1808. *January* 12.

SIR JAMES NORCLIFFE INNES and BRIGADIER-GENERAL WALTER KER of Littledean, and RICHARD HOTCHKIS, Writer to the Signet, his Attorney, *against* JOHN BELLENDEN KER, ESQ.

No. 18.
Under a clause, 'Reserving always liberty and privilege to our saids aires of tailzie to grant fews, tacks, and rentals of sick parts and portions of the said estate and living as they sall think fitting, providing the samen be not made and granted in hurt and diminution of their entail,' the heir found not entitled, by one gratuitous act, to feu out the whole estate for the purpose of alterin the order of succession.

BY the entail of the estate of Roxburghe, dated 23d Feb. 1648, and which, by a decision of the Court, already reported, 23d June 1807, No. 13. *supra* has been determined to be an effectual entail, and the regulating investiture, it is provided, 'That it shall not be lawful to the persons before designit, and the airis-male 'of their bodies, nor to the others airis of tailzie above written, to mak or grant 'any alienation, disposition, or other right or security qtsomever of the saids 'lands, lordship, baronies, estate, and leiving above specified, nor of no part 'thereof, nather zitt to contract debts nor do any deidis qrby the samen, or 'any part thereof, may be apprizit, 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 haill or in part of all, quilk deides, sua to be done 'by them, are by thir pntis, declarit to be null and of nane avail, force, nor 'effect: Reserving always liberty and privilege to our saids airis of tailzie to 'grant feus, tacks, and rentals of sick parts and portions of the said estate and 'leiving as they shall think fitting, providing the samen be not made and granted 'in hurt and diminution of the rental of the samen lands and others foresaids, 'as the samen sall happen to pay the time the saids airis sall succeed thereto.'

On the 26th September 1804, the Duke of Roxburghe executed, in favour of Mr. Bellenden Ker, 16 feu-dispositions, relating to as many portions of the estate of Roxburghe, and comprehending the whole of it, with the exception of the mansion-house and about forty acres round it. These dispositions were all conceived in terms exactly similar. After containing a grant in feu-farm of the lands respectively therein conveyed, they provide, that they shall become void and null, 1*st*, 'In case there shall exist at my death any descendants of 'my own body; and, 2*dly*, they shall become void and null in the event of the 'said John Bellenden Gawler, or his foresaids, establishing in their persons 'right to and possession of my estates, contained in a deed of entail executed 'by me on the 18th day of June last, in virtue thereof, or of any other deed of 'entail which I may hereafter execute in virtue of the powers thereby reserved 'to me; and which declarations shall be verbatim inserted in the infeftment to 'follow hereon, and in all the subsequent transmissions of the saids lands and 'others.'

The feu rights then impose a burden of feu-duty equal to the rents of the lands at the time; but the casualties were taxed in the following manner: 'And also paying 1*s*. Sterling yearly at the entry of each heir, and 2*s*. at the 'entry of each singular successor, and these for all other burdens, exactions,' &c. By a subsequent clause, it was declared, that the disponee 'should be

'entitled to retain, out of the said feu-duty, the amount of the public burdens No. 18
'on the lands disponed, and to apply the same in payment thereof, in case it
'should be found that, by the investitures under which his Grace held the said
'lands and others, he had power to allow such deduction.'

The term of entry was declared to be at Martinmas 1804.

Of the same date with these feu-dispositions, a contract was entered into between the Duke and Mr. Bellenden Ker, upon the narrative of the lands, and declaring the intention of the parties to be of the following import:

First, That Mr. Bellenden Ker should immediately execute a disposition and deed of entail of the lands and others disponed to him by the sixteen several feu-dispositions, by which this property should stand limited to the same series of 'heirs of entail appointed to succeed to the lands and estate belonging to 'the said William Ker, Duke of Roxburghe, by the foresaid deed of entail exe-'cuted by him on the 18th day of June last;'—'with and under the conditions, 'provisions, restrictions, limitations, exceptions, clauses irritant and resolutive, 'declarations, and observations specified in the said entail.'

Secondly, That during the lifetime of his Grace, it 'should be in the power 'of him and of the said John Bellenden Gawler, or, after his death, the insti-'tute 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.'

Thirdly, Certain legacies and annuities to a considerable amount were to be paid by Mr. Bellenden Ker out of the surplus rents arising from the *dominium utile* of the estate, which should fall due and become payable after his Grace's decease, reserving to him relief for all these payments from certain funds vested in trust by a deed dated 18th June preceding.

Fourthly, That Mr. Bellenden Ker should pay to the Duke of Roxburghe, during his life, the whole surplus rents of the lands, and should also '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-dis-'positions, 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 sixteen feu-dispositions, at his pleasure, and 'to apply the price or proceeds thereof to his own use, without being liable to 'account for the same to any person whatever.' And to render these provisions more effectual, it was farther provided, 'That any leases of the said 'estates, which shall hereafter be granted during the lifetime of the Duke, shall 'be made with his consent and approbation as a party thereto, for a term not 'exceeding twenty-one 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 lifetime; in consideration whereof, he shall, on receiving such rents, grant discharges to the said John Bellenden Gawler and

No. 18. ' his foresaids, for the feu-duties of the said lands and others, corresponding to ' the periods for which the said rents are paid.' And,

Lastly, That Mr. Bellenden Ker, when required, shall grant a liferent tack to the Duke, of the said estate, at a rent equal to the feu-duty; 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.

