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KER
v.
DUKE OF ROXBURGHE, &c.

(Feu Cause continued, Fac Coll. Vol. xvii. p. 374, et Dow, Vol. ii. p. 149.)

JOHN BELLENDEN KER, Esq., . *Appellant;*
DUKE OF ROXBURGHE,* and JAMES HORNE, Esq., W.S., his Commissioner, . } *Respondents.*

House of Lords, 18th December 1813.

TAILZIE—CLAUSE—FEUING— ALIENATION — ALTERATION OF THE ORDER OF SUCCESSION.—The Duke of Roxburghe held the Roxburghe estate under a strict entail, prohibiting the heir of entail to sell, alienate, dispone, or to do any deed whereby the estate might be adjudged, or do any other thing to the hurt and prejudice of the said tailzie and succession, reserving to the said heirs of tailzie to grant feus, tacks, and rentals of such parts and portions of the said estate as they shall think fitting, provided the same be not granted in hurt and diminution of the rental. The Duke granted sixteen feus of the whole estate. The question was, Whether these feus were good, or in contravention of the entail? In the first appeal, the case was sent back for reconsideration to the Court of Session. The Court of Session pronounced an interlocutor, stating the special grounds upon which it annulled those feus. The House of Lords affirmed the judgment, on these grounds, that they could not be considered as proper feus made according to the true meaning of the entail, or in the due exercise of the powers therein, nor made with any view to the rational management of the estates; and that the whole deeds and instruments sought to be reduced, when considered as a whole, were to be taken as *alienations* and as *alterations* of the *order of succession*, under the colour of creating feu-rights.

In the report of this case, ante 609, the facts under which this question arose are stated, which had reference to the late Duke's power to grant the feu-rights under challenge. By the House of Lords the case was there remitted for the reconsideration of the Court of Session, with special directions to the Court, in reviewing their former judgment, and the whole cause, to state the particular grounds or reasons upon which their judgment might be founded.

Accordingly, on the return of the cause to the Court, and on resuming consideration of their interlocutor formerly appealed from, of 12th and 16th January 1808, the Court ordered mutual cases to be boxed preparatory to a hearing, and, after hearing further argument, the Court, after consulting the other Division, came to affirm the former judg-

18th and 19th June, 1813.

June 29, ——

* Sir James Norcliffe Innes had now assumed the dignity to which he was held by law entitled.

ment, by a special interlocutor, stating the grounds and reasons of their judgment. (Vide Fac. Col. vol. xvii. p. 374.) These grounds placed their judgment on a wider basis than had been indicated in their former interlocutor.

The opinions of the Judges are printed at great length in the Faculty Collection of Session Papers, (Hume's Collection, vol. cxix. No. 82, 1812-1813.)

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

After hearing counsel,

[THE LORD CHANCELLOR ELDON, after fully detailing the facts, proceeded as follows.]

" My Lords,*

" I come now, with your Lordships' permission, more closely to the Roxburghe case, of which I have stated the facts as well as my memory will enable me to do, and, my Lords, to recapitulate those facts in a very few words, before I proceed to examine the principles and precedents which are supposed to apply to it. In the year 1644, and the year 1648, (I would confine myself to the charter of 1648), there is an entail created of certain lands, and of the earldom of Roxburghe, a tailzie with very great anxiety to preserve both the title and property in that succession of heirs who are (to use the expression there used) called to that succession. There is a clause in it which shows the anxiety of the granter of the estate, though I am quite ready to admit his anxiety must go for nothing if he has not taken the proper means to secure the object of his anxiety. He addressed a sort of prayer to the person then on the throne, to protect his house and family, as he had taken particular care to call to that honour and dignity those who he trusted would persevere in duty and respect to their sovereign.

" My Lords, I here mention again, because it is fit it should not be forgotten, that in the year 1647, certainly about the period of this deed of 1648, but prior to it, the then Earl of Roxburghe had either made or contracted to make,—made, if you please so to take it, and subsequent to that deed of 1648, he had made, either with a view of fulfilling his contracts, or without previous contracts, a great variety of feus. I think in the book before me it is stated that the number of them was about three-score; but they are all feus, as I look at them, of small parts and portions of lands granted to kindly tenants as they call them in the law of Scotland. They are feus, the property not being large, made to persons holding small farms, small vassals. The rental is not large, and in most of them, if not in all of them, the feu-duty upon the entry of the heir and successor is to be doubled; *Sicut usus est* is the expression, or something like that, in these different feus.

" My Lords, from 1648 down to the year 1729, there is little of

* Mr. Gurney's short-hand Notes, revised by his Lordship.

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fact which is worthy your Lordships' attention, except with respect to the grants of some other feus made by some of the heirs of tailzie. There is a feu which was made as early as 1650 by the same Robert, Earl of Roxburghe, which was a feu of Broomlands and others. It is not necessary for me to enlarge upon the terms of the feu, because, in point of fact, as late as the year 1733 that feu was reduced (as being *ultra vires* of the Earl) by the judgment of the Court of Session, and affirmed by this House. With respect to the small feus it has been represented, and I think very properly, that they are feus granted according to the plain obvious intent of the permissive clause to make feus, the terms of which I shall state to your Lordships by and bye.

