

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

J. BELLENDEN KER, Esq.—*Appellant*.JAMES DUKE OF ROXBURGHE—*Respondent*.

ENTAIL (in 1648) of an estate consisting of about sixty thousand acres, *with prohibition against alienation, disposition, contracting debt, or doing any thing in hurt of the tailzie and succession, in whole or in part; but with a power expressly reserved to the heirs of entail "to grant feus, tacks, and rentals, of such parts and portions of the said estate as they should think fitting, provided the same were made without hurt or diminution of the rental of the lands and others, as the same should happen to pay at the time the heir, granter, should succeed thereto."* Grant by one of the heirs of entail of *sixteen feus* of parts and portions of the estate, comprehending in all *the whole of the estate*, except the principal mansion house and 47 acres adjoining. Relative contract that the feued lands and others should be entailed upon a new series of heirs designated by the granter, and that the granter should have the entire use and enjoyment of the estate during his life, &c.; and acts of ownership accordingly exercised by the granter during his life, in the same manner as if he had continued proprietor. These feus dated the same day, and made in favour of the same person, and the casualties taxed. Held by the Court of Session, that these feus could not be considered as granted in conformity with the reserved power in the entail of 1648; that they were not real feus, or dispositions *inter vivos*, but *mortis causa* settlements for the purpose of altering the order of succession appointed by the entail of 1648; and that each of them was liable to one or other of several special objections stated in their interlocutor, (*vide post*;) and that the whole were so bound together that they could not be separated, *but must be reduced in toto*. This judgment affirmed by the

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

House of Lords on the general grounds:—1st, That the feuing power, like that of leasing, was to be exercised, not *ad libitum*, but in a course of *rational administration*, (without limiting that expression strictly to the sense in which it was to be understood when speaking of the duty required of an ordinary administrator or manager;) and that the 16 feus, being in reality but ONE feu of the whole estate, were not granted in the due exercise of a power of rational administration, and on that ground could not be supported. 2d, That the real object, and effect of the transaction was not to grant feus properly so called, but, under the colour of granting feus, to alter the order of succession established by the entail of 1648; which, under that colour, the law would not permit to be done.

Sir Robert
Ker, of Cess-
ford, a de-
scendant of a
distinguished
race of border
chiefs, in
1648, exe-
cutes a deed of
entail of his
estates and ho-
nours.

KER, of Cessford, who had, in the earlier part of the 17th century, been advanced to the peerage with the title of Lord, then Earl of, Roxburghe, and who had obtained the unusual privilege of nominating his own successors in these honours as well as in his estates, in the year 1644 executed a deed of entail which differed from that of 1648, the entail now chiefly in question, in containing no reserved power of granting feus, tacks, &c. The deed of entail which he executed in 1648 contained the following prohibitory clause:—

Prohibitory
clause in en-
tail of 1648.

“ It shall not be lawful to the persons before de-
“ signit, and the heirs male of their bodies, nor to
“ the other heirs of tailzie above written, to make
“ or grant any alienation, disposition, or other right
“ or security qtsomever, of the said lands, lordship,
“ baronies, estates, and lieving, above specified, nor
“ of no part thereof: neither zitt to contract debts,
“ nor to do ony deeds qrby the samen, or any part

“ thereof, may be apprisit, adjudgit, or evictit, fra
 “ them; nor zitt to do any other thing in hurt and
 “ prejudice of thir pntis, and of the foresaid tailzie
 “ and succession, in hail or in part; all quilk
 “ deidis sua to be done by them; are, by thir pntis,
 “ declarit to be null, and of nane avail, force, nor
 “ effect.”

Nov. 15, 17,
 19, 22, 24, 26,
 Dec. 15, 17,
 1813.

ENTAIL.—
 ROXBURGH
 FEU CAUSE.

These prohibitions were qualified by the following exception or reservation:—

“ *Reserving always liberty and privilege to our*
 “ *saidis airis of tailzie to grant feus, tacks, and*
 “ *rentals, of such parts and portions of the said*
 “ *estate and living as they shall think fitting, pro-*
 “ *viding the samen be not made nor granted in hurt*
 “ *and diminution of the rental of the samen lands,*
 “ *and otheris forsaidis, as the samen shall happen*
 “ *to pay the time that the saidis airis shall succeed*
 “ *thereto.*”

Power to grant
 feus, &c.

This deed contained the following address to the Sovereign:—

“ And seeing that we ever pressed and endea-
 “ voured to live ane faithful and dewtiful subject,
 “ and intendis till death so to remaine to His Sacred
 “ Majestie our dread Soveraine; we therefoir, in
 “ all humilitie, by thir pntis intreit^s & requestis
 “ His Ma^{tie}, and his Hienes Success^{rs}, graciously
 “ to be pleisit to protect and maintene the richt &
 “ successioun of our said estait, hous, & leiving,
 “ according to his pnt nominatioun, speciallie seing
 “ we have been cairfull to nominate & designe such
 “ as we hope will continew and persevere in that
 “ same humble dewtie & faithfull respecte to His
 “ Ma^{tie}, and his Hienes Success^{rs}, as we have done

Address to the
 Sovereign.

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Entails of
1729 and
1740.

Clause as to
power of feu-
ing in the en-
tail of the *nova*
acquisita.

“ heirtofoir to His Ma^{tie}, and His Hienes Pre-
“ decess^{rs}.”

Earl Robert was succeeded by Earl William, the heir first named; who again was followed by Robert Earl of Roxburghe. John Duke of Roxburghe, who next succeeded, having acquired a variety of lands which either did not belong to the original estate, or had been feued out by his predecessors, executed two new deeds of entail, one in 1729, and another in 1740. By the former, he disposed the old estate; by the latter, the lands so acquired, to his eldest son and the same series of heirs with that in the old entail, under limitations in the same terms with those above quoted. The clause of reservation in the deed of 1740 was in the following terms:—

“ Reserving always liberty and privilege to the
“ said Robert Marquis of Bowmont, and the said
“ heirs of tailzie, to grant feus, tacks, and rentals, of
“ such parts and portions of the said lands and
“ estate above disposed as they shall think fit, pro-
“ viding the same be not made nor granted in hurt
“ and diminution *of the true and real rent* of the
“ said lands and others foresaid, as the same shall
“ happen to pay the time that the said heirs shall
“ succeed thereto: and sicklike, reserving power
“ and liberty to the said Robert Marquis of Bow-
“ mont, and the other heirs of tailzie above speci-
“ fied, to grant competent life-rent provisions and
“ conjunct fees, by contract of marriage, or other
“ habile security, in favours of any ladies with
“ whom the said persons or heirs of tailzie shall
“ happen to be married.”

A still later entail was executed by Robert Duke of Roxburghe in 1747, containing two dispositive clauses; the one applicable to the lands held under the old entail, and the other to those held under the deed of 1740. In the first the clause of reservation was expressed as in the deed of 1648, and in the second it was expressed as in the deed of 1740. (*Vide* the several deeds more particularly stated in the Chancellor's speech in judgment, *post*.)

Several feus were granted by the heirs of entail in virtue of the reserved power in the entail of 1648, some of them of considerable extent. A feu of the lands of Broomlands was made in 1650, but reduced in 1733, (by judgment in appeal,) as being *ultra vires*. A feu of the lands of Greenhead was made to Sir Andrew Ker in 1663, which was not challenged. In 1742, Robert, second Duke of Roxburghe, (the family having obtained from Queen Anne a patent granting to the family the titles of Duke of Roxburghe, &c.) granted to Lord Milton (a Judge of the Court of Session) a feu of a parcel of land near Edinburgh, consisting of about 12 acres, on which the family town house had stood before the Union.

William, second Earl of Roxburghe, besides Robert, who succeeded him, had another son, John, who was created Lord Bellenden. John, third Duke of Roxburghe, was the last of the heirs male descended from the eldest son, Robert; and at his death, which happened in March, 1804, the late Duke William, seventh Lord Bellenden, succeeded to the titles and estates.

Duke William having no heirs of his own body, Wi. King

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Another en-
tail by Duke
Robert in
1747.

Feus granted
by the Rox-
burghe family
at various pe-
riods.

Nov 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Duke of Rox-
burghe, suc-
ceeds, and, on
the presump-
tion that he
was absolute
fiar, executes
a new entail
in favour of
Appellant, &c.

Deeds exe-
cuted by Duke
William, on
the presump-
tion that he
was absolute
fiar.

Trust disposi-
tion, June 18,
1804.

Entail, June
18, 1804, in
favour of the
Appellant, &c.

and being advised that the entailed destination was at an end, or at least that the question was doubtful, executed a new settlement and deed of entail in favour of the Appellant, who was his near relation, and to whose family he was stated to have been under great obligations. These deeds having been reduced, it is material to state them only on account of their alleged bearing upon the question in regard to the feu dispositions which Duke William afterwards executed.

After having made a provision for the Duchess by a deed executed in the form of a post-nuptial contract of marriage, (21st May, 1804,) he then, by a trust disposition, (June 18, 1804,) conveyed the estates of Roxburghe to trustees, for certain uses and purposes therein mentioned; particularly, to pay an additional life-rent annuity of 3000*l.* a-year to the Duchess, together with a sum of 6,000*l.*; and also to pay a sum or sums not exceeding 100,000*l.* to such persons as she should appoint in case she survived him; 10,000*l.* to Mr. Hamilton Fleming, &c.; with power to borrow money on heritable security of the estates, to discharge the various legacies and annuities. The deed contained a power of revocation.

Of the same date with this trust disposition, he executed a deed of entail referring to that of 1648, and stating that “he lay under none of the limitations of it, and was at liberty, as absolute and “unlimited fiar,” to carry on the representation of the family by a new entail. By this new entail, after failure of heirs male and female of his own body, he continued the destination to Lady Essex

Ker, and then to Lady Mary Ker, and the heirs male and female of their bodies; whom failing, to John Bellenden Gawler, eldest son of John Gawler, of Ramridge, in the county of Southampton, &c. and the heirs male and female of his body; whom failing, to Henry Gawler, brother of J. B. Gawler, and the heirs male and female of his body, &c. This deed contained a power of revocation.

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

In September, 1804, the Duke executed another trust disposition in favour of the same persons, and nearly in the same terms as the former trust deed of June 18, 1804, for the purpose of including certain lands not comprehended in the other. The trustees were, by this deed, empowered to sell as much of the estates as might be necessary to pay the legacies, &c.

Sept. 26, 1804.
Another trust
deed including
certain lands
not compre-
hended in the
former.

It being doubtful whether the above deeds could be supported, the Duke, to provide against the event of their failure, founding upon the reserved power of feuing in the entail of 1648, &c. on the 26th September, 1804, executed *sixteen feu dispositions* in favour of the Appellant, comprising the whole of the Roxburghe estate, with the exception of the mansion house of Fleurs, and forty-seven acres adjoining. These feus, it appeared, all contained the same clauses, were written by the same person, subscribed on the same day and before the same witnesses, and were all in favour of the same person. It was declared however that the feus should be void:—1st, In case there should exist heirs of the Duke's body at the time of his death. 2d, In the event of the said J. B. Gawler, or his foresaids, establishing in their persons a right to the

Deeds made
on the suppo-
sition that he
might be
bound by the
entail of 1648.

Sixteen feus in
favour of Ap-
pellant.

Proviso, that
the feus should
be void in case
the Duke
should have
heirs of his

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURCHE
FEU CAUSE.

body, and in
case Appellant
should estab-
lish his right
under new en-
tail of June
18, 1804.

Casualties
taxed.

Unless feu
duty equalled
the rent paid
at time of
Duke's suc-
cession, Ap-
pellant to pay
the difference.

Appellant al-
lowed to re-
tain out of feu
duty the
amount of the
parochial bur-
dens.

Reservation of
access and
egress to and
from mansion
house of
Fleurs.

The other
mansion
houses, woods,
mines, and
minerals, &c.
were included
in the feus.

Contract rela-

estates under the entail of June 18, 1804, or under any other entail he might execute, &c. Subject to these conditions, the Duke bound himself, his heirs, and successors, to infest and seize the said J. B. Gawler, &c. for payment, &c. of a feu duty, stated to be *more than the rent of the lands at the time of the Duke's succession*. The casualties were taxed at 1s. at the entry of each heir, and 2s. at the entry of each singular successor. By another clause, it was stipulated, that in case it should appear that the feu duty did not equal or exceed the said rent, J. B. Gawler should be bound to pay the difference between the amount of the rent and that of the feu duty. These feu dispositions contained clauses of absolute warrandice, assignation to the writs and cvidents, mails and duties, from and after Martinmas, 1804, &c. It was also declared, that the feuar should be entitled to retain out of the feu duty the amount of the parochial burdens, in case the Duke had power to allow such deduction. The mansion house of Fleurs, with 47 acres, having been reserved as above, “free access and egress to and from the said mansion house, &c. by all the roads, avenues, and paths, presently leading to and from the same,” were also reserved. All the other mansion houses, with their appendages, were feued. Lands not rented at the time of Duke William's succession, or not rented separately for any precise or definable rent, were included in the feus, and a conjectural annual value put on them. The woods, mines, and minerals, were also conveyed by the deeds.

In consequence of a previous understanding and

agreement, a mutual contract of the same date with the feu dispositions was executed by the Duke and the Appellant, for declaring their intention in regard to the feus. After referring to the trust deed and entail before mentioned, this contract stipulated, that J. B. Gawler should, within 10 days from the date of the contract, execute and deliver to the Duke a deed of entail of the lands comprehended in the feus, conveying the same to himself (J. B. Gawler) in life-rent, to Henry Gawler, his brother, and the heirs male and female of his body; whom failing, to the other heirs appointed by the deed of entail of the 18th June, 1804, and with and under the conditions, &c. of that entail. It was also provided that this entail should be revocable by a joint writing by the Duke and the Appellant, &c. The Appellant also became bound to pay a sum of about 30,000*l.* and annuities to the amount of 2,900*l.*: and in case any of the feus should be reduced, the sums and annuities were to abate in proportion. A power was also given to the Appellant to sell lands to the amount of 20,000*l.* to pay off the legacies. The whole surplus rent was to be paid to the Duke for his life, and he was to have the lands falling out of lease, and leave to cut wood at his pleasure and for his sole benefit. Leases were to be made with his consent, and the rents were to be payable to him; and, in short, he was to have the entire use and profit of the property for his life.

A deed of entail was executed bearing the same date with the feu dispositions and contract, though, by the contract, it was only stipulated that it should

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

tive to the
feus, same
date, Sept. 26,
1804.

Appellant
bound to exe-
cute an entail
of the lands
feued to a se-
ries of heirs
appointed by
the Duke,
with the con-
ditions, &c. of
the deed of en-
tail of June 18,
1804.

Appellant
bound to pay
certain lega-
cies and an-
nuities, and
allowed to sell
lands to the
extent of
20,000*l.* to
pay off the le-
gacies.

Duke to have
full use of es-
tates for his
life.

Deed of en-
tail of feued
lands, exe-
cuted same

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—

ROXBURGHE
FEU CAUSE.

date, Sept. 26,
1804, though
stipulated only
to be delivered
in 10 days
from that time.

Subsequent to
feu transac-
tion, Duke ex-
ecutes two
deeds of entail,
in his sup-
posed charac-
ter of absolute
fiar, altering
the entail of
June 18, 1804.

be delivered within 10 days from that date; and the Respondent therefore argued, that this entail, if shown to the Duke at all, had not been accepted, as it differed in some material particulars from the entail required by the contract. The statement for the Appellant was, that this and the other deeds were delivered on the day of their date.

The Duke, after this, in his supposed character of absolute fiar, executed two entails, dated 11th January and 8th June, 1805; respectively, taking no notice of the feu transaction. By the former of these, the entail of the 18th June, 1804, was revoked, in so far as regarded the Ladies Essex and Mary Ker, and the heirs of their bodies; and by the latter, in so far as regarded the heirs of his own body: so that the Appellant was made the direct institute and disponee. Both these deeds contained a power of revocation. In all these entails, the heirs were empowered to grant leases for 21 years, or on the terms of the act 10 Geo. 3. cap. 51. But in the last deed it was provided, that the power of leasing should not extend to enable the heir to let the mansion house of Fleurs, or such other mansion house as happened to be the chief mansion house of the heir for the time, with 400 acres adjoining, for any longer period than the life of the grantor.

Duke also,
subsequent to
feu transac-
tion, grants a
commission to
Mr. S. Karr
to grant leases,
&c of his es-
tates in Scot-

The Duke also, on the 24th January, 1805, granted a commission and factory to Mr. Seton Karr, to manage his affairs and estates in Scotland. The witnesses to this were the Appellant and his brother. Mr. S. Karr, as commissioner for the Duke, granted five leases, Sept. 7, 8, 9, 1805.

Besides these, a sixth lease of the farms of Byre-
cleugh, &c. was granted by the Duke himself, as
heretable proprietor of the lands, to Mr. S. Karr,
in trust for the Duchess, for 21 years from the
term of Whitsunday, 1805. The tack duties in
these leases were made payable to the Duke, his
heirs, or assignees. The Appellant was a sub-
scribing witness to the execution of the lease of
Byrecleugh by the Duke. The Duke continued to
cut down and dispose of the woods at his pleasure.
The Respondent relied on these circumstances as
evidence that the Duke did not conceive that any
right had passed by the feu dispositions.

