mrs Marion Lockhart, her daughter, dated the 10th day of "September 1805 years: That the said assignation and bond "of provision was not now in the same state in which it had "been when the deponent received it from the said Mrs Jean "Mure; that was to say, it was now cancelled, and it had "been an existing deed when he received it from Mrs Jean "Mure: That he received it from her upon the 1st day of

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" May last; and being interrogated, at what time of the day " he so received it, and whether, previous thereto, he received " a notice from Mrs Mure, intimating that she had been " taken suddenly ill, and expressing an anxious wish to see " him; depones, That he received a message from the said " Mrs Jean Mure on Sunday, the 30th day of April last, " desiring him to come and speak to her: That he went ac- " cordingly, when she informed him that she had fallen twice, " and that she was afraid of herself; and she mentioned her " anxious desire, that the deponent should not go out of " town on the next day, namely, Monday the 1st day of " May last, because she wanted him to make out a new bond " of provision and assignation in favour of her son and " daughter, making the provisions payable to them by instal- " ments, in five years instead of three years, as provided by " the assignation and bond formerly executed and now pro- " duced: That on Monday morning before breakfast, the " deponent waited on the said Mrs Jean Mure, and she went " up stairs with him to her drawing room, and took out the " said assignation and bond of provision from a drawer, con- " taining linens, and delivered it to the deponent, and desired " him to cancel it, and to make out a new assignation and " bond of provision in the terms communed on the preceding " day: That the deponent, accordingly, made out a new " bond of assignation, and had it executed upon the said 1st " day of May last; and immediately after it was executed in " Mrs Jean Mure's house, he, in pursuance of her directions, " cancelled the former assignation and bond, by cutting or " tearing her subscription from the first and third pages of " the deed in the manner in which it now appears; and he " so cancelled the deed in his own office, after he returned " from Mrs Mure's house, for he had left it in his office when " he went to Mrs Mure's house to get the new bond and as- " signation executed: That he did not think that any person " was present when he received Mrs Mure's directions to " make out the new bond and assignation, and to cancel the " former one; and he did not think that Mrs Mure gave any " orders for cancelling the former assignation and bond of " provision, in presence of the instrumentary witnesses to the " execution of the new one; and which assignation and bond " now exhibited were marked and signed, of this date, by the " deponent, commissioner, and clerk as relative hereto."

Nov. 13, 1810. The Lord Ordinary pronounced this interlocutor:—" In " respect that the deed alleged to have been executed on

"deathbed, was only explanatory of the prior deed of pro-
"vision, and was not to the prejudice of the heir, but for his
"benefit, in as much as it gave him five years to pay the
"provisions to the younger children, whereas these were
"payable to them in three years by the prior deed, sustains
"the defences and decerns."

On representations being presented, his Lordship pronounced this interlocutor:—"Conceiving the case of Coutts June 19, 1811.
"founded on by the pursuer, is materially different in its
"circumstances from the present, where the two deeds of pro-
"vision are in favour of the same persons, and the first of
"which was not cancelled till the second explanatory deed
"was executed, adheres to the interlocutor represented against,
"so far as regards the challenge on the head of deathbed;
"and with respect to the other objection, made to the pro-
"vision of separate funds, out of which her younger children
"may be provided: Finds that the pursuer has not yet suf-
"ficiently instructed the facts upon which it is founded, and
"therefore, repel the same *in hoc statu*, assoilzies the defenders,
"and decerns."

On reclaiming petition to the whole Lords of the First Division, the Court pronounced this interlocutor:—"The
"Lords adhere to the Lord Ordinary's interlocutors reclaimed
"against, so far as relates to the reason of reduction, founded Feb. 8 and 12, 1812.
"on Mrs Mure's alleged possession of a separate fund, out
"of which to provide the younger children, and so far refuse
"the prayer of the said petition; but *alter* the said inter-
"locutors, so far as they sustain the defences against the
"challenge of the bond of provision and assignation libelled
"on the head of deathbed; sustain the reason of reduction
"of the said bond of provision and assignation, that the same
"was granted upon deathbed; repel the defences on that
"head, and reduce, decern, and declare in terms of the
"conclusions of the libel accordingly."*

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* Opinions of the Judges:—

Advising, 8*th and* 12*th February* 1812.