"My Lords, in 1663 the then Earl William granted a feu of Greenhead to Sir Andrew Ker. In respect of that feu there has been a great deal of reasoning, tending to show that it was for onerous consideration, that it was a fair and a provident administration of the estate, and a great deal of colourable argument of that sort; but I do not think it unreasonable to say, that it is difficult to reconcile that feu with the terms of this charter. Let us suppose that it was a feu not according to the terms of the charter, it will then be a feu granted in 1663, not according to the terms of the charter, of a particular part or portion of the estate, a larger part or portion than in that way of putting it should have been granted in one feu; but then the utmost which can be stated with respect to it is, that there was one feu granted in that year 1663 of a part of the estate, too large to be made the subject of one feu according to the terms of this charter, but that it is utterly impossible, that because that Earl William made that one feu, and that one feu has been submitted to by the family, the feus in question must therefore necessarily be consented to likewise. There was likewise a feu made in the year 1742 of about twelve acres, lying on the south side of the Canongate of Edinburgh; and with respect to that feu, although it appears to have been made on the site of a dilapidated mansion-house, it would have been very difficult to have affected that feu, as a feu not made in the due exercise of the power of feuing; but if you take it to be so in that way of putting the case, it is one feu granted not in the due exercise of the power in addition to that other one, and then the question is, whether those two deeds prove more than this, that the owner of the property made feus which could not be supported? That Earl William granted in 1663 feus which could not be supported, and that Duke Robert granted other feus in 1742 which could not be supported, but that they granted them under the notion that they could be supported; and the question then is, whether their notion that they could be supported is, aye or no, supported by the tailzie and charter under which they hold? and even if they could make them consonant with that authority, there would remain the question, whether such feus as were made in 1804 could possibly stand?

"My Lords, I need not tell your Lordships, that in the year 1729 there was an entail made of other estates, which comprehended an

additional property in the effect of the old entail; and that in the year 1740 there was another addition to the entailed property, which became comprehended under the old entail; and I think in the year 1747 it was that a certain property, which had been in wadset in order to pay the debts of one of the family, was redeemed, and that was settled also so as to be brought under the terms of the old entail.

"On the death of the last Duke but one, the last Duke (who was the author of these feus) came into the possession of the estate. And coming into the possession of the estate, in the course of eighteen months previous to his death he executed, first a trust-disposition on the 18th of June 1804, for the purpose of creating the means of making very large payments, which were there provided for. On the same 18th of June 1804 he executed his first deed of entail; and then, in the month of September 1804, he executed these sixteen feus, the validity of which is now in question; and which sixteen feus, your Lordships will permit me just to remind you, did in fact vest in those who were to take the benefit of these fees, (the instruments being upon the face of them pure feus), the whole beneficial property of the estate of Roxburghe, with the exception only of the mansion-house of Fleurs; with no exception of the mansion-house at Broxmouth; with no exception of the mansion-house at Greenhill; with no exception of the mansion-house of Byrecleugh; and that mansion-house at Fleurs being excepted, together with forty-seven acres, only parcel of a property containing sixty thousand acres, and liberty of ingress and egress for the Dukes of Roxburghe to this house so reserved to them, with forty-seven acres.

"My Lords, these deeds are all made upon the same day; they are all made by the same person; they all contain, I think, nearly the same clauses; they are stated to be made in consideration of the feu-farm duty, and for other onerous considerations; terms, the generality of which is not explained by any thing to be found in the cases, but which have been said to be capable of explanation, and actually explained by what appears upon these deeds. There was executed upon this same 26th of September 1804 a contract of entail with respect to those feus; that is to say, Mr. Gawler thereby contracted, that there should be an entail made of these feus; which entail would in truth give the substance of that interest which the persons marked out were to take under the entail of the 18th of June 1804, to the very same persons, if those persons could not take the benefit of that entail, or of any other entail which might be executed by the Duke in the course of his lifetime, and they might be found ineffectual after his death; and all these feus are subject to what have been called irritancies; *first*, If the Duke should have any descendants of his own body; *secondly*, If he did not leave descendants of his own body, if the entail, that he had executed, or any other entails which he should execute, should be found to be effectual dispositions, not *ultra vires*, not contrary to the power he had in the deeds of 1648 and 1747.

"My Lords, these have been called irritancies; and it has been

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argued, that they are so, and that it is no objection to the granting of a feu that it contains such irritancies as these; but your Lordships will be pleased to attend to the further circumstance, that this contract of entail, of even date, which provided an actual entail to be made within ten days, and which actual entail was made on the very same day, the 26th of September 1804, provides further, that the Duke of Roxburghe shall in effect have the whole beneficial enjoyment of the estate during his own life; that he shall take all the surplus rents, notwithstanding by the feus the entry of the grantee of the feus was to be at Martinmas then next; that he shall have all the surplus rents; that he shall have the possession of all he chooses to have in his actual possession; that he shall have power to enter and cut down wood; in short, even if the property was transferred, he had, in point of substance under this agreement, during the lifetime of Mr. Gawler, unquestionably the *dominium utile* of all these estates. I have before stated to your Lordships, that in my view of this case I should consider the seisin of infeftment to have been properly taken in the lifetime of the Duke; the possession to have been delivered in the lifetime of the Duke; and that the charter of entail, together with the contract of entail, had appeared to the world before the Duke ceased to exist; it is not in my view very material to consider how these facts stand, one way or the other.