Infestments were taken on the feu dispositions, on
the 15th, 16th, 17th, and 19th October, 1805; and
the Duke died on the 22d of the same month and
year. It was stated by the Respondent, that none
of the infestments were put into the Register till
some weeks after the Duke's death.

Among a variety of other proceedings which
commenced on the death of Duke William, in re-
gard to the Roxburghe titles and estates, the Re-
spondent; then Sir James Innes Ker, and his then
competitor, General Ker, raised actions of reduc-
tion of the whole of these deeds, on the grounds,
“ that they had been obtained from the Duke
“ when infirm in body and mind; that they had
“ never been legally delivered; and that they were
“ so many contrivances to defeat the entail of 1648,
“ &c. by the fetters of which the late Duke was
“ bound.” Two distinct questions arose in the re-
duction :—

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—

ROXBURGHE
FEU CAUSE.

land; to which
commission
Appellant and
his brother
were wit-
nesses.

Leases grant-
ed under the
above com-
mission, and
rents made
payable to the
Duke, his
heirs, or as-
signees. Ap-
pellant a wit-
ness to execu-
tion of one of
them.

Infestments
taken on feus,
on Oct. 15, 16,
17, and 19,
1805; and
Duke dies on
22d of the
same month
and year.

Actions of re-
duction of all
the new deeds
of entail, and
of the feu dis-
positions.

Grounds of
reduction at
first stated.

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Question in
reduction di-
vided into two
branches,—
entails and
feus.

1st branch.
Judgment of
Court of Ses-
sion affirmed
by House of
Lords, that
Duke was
bound by fet-
ters of the en-
tail of 1648,
and that new
entails were
ineffectual.

2d branch.
Feus.

Interlocutor
of Court of
Session, 12th
Jan. (signed
16th,) 1808,
setting aside
the feus.

Appeal, and
judgment of
remittal.

1st, With respect to the deeds made by the Duke, on the supposition that he was not fettered by the entail of 1648.

2d, With respect to the validity of the feus.

It was determined by the Court of Session, (Jan. 15, 1807,) that Duke William held the estates under the fetters of an entail (1648) containing an effectual prohibition against altering the order of succession, &c. By this judgment, which was affirmed on appeal, (8th June, 1811,) the first branch was disposed of, and the deeds settling the estates on a different series of heirs found to be ineffectual.

The Court of Session then proceeded with the question as to the réduction of the feus, and in or about the month of May, 1807, the contract and entail of the feus were produced, (the other deeds having been produced before.)

On the 12th (signed 16th) of January, 1808, the Court pronounced the following interlocutor:—

*“ The Lords of Council and Session having ad-
“ vised the memorials in this case, find that the late
“ Duke of Roxburghe held the estates of the
“ Dukedom of Roxburghe under the fetters of a
“ strict entail: find that the deeds now challenged
“ were not granted in due exercise of the reserved
“ powers of that entail, of granting feus, tacks,
“ and rentals; and therefore sustain the rea-
“ sons of reduction thereof, and of the saisines
“ thereon.”*

An appeal having been entered against this judgment, and the cause having been argued in the

House of Lords, the following judgment of remittal was pronounced, (6th July, 1812:)—

“ Ordered and adjudged, that the cause be remitted back to the Court of Session, to review the interlocutor complained of in the said appeal, as to all and each of the deeds sought to be reduced, taking into their consideration all objections to the validity thereof, whether general or special; and in their farther judgment to state specifically the legal grounds upon which the said deeds respectively are to be considered as not granted in the due exercise of the power of feuing, if it shall be their judgment that the same are to be so considered. And it is further ordered, that the Judges of the Division to which this cause, after this remit, shall belong, shall require the opinion of the Judges of the other Division in matters or questions of law.”

The cause having come on before the First Division of the Court of Session, and the opinions of the Judges of the Second Division having been taken, the following judgment was pronounced:—

“ The Lords having resumed consideration of this cause, with the remit thereof from the House of Lords, and advised the same with the mutual cases for the parties and papers produced, and having heard Counsel at great length in presence of the Judges of both Divisions, and considered the answers by the Judges of the Second Division of the Court to the questions in law transmitted to them by the interlocutors of the Court of the 21st January and 6th February last; Find, Primo, That the entail of the estate of Rox-

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

May 18, (signed 21,) 1813.
Judgment of the Court of Session, with the general and special grounds on which the feus were reduced in toto.

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

“ *burghe, executed by Earl Robert in 1648, and*
 “ *subsequent entails, under which the late William*
 “ *Duke of Roxburghe held the said estate, contain*
 “ *a general prohibitory clause against alienation,*
 “ *contracting debt, or altering the order of succes-*
 “ *sion; and that the reservation annexed to the*
 “ *said clause, giving liberty and privilege to our*
 “ *said airis of tailzie to grant feus, tacks, and*
 “ *rentals, of such parts and portions of the estate*
 “ *and living as they shall think fitting, providing*
 “ *the same be not made nor granted in hurt and di-*
 “ *minution of the rental of the samen lands and*
 “ *others foresaid, as the samen shall happen to pay*
 “ *the time that the saids airis shall succeed thereto,*
 “ *is not to be considered as a substantive clause,*
 “ *but is to be taken in connection and consistency*
 “ *with the previous prohibitory clause, and as mo-*
 “ *difying, and not destroying it; and that these*
 “ *two clauses must receive a construction consistent*
 “ *on the whole: Find, That such construction ne-*
 “ *cessarily imports only a power of administration,*
 “ *according to sound discretion, by which all the*
 “ *heirs of entail in succession may enjoy, under the*
 “ *control of Courts of Justice, the power and pri-*
 “ *vilege of feuing parts and portions for the benefit*
 “ *of the estate. That this construction, warranted*
 “ *on general principles, appears also to be conso-*
 “ *nant to the probable intention of the entailer, as*
 “ *discoverable from the context; seeing that he*
 “ *confers the power of feuing on his heirs of tailzie*
 “ *in their order, which therefore cannot be compe-*
 “ *tently exercised by any one heir to the exclusion*
 “ *of all others, and to the destruction and annihi-*

“ lation of the subjects over which this power is so
 “ reserved to them all; seeing also that he limits
 “ the power to parts and portions, which is exclu-
 “ sive of the power of feuing the whole at one time,
 “ either in one or more deeds; seeing also that he
 “ limits the power to such parts and portions as the
 “ heirs shall think fitting; which words must be
 “ applied, not as descriptive of the absolute will and
 “ pleasure of the heir, but as indicative of the parts
 “ to be feued, as being in sound discretion, apt,
 “ suitable, and fitting for that purpose; seeing
 “ also that he limits the power in the amount of the
 “ feu duty, which is to be without hurt or diminu-
 “ tion of the rental; all clearly indicating a re-
 “ strictive intention in the tailzier, for the be-
 “ nefit and security of future heirs; therefore
 “ find, that the 16 feu dispositions sought to be
 “ reduced, all of the same date and in favour of the
 “ same person, conveying away the property or do-
 “ minium utile of the whole entailed estate, with
 “ the exception of the mansion house of Fleurs, and
 “ about 47 acres of ground adjoining, cannot be
 “ considered as granted in conformity to the powers
 “ conferred by the said clause, or in consistency
 “ with the rights of future heirs of entail.—Se-
 “ cundo, In respect of the form of the transaction
 “ between the parties, and the whole circumstances
 “ of the case, find, that the whole of the said 16
 “ feu dispositions are so connected and bound to-
 “ gether, that they must necessarily be set aside in
 “ toto, and cannot be supported in part.—Tertio,
 “ Find, that the said 16 feu dispositions in favour
 “ of the Defender, whom the Duke had constituted

Nov. 15, 17,
 19, 22, 24, 26,
 Dec. 15, 17,
 1813.

ENTAIL.—
 ROXBURGHE
 FEU CAUSE.

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

“ his heir of entail in the same lands by a previous
 “ existing entail, and so continued by subsequent
 “ entails, taken with all the conditions, reserva-
 “ tions, irritancies, and defeasancies, contained in
 “ them, and in a relative contract and entail of the
 “ same date, and with the other deeds and conduct
 “ of the parties, prior and subsequent to the exe-
 “ cution of them, cannot be held as real feus or dis-
 “ positions inter vivos, conferring an indefeasible
 “ right of property de præsentî on the Defender,
 “ but as settlements of succession, to take effect
 “ only after the death of the Duke, and made in
 “ order to accomplish an alteration of the order of
 “ succession prescribed by the foresaid entail 1648,
 “ contrary to the prohibition contained therein
 “ against altering the order of succession of the
 “ heirs thereby called.—Quarto, Find, that the
 “ foresaid clause of reservation gives no liberty or
 “ privilege to the heirs of entail to feu any lands
 “ which did not pay a rent at the time the heir so
 “ feuing succeeded thereto; and that all such feus
 “ are in contravention of said entail; and that this
 “ objection applies to the feus which have been
 “ numbered 1, 2, 3, 4, 6, 9, 10, 11, and 15.—
 “ Quinto, Find, that by the law of Scotland, founded
 “ on the ancient principles and customs of the
 “ feudal system, which is the common law of Scot-
 “ land in all matters of land rights, Duke Wil-
 “ liam, under the said clause of reservation, had
 “ no power to grant feus of the family mansion
 “ house of Fleurs, Broxmouth, and Byrecleugh,
 “ nor of the grounds adjacent thereto, in the na-
 “ tural occupation of Duke John and himself, and

“ not rented at the period of his, Duke Wil-
 “ liam’s succession; and that this objection applies
 “ to the feus which have been numbered 1, 2, 3, 10,
 “ and 11.—Sexto, Find, that the superiority of the
 “ said whole lands was in all events comprehended
 “ under the strict fetters and limitations of the
 “ entail 1648; and that the said Duke had no
 “ power, in virtue of the said clause of reserva-
 “ tion, to tax the casualties of superiority natu-
 “ rally incident to feu-holdings, and which must
 “ have remained to the heirs of entail, unless they
 “ had been specially alienated by such clause of
 “ taxation, thereby depriving the succeeding heirs
 “ of entail of important and beneficial rights ap-
 “ pertaining to the entailed superiority; and that
 “ this objection applies to the whole 16 feu disposi-
 “ tions.—Septimo, That the comprehending gene-
 “ rally mines and minerals, lime and stone quarries,
 “ in the said feu dispositions, does not afford an
 “ objection to the same, under the prohibitory
 “ clause of said entail; but find, that where mines
 “ and minerals, lime or stone quarries, were let to
 “ tenants, the said Duke William had not power
 “ under the said clause of reservation to feu the
 “ same, without stipulating a separate appropriate
 “ feu duty, not less than the rent so paid: but
 “ find, that the Pursuer has not condescended on
 “ any mines or quarries which were so rented.—
 “ Octavo, Find, that the comprehending woods and
 “ timber situated on farms, the solum on which
 “ they grew being let to tenants, does not afford an
 “ objection to the same under the prohibitory clause
 “ of said entail: but find, that where woods or

Nov. 15, 17,
 19, 22, 24, 26,
 Dec. 15, 17,
 1813.

ENTAIL.—
 ROXBURGHE
 FEU CAUSE.

Nov. 15, 17,
19; 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

“ plantations were reserved from the leases, and in
 “ the natural occupation of the heir of entail, the
 “ said Duke William had not power to feu the same
 “ under the clause of reservation in the said entail;
 “ and that this objection applies to the feus num-
 “ bered 1, 2, 3, 4, 5, 10, 12, 13, 14, and 16.—
 “ Nono, Find, that such of the feu dispositions as
 “ contain lands composing parts of the entailed es-
 “ tate, which had been let along with lands not in-
 “ cluded in the said entails, at cumulo rents for
 “ both, are objectionable and reducible, in respect
 “ that the matter has been made inextricable by
 “ the parties, the clause of reservation not furnish-
 “ ing data for dividing the rents, and restricting
 “ the feu duties contained in these deeds to the en-
 “ tailed lands; and that this objection applies to
 “ the feus numbered 5, 7, 12, 14, and 15.—De-
 “ cimo, Find, that the whole of the 16 feu disposi-
 “ tions are liable to one or other of the foresaid spe-
 “ cial objections; and, in respect of the nature of
 “ the rights granted and created, and that the
 “ same cannot be altered or modified by any Court,
 “ find, that each feu so objectionable must be set
 “ aside in toto: and on the whole find, that the
 “ said 16 feu dispositions were not granted in the
 “ due exercise of the power of feuing, contained in
 “ the foresaid clause of reservation, conferred on
 “ the heirs of entail in succession, of granting feus,
 “ tacks, and rentals; and adhere to the former in-
 “ terlocutor of the Court, dated the 12th, and
 “ signed the 16th of January, 1808, and sustain
 “ the reasons of reduction of the said 16 feu dispo-
 “ sitions, and of the sasines thereon, at the instance

“ of the Pursuer, James, now Duke of Roxburghe,
 “ designed in the summons, Sir James Norcliffe
 “ Innes, Baronet, who is now served and retoured
 “ heir of entail in the said estate of Roxburghe;
 “ and reduce, decern, and declare accordingly.”

Nov. 15, 17,
 19, 22, 24, 26,
 Dec. 15, 17,
 1813.

ENTAIL.—
 ROXBURGHE
 FEU CAUSE.

Appeal.

From this judgment the Appellant again appealed to the House of Lords.

Clerk and Leach (for Appellant.) The notion that the power of an heir of entail might be a power of administration for the benefit of the estate, had originated with *Lord Meadowbank*; and though it had never before occurred to the Respondent's Counsel, *Blair*, the late President, *Gillies*, now *Lord Gillies*, &c. this new *nostrum* of entail law became on the remit the Respondent's leading proposition. The Earls and Dukes of Roxburghe had been all along granting feus, without the smallest conception that the power was given merely for the purposes of a beneficial administration of the estate. The objection to the feus comprehending lands not before rented, &c. had not before occurred. A doubt on the point was first intimated by an authority here. (*Lord Eldon*. When I shall be dead and gone, you will hear that my doubts in this case have been either the most beneficial or the most mischievous that ever were thrown out.) This notion of a power of administration was founded on no authority, and was contrary to every principle of law. The general rule was, that heirs of entail were absolute proprietors, except in so far as they were expressly fettered. They might be restricted from doing many things which an administrator might do; but their power being partly for their own advantage, they might do innumerable acts not competent to an administrator.

Power of ad-
 ministration.

Lady Hamil-
 ton's case.

The heir of entail had a right of property, in which the power to transfer was inherent. This created the necessity of the resolute clause; for otherwise it would have been more convenient to have established a succession of trusts, life-rents, or powers of administration. But here the resolute clause was perfect; and the question was, Whether the Duke had forfeited his right to the whole estate by granting these feus? The slightest violation was a contravention, and it was only by forfeiture of the

Hope. M.
 Prac. Tailzies,
 s. 9, 10, 11.

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Young, Dec.
12, 1705.—

Lady Red-
heugh v.

Bruce, March
11, 1707.—

Creditors of
Craig of Ric-
carton, June
13, 1712.—

Creditors of
Primrose v.

the Heirs of
Entail of Dun-

napice, Jan.
27, 1744.—

Kilkerran.—
Creditors of

Hepburn, Feb.
8, 1758.—

Bryson v.
Chapman,

Jan. 22, 1760.

—Cases of
Tillicoultry,

Bonnington,
Sutherland,

Feb. 26, 1801.

—Lockharts
v. Stewart,

June 11, 1811.

That, if this
was a power
of administra-

tion, the feus
ought only to
be reduced

quoad exces-
sum.

contravener's right that his creditors and purchasers could be defeated. This had been settled by numerous decisions. The Appellant was not a gratuitous donee, and therefore the principle of strict construction applied as in the case of creditors, &c. The feus had all the onerosity required by the entail, and a great deal more.

If the heir of entail was only an administrator, what was the legal capacity or character according to which he must manage? Was it that of a tutor, curator, a trustee, a factor or mandatory of any sort, a bankrupt, or a person on death-bed, &c.? No analogy from any or all of these characters would define his powers, and the Court had not defined them. If the power was a power of administration, one of two things must be maintained:—1st, That the most onerous feu, to a party who had paid down his money and obtained possession, could have been set aside by this control of Courts of law, *independent altogether of a resolute clause*; or, 2d, That if the Duke had granted such a feu strictly according to the terms of the clause, but for his own benefit, and not for that of the estate, a declarator of irritancy might have passed against him to forfeit the whole estate. The first proposition was contrary to the act of 1685, cap. 22, and to all the authorities: the second was a contradiction in terms; for the limits of a power of administration followed from its nature, and required no aid from a resolute clause; and the necessity of maintaining that a feu to a third party could not be reduced without that clause, amounted to a demonstration that the power of the heir to feu could be nothing else than a power remaining with him as *proprietor for his own benefit*.