Lord Craig.—"The question is difficult; but I incline to alter. The last deed by itself cannot stand. Can it be supported by reference to the cancelled deed? I think not, because it lies on our table cancelled. It is no deed, and cannot be regarded. This may be hard, but it cannot be helped. As to the alleged irregularity of the agent, and want of authority to cancel, we

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Another reclaiming petition was given in, upon advising which, and hearing parties, this interlocutor was pronounced: "The Lords having resumed consideration of this petition, "and advised the same, with answers thereto, they were "equally divided in opinion, and, therefore, they supersede "further advising, for the opinion of Lord Armadale, the "senior Ordinary." Thereafter, "The Lords having ad-

Jan. 14, 1813.

"vised the petition, with answers (Lord Armadale, the "senior Lord Ordinary, having been called in), they alter

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have no evidence on that head at present before us. All we see is, a cancelled deed, which we cannot look into, till re-established."

LORD BANNATYNE.—"I find great difficulty in the case. If the deed be regularly and by authority cancelled, we cannot regard it. But I wish to delay deciding on that point, till the issue of a proving of the tenor for restoring the deed."

LORD SUCCOTH.—"It is certainly a difficult question, yet on the whole I incline to adhere. (Here his Lordship commented on the difference between this case and Coutts.) In the case of Coutts, the clause of revocation was very peculiar. Accordingly, it was *not* followed in the case of Lang *v.* Whytlaw (1809), which latter case is like this, and a precedent that touches it. I see no difference between a revoked and a cancelled deed."

Vide ante, vol. v. p. 73.

Ross' Land Rights, vol. i., p. 674; *et* Shaw's App. Cas., vol. ii., (note) p. 13.

LORD PRESIDENT HOPE.—"This is a good petition of Mr Blackwell. I cannot support this deed. All we see is a cancelled deed, and cancelled by authority, according to the only evidence we have, namely, that of Niven. We *must* believe him if we *look* into the evidence at all. If we dont look into it, all we see is a cancelled deed. Now we cannot look at that deed. We cannot *read* it, or *know* what is in it, or whether it was in favour of the heir at law, or to his prejudice on that head. If the former deed had been cancelled, it could not be attended to at all; there was in the House of Lords, in the Coutts' case, no doubt at all. The principle in Coutts' case was, that the heir's challenge can only be excluded by production of a *prior existing deed*, which excludes him, if the last deed be reduced. Whytlaw's case was a case of construction, not of deathbed—it is not applicable here; and in Coutts' case, the clause of revocation was so peculiarly constructed, that the prior deed could not be viewed as a subsisting deed to exclude the heir, being simply revoked, except to the effect of supporting the late deed."

LORD BANNATYNE.—"If we are to decide upon the deeds as they lie at present on the table, I must be for altering."

For Altering.—Lords President, Craig, and Bannatyne.

For Adhering.—Lords Hermand and Succoth.

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

" their former interlocutor reclaimed against; repel the reason " of reduction libelled on the head of deathbed; sustain the " defences; assoilzie the defenders, and decern: Find the " defenders entitled to their expenses, and the pursuers liable " in the same; appoint an account thereof to be lodged, and " remit the same, when lodged, to the auditor of Court to tax " and report." *

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* Opinions of the Judges:—

Advising, 12*th January* 1813.

LORD PRESIDENT (HOPE), said—" I am clear to adhere. That the deed is blundered is no argument. Every transaction will, or will not have effect according as it is, or is not duly executed.

" If we reject Niven's evidence as to the mode of cancellation, the case is so much the worse for the petitioner. Farther, we have just the deed on our table cancelled, and no evidence how or when it came to be so. Must it then be presumed that the granter herself, with her own hand, cancelled it? If so, then when cancelled it was no deed. That was laid down by the Court in the Crawfordland case, and that we did a wrong in looking into it. But, *de jure*, we cannot look into the deed in this case. Where a deed is revoked only, it may be looked into, because it is still an entire writing; but here there is no existing deed. Suppose the deed had been burned, would we have raised it up in that case? Are we to sustain where the deed is cancelled in one way, and not in the other?"

LORD GILLIES.—" May we not look at the first deed here, by way of explanation of the last deed, not as recognizing it to be an effectual settlement, but to satisfy our minds? It is said, that the first deed was cancelled, but this leads to the question, whether it was so cancelled by authority, or not? Suppose the first deed had been expressly revoked, it would have brought into this case, the question which occurred in the case of Whytlaw. In that case, the Court inquired *quo animo*, was the deed revoked? Here the *animus* is clear, only to cancel the first in case the second was effectual. If her man of business had told her, that the second deed would not be effectual, unless she lived sixty days, her answer would have been, Then don't cancel the first till the sixty days have run.