"Such, my Lords, being the state of the case of the Duke of Roxburghe, in these two years, 1804 and 1805, having at that time an estate partly in his natural possession and partly enjoying it by means of rents paid him, and which, I will suppose, in illustration of the argument, to amount to about £20,000 a-year, makes feus of the whole interest in the estate beyond that income of £20,000 a-year; and here I must take the liberty shortly to put your Lordships in mind again of those passages to be found in the entail and the feus, and in the agreements respecting that entail, and respecting the obligations Mr. Gawler came under. I must put your Lordships again in mind that it has been argued, and, I think, satisfactorily argued, that the provisions of that entail and the other deeds are such, that the act of the Duke cannot be considered, at least in my judgment, as an act the benefit of which was purchased by Mr. Gawler, but an act of gift on the part of his Grace, the obligations of Mr. Gawler being expressed, and being provided for by the very terms under which he takes the estate, and by which he comes under obligation to make these several payments.

"My Lords, having stated this much to your Lordships, as one noble Lord is present now who was not before, I will just add this circumstance, that after this the Duke takes upon himself, as heritable proprietor of the estate, to make a deed of entail both of the superiority and of the property, and he gives a factory to a gentleman of the name of Seton Karr to act as his general agent of this estate pretty much as if it was his own; and he actually executes, I think, five leases, but it is immaterial whether three or five leases, parts of the estate by those leases demising (to use an English word)

the *dominium utile* of the subjects leased to tenants, who take directly from him by his act, whereas he had no title at all of the feus in law and equity, passed an immediate beneficial interest *in presenti*, to the person who was the grantee in these feus: He had no interest whatever to convey to those tenants; he reserves those surplus rents which, upon the face of these feus, were to be Mr. Gawler's, but which, by the effect of the collateral contract, were to be the Duke's; the Duke being to give discharges, as your Lordships recollect, to Mr. Gawler for those surplus rents. He reserves the rents, not to the persons to whom he passed the *dominium utile*; he reserves those rents to himself, his heirs and assigns, and he dies in the natural possession of these estates.

" My Lords, the true question before your Lcrdships I take to be this, whether this transaction, constituted,—I do not say of these sixteen feus,—but whether this transaction, constituted by all these deeds, and under all these circumstances, amounts to an exercise of the power of feuing, such as is given by this charter of 1648, and given nearly in similar terms, with some small variation of expression, which I do not think very material as to the words rent and rental in the subsequent deeds of 1729, 1740, and 1747; whether this transaction amounts to such an exercise of the power of feuing, contained in the charter of 1648, as a Court of Justice can say is the true and proper exercise of the power of feuing contained in the charter of 1648 and the subsequent charters. My Lords, I apprehend when I say this transaction, I am fully entitled to say so, for I apprehend, according to all law, if you are to look at the real nature of a transaction, you must not look at its parts as distinct and altogether separate from its effect as a whole. Deeds and instruments executed at the same time, relative to the same property, connected with the same powers, various as they may be in their number, we may construe as one transaction. Then this transaction, my Lords, appears to me to amount to this. The Duke of Roxburghe certainly meant, and I am sure I need not, after what I stated on Wednesday, state to your Lordships, that I do really and sincerely wish that he had meant somewhat less, and done something more effectually; he certainly meant to change the series of heirs that were to take under the charter of 1648, and the other charters. That he meant so to do, appears from the recitals he has mentioned in his trust dispositions; that he was not fettered like the prior heirs of tailzie; that being the last heir of tailzie named, he had power, as he would have had if he had been correct in the fact, that he had a power beyond the heirs of tailzie mentioned in the charter, that he meant therefore to change the whole series of heirs; and without entering at all into any observation upon his motives, I say no more about them than this, it is far too delicate a thing for a Judge to trust himself with determining whether the motives with which a man executes a power which he has, or conceives he has, are motives which should lead him to the execution of that power; or whether motives of a higher nature should have restricted him from taking advantage of his legal rights. That is a

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question with which Judges have nothing to do; but if they had any thing to do with it, it appears to me from the whole of this cause, that the Duke was under a moral obligation to do something for the persons for whom he meant to provide by the effect of this act.

" My Lords, you will permit me to call your attention to the charter of 1648, as far as it contains the prohibitory clause, and the permissive clause upon which you are to determine. My Lords, the prohibitory clause was in these words; and I mention again that the irritant and resolutive clauses go as far as the prohibitory clause:— ' It shall not be lawful to the personnes before designit, and the ' airis male of their bodies, nor to the otheris airis of taillie above ' written, to make or grant any alienatioun, dispositioun, or either ' richt or security qtsumever of the saidis landis, lordschip, barones, ' estait, and leiving above spe'it, nor of na part thereof; neither zit ' to contract debtis, nor do ony deides qreby the samyn, or any part ' yairof may be apprised, adjudget, or evicted frae thame; nor zit to ' do ony uther thing in hurt and prejudice of thir pntis, and of the ' foresaid taillie and succession, in haill or in pairt; all quhilkis ' deides, sua ta be done be thame, are be thir pntis, declarit to ' be null, and of nane availl, force, nor effect.' Here, my Lords, we are not puzzled with the same question as that which presented itself in the Duke of Qeensberry's case, because there appears to be no dispute that this prohibition of alienation will amount to a prohibition of feuing as an alienation, although under the contract and lease nothing passed but a sort of conventional right to take the profits. Nobody doubts that under a feu duly executed, with seisin and infeftments, the property is actually transferred. Alienation therefore was prohibited, and if your Lordships will look at Erskine and Stair I think you will find, that it became necessary upon grounds of a prudential kind, to provide what was to be done for the improvement of the estate; in fact, what was to be done in the article to a certain degree of letting loose the parties prohibited from the effects of the express prohibitions.