The interlocutor, too, was inconsistent, inasmuch as it did not give effect to this power as if it were a right of administration. The general rule was, that the acts of an administrator were only reducible *quoad excessum*. Upon their own principles, then, the feus ought to have been sustained in part; whereas, they had, upon this ground of excess, reduced the whole. Here it was evident they mixed the idea of an heir of entail as a restricted proprietor, with the idea of his being an administrator with powers of administration. Upon this hypothesis, it must be held,—1st, That the powers of the heir of entail were powers of administration. 2d, That if the power was exceeded, the

estate was forfeited. 3d, That the power of administration being undefined, must be construed according to the arbitrary notions of the Court, as to what was proper or improper in the management of the estate. It was hardly possible to imagine a doctrine more hostile to every principle of law or justice, or more mischievous in its tendency. An heir of entail could not be safe, according to this doctrine, in doing even that which was not prohibited by the entail. He might incur an irritancy by cutting a tree, by pulling down an old wall, by granting a lease at what the Court might imagine too low a rent, for a longer time than they might think proper, to a bad tenant, or on conditions as to cropping, &c. There might be an endless variety of opinions as to the proper exercise of such a power. Here, then, was a question of *irritancy* depending entirely on *the arbitrary discretion* of a Court. The very statement of such a proposition showed that it was absurd. The fixed rule of law was directly the reverse.

Besides, it was now an established rule of law, that no perpetual unknown incumbrance could be created on lands, nor any real burden which could not at once be discovered from the records by creditors or purchasers. But how were they to discover on the face of the entail the supposed limitation of the heir to a right of administration, or the bounds of that right? Here, then, in the face of a fixed rule of law, was an unknown burden or limitation on the right of feuing, depending on the arbitrary discretion of the Judges. The right of feuing without diminution of the rental was in the present case *ex facie* absolute. A purchaser, then, must suppose himself safe by the absolute terms of the power, or it must be a matter of *uncertainty* whether he could safely transact or not; but it was impossible that, where a power was given, in its terms absolute, it could be an arbitrary question, whether a purchaser was safe in contracting on the faith of it.

The doctrine was no less contrary to precedent than to principle. The Broomlands and Greenock cases, which had been relied on as authorities in its favour, would be found on examination directly adverse to it.

The subordinate propositions were little calculated to aid the general doctrine. It was a power of rational administration, it was said, because it was given to the heirs in succession. But

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Ersk. b. 2. t. 3.
s. 49, 50, 51.—
Bell on Bank-
rupt Law, p.
207—213.

Duke of Rox-
burghe v.
Wanehope of
Don, March
5, 1733.—
Cathcart v.
Schaw Stew-
art, 1775.
Vide Lord

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1818.

ENTAIL —
ROXBURGHE
FEU CAUSE.

Swinton's
pamphlet on
Entails, 1765.

Erskine v.
Balfour, Feb.
14, 1758.—
Edmonston of
Duntreath,
Dec 24, 1769.
—Menzies v.
Menzies,
June 25, 1785.
—Wellwoods
v. Wellwoods,
Feb. 23, 1791.
—Marchion-
ess of Titch-
field v. Cum-
ming Gordon,
May 22, 1798.
—Bruce v.
Bruce, Jan.
15, 1799 —
Brown v. Lady
Dalhousie,
May 25, 1808.

the whole must at last be feued out; and what did it signify whether this was done by one heir or by a dozen? “*Under the control of Courts of Justice.*” — Where were these words to be found in the entail? A Duke of Roxburghe, before he granted a feu, must apply to the Court for permission, or he must grant it at the peril of forfeiture, depending on arbitrary discretion! No man would then accept a feu, without having the right ascertained by declarator. — But what if decree in absence only could be obtained? The feu might be reduced at any period within 40 years, if not suited to arbitrary notions of due administration entertained by the Judges for the time. “*For the benefit of the estate.*” Where did these words appear in the entail? This was making a new entail, not construing the old. In questions of fetters, intention had hitherto gone for nothing. But now *probable* intention was, in such cases, to be the rule of construction. Where was the evidence of it to be found? He who examined the records would look for it in vain. Nice distinctions had been made between the words *fitting* and *fit*. But in the entails of 1740 and 1747, by which half the estate was regulated, the word *fit* was used. From these, and the entail of 1729, it was clear that the makers considered the words *fitting* and *fit* as synonymous with, *at their pleasure*.

The power was applied to tacks and rentals, as well as feus; and from the analogy as to the case of tacks, it had been said, that the power to feu imported only a power of administration, without being converted into an instrument of alienation. But a permission to feu was a permission to alienate. A feu was a permanent, a tack a temporary right; and there could be no analogy between them in point of duration, but there might be in point of extent; and it had been asked, but not answered, Whether a tack of all or any part of the estate would have been set aside merely on account of its extent?

The introduction of the limitation, “without diminution of the rental,” proved that the entailer had no idea that he was giving merely a power of administration. The entailer himself had given the only rule. It had been said by a high authority here, (*Eldon*,) that in the case of an English power to let at the rent paid at a person's succession, if he succeeded at 21, the lands then paying 21,000*l.*, and lived till 90, the lands then paying 90,000*l.*, he might, at his age of 90, make a lease for his

own interest, at 21,000*l.* One of the Judges below had said this was not Scotch law. But there was no principle nor authority to show that it was not.

The reduction, on the head of excess, amounted to the common case of the eviction of part of an estate sold, (as to which, *vide* Bankton, b. 1. t. 19. s. 24.—Voet. l. 21. t. 2. s. 2. 15. 35.—Dict. vol. ii. p. 356, 357. vol. iv. p. 255, 256.—*Macleari v. M'Niel*, June 23, 1757.—Dict. vol. ii. *voce* *Warrandice*, p. 513—519. *Russel v. Harrower*, June 28, 1751.) The Court frequently reduced *decrees arbitral*, in so far as they were *ultra vires*, and sustained them *quoad ultra*. A deed of settlement might be reduced, in so far as it was to the prejudice of the *legitim*, or *jus relictæ*; and yet it would not be reducible, in so far as it settled the dead's part, (*Crauford v. Hamilton*, Dec. 25, 1702.—*Jackson v. Cramond*, March 6, 1777, (Morrison Dict. Appendix, *voce* *Arbitration*.)—*Kyd v. Paterson*, Jan. 27, 1810.) If the power was a power of administration to be exercised *secundum arbitrium boni viri*, the very idea included in these words supposed that the Court *must* fix what *was* too much, and what *was not* too much, (*vide* Dict. *Arbitrium boni viri*.) It was what took place sometimes in England, and almost every day in Scotland, in cases of powers to charge estates with competent provisions for wives and children.

The proper description of a *mortis causa* deed was, *a deed not delivered, containing a clause dispensing with delivery, of course revocable at the will of the grantor, by which neither a legal right nor beneficial interest was vested in the grantee during the grantor's life.* On the other hand, *a deed not dispensing with delivery, actually delivered, and not subject to revocation, was a deed inter vivos.* One of the Judges below (*Glenlee*) had stated (but without mentioning any authority) four kinds of *mortis causa* deeds, one of which was a deed, though without power of revocation, express or implied, where its effect in favour of the donee was suspended during the grantor's life. None of the Judges of the Second Division had held as a rule of judgment that there was here a power of revocation; and the Court therefore must have decided that the deeds were *mortis causa* in the sense just mentioned. But such a thing was never before heard of as a *mortis causa* deed *delivered and admitted to be irrevocable.* The description applied to marriage contracts, to conjunct fees to husband

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Mortis causa.

Ersk. b. 3. t. 2.
s. 43 —Case
of Thomson's,
Dec. 8, 1675.
—Stat. 1696,
cap. 25.—
Duggan v.
Wight, March
2, affirmed
Nov. 24, 1797.

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Greenock
case, 1755.—
Law v. . . .
M'Gill, 1798.
—Wellwood
v. Lord Elgin,
1810. . . .

Lands not be-
fore paying
rent. . . .
rent.

and wife, to parent and child, &c. Were these *mortis causa* deeds? A great deal had been said with a view to raise an inference, that the feus were to be held in trust for the Duke; but as there was no declaration to that effect, nor any express power of revocation, the allegation was in reality an allegation of a trust to be proved neither by writ nor oath of party, which was directly in the face of a positive statute. But suppose (which was not the fact) there had been a power to revoke the feus, the Duke had power to limit the whole at his pleasure; and why should he not have power to make the feus revocable as well as conditional?

The argument of the Respondent at last ended in this,—that the feu rights had the effect of giving away the *dominium utile* of the estate, and altering the order of succession. But the question was, Whether this was within the power? It was a settled rule in the law of entails, that that might be done indirectly which could not be done directly.

The power to feu such parts and portions of the estate as the heir should think fitting, was broadly given, without any indication of intention, to confine it to those lands which had been let at the time of his succession. But the restriction of the power to the lands before actually paying rent, must be clear and express, before it could be available; as the question must be, Whether the Duke had, by comprehending in the feus lands which had not been let, forfeited his right to the estate?

The only limitation was, that the rental of the estate should not be diminished; which might mean, that the whole amount of the rents, as paid by the tenants, should be reserved, or rather the issues and profits paid or yielded by the whole estate, including lands let or unlet. No one ever heard the word *rental* applied to the rent paid for a single farm. *Rental* more properly signified an account or schedule of rents. It was true, in the entail of the *nova acquisita*, the expression was, “true and real *rent*;” but all these lands had been under lease, so that the question there did not arise. It would have been very inconvenient to separate lands which had been let from those which had not. (*Lord Eldon*. In the case of tenant for life, in England, with power of leasing only such lands as had paid rent, the inconvenience signified nothing, if the meaning was clear that he should so lease. If he wanted powers, he must come to Parlia-

ment. It was worthy of notice, that in each of these feus, the feu duty referred to the rent or rental of that one in particular, and not to the rental of the whole estate.) If this were a case of English law, and a power had been clearly given to let the *whole* of the estate at the old rent, lands not before rented might be let at any rent the lessor pleased. The cases might be cited from a book where the principles and distinctions were accurately pointed out. "In the case of *Bagot v. Oughton*, the power was to lease *all* or any of the premises *at such yearly rents or more as the same are now let at.*" A lease was made of the mansion house and demesne lands, which had not been leased before. It was determined, principally on the authority of Lady Baltinglass's case, (cited before in the same book,) that the lease was void, although it was forcibly argued that *all* the lands were authorised to be leased, &c. It was thought there, that the power could not be meant to extend to the mansion house, &c. and the conclusion followed the fact. Mr. Sugden then cited other cases, and observed, "that in all these cases, the intention of the parties was to govern; and that there were several instances in which parts of the estate, never leased before, had, in favour of the supposed intention, been considered to be within powers requiring the ancient, or usual, or present rents to be reserved." The first of these was *Cumberford's* case, where, under a power to make leases of the premises, or any part thereof, "so that as much rent, or more, were reserved on each lease as was reserved in respect of it within the two years immediately preceding," it was resolved, that lands which had not been leased within the two years at any rent, might be leased by the donee at any rent he pleased; because it appeared by the generality of the words, that it was intended he should have power to lease all the lands. The Court therefore considered the restrictive clause as applicable only to such lands "as had been demised two years before." Mr. Sugden then referred to other cases,—*Pomeroy v. Partington*, *Goodtitle v. Finucan*, &c.; and the conclusion was, that in the construction of powers, the intention of the parties, collected from the whole instruments, was to be the guide. But it could not have been the intention of the entailer here, that lands by accident perhaps out of lease at the time of an heir's succession, should thereby be deprived of their quality of being liable to be rented. Suppose

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Sugden on
Powers, 480—
482. 486.

Bagot v.
Oughton,
8 Mod. 249.
Fort. 332.

Cumberford's
case, 2 Ro.
Abr. 262, pl.
15.

Pomeroy v.
Partington,
3 T. R. 665.—
Goodtitle v.
Finucan,
Dong. 565.
1 Bur. 124.

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

“Eately let-
“ten.” This
appears to have
been the opi-
nion of the
Judges below,
though not
exactly so put
in the interio-
rator.

Mansion
houses.

Casualties.

Hope, *voce*
Vassal.—Kin-
caird v. Hat-
ton, Dict
voce Relief,
No. 2.—E.
Dundonald,
Nov 24, 1736.

Woods,
mines, and
lands entailed
and not en-
tailed.

the construction to be, that lands *lately* letten might be feued; what was to be considered as *lately*, or where was the limit in principle.

The finding as to the mansion houses rested on no authority except the Greenock case; and at any rate, the principal mansion house, with 47 acres about it, had here been reserved. The mansion house, it was true, went to the heir, and not to the widow; but if there were two, the widow took one of them. The eldest of heirs portioners had the principal mansion house, garden, &c.; but all the rest was divisible. There was no authority at all for extending the rule from one to several mansion houses.

The Greenock case was a direct precedent for the taxation of the casualties. But the only casualty taxed was that of *relief*, and it was doubtful whether it was a casualty at all.

The finding as to the mines and minerals was final in favour of the Appellant. The objection to certain of the feus, as comprehending woods, the *solum* of which had not been before let, and as containing entailed and unentailed lands before let at a cumular rent, was bad, on the general ground, that the only limitation was, that the rental of the whole should not be diminished. The Appellant, in case that ground should fail him as to the woods, was willing to give up the parts where considerable plantations stood, and still to pay the whole of the feu duty. In case it should fail him as to the entailed and unentailed lands, he contended that the rents might be divided. It might be stated as a general principle, that the law of Scotland furnished an universal power of division, where division was possible; as in cases of heritable and moveable subjects granted on death-bed, of heirs portioners, allocations of stipends, &c. In England, if the excess in the execution of a power could be distinguished, the execution was good to the extent of the power. The Appellant (if that should be held necessary and sufficient) offered to increase the feu duty to the full amount of the rents due by the leases, including the sums paid for the unentailed lands.

Romilly and *Cockburn* (for Respondent.) The whole question might be comprised under two general heads:—1st, What the power was? 2d, What had been done in the execution of it? The Respondent had not presented a cross appeal against the finding as to the mines and minerals, because, as the Court

had reduced the 16 feus, he did not think it necessary to insist that they should be reduced for his reasons. If any thing turned upon that, the standing order might be suspended, to enable the Respondent still to present a cross appeal, as had been done in a former case.

The power was (as the Court below had stated it to be) a power of rational administration, and evidently so intended to be by the entailer. His object was to raise a powerful support to the throne, as appeared from the invocation or address to the Sovereign, in the entail which had a reference to the public events of the time (Charles I.) But if these feus were to stand, this great feudal Lord would not have a single tenant, and a colliery might be carried on close to his window.

The Court below had not decided generally that the powers of heirs of entail were powers of administration, but that such was the case here. This principle, or *nostrum* of entail law, as it had been called, was to be found in the Greenock case. The entailer might have confined the heirs within a power of rational administration, and this brought the matter to a question of construction. This, it had been said, was not a power, but a right. The distinction in law was not very clear. An heir of entail was said to be absolute fiar, except in so far as he was fettered; in other words, he might do any thing within the power, which was admitted.

According to the construction put upon the entail by the Appellant, it first prohibited alienation, and then permitted it; which could not be the meaning. The power given to the heirs in succession, to feu such parts and portions as they should think fitting, imported, that each should only feu such small parts, &c. that one could not reasonably look forward to the period when all should be feued out. There was a greater distinction between *fitting* and *fit* than between *rent* and *rental*. But even if the power had been in express terms to feu parts and portions *at the pleasure of the heirs*, it could not, when considered in connexion with the rest of the deed, be held as a power in one heir to feu the whole. The words, "*take such as you choose*," (out of a collection of pictures, for instance,) implied a selection. It was admitted, that in feuing "*under the control of Courts of Justice*," the heir must act at the peril of contravention; and so he must do on the Appellant's principle. Wherever there was a limited

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

1st, What the
power was.
Power of ad-
ministration.

Cathcart v.
Schaw Stew-
art, Jan. 31,
1755 Appeal,
March 19,
1756.

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

2d, What had
been done in
execution of
the power.

Mortis causa.

Subjects not
before paying
rent.

Cumberford's

power, it might be exceeded; and the legal consequences, be they what they might, must follow. It had been said that the strict *letter*, and not the *intention*, was the proper principle of construction, as in the Duntreath case. The decision there appeared to border a little on absurdity; but, admitting its authority, the rule did not apply in cases of powers.

If an heir could not feu the whole, how much, it had been asked, could he feu? Where did the excess begin? They were not bound to answer that. It was enough to show that here there was an excess.

As this was one transaction, any objection to one feu vitiated the whole.

It was clear from the deeds themselves, and the acts of the parties, (*vide ante*,) that these were not proper feus, but *mortis causa* deeds, for the purpose of altering the order of succession. It was not necessary for them to contend that they were so in form. It was sufficient that they were so in substance.

There was no rule by which an heir under strict entail could do a thing forbidden, directly or indirectly. Where a thing was not forbidden, it might be done for the purpose of accomplishing that which the entailer had not intended. But where the act forbidden formed part of the original transaction, it could not be supported. Where a sale was not forbidden, an heir of entail might make a genuine sale; but if the purchaser was bound to reconvey and settle the estate on a different series of heirs, (if the alteration of the order of succession was prohibited,) this was void. In England, illusory executions of powers, though right in form, were void, as being wrong in substance; and there was no authority to show that such was not the law of Scotland. On the face of them, the deeds were to take effect *de præsenti*; but they were *mortis causa*, because held under a secret trust, by which the Duke was still to remain proprietor.