" The case of Coutts does not interfere with my interpretation; for there the deeds were in favour of *different* persons. The revocation here is *qualified* just as much as if in the case of Coutts it had been declared, that the deed of revocation was not to have any effect, unless it was effectual, in making the first deed revive. The question, perhaps, might have been different, if she had cancelled the deed herself, but that is not the fact here."

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On a further reclaiming petition they finally adhered to the above interlocutor.*

LORD BALMUTO.—"The two deeds are the same, except that more time was given to the heir to pay the provisions."

LORD BALGRAY.—"I am for the interlocutor. We are not at liberty to look back to the cancelled deed at all. It is a nonentity. I feel, indeed, some difficulty upon the fact, whether the deed was cancelled by her authority, or whether the *animus* of the lady at cancelling it was explained to the man of business. There should be further evidence as to this."

LORD HERMAND.—"I cannot shut my eyes to the cancelled deed, supported by the clear intention of the party. The second deed was favourable to the heir, and he cannot, therefore, found on the law of deathbed, for the deed was not to his *prejudice*. At all events, we should have Niven and Smith examined as witnesses, as to *the authority*, and the direction for the cancellation."

Campbell's Session Papers, vol. cli.

* Opinions of the Judges:—

Advising, 1*st June* 1813.

LORD BALGRAY.—"If I were to deal as arbiter, I would be for the interlocutor. But as a judge I must take the principle of law, which says, that a deed falls if *executed* within sixty days. Law creates a right in the heir to challenge; now, are we to refuse to apply it? *When* the purpose of executing the deed was first conceived is of no moment, the date of the execution is alone material. *When* it was cancelled, or by what authority we have not, at present, *evidence* before us. If proof be given that the deed was unwarrantably or irregularly cancelled, it may be restored. I am, therefore, for allowing a proof, and inquiring into these circumstances. But, *at present*, if we are to judge, I am against the interlocutor, having no proper evidence of the irregular cancellation."

LORD GILLIES.—"I see nothing in the principles of law against this interlocutor. We are entitled to inquire into the authority and circumstances of the cancellation. *That* does not *more* do away with a deed than *revocation* does. Yet, in Whytlaw's case, we inquired into the *animus* of revocation, and sustained the deed. Just so here. Niven's evidence shows that there was *no animus* to recall this burden. The case of Coutts is an illustration on the *other* side; for there, too, the purpose of revocation was cleared up, and there was no party to claim in whose favour there was a *liege poustie* will. What I look to, is this, that here, at no one point of time did this lady *will* in favour of the heir. She never meant to die intestate as to this matter. If she had cancelled this deed a twelvemonth before, and so re-

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

Pleaded for the Appellants.—1st, Mrs Jean Mure had a separate real and personal estate, and consequently under the conditions set forth in the entail of Livingstone, she was not entitled to burden that estate with provisions in favour of younger children. She was only authorized to do so, if she possessed no other real or personal estate. 2d, By the law of deathbed the deed of provision is null and void. It was a deed purporting to affect the entailed estate and the heir of entail, and being executed on deathbed, must be deemed as invalid and ineffectual. Nor is it of any consequence

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mained for a time, that would have been a quite different case. The right of the heir would have revived. But here it could not —the cancellation being attended with the instant execution of another deed, and for the purpose of making way for it."

LORD SUCCOTH.—" I am for adhering. This is not like the case of Coutts; because, here the grantee of *both* deeds was the same, and the latter deed *more* in the heir's favour. Also, Whytlaw's case is in point, for the second deed was there expressly found good as a *revocation*, and yet, as to the widow's interest, the deathbed deed was sustained; and in that opinion President Blair concurred. I don't see any material distinction between cancellation and revocation. The one annuls equally as well as the other. Nay, sometimes cancellation may be equivocal. There may be doubts as to the authority—of the purpose—whether it was accidental or wilful, and so forth, which in a deed of revocation are always cleared away under the hand of the party. Niven's evidence here shows that she had no *animus* to relieve the heir. If he had stated the law of sixty days, and asked her, Shall I cancel till the end of the sixty days? no one can doubt that she would have answered in the negative. I say more, it was Niven's duty to do so, as a man of business, and his whole conduct in the matter has been rash and unbusinesslike."

LORD HERMAND.—" I am clear for adhering. The purpose of burdening the heir was not one taken up within the sixty days. It existed and had been executed before. The only purpose conceived within the sixty days, was one in favour of the heir, which he cannot object to. Niven's conduct was, no doubt, exceptionable. The old deed existed after execution of the new, and was only cancelled after his return home out of the presence of the party, and on no order given at that time."