" If your Lordships look to Erskine and Stair you will find, that it was the demands of agriculture that necessarily suggested the propriety of giving leave to make leases of some duration, and that it was the same consideration which suggested the circumstance of granting these feus; granting feus, under a permission to be looked at, at least *prima facie*, as a provision consistent with the prohibition to alienate.

" My Lords, Stair and Erskine have passages to this effect:—' Infeftments feu are like to the emphyteusis 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,' that is, conclusion and termination; ' therefore, these feu-holdings partake both of infeft-

'ments as passing by seisin to heirs for ever, and of locations as 'having a pension or rent for them *reddendo*, and are allowed to be 'perpetual for the increase of planting and policy;' and, accordingly, in a case, I think, of Elphinstone against Campbell, or some such name, your Lordships may recollect, Lord Thurlow stated, that these feus, when they came to be applied to the purposes of agriculture, were in little more acceptation in the law of Scotland, than common tacks were; those, I think, were his words.

"Your Lordships know, that the use which Earl Robert, about 1647 and 1648, made of this power in the original charter 1644, was to grant certain feus, which seem to have been granted in the very terms, I think, which the provision contained in this charter permitted feus of the very nature and essence which this charter meant to provide for. The permission is in these words: 'Reserv-'ing libertie and privilege to our saids airis of taillie to grant 'feuis, tackis, and rentallis.' Your Lordships observe, it is not merely a provision to grant feus, but it is by virtue of the same permission that there is the liberty, not merely to grant feus, but to grant feus, tacks, and rentals; and it was upon that ground that I once submitted to your Lordships, that you must put such a construction on this clause as not only to make the clause consistent with the nature of the feus, but also to make the clause consistent with the nature of those other grants which it authorises; 'the 'grants of tackis and rentalis of sik parts and portions of the 'said estait and leiving as they shall think fitting, providing the 'samyn be not maid nor grantit in hurt and diminutioun of the 'rentall of the samyn landis and utheris forsaidis, as the samyn sall 'happen to pay the tyme that the saidis airis sall succeed yrto.'

"My Lords, I will, in the *first* place, discharge myself of such very few observations as I mean to make to your Lordships with reference to that part of this clause of permission which relates to the rentals. Your Lordships know that a question has been raised, whether these feus have been made with a due attention to the condition, that the feu-duty to be rendered was not to be less than the rental, as it is here called, or, in the subsequent charter, the rent, upon the distinction of which I lay no stress; but whether sufficient attention had been paid to that condition of the permissive clause which relates to what was to be the quantum of the feu-duty? My Lords, when I say whether attention had been paid, I do not mean whether attention had been paid by those who drew these instruments, who were the actual conveyancers, because I think, after reading them, as I did the day before yesterday, and pointing your Lordships' attention to the *reddendo* of the feu-duty, it is impossible not to see that every person who was concerned in drawing these sixteen feu-deeds aimed at a compliance with this condition about the rental in the granting of every one of these feus; for though every one of the subjects feued are stated to be in the actual possession of the person feuing, many of them do not appear to have been let at any rent. Some do, but many of them do not appear

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to have been let at any rent at the time the succession opened to that Duke, who was the granter of these feus; yet they are all of them granted with a feu-duty averred in the instrument itself to be the money rental; either the present money rental, which would not be a strict compliance with the terms, or the money rental at the time of the Duke's succession. When I said that a question had arisen, whether sufficient attention had been paid to this, I meant to refer to what had passed in these proceedings when this was argued in the Court of Session. When it was argued here on appeal, and again in the Court of Session, a sort of doubt was created in my own mind, which led me to suggest, that there might be considerable difficulty in supporting these feus with reference to the question, whether there had been such a punctual observance of this condition as was necessary to give validity to it, and the Judges having been called to state what were their special as well as their general objections to these feus, a great majority of them have agreed that these feus are bad, as far as they either comprehend only lands that were not in the possession of persons paying a rental at the time the last Duke succeeded, or that they are bad, so far as they comprehend lands which were partly in the possession of tenants paying a rent, and partly in the possession of the late Duke; and that where there is a feu of property which was unentailed together with property which was entailed, and where there is a *cumulo* rent for both, and no distinction taken between what was to be paid for one and what for another, it is bad; and a great majority of the Judges have determined, that upon this ground alone these feus cannot be sustained.

"My Lords, the species of consideration which I adverted to in the beginning of this case, leads me into a situation, I confess, of some singularity and awkwardness with respect to this point. The point was originally suggested by myself. I suggested it, prompted to do so by what I apprehended to be the law of England, not knowing it to be the law of Scotland, in reference to reservation of rents. It may be in the recollection of your Lordships that I stated this. If a man has one house in St James's Square, of which he is a tenant for life with a power of leasing, and, being entitled in fee to the next house, he chooses to make a lease of the two with one *cumulo* rent, without distinguishing what rent was to be paid for the other; no Court could say this should be good for the one and bad for the other, and that they would set it aside for the excess; and the reason why they could not set it aside for the excess alone, as it seems to me, is this, that if parties enter into what is called a bargain, if the terms of the bargain do not finally prevail between the bargainer and the bargainee, a Court of Justice has no right to substitute other terms and to introduce a new contract. It appeared to me also, having regard to what our law was, that if a person having a power of leasing was desirous to reserve a particular rent, he must reserve that particular rent, and it must appear upon the face of his instrument that he does reserve that particular rent, because the man to

take after him has a right to know from his act what it is he has done.