In answer to the objection, that the power was confined to subjects which had been before rented, a distinction had been made between *rent* and *rental*; and it had been said, that rental meant a schedule of rents. That certainly was not the meaning here, and there appeared no foundation for the distinction. By the English law, the objection would clearly have been good. *Cumberford's* case had been mentioned with dissatisfaction by

Hale, and also by *Lord Chancellor King*, in *Foot v. Marriot*. The case of *Goodtitle v. Finucan* was cited by Sugden to show that the intention to be collected from the whole of the instrument was the rule of construction; and the cases of *Bagot v. Oughton*, *Foot v. Marriot*, and *Pomeroy v. Partington*, were cited to show that it was still open to contend that the property to which the restrictive clause could not apply, should, if valuable, be rather held not to be within the power, &c. It was only requested that this case might be acted on according to these cases of English law, and that the power should be construed according to the intention of the entailer.

It had been decided, that where a lease was made of all the lands, some of them within the power, and some not, at an entire rent, the rent could not be apportioned, but the lease was void as to the whole, (*vide Orby v. Mohun, Cardigan v. Montagu*, and cases cited in Mr. Sugden's book on Powers, cap. 10, sect. 4.) The case of *Campbell v. Leach* was no authority against this, as the reservation there was distinct and separate. (*Lord Eldon*. Suppose a tenant said, 'It was our intention to reserve the best 'improved rent, but we were mistaken, and I am willing to pay 'a larger sum;' no Court of Equity, in my apprehension, could say that this was sufficient.) 'The question always was, Whether the execution was good at first? If it was not, nothing could cure it.

The *Greenock* case had decided the question as to the mansion houses and policies.

It was not contended that all the casualties had been taxed. The Respondent only said, that the sums payable at the entry of the heirs and singular successors (which in this case must be very considerable) had been taxed. These were clearly an incident which remained after the severance of the superiority and property. This, then, was not merely granting feus, but giving away a part of the superiority, which the heir of entail was not entitled to do. This casualty was taxed in the *Greenock* case; but it was necessary there, from the nature of the thing, and the description of feus (for building) intended to be granted.

Lord Eldon (Chancellor.) It had been stated with great propriety, and with great energy, that

Nov. 15, 17,
19, 22, 24, 26,
Dec. 15, 17,
1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.
case, 2 Ro.
Abr. 262.—
Walker's case,
1 Freem. 413.
—Foot v.
Marriot, 3 Vin.
Abr. 429, pl. 9.
—Goodtitle v.
Finucan,
Doug. 565.
1 Barr. 124.
3 T. R. 671. n.
—Bagot v.
Oughton,
8 Mod. 249.
Fort. 332.—
Pomeroy v.
Partington,
3 T. R. 665.
Entailed and
unentailed
lands, &c.
Orby v. Mo-
hun, 3 Cha.
Rep. 56.
2 Vern. 531,
542. Prec.
Cha. 257.
2 Freem. 291.
Gilb. Eq. Rep.
545.—Du-
chess of Ha-
milton v. Mor-
daunt, 3 Bro.
P. C. 248.—
Owen v. Tho-
mas, Cro. Car.
94.—*Cardi-*
gan v. Monta-
gu, Sug. Po.
565.—*Camp-*
bell v. Leach,
Amb. 740.
Nov. 23, 1813.

Nov. 23, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.
Judicial ob-
servations.

the judgment to be given would not only decide this cause, but would have a most extensive effect, with respect to the power, or rather (as *Mr. Clerk* would have it) the *right* of granting feus and tacks upon all the estates held under entails in that part of the island from which the cause came. They now knew to a certainty that these feus had been thought capable of being struck at on grounds which had not at first occurred to the Judges below; one of which grounds had been first suggested by himself. In a cause relating to property of such immense value, in a question of such vast importance to the parties, and to the law of Scotland, it could not be expected that judgment should be pronounced immediately upon the close of the argument. But considering for how long a time the parties had already been kept in painful suspense, he added, that no farther time should be suffered to elapse before judgment than was absolutely necessary for due deliberation.

Dec. 15, 1813.

Judicial ob-
servations, and
statement of
facts.

Entail of 1644.

Lord Eldon (Chancellor.) The entail of 1644 contained the same address to the throne as that of 1648, and held out the same inducement for the support of the entail,—the entailer's known loyalty. He thought it right to notice this instrument, as he could not find there, in terms, the same permission to grant feus, tacks, and rentals,—a difference which might possibly be considered by some as material. Then came the entail of 1648, with its prohibitory and permissive clauses, (*vide ante*;) to every word of which clauses he was anxious to point their particular attention, as it had been said on the bench

Entail of 1648,
chiefly found-
ed on in this
question.

below, that it was material to attend to every word of the prohibitory clause. It ought to be observed, that the entailer himself granted feus, and that feus had also been granted by the heirs of entail previous to the date of the feus in question.

It was unnecessary to say any thing as to what passed in Parliament relative to the confirmation of this charter: but it was proper to call their attention to the charter of 1729, as a difference had been noticed between that and the charter of 1740. The charter of 1729, after adverting to the reserved power in the entail of 1648, to the heirs to grant competent portions, &c. and to the intention of Duke John to enable his son the more effectually to exercise that power, proceeded thus:—"Therefore
 " wit ye me to have given, granted, and disponed,
 " like as I by these presents give, grant, and dis-
 " pone, to the said Robert Marquiss of Bowmont,
 " &c. my son, and the heirs male lawfully to be
 " procreate of his body; which failing, to the other
 " heirs of tailzie substitute to them, contained in
 " the said tailzie (1648) made by the said deceased
 " Robert Earl of Roxburghe, &c. all and haill the
 " Earldom of Roxburghe," &c. And then followed these words,—
 " Reserving always to me, the said
 " John Duke of Roxburghe, my own life-rent right
 " of the said haill lands and estate above disponed,
 " during all the days of my life-time, with full
 " power to me, during my said life-time, to enter
 " and receive feuars and vassals, and to grant
 " charters and precepts for infesting them as ac-
 " cords, and *to set tacks and grant feus* AT MY
 " PLEASURE, *without diminution of the rental, in*

Dec. 15, 1813.

ENTAIL.—
 ROXBURGHE
 FEU CAUSE.

Author of the
 entail of 1648
 himself grant-
 ed feus.

Entail of 1729,
 by which
 Duke John
 enabled his
 son to exercise
 the power of
 granting con-
 sistent provi-
 sions, &c.
 given by the
 entail of 1648.

Power reserv-
 ed to Duke
 John, during
 his life-time,
 to grant feus;
 &c. at his
 pleasure, " in
 " terms of the
 " entail of
 " 1648."

Dec. 15, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Prohibitory
clause in en-
tail of 1729.

Liberty to
grant feus as
the heirs
should think
fitting, with-
out diminu-
tion of the
rental, as in
the entail of
1648.

“ *terms of the said tailzie*, and that by myself
“ alone, without the consent of my said son, or his
“ foresaids, had thereto, and with and under the
“ said haill provisions, conditions, limitations, re-
“ strictions, and irritancies, after expressed and con-
“ tained in the said tailzie; providing that it shall
“ not be lawful to the said heirs of tailzie to make
“ or grant any alienation, disposition, or other right
“ or security whatsoever, of the said lands, lord-
“ ships, &c. nor of no part thereof; neither yet to
“ contract debts, nor do any deeds whereby the
“ same, or any part thereof, may be apprized, ad-
“ judged, or evicted from them; nor yet to do any
“ other thing in hurt or prejudice of the said tailzie
“ and succession, in whole or in part; all which
“ deeds so to be done by them are declared to be
“ null, and of no avail, force, nor effect; RESERVING
“ *always liberty and privilege to the said heirs of*
“ *tailzie to grant feus, tacks, and rentals, of such*
“ *parts and portions of the said estate and living*
“ *as they shall think FITTING, providing the same*
“ *be not made and granted in hurt and diminution*
“ *of the RENTAL of the said lands and others fore-*
“ *said, as the same shall happen to pay at the time*
“ *the heirs shall succeed thereto; and sicklike re-*
“ serving liberty to the said heirs of tailzie to grant
“ competent portions and conjunct fees, by con-
“ tracts of marriage in favours of any ladies with
“ whom the said persons or heirs of tailzie shall
“ happen to be married,” &c.

The whole was fortified with irritant and resolu-
tive clauses as to what was expressed, or to be in-
ferred, if any thing could legally be inferred.

Then another charter was made in 1740, by the same Duke John, entailing the *nova acquisita*. There they would find that it was not to be lawful for the heirs of tailzie “to make or grant any alienation, disposition, or other right and security whatsoever, of the said lands and estate, &c.; but that a liberty was reserved to grant feus, tacks, and rentals, of such parts and portions of the said lands, &c. as they should think fit, provided the samen be not made nor granted in hurt and diminution”—not of the *rental*, but—“of the *true and real rent* of the said lands.” And here too there was a saving, or reservation, to the author of the entail, of “full power and liberty, at any time in his life-time, and even in the article of death, to alter and innovate these presents, and to revoke and cancel the same at his pleasure, and to sell and dispose upon the lands, &c. to whatsoever person or persons he should think fit, either gratuitously, or for onerous causes; and to contract and ontake debts thereupon, and grant all such securities therefor which he should judge convenient; and to grant feu rights and tacks of the said lands for such duties as he should think proper; and generally to do every thing concerning the premises which any absolute fiar or proprietor by law might do,” &c.

In this charter, also, they would have to consider what was the effect of the permissive clause, and the authority to grant feus and tacks.

Another charter, of the same nature as that of 1729, was made in 1747, by the next Duke, in favour of his son, which was not material, except

Dec. 15, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Entail 1740, of the *nova acquisita*, upon the same series of heirs as in that of 1648, with a variation in the expression of the permissive clause,—*fit*, instead of *fitting*; and “true and real rent,” instead of *rental*.

Entail of 1747.
Words of the permissive clause, *fit*, and

Dec. 15, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

“ true and
“ real rent.”

that it also reserved the life-rent right of the Duke,
“ with full power to me, during my said lifetime,
“ to enter and receive feuers and vassals, &c. and to
“ set tacks and grant feus *at my pleasure*, without
“ diminution of the rental, in terms of the said
“ tailzie,” &c.

Entail, June
18, 1804, by
the late Duke
William,
made on the
supposition
that he, as last
heir male and
substitute un-
der entail of
1648, was ab-
solute *fiar*.

These were the instruments, of which the con-
tents were at all important, from 1644 till the new
disposition and entail of the late Duke of Rox-
burghe, of the 18th June, 1804. There they would
find this recital, which deserved attention, as it
showed that the Duke thought, or had been ad-
vised, that he had such powers as he there stated
himself to have. And notwithstanding it had been
said, that an heir of entail, except in so far as he
was expressly fettered, was an absolute proprietor,
as contradistinguished to an administrator, or any
other person, a difference was stated between the
powers of the previous heirs of entail, and other
persons there mentioned; viz. last heirs and substi-
tutes. The recital was this:—“ Whereas, upon
“ the death of John, late Duke of Roxburghe, in
“ the month of March last, I succeeded to the ho-
“ nours and estates hereinafter mentioned of the
“ noble family of Roxburghe; and *being the last*
“ *heir male and substitute* to whom the said estates
“ were limited by deed of nomination and entail
“ executed by Robert, first Earl of Roxburghe,
“ bearing date 23d February, 1648, *I lie under*
“ *none of the limitations which fettered the former*
“ *heirs*, but am at liberty, as *absolute and unlimited*
“ *fiar*, to carry on the representation of the said
“ noble family by a new entail in manner here-

“ inunder written ; therefore, for the love, favour,
 “ and affection I bear to the heirs of entail herein-
 “ after mentioned, and for other good and weighty
 “ causes and considerations me hereunto moving, I
 “ do, by these presents, with and under the condi-
 “ tions, provisions, restrictions, limitations, excep-
 “ tions, clauses irritant and resolute, declarations
 “ and reservations after specified, and subject always
 “ to the deed of trust bearing even date herewith,
 “ but which deed of trust will expire with the lives
 “ of the parties for whose benefit the same is
 “ created, and with the raising of the sums of mo-
 “ ney thereby authorised and required to be raised,
 “ give, grant, and dispone,” &c. In the trust deed
 here alluded to, the same difference between *the*
last heir and substitute and the *former heirs* was
 again expressed.

Dec. 15, 1818.

ENTAIL.—
 ROXBURGHE
 FEU CAUSE.

Trust deed,
 June 18, 1804.

The motives which led to the making of this entail were no concern of their Lordships, except in so far as a knowledge of motives could assist them in gathering what was the legal effect of the instruments. He really was not competent to judge of the motives. The parties whom the Duke favoured might be, on the one hand, such as justly deserved this proof of his favour and affection ; and, on the other hand, it might be said, that he ought to have continued the order of succession, out of regard to those who made the entails under which he himself came into possession. But in point of fact, he was advised, and thought it right, to give to a new series of heirs the superiority and property, over the Roxburghe estates by this instrument ; and, in case he could not do that, to give the *dominium utile* by

Motives of no consequence, except as they assisted in collecting the legal effect of the instrument.

Dec. 15, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Feu dispositions, Sept. 26, 1804, made on the supposition that Duke William was bound by the limitations of the entail of 1648.

Feu of the policy of Fleurs.

Mansion house of Fleurs, with 47 acres adjoining, excepted.

other instruments: and accordingly, on the 26th September, 1804, he executed 16 feu dispositions, to the contents of which, and every part of them, their Lordships would attend.

First, with regard to the feu of the policy of Fleurs,—that was a feu, as it purported on the face of it, “to John Bellenden Gawler, and to his heirs and disponees whomsoever, heritably and irredeemably, of all and whole the lands, &c. presently *in the Duke’s natural possession.*” Nothing was said about these lands having been in the natural possession of the former Duke, but only in the possession of the Duke who executed the deed. The Duke then described the policy, as comprehending plantations and parts of farms *as possessed by himself*; and then described several other portions of land, plantations, &c. as possessed by other persons; “as also all and whole the several belts, strips, and clumps of planting belonging to the Duke, on his farms of Galalaw, &c.; but *excepting* and reserving always from this present feu right all and whole *the mansion house* of Fleurs, with the offices and yards adjoining and contiguous thereto; as also the terrace on the south side of the mansion house, and the two plantations lying contiguous, &c.; as also the north lawn, &c.; containing in the whole *forty-seven English acres, &c.; with free access and egress to and from the said mansion house, offices, and grounds, by all the roads, avenues, and paths presently leading to and from the same*; and also excepting and reserving the large inclosure called the New Broxlaw, and Pond Park, &c. including

“ a small piece of land of the farm of Stodrig,” &c. Dec. 15, 1813.
 The deed then went on “ to give, grant, and in feu-
 “ farm dispone to thè said J. B. Gawler, and his
 “ foresaids, the whole stone and lime, limestone
 “ quarries, coals, marle, sand, clay, mines, metals,
 “ minerals, and fossils, of every kind, within the
 “ lands and others before described, with full power
 “ and liberty to work, win, and transport, use and
 “ dispose of the same, at their pleasure, and to do
 “ every thing necessary for these purposes; as also
 “ the teinds, parsonage, and vicarage, of the said Teinds, &c.
 “ whole lands hereby disponed; together with all
 “ right, title, and interest which I, my predecessors
 “ or authors, had, have, or can pretend, to the lands
 “ and others before disponed. Declaring always,
 “ as it is hereby specially provided and declared,
 “ that this feu disposition, and the infestment fol-
 “ lowing thereon, and all the obligations and presta-
 “ tions to which the said John B. Gawler, or his
 “ foresaids, is or shall be subjected in consideration
 “ hereof, either by these presents, or by any writing
 “ or deed granted, or to be granted, by him or
 “ them, shall become void or null, and be totally
 “ extinguished, in the events after mentioned; viz.—
 “ 1st, They shall become void and null in case
 “ there shall exist at my death any descendants of
 “ my own body. 2d, They shall become void and
 “ null in the event of the said J. B. Gawler, or his
 “ foresaids, establishing in their persons right to,
 “ and obtaining possession of, my estates contained
 “ in a deed of entail executed by me on the 18th
 “ day of June last, in virtue thereof, or in virtue of

ENTAIL.—
 ROXBURGHE
 FEU CAUSE.

Mines and
 Minerals.

Conditions on
 which to be
 void:—1st, If
 the Duke
 should leave
 descendants of
 his body.
 2d, If the en-
 tail of June
 18, 1804,
 should be
 found effect-
 ual.

Dec. 15, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

“ any other deed of entail which I may hereafter
 “ execute in virtue of the powers thereby reserved
 “ to me: and which declarations shall be inserted
 “ *verbatim* in the indentment to follow hereon, and
 “ in all the subsequent transmissions of the said
 “ lands and others; and in which lands and others
 “ before disposed, but always with and under the
 “ declarations before written, I bind and oblige my-
 “ self, my heirs and successors whatsoever, to indent
 “ and seise the said J. B. Gawler, and his foresaids,
 “ to be holden of and under me and my foresaids,
 “ in feu-farm, fee, and heritage, for ever, for pay-
 “ ment yearly, to me and my foresaids, of the *sum*
 “ *of 720l.* of feu-duty, being more than the *present*
 “ *MONEY rental* of the lands and others before
 “ disposed,” &c.

The feu duty
 (750*l.*) not
 stated with re-
 ference to
 what was the
 rental at the
 time the
 grantor suc-
 ceeded.