LORD PRESIDENT (HOPE).—" My opinion against the interlocutor remains unaltered; but I assigned the grounds of it formerly, and need not repeat them."

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whether the prejudice done to the heir is by a deed which directly *alienates* or only *burdens* the estate to which he was entitled to succeed. And it is impossible, as is attempted in this case, to connect this deathbed deed with a former bond of provision, executed in *liege poustie*, which is cancelled, so as to raise it by such connection into the character of a deed executed in *liege poustie*.

Pleaded for the Respondents.—1st, The deceased Mrs Jean Mure had no separate estate, and complete evidence of this has been adduced. 2d, There is also complete evidence to show that the bond, which is the subject of reduction, was not a deathbed deed upon the part of the deceased, but one made in *liege poustie*, and not altered as long as she lived. 3d, It coincides with the previous bond in 1805, which the deceased delivered entire into *Mr Niven's* hands, without any instructions to cancel, and which, therefore, must be held to be a subsisting document.

After hearing counsel,

THE LORD CHANCELLOR ELDON said—

"My Lords,*

"I have been extremely anxious to form an opinion so as to enable me to advise your Lordships to decide this cause. It would require no consideration for this, if I could move your Lordships to affirm; but unless the facts of the case were altered it would be very difficult to sustain the judgment. In this view it may be necessary to remit the cause.

"The question is of this nature: a lady, had by a sealed deed not made on deathbead, burdened her estate (as she had power to do) by charging the heir with three years' rents. She afterwards, on a change taking place of the person who was to succeed to the estate, thought an alteration necessary, and she sent for a writer,—a Mr Niven, and intimated to him, that she was ill, having fallen twice, and she directed him to cancel the first bond, and prepare another, the only alteration in which, was to be, that instead of the burden on the estate being payable in three years, it should be payable in five. Mr Niven prepared the deed, and after its execution, he went home (and as he says, by her desire), he cancelled the bond by tearing the name from the first and last pages. Unfortunately the lady did not live sixty days, and the deathbed deed was good for nothing, unless it could be sustained by the former bond. And the question is, whether the instrument cancelled is such an instrument as can be raised up in protection of the instrument made *in articulo mortis*.

* Taken from Mr Gurney's Short-hand Notes.

"Your Lordships know, that by the law of Scotland, if a person make a deed in *liege poustie*, and a different deed *in articulo mortis*, both excluding the heir, if the first of these subsists—as nobody can challenge the right of the person who takes under the deed *in articulo mortis*, but the heir, and as he is cut off by the former deed—he has no interest to challenge it, and it would be affirmed; but the difficulty in this case is, how the first deed, *actually cancelled*, can be set up?

(His Lordship then referred to the practice in English cases.) "If a person, having executed a first, gives directions for the execution of a second will, and does not succeed in completing the second, our law holds the first as not cancelled. The difficulty in this case is to say, that the first can operate to set up the second. In England it is the first deed which we set up, in Scotland it is the second.

"Some of the cases quoted are so strong that their decision goes to destroy their authority altogether. I cannot see, having regard to the decision in the case of Coutts *v.* Crawfurd, that any distinction is to be taken when the second deed only makes an alteration on the first, or is in favour of strangers. What are the facts in this case? Niven was summoned as a haver (as the law of Scotland terms a person called on to produce papers), and he produced the first instrument indorsed, '*Cancelled, May,*' and with the subcription torn from two pages, and says that Mrs Mure directed him to cancel it when she directed him to make the other. Some facts of the case seem to import that Niven must have understood her not to mean him to cancel the first till the second took effect. If the author of the second did not authorize him to cancel the first till she had provided herself with a good effectual second deed, *his* cancelling would not amount to *her* cancelling. And there was an offer of proof in the Court below, that Niven had declared to two persons, that he had no directions to cancel. I propose to your Lordships to take till after Easter to decide, whether it would be proper to remit, with a view to come to a farther knowledge of the facts."

On resuming consideration of the case, his Lordship proposed judgment as follows:—

Journals of the House of Lords.

It is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, that the interlocutors complained of in the said appeal, as far as they relate to the reason of reduction founded on Mrs Mure's alleged possession of a separate fund be, and the same are hereby affirmed. And it is further ordered, that, with this affirmance, the cause be remitted back to the Court of Session in Scotland, to review the interlocutors com-

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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?