"Cases were cited to your Lordships of this sort, where there was a general power of leasing given in our law and the ancient rent was to be reserved, but where the power of leasing was general as to lands which never had been let, and also as to lands which had been let, and cases were cited, proving that a convenient construction had been made by the Courts of Justice, who have said that where the power was general it should be applied to such lands as it could be applied to, but that the condition should not be insisted upon as to those lands with reference to which the condition had no application, because they never had before been let; and they have varied, I think, in what they have required in the execution of such a power as that, with reference to the fact that they could be let for more rent. The question has been raised, whether, where there had been no rent reserved for a part, you are to add to the ancient rent something for the premises not before let? or, whether you are to reserve for that a proper, fair, and reasonable rent? And the result of all the cases is not very easily reconcileable, God knows, but the result is, that all these powers are to be construed according to the intent of the parties. Now, my Lords, it does not appear to me to be by any means necessary that we should decide this point, unless we should happen to differ upon some other grounds to be proposed to your Lordships for the judgment in this case; for although it was your Lordships' wish to know, by the statement of the Judges in the Court of Session themselves, what was the nature of their general objections, and what was the nature of their special objections, that request was more, on your Lordships' part, for the purpose of supplying what you thought a defect in the judgment you had before, viz. that you did not know the grounds upon which they proceeded, than on any notion that we were to affirm every *ratio decidendi* that the Judges had communicated to us as the grounds of their opinion. They state reasons in which they are mostly agreed; they are, in my opinion, sufficient to justify the conclusion at which they have arrived. There aré also special objections, which they think apply to each and every of them upon both grounds. I conceive their judgment is right; but it is not necessary that we should adopt their judgment upon all the grounds. I lay, therefore, out of the case the rental for the present moment.

"But, my Lords, I cannot help calling your Lordships' attention to another view of the case, which is this;—It is now contended, that, consistently with this deed, the late Duke of Roxburghe could give away from the series of heirs called in the deed of 1648, and to a class of heirs whose interest was not contemplated by that deed of 1648, the whole of the *dominium utile ultra* the value, because we may put that construction, for the purpose of stating what I am about to state: *Ultra* the value of what this estate was at the time of that Duke himself succeeding to it. And if he, who enjoyed it during so very short a period, could do so, you must also say, that if an

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infant came in as the heir of tailzie, and lived ninety-nine years, notwithstanding the whole course of improvement that might be made in the course of so long a period as that, you must say, that the same rules of construction, that just before he was dropping into his grave he could give away, not merely the *dominium utile* beyond the value of the property when he was in his ninety-ninth year, but the *dominium utile* beyond the value of it at the time of his succeeding to the estate.

" But, my Lords, in construing this case for the general purpose of seeing whether a due exercise has been made of this power, you must make up your minds to say, what was a due exercise of a power not containing this provision, that the rental of the feu should be equal to the rental of the estate at the time the granter of the feu succeeded to that estate. Let me suppose, that there was no such condition in this deed, what is the construction contended for to support these feus? If this condition did not stand part of this permissive clause, the consequence would be this, that the power of feuing would be without any limit whatever; the feus certainly must have this limit, they must have the limit which is prescribed by the necessity of there being, in the body of the feu, all the requisites of a feu; there must be some rent; but the consequence would be this, that if the terms of the permissive power did not require an attention to a given rent, if there was no such condition in it, the construction of the power of feuing being contained in a deed prohibiting alienation, feuing being one species of alienation, the tenant for life, under all those anxious words I have read to your Lordships, would have nothing to do but to say, I am prohibited from alienating, but I am not prohibited from feuing. I will therefore feu out directly the whole *dominium utile* of the estate, *reddendo* a capon, *reddendo* a fowl, or *reddendo* a Scotch pound; and yet that is a due exercise of the power of feuing under a deed prohibiting alienation of the estate, or of any part of it.

" Your Lordships must also look at this, not merely as being a clause permitting feus to be made, but as a clause permitting tacks to be made, and permitting rentals to be made; and how will you ever put such a construction upon this power, as to say you may give away the whole *dominium utile* in the form of a feu, and yet it is impossible to grant a lease of more than ordinary endurance, and it is impossible to grant a rental of more than ordinary endurance? That, I apprehend, is impossible. You must, therefore, at least this cannot be denied in argument—you must, if you look at the permissive clause alone, make such a construction of the permissive clause, and all the terms of the permissive clause, as is suitable and fitting to the terms of that clause taken alone; but you are not only to make it suitable and fitting to the terms of that clause taken alone, but you are also to make it such a construction as is suitable to the whole of the instrument taken together. Now, my Lords, that is a most material part of the case. I say, to the whole of the instrument taken together; and when I say the whole

of the instrument taken together, I have now your Lordships' authority upon the question as to the variance of the entail of 1648; that, looking at the whole of the instrument taken together, is not breaking down any of the decisions or the doctrines laid down as to the construction of fetters on an entail, and the imposing fetters by implication; but there is no ground here for saying you are imposing fetters by implication. The question is not, what fetters are imposed, but what fetters are taken off; the fetters are imposed by the prohibition to alienate; it is in the permissive clause that the fetters are taken off: and I quite agree, that you are to look at the fetters as taken off to the very extent to which the fair construction of those terms that remove the fetters will bear you out; but you are not to make such a construction of that permissive clause as for it to operate to let the party loose from prohibition. You are not to make such a construction of that permissive clause as to destroy altogether substantially the effect of the prohibitory clause. Here is a prohibition to alienate;—to feu is to alienate. Then there is a prohibition to feu; but here is a permission to feu. What then is to be the effect of that permission to feu? Is it to destroy that prohibition altogether, or to be construed as consistent with it? Must it not be construed as a permission, the nature of which is to be collected and gathered from the purposes for which it is given, and to be collected and gathered from the purposes to which the power given in the other clause can possibly be applied?