Their Lordships would attend to the expression—
 “ *MONEY rental.*” This sum, then, (750*l.*) was not
 stated with reference to what was the rental at the
 time the Duke succeeded. It was not said that it
 had a reference to the value of the produce of the
 land; it was merely the *present MONEY rental.*
 This could hardly mean the money rental of lands
 in the natural possession of the Duke which paid no
 money rent. If this, therefore, were to be taken
 strictly, the Duke had not done here what, accord-
 ing to the original settlement, it was necessary for
 him to show he had done, in order to entitle him
 to bind his successors. Their Lordships would also
 notice, that, according to the scheme of the feu dis-
 position, if it was to take effect according to the
 terms of it, the Duke was to be the Lord, or Supe-

rior, and J. B. Gawler to take, under the declarations and conditions stated, the *dominium utile* in feu.

Then came the clause taxing the casualties; “and also paying one shilling sterling at the entry of each heir, and two shillings at the entry of each singular successor; and these for all other burden, exaction, or secular service, which can be asked or required forth of the lands and others hereby disposed.” There was a dispute whether this was or was not a casualty. He did not enter into that now, but only called the attention of their Lordships to the fact, that, instead of very large payments, the Superior was only to have a shilling at the entry of an heir, and two shillings at the entry of each singular successor. Then followed this clause:—“And in regard the feu duty payable by the said J. B. Gawler and his foresaids *equals* or exceeds the rental” (there the expression, MONEY rental, was dropped) “of the said lands and others at the time of my succeeding to my predecessor in the same,” &c. In what sense this passage was to be understood, with reference to what was before called “the money rental,” and now “the rental,” dropping the word “MONEY,” was not very clear.

The effect upon the whole, however, was, to grant the lands where the mansion house stood, except the mansion house itself, with about 47 acres of ground, and “free access and egress to and from it by all the roads, avenues, and paths, presently leading to and from the same.” And the feu was

Dec. 15, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.
Casualty
taxed:

Dec. 15, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Feus to be void, in case the Duke left descendants of his body, or grantees established their title under the entail of June 18, 1804, &c.

Difficult to conceive how a title could be supported, by which it was rendered impossible for the person acquiring it to know whether he was superior or vassal at the time it accrued.

to be void and null in case there existed at the time of his death descendants of his own body, and *also in the event of the grantee's establishing a right to the lands under the deed of entail of the 18th June, &c.*; and it was said that these were irritancies that might be reserved in a feu charter. This was very singular, as it struck him; but he dismissed that, as it had not been noticed in the Court below. After looking again and again for information on the point from the Scotch law books, &c. he was still unable to conceive how a title could be supported by which it was rendered impossible for a man to know whether he was lord or vassal when his title accrued;—a *superior*, if he took under the entail—a *vassal*, if he took under the feus; but, *rebus existentibus*, not knowing what were his duties. He however laid that out of the question, as a circumstance not noticed any where, and as a riddle which, like other riddles, presented a formidable difficulty at first, but which, when explained, showed the seeming difficulty to be nothing.

There was a vast difference now between English leases and Scotch tacks. But if this were a case of an English lease, reserving rent as it was at the time the lessor succeeded, it might be good as a money rent, equal to what the rent was at the time mentioned, provided it were evidenced clearly by the instrument to the person bound by it, that the rent reserved was in fact equal to the rent which the grantor was bound to reserve. But here the present *money* rent might be more, or it might be less; and that must depend upon circumstances not

here disclosed,—on what lands were then in the Duke's natural possession, on what had, and what had not been before on lease, &c.

Another circumstance was deserving of notice. He had taken occasion before to say, and he now repeated it, that it was clear the conveyancers thought when they drew these instruments, attending to the deed of 1648, that it was proper to insert something to show that the feu duty was conformable to the rent there required to be reserved: it might however be necessary that this conformity should be evidenced in the instrument itself, or it might not; but if it had been the case of an English lease, it must be clearly shown on the face of it, that the rent reserved was equal to the former rent, instead of leaving the person bound by the lease to be informed of it by the lease itself and by some other proof in addition.

The next feu was that of Broxmouth House and policy, which deserved to be specially noticed on account of this particularity, that it contained a mansion house. There the feu duty was spoken of as "the full amount of the present rent of the lands," &c. There were 14 other feu dispositions, varying in their terms with reference to the feu duties to be paid. In some, the expression was "*rental*;" in others "*rent*," "*money rental*," "*money rent*."

These feu dispositions appeared to have been all executed the same day; they all bore the same date, were made in favour of the same person, on the same principle, (except in the case of the feu of

Dec. 15, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

In the case of an English lease, made by a tenant for life, with a leasing power, it must clearly appear by the instrument that the proper rent is reserved.

Feu of Broxmouth, &c. Variation in the terms in which the feu duties were reserved.

The feus formed but one feu of the entire estate, with the exception of the

Dec. 15, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.
house of
Fleurs, and 47
acres adjoining.

Fleurs, in which the mansion house, and 47 acres adjoining, were reserved, with free access and regress to and from the mansion house,) all containing the same irritancies; and on the whole, this was a feu of the entire estate, consisting of 60,000 acres, with reservation of the mansion house of Fleurs, and 47 acres.

2d trust, Sept. 26, 1804.

On the same day, the Duke executed another trust deed in favour of the same persons as formerly, but including certain estates which had been left out of the trust deed of the 18th June, 1804.

Contract relative to the entailing of the feus, &c. Sept. 26, 1804.

Then came the contract of the same 26th September, declaring the intention of the parties as to the feus, between the Duke as the superior, and J. B. Gawler as the vassal. The preamble narrated the two trust dispositions, the entail of the 18th June, and the 16 feu dispositions "*dated the same day with these presents,*" the whole of which were mentioned; "and that at the time of granting the said feu dispositions," (he called their Lordships' attention particularly to the words)—

The entail of the feus to be delivered within 10 days from the date of the contract.

—"It was understood and agreed upon between the parties, that they should enter into a separate contract for declaring their intention relative thereto; therefore, the said J. B. Gawler binds and obliges himself, and his foresaids, within 10 days from this date, to grant, subscribe, and deliver, to the said William Ker, Duke of Roxburghe, a disposition and deed of entail of the whole lands and others disposed to him by the 16 several feu dispositions before narrated, whereby he shall dispoise and convey the said lands and others to himself in life-rent, and to the said Henry Gawler, his brother, and the heirs male or female, procreated, or to be procreated, of his body, in fee; whom failing, to the other heirs of entail appointed to suc-

“ceed after them to the lands and estate belonging to the said William Ker, Duke of Roxburghe, by the foresaid deed of entail executed by him on the 18th of June last, *and with and under the conditions, provisions, restrictions, limitations, exceptions, clauses irritant and resolute, declarations and reservations therein mentioned,*” &c.

Dec. 15, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Conditions of the entail of June 18, 1804, to be inserted in the entail of the feus; one of which was, a power of revocation in the Duke alone.

And also with this provision,—

“That during the life-time of the said William Ker, Duke of Roxburghe, it shall be in the power of him and the said J. B. Gawler, or, after his death, the institute or heir of entail in possession for the time, by a writing to be subscribed *by them jointly, to alter, revoke, or annul,* in whole or in part, the said deed of entail, and whole clauses and conditions thereof, at their pleasure.”

Power to revoke by joint consent.

This last clause was to be attended to, with a view to the question, Whether the Duke alone had power to révoke?

“And further, the said J. B. Gawler, in consideration of the feu rights before narrated, hereby binds and obliges himself, and, after his decease, the institute and heirs who shall take the said lands and others in virtue of the foresaid deed of entail to be granted by him in manner foresaid, *to pay the annuities and sums after mentioned.*”

This part of the contract was to be attended to, with a view to the argument as to the onerous consideration given for the feus; to which argument it had been answered, that the estate which Mr. Gawler took was to satisfy the obligations. Besides payment of these life-rent annuities from the time of the Duke's death, particularly an annuity of 1000*l.* to Mrs. Bechenoe, and, after her death,

Onerous consideration to be given for the feus.

Various legacies, &c. to be paid by Appellant, out of funds after specified

Dec. 15, 1813.

ENTAIL.—
ROXBURGHE
HEU CAUSE.

annuities of 500*l.* to each of her two daughters, Mr. Gawler agreed to pay 10,000*l.* to Hamilton Fleming, described as Earl of Wigton, at the first term of Whitsunday or Martinmas—

—“ After the death of the said William Ker, Duke of Roxburghe, or as soon thereafter as *the funds hereinafter mentioned shall be sufficient for paying the same, &c.*; and lastly, to pay to Mary Duchess of Roxburghe, wife of the said William Ker, Duke of Roxburghe, executrix appointed by him, and general disponee to his personal estate, conform to general disposition granted by him in her favour, dated the 18th of June last, or to any other executor or executors of the said Duke, or to any other person whom the said Duke shall name and appoint, by writing under his hands, 20,000*l.* at the first term of Whitsunday or Martinmas after the death of the said Duke, or as soon thereafter as the funds hereafter mentioned shall be sufficient for paying the same.”

The contract then noticed the trust disposition of the 18th June last, and the bequests made by it, and declared,—

“ That though the contract and trust disposition bear no reference to each other, they are only for securing once and single payment of the said annuities and sums.”

And it also declared,—

The Appellant, &c. to be relieved, in respect of the payments, out of the funds in the hands of the trustees, to whom the Duke had con-

“ That though J. B. Gawler, the institute, and heirs of tailzie, were bound in payment of the said annuities and sums, they should be entitled to claim and obtain relief thereof from the trustees acting under the foresaid trust disposition, &c.; but that J. B. Gawler, the institute, and heirs, should be liable to relieve the executors, and all others the representatives of the said Duke, excepting the said trustees, of the foresaid annuities and sums.”

Then followed this declaration:—

Dec. 15, 1813.

“ *And whereas the several feu duties contained in the said 16
 “ feu dispositions before narrated, are equal to, or exceed, the full
 “ rent of the lands and others thereby feued, as paid by the
 “ tenants thereof at the period when the said William Ker, Duke
 “ of Roxburghe, succeeded to his predecessor in the said estate,*”—
 an averment which he (*Lord Chancellor*) did not find in any of
 the feus themselves;—“ and as the expenses of management, and
 “ other burdens and losses by the failing of tenants to pay their
 “ rents and otherwise must amount to a considerable sum an-
 “ nually, by which, until the rents of the said estates shall rise
 “ very considerably, the said J. B. Gawler, and the institute and
 “ heirs of tailzie succeeding under the tailzie to be executed by
 “ him as aforesaid, will not be possessed of a sufficient fund
 “ arising out of the rents of the said subjects for the payment of
 “ the said annuities and sums; and as they may not be able to
 “ operate their relief of the same from the trustees before named,
 “ to whom the said Duke has conveyed his estate as before
 “ mentioned; *and as it is the meaning and intention of the parties
 “ that the said John B. Gawler, and the institute or heirs taking
 “ or succeeding under the entail to be executed by him as aforesaid,
 “ should themselves draw some reasonable yearly sum out of the
 “ rents of the said feus, even during the subsistence of the said
 “ annuities, &c. and before payment of the said sums:* therefore,
 “ it is hereby provided and declared, that the said J. B. Gawler,
 “ and the institute and heirs of tailzie who shall take or succeed
 “ under the tailzie to be executed by him as aforesaid, shall, in
 “ the computation of the surplus rents, be entitled to credit for
 “ the sum of 2670*l.* annually; and it is hereby farther declared,
 “ that in case the said surplus rents, after deduction of the sum
 “ of 2670*l.* shall not, at the time of the death of the said Wil-
 “ liam Ker, Duke of Roxburghe, exceed the foresaid annuity,
 “ &c., or in case the said J. B. Gawler, or the institute or heirs
 “ of tailzie, shall have made any advances on account of the said
 “ annuities or sums, before they shall be enabled so to do out of
 “ the surplus rents paid them; then the said J. B. Gawler, and
 “ the institute, &c. shall not be liable in payment of any part of
 “ the other annuities and sums before mentioned, until the said
 “ surplus rents shall afford a sufficient fund for the payment of

ENTAIL.—
 ROXBURGHE
 FEU CAUSE.
 conveyed his es-
 tates.

Or these pay-
 ments to be
 made out of
 the surplus
 rents, after
 payment of
 the duty.

But Mr. Gaw-
 ler, and the
 heirs, &c. to
 have an an-
 nual sum of
 2670*l.* out of
 the surplus
 rents, in pre-
 ference to the
 payments; ex-
 cept an an-
 nuity of 1000*l.*
 to one of the
 legatees, and,
 after her death,
 of 500*l.* to each
 of her two
 daughters.

Dec. 15, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Mr. Gawler,
and heirs, &c.
to be at no
time obliged to
go in advance
for any pay-
ments, except
the annuities
to Mrs. B. &c.

But Mrs. Be-
chenoe's and
her daughters'
annuities to
be paid, whe-
ther the sur-
plus rents af-
forded a suffi-
cient fund or
not.

In computing
the surplus
rents, no rent
to be put on
the mansion
house of Brox-
mouth, &c.

“ the annuities to the said (Mrs. Bechenoe and her daughters,)
“ and until the said J. B. Gawler, &c. shall have been reimbursed
“ of any payments they may have previously made on account of
“ the said annuities before receiving the said surplus rents, &c.
“ And it is farther hereby expressly provided and declared, that
“ notwithstanding the terms of payment of the said annuities be-
“ fore expressed, and the power to sell for raising 20,000*l.* here-
“ inafter inserted, the said J. B. Gawler, &c. *shall at no time be*
“ *obliged to advance more than the surplus rents* received by
“ them, after deduction of the feu duties, and of the foresaid
“ sum of 2670*l.* for the public burdens, and other expenses and
“ losses before mentioned, to or for payment of the foresaid an-
“ nuities or sums, except for payment of the annuities hereby
“ granted to the said J. E. and A. Bechenoe; with regard to
“ which it is specially provided and declared, that they shall in
“ all events be paid to them at the terms, &c., and that whether
“ the surplus rents of the said estate shall then afford a sufficient
“ fund for paying the said annuities or not; but with regard to
“ all the other annuities or sums aforesaid, the said J. B. Gawler
“ &c. shall only be liable in payment thereof progressively, as
“ free funds for the payment of the same shall arise from the
“ surplus rents of the said lands and estate, after deduction fore-
“ said, &c. And it is hereby declared, that in the computation
“ of the surplus rents, no rent shall be put upon the house of
“ Broxmouth, or the offices or gardens thereto belonging, or
“ the pleasure ground thereto adjoining, amounting to 50 acres,
“ or thereabout, and commonly known by the name of the *Wil-*
“ *derness*; and as to the other lands which may be retained in
“ the possession of the said J. B. Gawler, or the institute or
“ heirs of tailzie aforesaid, it is hereby declared that the rents
“ or values are to be computed by the profit or produce actually
“ drawn or to be drawn for that year, and not according to any
“ calculation of what they might have been let for,” &c.

It was foreseen that some of these feus might be ineffectual; and therefore those who prepared the instrument, acting under this foresight, (and no judicial person had been of opinion that all of them could stand,) introduced this clause, which was also

worthy of attention, with a view to the argument in regard to the feus being granted for onerous cause:—

Dec. 15, 1818.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

“ And as it may happen that some of the said feu dispositions
“ may, from causes unknown to the parties, become ineffectual;
“ therefore it is hereby specially stipulate and agreed, that in
“ case one or more of the said feu dispositions shall become in-
“ effectual, or be set aside, then the annuities or sums for which
“ the said J. B. Gawler does hereby become bound shall suffer an
“ abatement, and that in the proportion which the feu duties,
“ stipulated by such of the said feu dispositions as shall so become
“ ineffectual, shall bear to the feu duties contained in the whole
“ 16 feu dispositions before narrated,” &c.

In case any of
the feus should
be reduced,
the legacies to
abate in pro-
portion.

Then J. B. Gawler entered into an obligation which was said to be one of great consequence:—

“ And also the said J. B. Gawler hereby binds and obliges him-
“ self, and the heirs succeeding to him in virtue of the aforesaid
“ feu dispositions, or the institute or heir who shall take or suc-
“ ceed under the said deed of entail to be executed by him as
“ aforesaid, to pay to the said William Ker, Duke of Roxburghe,
“ during his life, the whole surplus rents of the lands and others
“ feued and conveyed to him as aforesaid; that is, the whole
“ sums which shall be paid to them by the tenants thereof, over
“ and above the feu duties stipulated as aforesaid,”

Surplus rents
to be paid to
the Duke dur-
ing his life-
time.

It had been contended that these were not real feus, and the above payments were said to bear upon that question; and then it was contended, that whatever might be the effect of the irritant clauses, in case the grantee established his right under the entail, or the Duke had issue, there was a great difference between an irritancy in a feu which at the time of the grant was completed, and one in which the enjoyment was on such terms that

Dec. 15, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

The Duke, during his life, to have the use of the lands falling out of lease, liberty to cut and carry away woods, and leases to be made with his concurrence and approbation.

Tenants to pay their rents to the Duke.

Mr. Gawler bound, if required, to grant a life-rent tack of the estate to the Duke, at a rent equal to the feu duty.