"My Lords, I put the case again, What would possibly be the meaning of prohibiting all alienation, if the intent was, that in feuing you might accomplish all alienation? because this is extremely clear, that if Earl Robert, who made this in 1648, had died the next day, and then Sir William Drummond, who succeeded, had come into possession upon the succeeding day, a fact which might have happened, upon this construction Earl William would have had nothing more to do than to say this,—I will make up my titles under the deed of 1648; I cannot sell any part; I cannot alienate an acre of it; I cannot dispone a rood of it; I cannot contract any debt that can affect it; I can do nothing which shall authorise those entitled to the succession after me to say that as to half an acre of it I have altered the course of succession:—But this I can do, Earl Robert yesterday being in possession of 60,000 acres, which 60,000 acres yielded yesterday, and this morning, when I succeeded to the estate, for the sake of the argument I will say £500 a-year, I can feu, reserving the rental paid this morning; I cannot alienate. I can do none of those acts which would come under that term; but I can do this,—I can immediately make one feu of the whole estate, reserving only that £500 a-year rent; and so I can give away the estate for ever; and by making a feu I can destroy for ever the exercise of this power which my author yesterday meant I should exercise for the benefit of the estate as to rentals and as to leases. Nay, I can do this, I can give away this estate for ever in the shape of a feu, paying a feu-duty of £500 a-year, and yet I cannot make

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a lease for 99 years, making a provision for that £500 a-year during the term. Why? Because your power of granting leases is to be used only in the exercise of a proper administration, not for the purpose of destroying, but of supporting the entail, it being a power given to you for the purpose of supporting the entail. Then, my Lords, without more in the case than that these sixteen feus were executed upon the same day, I care not whether to the same person or not, but that they were executed on the same day, with the additional fact that they were in favour of the same person, and that they were in truth a gift of all the surplus rents of this estate for ever in perpetuity,—I should say, that upon that ground alone it was impossible that this transaction could stand.

"My Lords, it is impossible for me to say that I can give my consent to the doctrine which says that you are not to look at the real nature of the thing that is done, you are to look to see what is the nature of the thing apparently done, and if you find these sixteen feus supportable with reference to rent, supportable though woods are granted, supportable though mines are granted, supportable though they grant all those things which, according to the books, are very seldom capable of being granted, and absurd it would be if they were capable of being granted; if notwithstanding the special objections they are capable of being supported, you are to look at the nature of the transaction. A feu I apprehend to be of this sort; a man constituting himself the superior, and the other his vassal, owing, from the moment he becomes such, duties, and duties known to the law, and standing in a relation which furnishes obligations, as between those persons flowing out of a present interest, are to be presently and immediately attended to and discharged. Was that so here? My Lords, I should be glad to ask this question, Whether any man could doubt what the nature of the transaction was, if all these feus had been in one instrument, and the contract for the entail of the feus, and the actual execution of that contract, had been embodied in one and the same, and there had been embodied in the same deed a stipulation and provision that the Duke was to make himself superior, who by the terms of the deed was to part with the *dominium utile*, and that Mr. Gawler, by the effect of the feus, was to become the vassal, and, *ipsissimis terminis*, to entitle himself to the surplus rent from Martinmas thereafter; and if instead of any such relation being carried on, the Duke remained the substantial owner of the property during the remainder of his life, receiving all those surplus rents and profits, dealing with the estate as his own, leasing and reserving rents payable to himself in deeds to which Mr. Gawler himself is an attesting witness? Why, my Lords, I repeat again what I said the day before yesterday, I should think much less respectfully of Mr. Gawler than I do, if I could suppose that, in a transaction with a person meaning to be somehow or other very largely his benefactor, at a period which could not be very far distant, and was not far distant from the period when these leases were executed, he could have interposed himself against these purposes of the Duke; but it

is quite impossible not to look at facts of this sort, as evidence of what was the real nature of the transaction.

" My Lords, It is said that it might very well be that these two irritancies should be reserved in all the feus; that is, that the feu was to be void if there was an entail under which the grantee of the Duke was to take, or if the Duke had descendants of his own body. My Lords, I do not mean to say, that if these are to be looked at as pure irritancies, you may not reject the condition on which the feu is to become void, but you cannot do that without examining what they really are. Now, if Mr. Gawler had taken possession at Martinmas 1804, as he was destined to do;—if Mr. Gawler had been the person really enjoying the *dominium utile*;—if the enjoyment had been according to the instruments;—if there had not been that sort of contract as to the interim enjoyment, which is a species of contract which, as it appears to me, goes a great way to destroy the whole relation of superior and vassal,—if there had been that singularity which left it at the death of the Duke a question which no person could decide, whether Mr. Gawler was superior or vassal, these might be called irritancies; but I say these are parts of the transaction: and when you come to see the contract for the entail, and the entail itself, but particularly the contract for the entail, which decides, what is the intention of granting the feus, the feus themselves being quite silent as to the intention with which they are granted, and then see that the intention was to make an entail upon that series of heirs, who were to take under the entail of the Duke, if the entail of the Duke could stand good: I say, the intent of this transaction was neither more nor less than this;—that it was, under the colour of leasing, in sixteen feus to convey this estate. And it is not immaterial that there were sixteen feus, because that shows to demonstration what must have been thought of the effect of the words, 'such parts and portions;' but when you see the whole *dominium utile* of the estate feued away, and feued away upon principles which cannot sustain these feus unless they would sustain a deed if there had been a rental of £500 in the case I before put, or if there had been no condition with respect to the rental, the question your Lordships are to look at is this, whether the real and actual intent of this transaction, taken altogether, was not this: I am determined to alter the order of succession: If I cannot alter the order of succession by the effect of my entail, I will alter the order of succession by granting, and that is the substance of the thing, by granting these feus, which shall operate exactly as if I alienated the estate contrary to the prohibition itself. It is, my Lords, upon grounds of this nature, which I am sure I could enlarge upon till your Lordships would be as much fatigued as I am myself; it is upon grounds of this nature I am of opinion that upon general reasons these feus cannot stand; and from my heart I declare, I am sorry part of them cannot stand, but I must act according to my judgment: I am governed by nothing else. It does appear to me, that this power of feuing was a power given as

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a power of leasing is given (for it is the same power), to be exercised in the reasonable administration of the estate for the benefit and support of the tailzie, and upon that ground I should have thought that, independently of the other transactions, these sixteen feus, which I look at as one feu, could not be sustained. Again I think, that the real nature of this transaction was under the colour of feus, not to feu, but to give the substance of the estate to another course, order, and series of heirs, than those who, under the entail of 1648 and the subsequent entails, were to take that estate; that the law will not permit that to be done under that colour; and therefore also I think these feus are void.

"My Lords, I do not enter here into the other reasons of special objection. I say nothing about feuing the mines, about feuing the woods, and about feuing what never had been let; for in the formation of my own individual opinion it is not necessary, and I know, generally speaking, it is dangerous to determine points which are abstract points and not necessary; but it is quite impossible to pass by leases of mines, and woods, and lands never let before, and so on, without saying this at least, that they must be regarded as circumstances and as facts which have a tendency to show what was the real nature and the real object of this transaction. Now, my Lords, that the Duke himself could not have any notion that this was an act of prudential administration of the estate, is clear enough; it is demonstrated by all he did himself, with respect to the entail of the feus; his requiring an entail of the feus by the contract between him and Mr. Gawler, which entail is created by a contemporaneous deed, for it is of the same date, and executed on the same day, and is part of the same transaction, is decisive to show, that the Duke never meant to make a feu to Mr. Gawler, but that he meant in another form to make a new entail; and that is proved by the acts of the Duke himself, with respect to those entails which he made, both as to the superiority and the property, subsequent to the grant of these feus, in order to take the chance of the feus falling under what has been called, in the course of this cause, the second irritancy; entails which do not give to Mr. Gawler the interest he was to take under the feus, as feus, but which are calculated to give, and are drawn up not to give to Mr. Gawler as a vassal a feu of the estate, but to introduce a new series of heirs, taking both the superiority and the property, whereas, in the other case, they were to take the property only.

"My Lords, I do not advert here to several cases which have been alluded to, though some of them are material to be attended to in my opinion of this case. I stated formerly in this case, when this matter was before us, that I thought the Greenock case could be accounted for without looking at it as a direct precedent. The idea floating in my mind, when I so expressed myself, was this: If your Lordships recollect, the word there was 'alienation,' and feuing was there admitted to be alienation; but the words were, that he should have liberty to feu 'sic parts and portions of the estate;' the very same

terms that occur here, and terms which I cannot help feeling are expressive of no such purpose in the mind of him that used them, as that feus should be made of the whole of the estate, which by one lumping clause was declared incapable of alienation, either in whole or in part; the words were the same there; but then the *reddendo* was, for the houses so much rent reserved; for the gardens so much rent reserved; and one principal question was, Whether the feu of the western barony was good? So far that is an authority, because it was held in that case that the western barony could not be feued, notwithstanding there was that reservation, because the nature of the reservation showed, that the intent of the permissive power was only that land should be feued upon which there could be erected houses and buildings; and it not being at that time probable that houses and buildings would be erected on that farm which formed the western barony, the House of Lords held that that feu was bad, not entering into the question, whether the time might ever come when that western barony might be feued, reserving so much for the fall of houses, and so much for the fall of lands; that at that time there was no idea that that western barony could be applied to any such purpose; and they collected from the terms of the *reddendo* in the permissive clause of feuing what was the liberty meant to be given, and they cut down the feu of the western barony for that reason; a feu which, from what I have read in these cases, I have very little doubt the same House of Lords would at this very moment permit to be made as an extremely good feu, because, from some of the papers I have before me, I see buildings have got to that western barony, and it might properly at this time of day be applied to those purposes. What then is the meaning of that judgment? that where there is such a permission of feuing, it must be looked at consistently with the prohibition of alienation, and that the power of feuing must be exercised for those purposes which are consistent with the prohibition of alienation; or it must be exercised, in other words, in the rational adminstration of the estate, or it must be exercised, in other words, for the beneficial purposes in respect of which it is given.