For which onerous considerations the Duke had granted the feus, &c.

the rents were to be paid to the grantor. . He was now merely stating how they put it. The instrument then went on,—

“ And also to permit and allow to the said Duke, during his
 “ life, the possession and enjoyment of whatever part or parts of
 “ the lands and others contained in the said feu dispositions
 “ which now are, or shall be, or become out of lease, and which
 “ the said Duke shall incline to keep unlet; and also full power
 “ and liberty to the said Duke to cut, dispose of, and carry off,
 “ the wood and trees on the lands and others contained in the
 “ said 16 feu dispositions, at his pleasure, and to apply the price
 “ or proceeds thereof to his own use, without being liable to ac-
 “ count for the same to any persons whatever: and in order to
 “ render these provisions more effectual, it is hereby agreed,
 “ that any leases of the said estates which shall hereafter be
 “ granted during the life-time of the Duke, shall be made with
 “ his consent and approbation as party thereto, for a term not
 “ exceeding 21 years, and without any fine or grassum being
 “ taken therefor: and by such leases the tenants shall be bound
 “ to pay their whole rents to the Duke, during his life-time; in
 “ consideration whereof he shall, on receiving such rents, grant
 “ discharges to the said J. B. Gawler, and his foresaids, for the
 “ feu duties of the said lands and others, corresponding to the
 “ periods for which the said rents are paid; and the said J. B.
 “ Gawler hereby binds and obliges himself and his foresaids,
 “ when required, to grant a life-rent tack to the said Duke of
 “ the said estate, and that at a rent equal to the feu duty stipu-
 “ lated by the said feu dispositions thereof respectively; and
 “ which tack shall contain an express provision in favour of the
 “ Duke, to cut, dispose of, and carry off, the woods and trees
 “ on the said lands, and apply the price and proceeds thereof to
 “ his own use, without being liable to account for the same to
 “ any person whatever: for which, and upon the other part, the
 “ said William Ker, Duke of Roxburghe, has granted the 16
 “ several feu dispositions before narrated, and hereby binds
 “ himself, his heirs, executors, and representatives, whomsoever,
 “ to pay the whole public burdens and expense of management
 “ of the said estate which shall become due during his life, and

“ to free and relieve the said J. B. Gawler, and his foresaids,
 “ thereof. And the said Duke also hereby reserves full power
 “ and liberty to himself, at any time in his life, to revoke the
 “ annuities and sums before mentioned hereby incumbent on
 “ the said J. B. Gawler, or to alter the same; that is, to diminish
 “ the amount thereof, or to adject such conditions and declara-
 “ tions thereto as he shall think proper, provided that the sums
 “ to be paid by the said J. B. Gawler and his foresaids shall not
 “ thereby be increased.”

Dec. 15, 1813.

ENTAIL.—
 ROXBURGHE
 FEU CAUSE.

The Duke to
 have power to
 alter the an-
 nuities, &c.
 but not so as to
 increase the
 sums to be
 paid by Mr.
 Gawler.

The principal
 points in the
 CONTRACT.

Their Lordships would observe, that the tenants under such new leases as might be granted by the Duke by virtue of this contract, notwithstanding the feu dispositions, were to pay their whole rents to the Duke during his life-time, as much as if he had still had the *dominium utile* as well as the *dominium directum*: and the Duke was to give discharges to J. B. Gawler, &c. for the amount of the feu duties payable for the lands so to be leased. J. B. Gawler was to give a life-rent tack, if required, to the Duke, of the whole estate, at a rent equal to the feu duties, with power to dispose of the woods, &c. as he should think proper; for which it was said the Duke granted the feu dispositions: and the Duke bound himself to pay the expenses of management, &c. and reserved the power of revoking the annuities, &c. or altering them so as to diminish them only, and not to increase the sums to be paid by J. B. Gawler.

It would be in the recollection of their Lordships, that a deed of entail was under this contract to be executed within 10 days from the date of it: but it appeared to have been executed on the same day, (26th September, 1804.) This deed contained a

Entail of the
 feus, Sept. 26,
 1804.

Dec. 15, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

prohibition against “innovating, altering, or in-
“fringing, the entail or order of succession, &c. or
“doing or granting any act or deed that might
“INFER any alteration, innovation, or change of
“the same;” and a clause which must receive
some attention, as bearing upon the argument re-
specting the power of revocation,—“It is hereby
“specially provided and declared, that during the
“life-time of the said William Ker, Duke of Rox-
“burghe, it shall be competent for him and me,
“ (J. B. Gawler,) by a deed to be subscribed by us
“*jointly*, or in case of my predeceasing the said
“Duke, it shall be competent for him and the said
“H. Gawler, &c. by a deed to be subscribed by
“them *jointly*, to alter, revoke, or annul, in whole
“or in part, this deed of entail,” &c. This bore
upon the question which had been raised, whether
the power of revocation was really joint, or whether
it did not rest with the Duke alone, under the ge-
neral reference in the contract to the conditions,
&c. of the entail of June 18, 1804.

Now as to the matter of fact in regard to this
trust deed, these 16 feu dispositions, this contract
and deed of entail, all executed on the same day.
The natural effect of the feus, if they could be sup-
ported, was to put J. B. Gawler in possession of the
whole of this estate, with the exception of the man-
sion house and 47 acres adjoining, paying the
amount of the feu duties; and every thing else,
whatever was then, or might be at any time there-
after, the additional value of the estate, was to be
enjoyed under these feu dispositions; thereby raising

Effect of the
feus, if they
could be sup-
ported.

The Appel-
lant to have
every thing,
except the feu
duty and
house of
Fleurs, with
47 acres.

To raise a new

in the vassal a new family, as respectable in point of property as the ancient house of Roxburghe; and even exalting the vassal above the superior, as the Duke of Roxburghe could only go to and return from his own mansion house under the permission in one of these feu dispositions. That such was not the meaning of the author of the entail of 1648, there could be no doubt. What might be the legal effect of that entail was another question. By the contract and deed of entail, the Duke was to have all the surplus rents and profits—to keep in his natural possession whatever he chose—to have full power and liberty to cut, dispose of, and carry off; the wood at his pleasure—and, in short, the whole *dominium utile* during his life. Their Lordships would mark these circumstances, as it must be agitated, whether it was possible to support the feu of the policy of Fleurs, and the feu of Broxmouth, which no Judge had thought capable of being supported; and then, whether it was possible to support the rest, independent of these two. They might call them what they pleased,—feus, or any thing else; the question was, Were they within the reserving clause, supposing they were forbidden by the prohibitory clause?

Dec. 15, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

family, and
exalt the vassal
above the su-
perior.

This could not
have been the
entailer's in-
tention.

Then in regard to the abuse of a power. If he (*Lord Chancellor*) had a power to appoint a sum of money among children as he thought fit, he could not say that one should have 10,000*l.* and another only 2*s.* 6*d.* That would be an abuse of the power; and he must do what was a substantial execution of it. So a case had happened. A man had a

Powers must
be substan-
tially exe-
cuted.

Dec. 15, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

power to appoint a sum of money among his children: he had a daughter about twenty years of age, and gave her a proper share; but she was at death's door at the time, and he had given it to her because she must soon be in the sepulchres of mortality: he would be her administrator; and this therefore was only a way of making a gift to himself.

In regard to the next circumstance of fact, he was sorry for Mr. Gawler, who had to deal with a man who was his benefactor; and it was difficult to say how he could have interposed in the way it was said he ought to have done. But still these facts must have their legal effect. Subsequent to the acts which he had stated, the Duke had executed two deeds of entail, and must be considered as then conceiving himself to have the *dominium utile* of the estate. He struck out some of the names which had been inserted in his first deed of entail, &c.; but it was unnecessary to state these deeds particularly, as they were not material to the present question, except as they showed, that the Duke must have considered himself at the time as having the *dominium utile*.

He estimated his own entail higher than he had done that under which he had succeeded. He had under the latter reserved only 47 acres, along with the mansion house, for the heirs of entail; under the former, he had reserved the mansion house, with 400 acres adjoining, prohibiting the letting these in tack for any longer space than the life of the grantor. How could he do this, except he con-

Facts tending to show that the Duke, after the execution of the feus, still considered himself as having the *dominium utile*.

Entail made by the Duke subsequent to the feu grants.

ceived that he had the *dominium utile*? The Duke might wish to try whether he could not make a better entail. But then, if these were real, actual feus, he would naturally have considered what their effect was as to his powers.

Dec. 15, 1818.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Their Lordships would also recollect the leases that were made by Mr. Seton Karr, to one of which Mr. B. Gawler was a subscribing witness. He agreed it did not follow that a witness must know exactly what was in the instrument; but if a lease of his (*Eldon's*) property were made by the person who had made a grant to him of that property about eight months before, it was not very probable that he should have become a subscribing witness to that lease, without knowing what was in it.

Leases made
under a com-
mission by the
Duke.

He also just noticed the period at which seisin was taken upon these feus, (though perhaps a circumstance of no great weight;) and that the contract, and entail executed in consequence, did not appear till after the Duke's death. These were said to have been kept back from motives which were denied, and he should say no more on that subject.

Infestment
taken on the
feus a short
time before the
Duke's death.

Then, after the death of the Duke, the competition arose in regard to the Roxburghe succession; and it came to be agitated whether the Duke had gone *ultra vires* in executing these entails; and then, whether he had acted within his powers in alienating the *dominium utile* by the feus; and then, whether any of them were good? This competition appeared singular, when it came to be considered

Competition
for the Rox-
burghe suc-
cession.

Dec. 15, 1818.

ENTAIL.—
ROXBURGHE.
FEU CAUSE.

what duties, what prestations, were to be performed by vassals to their superior. Though when the vassal disclaimed his superior he forfeited his right, though where the rent was two years in arrear the feu was gone; yet the deeds in question had given rise to this controversy, which had lasted so long; while, under these deeds, it could not be understood who was the superior, or who the vassal, or in what relation parties stood to each other.

Decision that the Duke was bound by the limitations in entail of 1648, which prevented his own entails taking effect.

Former decision of the First Division of the Court of Session, that the feus were all bad.

Reasons for the remit.

It was then decided, that the deed of 1648 contained a prohibition which prevented the entails taking effect; and their Lordships' attention was next called to the question as to the feus, and they had to consider the deed of 1648, and the principles, as bearing upon this question, deducible from the act of 1685, cap. 22, and from the decisions. The Judges of the First Division below had declared that the feus were all bad.

It became their Lordships, however, to be fully satisfied as to the grounds of that decision. He had laboured as much as he possibly could, according to his habit, (and he thanked God that, at his time of life, he could conscientiously say that it had been his habit,) to make himself completely master of the subject, and he had formed an opinion upon several of the points, which opinion he did not then express, because, though they knew the result, yet it was difficult to say upon what particular grounds the Judges below had proceeded; and it was not, under these circumstances, fitting for their Lordships to proceed farther till the decision was reviewed. After sitting there 12 years as a Judge, it had not

been his habit to speak disrespectfully of Judges, or of any persons in respectable situations. . He said this, because one or two of the Judges below appeared to have thought that he, in stating his reasons for sending back the cause for review, had used harsh expressions. He was not aware, however, that he had said any thing that could bear to be so construed, and he certainly did not mean it.

Dec. 15, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

The present President had before thought that all the feus were good, except that of the policy of Fleurs, which, as he said, left only a stone quarry to the Duke of Roxburghe, with 47 acres about it; though his opinion now was, looking at the whole as one transaction, that all the feus were bad. He must say, that he could not understand the grounds of the former opinion, though he could easily imagine the ground upon the feu of the mansion house and policy had been held incapable of being supported.

Former opinion of the President, (*Hope*,) that all were good, except one, (*Fleurs*;) his opinion now, that all were bad.

Another Judge, for whom he entertained the highest respect, (*Lord Meadowbank*,) had said, that the 16 feus could not be supported, but that one half of them ought to be reduced. Now, he could not understand on what principle the one half of them was to be reduced. Was it on the principle of excess? But why reduce eight, in preference to any other number? And which eight? It appeared to him to be a case of insuperable difficulty to say, upon the principle of excess, what ought to be reduced, and what not. Then, without going farther into the opinions of the Judges, he had only to say, that the result was, that the last judgment was the same as the former judgment; but they had now an

Difficult to understand the principle on which it had been said that one half of the feus ought to be reduced.

Dec. 15, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

The adminis-
tration re-
quired of an
heir of entail
not of that de-
scription
which is re-
quired of cu-
rators, &c.

Origin of the
objection to
certain of the
feus, on the
ground of their
comprehend-
ing lands
which had not
before *paid*
rents.

None of the
Judges
thought that
the feus of
Fleurs and
Broxmouthe
could be sup-
ported.

opportunity of considering the reasons on which it was founded.

He would also notice, as a matter of fact, that the general clause against alienation was held to prohibit long tacks, as not being consistent with a due administration of the estate. He had no conception, when he used these words as applied to an heir of entail, that they were to be understood in the same sense as if they had been applied to the administration or management of an estate by curators and other administrators.

It was not unnatural in him to say, that he had never seen the case of a power to grant leases without diminution of the rent actually *paid* for the lands, where the Court did not say, ‘Let us see whether the instrument is correct in this respect,—whether it reserves the proper rent, and is confined to lands for which rent had before been *paid*.’ He could not find that any one had before noticed this point; and then he had adverted to the English law on the subject,—and this had led to a very curious conclusion, which would be matter of comfort to him as long as he remembered the word *Roxburghe*, (and he should remember it as long as he lived,) though this point had never been mentioned before, yet the cause now came back with a judgment, that on this ground all the feus to which the objection applied were bad. He did not find that any of the Judges thought that the feus of the policy of Fleurs and Broxmouthe could be supported. The cause had been remitted, with directions to take the opinions of all the Judges; and he should have been glad to have had the opinion of the Judges

who had come to the bench since, but it would be improper to delay the final decision of the cause any longer. The Lord President was of opinion that the feus, one and all, were bad; and that was the opinion of the great majority of the Judges. Here, in one or two instances, there was an opinion that the excess might be corrected: how that could be done, he did not know; but the opinion of the generality of the Judges was, that they were all bad; and their Lordships had to consider whether this opinion was founded in law.

He should proceed another day to consider the law of entails before and since the act of 1685, cap. 22, the objects of that act, and the result of the decisions, particularly in the Duntreath case; with reference to which, though he considered their Lordships as now bound by it, he must say this, that if he had been in the House when it was decided, he would have been no party to that decision. They had to look at this entail, not merely with reference to the act of 1685, but as one partly prohibitory, and partly permissive; and with respect to the permissive clause, they were to look at it as applying to tacks and rentals, as well as to feus, and to consider the law of Scotland in regard to tacks under instruments of this description,—and here the Queensberry case would come to be examined: they had to consider the subject with reference to all the grounds stated at the bar, and all the grounds stated in the opinions of the Judges; the grounds of these opinions being, by their Lordships' authority, now before them, &c.

Dec. 15, 1818.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

And the great
majority were
of opinion that
all were bad.

The Dun-
treath case
now binding
upon them.

Dec. 17, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.
Judicial ob-
servations.

Lord Eldon (Chancellor.) He had before stated what was the first judgment of the Court of Session, and that the Court had then been desired to state the grounds on which they held the feus to be bad; or, in the words of the remit, “to review the interlocutor complained of in the said appeal, as to all and each of the deeds sought to be reduced, taking into their consideration all objections to the validity thereof, whether general or special; and, in their farther judgment, to state specifically the legal grounds upon which the said deeds respectively are to be considered as not granted in the due exercise of the power of feuing, if it shall be their judgment that the same are to be so considered,” &c.: and this produced the interlocutor now appealed from. In this interlocutor, there were various findings, special and general; and all the Judges were of opinion that some of the feus were bad.

Queensberry
case, *vide ante*.

This had come after the discussion of the case of the Queensberry lease; and, in the course of that discussion, many of the principles which had been examined in the Roxburghe cause had come under observation. He should now state the grounds upon which he conceived that the Court below had rightly reduced that lease, and at every step he must tread on the grounds on which the present case rested.

Reasons for
affirming the
judgment of
the Court be-
low in the
Queensberry
case.

The Queensberry case was one of this nature:—
An entail had been made, by which it was provided,
“*That it shall noways be leisome nor lawful to the*
“*said Lord William Douglas, and the heirs male of*

“ his body, nor to the other heirs of tailzie above
 “ mentioned, nor any of them, to sell, ALIENATE,
 “ wadset, or dispone, any of the said haill lands,
 “ lordships, baronies, offices, and patronages, and
 “ others above rehearsed; nor to grant infeftments
 “ of life-rent, nor annual-rent, forth of the same;
 “ nor to contract debts, nor to do any other fact or
 “ deed whatever, whereby the said lands or estate;
 “ or any part thereof, may be adjudged, apprised,
 “ or otherwise evicted from them, or any of them;
 “ nor by any other manner of way whatsoever to
 “ alter or infringe the order and course of succes-
 “ sion above mentioned:” and these prohibitions
 were fortified by proper irritant and resolute
 clauses.

Dec. 17, 1813.

ENTAIL.—
 ROXBURGHE
 FEU CAUSE.

Prohibitory
 clause in the
 Nidpath en-
 tail.

Their Lordships would observe, that there was
 nothing here, in so many words, prohibiting *the*
letting of tacks, either short or long.

No prohibi-
 tion, in these
 particular
 terms, against
setting tacks.

Permissive
 clause.