"It is upon these grounds, my Lords, that I shall in the course of to-morrow propose to your Lordships a finding, to which I should wish to give half an hour's more attention, which, conceiving it as I do, unnecessary to decide upon the special objections, will state the general grounds upon which it humbly appears to me, much as I shall feel when I pronounce those words, it does appear to me these feus cannot be sustained; and therefore, stating in precise terms those general grounds, I shall propose to your Lordships, upon that statement, to affirm the interlocutors of the Court of Session now before you.

"My Lords, in stating this much to your Lordships, I can only add, that if I am in an error in this business, I protest to God I do not know how to extricate myself from it. I have endeavoured to look at this case in such a way as to support the whole or some of

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these feus. I have endeavoured to do it with an anxiety that I believe I never felt before in the whole course of my judicial duty; more particularly an anxiety to support some part; and I have looked again and again at all that I have been able to find in these papers; at all that I have been able to find in Scotch books; at all that I have been able to find in English books; I have tormented my mind with all the reasoning in which I could employ that mind, to find out whether this was a case in which I could do that, or the Court of Session could do that which the Courts can do in a case of competent portions, and so on, whether they could say, though these feus are bad for the whole, yet they may be reduced in point of excess; and I thought at one time that I had got hold of the means of doing so, for I found, as your Lordships may recollect, in this contract of entail, a clause, that if from any unforeseen causes these feus or any of them should be reduced, Mr. Gawler's obligations were to be lessened exactly in proportion to the value he lost by such reduction. I therefore thought the author of these feus had been contemplating a case which might be put as a case of excess, nevertheless leaving something which could be supported; but, my Lords, I cannot tell where to find any rule upon which I can say what is excessive, and what is not excessive. The transaction appears to me one entire transaction. It appears to me to have no distinct parts which I can lay hold of for this purpose, either in the contemplation of the granter or in the contemplation of the receiver of the feus.

" With respect to the feus of Fleurs and Broxmouth, all the Judges have agreed, (and agreed, I think upon sufficient authority, which affirms this doctrine of the rational administration of the estate), that those two feus of property on which the mansion-houses stand, are, as I collect their sentiments, bad. Why? Because, in the *first* place, the law of Scotland will not allow a mansion-house to be feued; and because, in the *next* place, it is absurd to say a mansion-house shall not be feued, and yet that it can be supposed to consist with any rational purpose in the mind of the person creating the deed of tailzie, that the mansion-house shall not be feued, but that the lands around it shall be feued; that the estate usually held with it shall be feued; that the mansion, in other words, shall be turned into a stone-quarry, and, as it was attempted by one of these feus, that the Duke of Roxburghe, as owner, should not have the liberty to go into and out of that mansion-house, without express permission of ingress and egress.

" My Lords, These two are capable of distinction from the rest; but on general grounds, I really cannot think they are capable of a distinction going to sustain them; and, with respect to the rest, I can see no ground upon which it does not appear to me your Lordships are bound to say that they are all good, or all bad. I have felt desirous to know upon what ground some of the Judges appear to have thought at one time one half of them were good. I cannot take them with reference to the proper interest which they give, or propose to give to the person who claims under them. Can I take them numeri-

cally? Can I say No. 1. is good, and No. 2. bad? No. 10. good, and No. 11. bad? I cannot make a distinction consistently with the principle of decision, which goes virtually to the heart's blood of the whole, and proceeds upon an objection which is either good for every thing, or good for nothing. It is for these grounds, I repeat, that I cannot extricate myself from that situation; and I neither can support these feus in whole nor in part."

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It was ordered and adjudged, That the deeds and instruments challenged by the action of reduction cannot be considered as proper feus, made according to the true meaning and construction, or in the due exercise of the powers of feuing parts and portions of the entailed estates, reserved to the heirs of tailzie by the several deeds under which William, late Duke of Roxburghe, held the said estates, or as made, or intended to be made, with any view to the rational and fit management of the said estates: And it is hereby declared, That the whole of the deeds and instruments are so connected together that none of them can be separately sustained in whole or in part. And it is hereby further declared, That, having regard to all the circumstances of this case, and to all the deeds and instruments appearing in this cause to have been executed, the deeds and instruments challenged are to be considered as alienations, or making parts of alienations, of portions of the estates, to operate only after the death of the Duke, to the prejudice of the subsequent heirs of entail, and altering the order and right of succession under colour of creating feu-rights; and therefore, and it not being necessary, in this case, to consider the several reasons of objection to the validity of the said challenged deeds and instruments expressed in the several findings of any of the interlocutors complained of, further than as they correspond with the foresaid declarations, it is ordered and adjudged, That the said interlocutors complained of in the said appeal, so far as they generally reduce the several deeds and instruments challenged, be, and the same are hereby affirmed; and it is further ordered and adjudged, That the said appeal be, and the same is hereby dismissed this House.

For the Appellant, *John Clerk, James Moncreiff.*
For the Respondents, *A. Colquhoun, A. Maconochie.*

NOTE.—Neither the Lord Chancellor's speech, as revised by his Lordship, nor the special judgment of the House of Lords, is given in Dow's Report of this case.