Then followed the permissive clause:—“ *It is*
 “ *always hereby expressly provided and declared,*
 “ *that, notwithstanding of the irritant and resolu-*
 “ *tive clauses above mentioned, it shall be lawful*
 “ *and competent for the heirs of tailzie above speci-*
 “ *fied, and their foresaids, after the decease of the*
 “ *said William Duke of Queensberry, to set tacks*
 “ *of the said land and estate during their own life-*
 “ *times, or the life-times of the receivers thereof;*
 “ *the same being always set without diminution of*
 “ *the rental.*”

In 1801, the Duke of Queensberry, who had
 lately been among their Lordships, thought proper
 to grant a lease of part of the entailed lands, for the

Lease in 1801,
 by the late
 Duke of
 Queensberry,

Dec. 17, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

for 97 years,
taking a gras-
sum.

Declarator to
ascertain the
right to make
this lease.

The fact as to
taking a gras-
sum laid out of
view, and the
question con-
sidered merely
on the ground
of the length
of time

Tailzies before
the act of
1685, cap. 22.

space of 57 years, from Whitsunday, 1800, at the yearly rent of 86*l.* 15*s.* 2*d.* and a grassum of 30*l.* This lease being renounced, the Duke granted, to the same lessee, a lease for 97 years, from Whitsunday, 1802, at the same rent of 86*l.* 15*s.* 2*d.* and a grassum of 318*l.* 1*s.* 2*d.* Disputes having arisen with the family, as to whether this lease was consistent with his powers under the entail, he instituted an action to have these doubts quieted, and to ascertain that he had not acted *ultra vires*.

In the observations which had been made upon this case the other day, (by *Lord Redesdale*,) considerable attention had been paid to the fact, that a grassum had been taken. He should only say of that, that he laid it entirely out of the question, thinking it wise, after the experience he had had in Scotch cases, not to take up unnecessary points, and not to carry the precedent farther than was required for the decision of the cause. He looked to this case, therefore, merely as the case of a lease for 97 years, under this entail.

In a number of tailzies, it had not been left to argument, whether or not the prohibition against *alienation* extended to tacks; but tacks were expressly, in so many words, prohibited. The act of 1685, cap. 22, had ordained that it should be lawful to make tailzies, and that they should be protected, if made according to the mode stated in that act. But there had been tailzies before this, though the clauses intended to protect them had been found ineffectual for that purpose. In England, too, the legislature had endeavoured to protect the entails of

estates: the English mode of barring the issue and remainder men was only a fiction of law; and it had often occurred to him as a very great singularity, with respect to the judicial and legislative powers, that it should have been permitted judicially to destroy these entails. But if the English statute protecting entails had been passed only about a century ago, it might be doubted whether the legislature would have permitted the exercise of such a stretch of power by the Judges.

The most effectual tailzie in Scotland was that which, like the entail of the Roxburghe estate, contained not only prohibitory, but also irritant and resolute clauses, by which a forfeiture was incurred upon contravention. But the efficacy of these clauses rested chiefly on the provisions of the act of 1685, cap. 22, by which it was declared,—“*That it shall be lawful to his Majesty’s subjects to tailzie their lands and estates, and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolute clauses, WHEREBY it shall not be lawful to the heirs of tailzie to sell, annailzie, or dispone the said lands, or any part thereof, or contract debt, or do any other deed whereby the samen may be apprised, adjudged, or evicted from the other substitute in the tailzie, or the succession frustrate or interrupted, declaring all such deeds to be in themselves null and void, and that the next heir of tailzie may immediately upon contravention pursue declarators thereof, and serve himself heir to him who died last infest in the fee and did not*

Dec. 17, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Singularity, in the case of English entails, that the Judges had been permitted to destroy them, in opposition to the will of the legislature.

Entails with irritant and resolute clauses, the most effectual.

Efficacy of irritant and resolute clauses depend chiefly on the act of 1685, cap. 22.

Dec. 17, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Some entails prohibit long tacks in so many words; yet the effect of this particular express prohibition depends upon the admission, that the word "*annailzie*," in the act of 1685, cap. 22, includes long tacks.

It is now to be taken as settled, that fetters are not to be raised by implication.

If the word "*annailzie*" included long tacks, a pro-

“ contravene, without necessity any ways to represent the contravener: it is always declared, that such tailzies shall only be allowed in which the foresaid irritant and resolute clauses are insert in the Procuratories of Resignation, Charters, Precepts, and Instruments of Seisin,” &c.

He had noticed that there were tailzies in Scotland expressly prohibiting long tacks; and, if these were not included in the statute, under the words, "*sell, ANNAILZIE, or dispone,*" &c. how came they to be in the tailzies at all? Wherever these words were acted upon in entails, by a particular express prohibition against setting tacks, this must have been introduced upon the presumption, that under these words in the act, it was lawful to prohibit tacks, as it was upon this authority that the provision rested.

It had been said, that an heir of entail was an absolute proprietor, except in so far as he was fettered; and in the Duntreath case, it had been decided, that fetters were not to be implied; though perhaps there the English policy in regard to entails weighed a little in the judgment. But they were not now to touch the principle, that fetters were not to be raised by implication. That fetters could not be extended by implication from cases that were expressed to cases that were not expressed, was now perfectly settled.

Then the question came to this, Did the prohibition to ANNAILZIE extend to a lease, for 97 years? If it did, in reducing that lease, they were doing nothing by implication, but only acting according to the meaning of a generic term,

finding the prohibition against such a lease in fact *expressed*. Dec. 17, 1818.

It had been urged, that a prohibition to make leases of one species could not operate as a prohibition to make leases of another description; and that no prohibition could be effectual, unless fortified with irritant and resolute clauses; and that the insertion of the Queensberry permissive clause, to make leases for the lives of the grantor or receiver, could not, in consistency with the principles established in regard to Scotch entails, be held by implication as a prohibition against granting leases of another kind. He laid these propositions out of view here. He considered the real question to be, Whether long tacks were prohibited under the prohibition against alienation?

ENTAIL.—
ROXBURGHE
FEU CAUSE.
hibition
against alien-
ation was an
express prohi-
bition against
long tacks.

He would here also mention, that in the case of *Leslie v. Orme*, and others, there had been always a distinction made between the principles of law, as applied to fetters, and as applied to a permission. As to fetters, they could have no effect, except expressly imposed;—none could be implied. But, when they came to look at what was permitted, the permission must be construed so as to render it consistent with the meaning to be collected from the whole of the deed. And here he laid aside, in both the Queensberry and the Roxburghe cases, all that had been said on the distinction between the same principles, as applied to questions as they arose *inter heredes*, or with third persons; for, whatever was the meaning of a permission, that meaning must be the same, whoever were the parties.

There was a distinction in the principles of law, according as they were applied to questions of *fetters*, or questions of *powers*.

Powers to be construed in consistency with the meaning of the author, to be collected from the whole of the instrument.

The question, upon the whole, came to this,—

Dec. 17, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

The argument
ab inconvenienti material,
when the ob-
ject was to set-
tle the mean-
ing of words
in a deed.

Did the word "*annailzie*" (alienate) extend to long tacks? When he stated arguments from inconvenience, it ought to be observed, that this was not done upon a supposition that fetters could be imposed by implication; but the argument from inconvenience became material, when the object was to settle the construction to be put upon words in a deed.

Why, then, suppose the word "*annailzie*" (alienate) did not include leases. It had been said, that a lease was not a transfer of the property; and it was not: and therefore it was said, that a lease was no alienation. Then see what the wisdom of Scotland had been doing since 1648 and 1685. It had furnished an infinite number of entails, where tacks were not expressly prohibited; it had furnished charters, providing for a certain series of heirs, from generation to generation, menaced with irritant and resolute clauses, annexing the penalty of forfeiture to every mode of contravention; and yet, notwithstanding all this care, the institute, or heir, might the next day, in defiance of all these fetters, grant a lease for 1000 years, and thereby defeat the interests of all the subsequent heirs of entail, from the beginning to the end! If heirs of entail had this power, it was singular that those in the Roxburghe entail had so religiously attended to the pious request of its author, and never availed themselves of this power to acquire all that might be acquired.

After all that he had heard, then, it appeared clear to him, that the word *annailzie* had been understood as extending to long leases. The English leases were originally much the same as the Scotch.

In cases of entails without express prohibition against setting tacks, the heirs might, by granting long leases, have defeated the entails, and would have done so, had it not been understood that long leases were included in the prohibition against alienation.

English leases originally much the

tacks, and they had something in common as to duration. They held in Scotland, that a lease must have a definite *ish*, clearly expressed. Craig spoke of 10 years as a period of too long duration; and Coke said, that, “by the ancient law of England, “for many respects, a man could not have made a “lease above 40 years, at the most.” Now, however, a tenant for life, with a power of leasing, might make a lease for 1000 years, if not restrained by the power. But there was no doubt that this was alienation, according to the English law,—alienation of the possession. They had no such principle of distinction in England, between long and short leases, as they had in Scotland. There could be no doubt, then, but long leases were included under prohibitory clauses of this sort.

Then it was said, what confusion would this not produce, when there was no certain criterion to determine what was a long lease, or what a short one? He admitted that. But, if such was the general law of Scotland, the inconvenience was only exactly the same as if a prohibition *against letting long tacks* were expressly inserted in a general way in the charter. If it were inserted in the charter, that no lease should be made, except such as was consistent with a due administration of the property, or no lease of more than ordinary endurance, the difficulty must be grappled with; and in the same manner it must be grappled with here.

In a great majority of the tailzies, the same difficulty occurred, in regard to jointures and provisions for children, when the heirs of entail were allowed “to grant competent portions,” &c. A question

Dec. 17, 1813.

ENTAIL.—

ROXBURGHE

FEU CAUSE.

same as Scotch
tacks.Co. Litt. 45,
46. (k.)

It was clear that long leases were prohibited by the prohibition against alienation. And if such was the general law of Scotland, the confusion arising from the want of certainty as to what was a long or what a short lease must be grappled with. The same difficulty occurred in cases of “competent provisions for “wives,” &c.

Dec. 17, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Leslie v. Orme.

Lord Redesdale appears to have rested his opinion in *Leslie v. Orme* on the ground that there was an express permission to lease, without any limitation as to rent or time.

It might, under particular circumstances, be a wise act of administration to grant leases *with* diminution of the rent.

The decision in the case of *Leslie v. Orme*, in the House of Lords, rested

arising upon this would have a reference to the particular circumstances, and according to these circumstances it must be determined, whether the provision was in fact competent or excessive.

As to the case of *Leslie v. Orme*, (he did not think it material to state that of Turner Hall,) where a lease for four 19 years had been sustained, a noble Lord (*Redesdale*) had the other day accounted for that in this way:—In this entail, the author had inserted a condition, that it should not be lawful for the heirs of entail to grant leases *in diminution of the rental*: this condition was done away by a subsequent deed, expressly allowing the heirs to grant tacks *with diminution of the rental*; and if the heirs might do this, it signified nothing whether the leases were long or short, as they might almost annihilate the whole estate. This sufficiently accounted for that case; but he had some reason to believe that it was not the ground upon which it was decided.

In the due administration of an estate, it might possibly be necessary and proper to grant leases *with* diminution of the former rent. It might be wise, under particular circumstances, to diminish the rent, in order to increase the advantages to be derived from the estate. Prior to the Union, it might, for example, be a wise act of administration on the borders; since, to diminish the rent might be the only way to raise it ultimately, after the ground had been wasted. The noble Lord who recommended the decision in the case of *Leslie v. Orme* in the last resort, had, he believed, satisfied himself, that under the particular circumstances of that

case, the lease then in question was not an unwise act of administration, and it was decided accordingly. Dec. 17, 1813.

He concurred, then, with his noble friend, in regard to the Queensberry case. If there was an inconvenience attending restricted powers of this nature, the remedy must be found elsewhere, as had been done by the act 10 Geo. 3, cap. 51, and not in judicial interference giving powers which the law did not give.

ENTAIL.—
ROXBURGHE
FEU CAUSE.
on the ground,
that the lease
was, under the
circum-
stances, a wise
act of admi-
nistration.

He came now more particularly to the Roxburghe case, and would recapitulate the facts in a few words. In 1648, a tailzie of the Roxburghe estate was made by Robert, then Earl of Roxburghe, which evinced great anxiety to preserve the estate to the heirs who were called, (though he granted that this anxiety went for nothing, unless the author of the entail had done what was necessary to carry his object into effect;) but this anxiety appeared strongly in the clause which contained an address to the throne. He would again mention, that in 1647; or thereabouts, Earl Robert himself had made, or contracted to make, a great variety of feus, but all of small parts and portions, granted to kindly and ancient tenants, where the render was not large, and the feu duty was generally doubled at the entry of each heir.

Roxburghe
case. Facts.

From 1648 down to 1720, there was but little that called for particular attention in regard to the facts, except that some more feus were granted. It was unnecessary to enlarge on the feu of Broomlands, as it had been reduced by their Lordships' House; and it had been represented that several small feus were granted in virtue of the permissive clause.

Dec. 17, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Feu of Green-
head, 1663.

Suppose that
feu bad, it did
not follow,
that because it
had been sub-
mitted to, the
present feus
were good.

In 1663, Earl William granted a considerable feu to Sir Andrew Ker, of Greenhead; a feu which, with all its circumstances, it was difficult to reconcile with the original charter. But suppose it was not according to the terms of the charter,—then the utmost that could be said was, that too large a feu had been granted in 1663. But it was impossible to contend with success, that because that had been submitted to, therefore the present feus were good.

In 1742, a feu was made of about 12 acres of the Roxburghe property, in the Canongate of Edinburgh. This might have been done in the due exercise of the power; but if not, then it was only another feu that could not be supported. The question then was, Whether their notion of the power of the heir of entail was sanctioned by the charter,—aye, or no? And if it could be made out that it was, then there would be a farther question, Whether, even upon that ground, the feu transaction of 1804 was such as could stand?

On the death of the last Duke but one, in 1804, the late Duke William came into possession; and, on the 18th June, 1804, he executed a trust disposition of the Roxburghe estates, for the purpose of making various payments specified in that deed. Then he executed, of the same date, a new deed of entail of the estates, under the impression that he was absolute and unlimited fiar; and, on the 24th September, 1804, he executed the 16 feu dispositions, the validity of which were now in question, which included, in fact, the whole beneficial property of the estates of Roxburghe, except the mansion house of Fleurs, with 47 acres adjoining, out of

60,000 acres, reserving ingress and egress to and from that mansion house by the roads and paths presently leading to and from the same. These were all executed the same day, between the same parties, containing nearly the same clauses, and bearing to be granted in consideration of the feu duties, and "certain other onerous causes" not there particularly explained. On the same 26th of September, 1804, a contract was executed, providing for the entail of the feus, giving the interest in substance to the very same persons nominated in the entail of the 18th June, 1804, in case they could not take the benefit of the former entail, or any other entail which the Duke might think proper to make. All these feus were subject to irritancy,—1st, In case the Duke left descendants of his own body. 2d, In case the entail of the 18th June, 1804, or any other entail to be made by the Duke on the same ground, should be held effectual.

These had been called *irritancies*; and it had been argued, that it was no objection to a feu that it was subject to such irritancies. But their Lordships would attend to this contract, by which an entail of the feus was to be executed and delivered to the Duke within 10 days; whereas, the entail appeared to have been executed the same day; by which also it was provided, that the Duke should have the beneficial enjoyment of the property during his life; that he should have the surplus rents; that he should be at liberty to cut down and carry away the woods at his pleasure; that leases should be made with his consent, and that the rents should be payable to him; and, in short, that he

Dec. 17, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Irritancies in
the feus.

Dec. 17, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

should have in substance the whole *dominium utile* of the estate for life.

He took it for granted that the infeftments were taken in proper time; that the deeds were duly delivered; and that the contract and entail of the feus had appeared before the Duke's death. In his view of the case, these points were not material.

It was to be attended to, that it had been argued, that in all these deeds and agreement, the provisions were such, that the act of the Duke was not a benefit purchased by Mr. Gawler, but a gift to him under conditions.

After having executed all these deeds, the Duke took upon himself to make a new entail both of the superiority and property, and also a third deed of entail; then he executed a commission and factory to Mr. Seton Karr, and under this commission, five leases were granted of parts of the estate, thereby demising the *dominium utile*, which he had no title to do, if it had, in law and equity, passed from him by the feus; and the rents, which on the face of the feus belonged to Mr. Gawler, but which by the contract belonged to the Duke, were reserved to the Duke, his heirs, or *assignees*; and the Duke died in the natural possession of the estate.

The true question then was, Whether *this transaction*, under all the circumstances, amounted to a due exercise of the power of feuing, given under the entail of 1648,—and the other entails of 1729, 1740, and 1747, which the Court below considered as containing the same restrictions, and the same powers? When he said, *this transaction*, he said so, because he considered these instruments, though

The whole
was but one
transaction.

various in number, as but parts of one transaction. It appeared to him, then, that the Duke meant, (and he wished he had meant less, and had effectually done more,)—that he meant to change the series of heirs, and “to carry on the representation of the family by a new entail,” as he had expressed it in his first entail, (18th June, 1804;) that he intended to alter the whole course of succession. With his motives they had, as Judges, nothing to do. The only question was, Whether he had the power?

Their Lordships would then attend to the charter of 1648, with its prohibitions and permissions; upon the construction of which they had to determine this case. The prohibition (and he again mentioned that the irritant and resolute clauses went as far as the prohibition) was in these words:—

“And sicklyk it is spe'allie provydit, that it sall not be lawfull to the personnes befoir designit, and the airis mail of their bodies, *nor to the utheris airis of taillie abovewrⁱⁿ, to make or grant ony alienatioun, dispositioun, or uther right or security q'sumevir, of the saidis landis, lordschip, baronies, estait, and leiving above spe't, nor of na part thereof; nather zit to contract debtis, nor do any deidis q'rby the samyn, or ony part yairof, may be apprisit, adjudgit, or evictit fra thame; nor zit to do ony uther thing in hurt and prejudice of thir pntis, and of the foirsaid taillie and successioun, in haill or in part: all quhilkis deidis sua to be done be thame, are be thir pntis declarit to be null, & of nane availl, force, nor effect.”*

Dec. 17, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

The Duke meant to change the series of heirs, and to carry on the representation of the family by a new entail.

Prohibitory
clause in en-
tail of 1648.

Dec. 17, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Clear that
feuing was in-
cluded in the
prohibition
against alien-
ation.

Here they were not puzzled with the same question as in the *Queensberry* case, since there could be no doubt that feuing was alienation, and that the property was thereby transferred. Feuing was therefore clearly prohibited. But it became necessary, on prudential grounds, for the improvement of the estate, that the heirs should be let loose a little from these restrictions. The purposes of agriculture required the granting of leases, and also, to a certain extent, the granting of feus, which in some measure resembled leases. Stair, in treating of this subject, had the following passage:—

Stair, b. 2. t. 3.
s. 34.—*Vide*
also Ersk. b. 2.
t. 4. s. 6.

“ Infestments *feu* are like to the *emphyteosis* in
“ the civil law, which was a kind of location, having
“ in it a pension as the hire, with a condition of
“ planting and policy, for such were commonly
“ granted of barren grounds, and therefore it still
“ retains that name also, and is accounted and
“ called an assedation or location in our law: but
“ because such cannot be hereditary and perpetual,
“ all rentals and tacks necessarily requiring an ish;
“ therefore, these feu-holdings partake both of in-
“ festments, as passing by seisin to heirs for ever,
“ and of locations, as having a pension or rent for
“ their reddendo, and are allowed to be perpetual
“ for the increase of planting and policy.—But
“ about the nature of *emphyteosis*, see sect. 3. Inst.
“ de Loc. Cond. tit. F. si Ager vectig. et tit. C. de
“ jur. Emphyt.”

Elphinston v.
Campbell,
April, 1787.

And accordingly, Lord Thurlow, in the case of *Elphinston v. Campbell*, had said in that House, that in ancient times sub-feus were little more regarded than common tacks were now. Earl Robert

himself, in 1647, had therefore granted some feus, and had the advantages just mentioned. Dec. 17, 1813.

Then came the permissive clause, where it would be observed, that the permission was to grant, not merely feus, but feus, tacks, and rentals; and that the construction of the clause must be such as was consistent with the granting of tacks and rentals, as well as feus:—

ENTAIL.—
ROXBURGHE
FEU CAUSE.

“ Reserving alwayis *libertie and priviledge to our*
 “ *saidis aires of taillie to grant feuis, takis, and*
 “ *rentallis, of sik parts & portiounes of the said*
 “ *estait & leiving, as they sall think fitting: pro-*
 “ *vyding the samyn be not maid nor grantit in hurt*
 “ *and diminutioun of the rentall of the samyn*
 “ *landis and utheris foirsaidis, as the samyn sall*
 “ *happen to pay the tyme that the saidis airis sall*
 “ *succeed y'rto; and siklyk, reserving libertie to*
 “ *our saidis airis of taillie to grant competent por-*
 “ *tiounes & conjunct fees, by contractis of mariages,*
 “ *in Favo^r of onie ladies to q^m the saidis persones*
 “ *and airis of taillie sall happen to be married.”*

He should first discharge himself of the few observations which he had to make as to the permission to grant these feus, tacks, &c. *without diminution of the rental, or rent,* (for there appeared to be no distinction.) He had looked at the feus, to ascertain what attention had been paid to this in the amount of the feu duty; and though the feus contained many subjects which had never yielded rent before, or did not yield any at the time of the succession of the granter; yet all were granted at a feu duty equal to, or exceeding, the rental, rent, or money rent, at the time of the Duke's succession.

Whether the feus had been granted without diminution of the rental.

Dec. 17, 1813. At the first hearing of this cause he had felt a doubt, which had led him to suggest, whether this condition had been so punctually complied with as it ought to have been. The Judges below were called upon to state their special reasons; and the majority of the Judges held, that the lands which had not been lately rented could not be feued; and as some of the feus comprehended lands which partly had been rented, and partly not, at a *cumulo* rent, and without distinction made as to what was paid for the one description of lands, and what for the other, these feus could not be sustained. His situation was somewhat singular, as to this. It had been suggested by himself, with reference to the law of England. He had stated the case of a person holding a house in St. James's Square, as tenant for life with a power of leasing, and the next house in fee, and making a lease of both, at a *cumulo* rent, without distinguishing what was the rent reserved for each: no equity could make this good for the one, and bad for the other. The excess in the exercise of the power could not be corrected: if the parties did not state the terms, the Court could not make a new contract for them. The rent required by the power must be reserved; and it must appear by the instrument itself, that this had been done. Cases had been cited, where the Courts had held, that where the power to lease was intended to extend to the *whole* of the lands, "reserving the ancient rent," such parts as had not before paid rent might be let without rent; though the tendency of the latter cases had been to establish the rule, that it was rather to be presumed, that subjects

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Leasing powers.

which had not before been let were not within the power; and the result of the whole was, that powers were to be construed according to the intention of the parties.

Dec. 17, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

But it was not necessary to decide this point, unless they disagreed on the other grounds on which it was to be proposed that this case should be decided. Though the cause had been remitted to the Court below, that they might state the special as well as general grounds on which their judgment rested, it was not therefore necessary for their Lordships to decide on all their *rationes decidendi*. He should therefore lay aside the point as to the feuing of lands which had, along with others which had not been rented at a cumular rent.

Not necessary here to decide the point as to feus comprehending lands which had, and lands which had not, before paid rent.

But he called their attention to another view of the case. It had been contended, that the Duke, under this power, could give away, to a different series of heirs, the whole of the *dominium utile* of estate *ultra* the value (so construing the *rental*) at the period when the Duke succeeded. And therefore, if the Duke lived to the age of 99 years, he might feu the lands, with all their improvements, at a rent, not as it was in his 99th year, but as it was at the time when he succeeded.

In considering whether this was a due exercise of the power, they might put the case,—What would have been a due exercise of it, independent of the condition as to the rental? Suppose then there had been no such condition, the consequence would be this,—that the power of feuing would be without limit, except that some rent must be reserved. Alienation was prohibited, but there was a

Where there

Dec. 17, 1813.

ENTAIL.—
 ROXBURGHE
 FEU CAUSE.
 is a prohibi-
 tion against
 alienation,
 with a permis-
 sion to grant
 feus, tacks,
 and rentals,
 the permission
 to feu must,
 in the con-
 struction of
 the power, be
 limited by the
 analogy of the
 law in regard
 to tacks, which
 must be con-
 fined to a pe-
 riod of ordi-
 nary endur-
 ance, and by
 the general in-
 tent of the au-
 thor, as it may
 be collected
 from the
 whole of the
 instrument
 taken together.
 Relaxation
 from fetters
 ought to be
 carried as far
 as reasonably
 could be done;
 but it could
 not be reason-
 able to carry
 this the length
 of destroying
 the fetters.

permission to feu; and therefore the whole *domi-
 nium utile* might be feued out, *reddendo* a fowl, a
 capon, a Scotch pound; and this, it was said,
 would be a due exercise of the power. But then
 tacks were likewise permitted, and these could not
 be granted beyond a period of ordinary endurance;
 and was it consistent with this restriction as to
 tacks, that there should be such an unlimited power
 of feuing? The permissive clause must be taken in
 a sense suitable to all the terms of it, and to the
 terms of the whole instrument taken together.
 Here they were not imposing fetters by implication.
 The question was, What fetters were taken off?
 He admitted that this relaxation ought to be car-
 ried as far as could reasonably be done; but they
 could not reasonably loosen a prohibition so as to
 destroy the effect of it. Here there was a prohibi-
 tion against alienation, with a permission to feu;
 and feuing was alienation. But the whole must, if
 possible, be made consistent. The nature of the
 power was to be collected from the purposes for
 which it was given. What was the meaning of the
 prohibition against alienation, if the heir might
 alienate the estate? Suppose Earl William, making
 up his title under the entail 1648, had said, ‘ I
 cannot dispone, contract debt, nor do any thing
 by which the estate may be appraised or evicted
 from the heirs, as to half an acre. But this I can
 do,—I can grant one feu of the whole, and thus
 alienate the property for ever. I can, in this way,
 destroy my own powers over the estate; and yet
 I cannot grant a lease for 99 years, because the
 power to lease must be exercised with a view to

‘ the rational administration of the estate, and used,
 ‘ not for the destruction, but the support of the
 ‘ entail!’

Dec. 17, 1813.

ENTAIL.—
 ROXBURGHE
 FEU CAUSE.

This being a
 gift of the
 whole of the
 surplus rent of
 the estate by
 one heir, the
 transaction on
 that ground
 could not be
 supported.

They must
 look, not only
 at the appa-
 rent, but also
 at the real na-
 ture of the
 transaction.

He could not help saying, therefore, that sup-
 posing all these feus executed on the same day, in
 favour of the same person, and constituting a gift of
 the surplus rent of the whole of this estate in perpe-
 tuity, he could not help saying, that in that view of
 the case, and on that ground, it appeared to him
 impossible to support this transaction. For he
 could not agree that they were not to look at its
 real nature, but only at what it was in appearance.
 If the transaction could be supported against all the
 special objections, still, on general grounds, it could
 not be supported. The Duke, after the feu trans-
 action, appeared to be the substantial owner, and
 reserved the rents to himself, under leases to which
 Mr. Gawler was an attesting witness. If Mr. Gawler
 had interposed to prevent these acts on the part of
 his benefactor, he should have had a less good opi-
 nion of him than he now had; but it was impossible
 not to look at these, along with other facts, as evi-
 dence of the real nature of the transaction.

The nature of the irritancies too were to be at-
 tended to. If Mr. Gawler had been in possession
 under these feus since 1804, if he had enjoyed the
 property according to their tenor, if there had been
 no relative contract, they would still have gone a
 great way to destroy the distinction between superior
 and vassal.

Effect of the
 irritancies.

When he then found that the real intention in
 granting these feus was, that they should be en-
 tailed upon a different series of heirs from those

Dec. 17, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

The real nature and intent of the transaction was, to alter the order of succession directly by a new entail; and if that could not be done, then to alter it by means of the feus.

The two general grounds on which the judgment of the Court below was affirmed:—1st, The transaction being a grant of one feu of the entire estate was not a due exercise of a power of rational administration. 2d, This, under the colour of feuing, was in reality an attempt to alter the order of succession.

called by the deed of 1648, and that this intent was to be accomplished by feuing the whole estate, separated into 16 feu dispositions for the purpose of forming a colourable compliance with the condition as to *parts* and *portions*; when he saw that these 16 feus were in reality all one feu, the question then came to be, Whether the real nature and object of the whole of the transaction was not this,—
' I mean to alter the order of succession: if I cannot
' do it directly by a new entail, as absolute fiar, I
' shall do it by means of these feus?'

It was therefore on these grounds—on the two general reasons, that he was compelled to say that these feus could not stand. It did appear to him, 1st, That this power of feuing, as well as that of leasing, was to be exercised for the purposes of a rational administration of the entailed estate; and that therefore these 16 feus, constituting in reality one feu of the *dominium utile* of the entire estate, could not, on that ground, independent of the other parts of the transaction, be supported. 2d, It appeared to him, that the real intention was not to feu, but, under the colour of feuing, to alter the order of succession, which the law would not permit to be done under that colour.

He said nothing as to the feuing of mines, minerals, and woods, &c. which had never been let, as it might be dangerous in such cases to go farther than was necessary. But it was impossible to look at this part of the transaction also, without seeing this at least, that these were facts to show what was the real nature and object of the whole transaction.

It was clear, from this act of feuing itself, that

the Duke could not have considered it as an act of rational administration. But his requiring a contemporaneous entail of these feus was decisive to show that the real intent was not to grant feus, but, in another form, to make a new entail: and the Duke's own entails showed that it was not so much his object to give Mr. Gawler the feus, as to entail upon a new series of heirs, in the one case, both the superiority and property, and, in the other case, the property only.

The words of the power in the Greenock case were, "Reserving always, &c. full power and liberty to the said Sir John Schaw, &c. to grant feus or long tacks, for such spaces as they shall think fit, of any portion of the said lands, *the feu or tack duty not being under 20 shillings Scots for each fall of dwelling houses, and five shillings for the fall of offices.*" The chief question there was as to the feu of the Western Barony; and it was held that it could not be feued, as the nature of the reservation showed, that only such parts were to be feued as were fitting for dwelling-houses and other buildings, and as it was not probable that the town of Greenock should extend to that length. But it had been said in that House, that if ever the time came when the town of Greenock should extend to the Western Barony, then the heirs of entail might grant feus of it. The town of Greenock had now extended that length, and at this day the lands of the Western Barony were properly applied to the purposes of feuing. What was the meaning of that, if it was not this,—that the power was to be con-

Dec. 17, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Cathcart v.
Schaw Stewart,
Jan. 31,
1755. Appeal,
March, 1756.

Dec. 17, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

strued with a view to the object for which it was given? Or, in other words, that it was to be exercised with a view to the rational administration of the estate?

Then the judgment, on these general grounds, ought, in his opinion, to be, to affirm the interlocutor.

In stating so much, if he was in error, he protested to God that he had endeavoured to come to a just conclusion upon this case, with an anxiety which he had never before felt in his life. He had looked again and again at all that he could find in the papers,—he had tormented his mind with all the reasoning that he could possibly conceive, to try whether, though the feus were bad as to the whole, they might not be reduced only as to the excess; and he once thought that they might, as there was a clause in the contract by which the obligations on Mr. Gawler were to be lessened in proportion as the feus might be reduced; but he could find no rule or principle on which to say, what was excess, and what not. There were no distinct parts: it was all one transaction. He could not say, on any rational ground, how these feus were to be distinguished, as to what was good, or what bad, except the feus of Fleurs and Broxmouth. These two were all bad, as the mansion house could not be feued, and as the house of Fleurs could not be turned into a stone quarry, by feuing all the grounds about it, though free ingress and egress were reserved. These two were capable of distinction, but all came under the general ground, and were all good, or all bad. One of the Judges

It was impossible to discover any rational ground on which these feus could be distinguished, and reduced only as to the excess.

had said, that one half of them were bad. But by what rule was he to take one, or two, or more? or to say which was good, or which was bad? The general grounds of decision went to the heart's blood of the whole, and they were all good for every thing, or good for nothing.

Dec. 17, 1813.

ENTAIL.—
ROXBURGHE
FEU CAUSE.

Lord Eldon (Chancellor.) He had not, the day before, called their attention particularly to some of the findings, such as those in regard to the taxation of the casualties, the feuing of mines and minerals, &c. These were evidence as to the real nature and object of the transaction; but, in the terms of the judgment which he should propose, he wished to avoid affirming or disaffirming many of the findings in this interlocutor. He had not failed to attend to what had been said in regard to the proof of a trust, but he gave no opinion upon that point.

Dec. 18, 1813.

He had stated his decided opinion the other day, that the grant of 16 feus, comprehending the whole estate, was, even if there had been no other circumstances, in effect, a grant of one feu, and that one was inconsistent with the entail of 1648; and that the object was, under colour of feuing, to alter the order of succession: that, according to the law of Scotland, attention was to be paid, in cases of entails, to the rational administration of the estate, or what was called management. But though attention was required to management, it ought not to be too curiously inquired into, whether the management by an heir of entail was the most rational.

He had reconsidered the question, whether the feus might not be separated; but had not been

Dec. 18, 1813. able to discover any rule by which that could be done.

ENTAIL.—
ROXBURGH
FEU CAUSE.

Then having regard to the whole,—all were alienations, to operate only after the death of the Duke, and to alter the order of succession, under the colour of feuing; and, on these general grounds, (without saying any thing as to the special reasons,)—

Judgment.

The judgment of the Court below was *affirmed*.

Agent for Appellant, CAMPBELL.

Agents for Respondent, SPOTTISWOODE and ROBERTSON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SELKRIG (Trustee for Creditors of } *Appellant.*
FAIRHOLMES) - - - - - }

DAVIES and SALT (Assignees under } *Respondents.*
a Commission against GARBETT, a }
Bankrupt) - - - - - }

March 23,
1814.

BANKRUPTCY
—EFFECT OF
AN ENGLISH
COMMISSION
OF BANKRUPT
IN SCOTLAND.

It is now settled law in Scotland, founded on a principle of international law, that the assignment under an English commission of bankrupt vests in the assignees, *ipso jure*, and without the necessity of intimation, the whole of the bankrupt's personal or moveable property in Scotland; and that the effect of all subsequent diligence, by any Scotch or other creditor, is thereby precluded. Thus, where a commission, issued in England, against a person, part of whose property consisted of certain shares of Carron stock, and a creditor in Scotland afterwards arrested these shares,