In implement of the contract, a deed of entail, in the terms dictated, was executed by Mr. Bellenden Ker.

These feu-dispositions were said to be delivered. But infeftment was not taken on them till the 15th, 16th, 17th, and 19th days of October 1805, when the Duke was *in extremis*.

It appeared that Mr. Bellenden Ker subscribed as an instrumentary witness to a lease by the Duke of part of the feued lands, in favour of the Duchess of Roxburghe, after the date of the feu-dispositions.

The Duke of Roxburghe died on the 22d October 1805.

Sir James Norcliffe Innes, and Brigadier-General Walter Ker, of whose title and interest under the entail 1648, and other investitures of the Roxburghe estate, a detailed account will be found in the question relating to the competition of brieves, reported *supra*, No. 13. instituted an action against Bellenden Ker for reducing these feu-dispositions. Counsel were heard in presence; and the case was stated in memorials.

Argument of the pursuer.

I. As to the principle of interpretation, and the import of the clause reserving to the heir a right to grant *feus, tacks, and rentals*.

That the estates of Roxburghe are subjected to the fetters of the strictest entail known in law, that alienations *inter vivos*, whether directly or indirectly, are effectually prohibited, and that the order of succession cannot be altered, are points admitted by the defender as determined. Such being the terms of the investiture, the natural condition of the property is inverted, and restraint has become the ordinary and presumed condition of those on whom the succession devolves. The clause of reservation, then, is a modification of this general condition of the property, and is a special exception to the general rule of restraint. Like every exception, therefore, it must be interpreted strictly, and in such a manner as least to injure or destroy that rule to which it stands immediately opposed.

By the clauses of the entail preceding that of which the import is the subject of the present dispute, the heirs are effectually prevented from doing any thing in prejudice of the *tailzie in hail or in part*. Under these clauses, no feu, however small, or however conductive to the melioration of the estate, could have been granted; nay, not even a lease of a few years endurance. For a lease of ten years was then accounted a species of location beyond the terms of useful

administration. To remedy the possible inconvenience thence arising, this clause of reservation is introduced. But that its introduction was intended to sanction transactions for the defeat and annihilation of the entail, is not to be presumed. No. 18.

The reserved power to feu is certainly *discretionary*; but the inference from thence that it is unlimited, is neither sanctioned by law nor reason. Between a discretionary and an unlimited power, there is a palpable distinction. The limits of that discretion are to be found in the avowed object of the entail. Under this clause, the sound discretion of the heir in possession, according to the infinitely varying circumstances in which he may be placed, must be exercised, and its limits must be determined by a series *rerum judicatarum* in similar and analogous cases.

Without defining the precise boundary of this discretion, which would certainly be difficult, and for which there is perhaps not yet a sufficient number of judicial decisions, there can be no hesitation to say that in the present instance this discretionary power has been illegally exercised, and enormously exceeded. Thus in the late case of the Duke of Queensberry against Earl of Wemyss, without defining the limits of the power with respect to the duration of leases, it was unanimously determined that the exercise of it therein debated could not be supported. (No. 15. *supra.*)

To afford *criteria* for the decision of the present case, it is clear,

1*st*, That the feus must be such as the heirs of entail *shall think fitting*. This word is not synonymous with *caprice or arbitrary choice*, but refers to the expedience or fitness of the measure itself. This fitness can only relate to what is useful and necessary in the fair and ordinary administration of the estate. Of this fitness, the heir in possession is the first judge; and in doubtful case his pleasure will decide; but it by no means follows that his arbitration is beyond the reach of controul. When this distinction between fitness and unfitness is recognised, there is room for debate on the matter, with reference to the whole management of which it is a part. 2*d*, The heirs have liberty to grant *feus, tacks, and rentals*, and this combination is not unmeaning or accidental. These acts of property must be presumed to refer to one general class; and as tacks and rentals belong to the ordinary course of administration, and would not be sustained as legal and fitting, if they exceeded in endurance the just bounds of ordinary management, so it must follow that the feus, permitted by the entail, are of a nature modified and controuled by the same principle. 3*d*, Liberty of feuing *sick parts and portions*, &c. is given. The mention of parts and portions indicates clearly the qualified nature of the power to feu. This expression bears an obvious reference to the partial details of which the regular and ordinary management of a great estate is composed, and is directly opposed to that total alienation of the property which had been already prohibited.

No 18. From these views it follows that the species of feus permitted by the entail must be real, onerous, and *bona fide* transactions, such as naturally arise out of the fair management of such an estate. To confer on such transactions this character, it is not enough that the technical form of them be unexceptionable; the feu must originate in the concession of mutual advantages; it must be an act of beneficial administration, and not a modification of gratuitous bounty.

II. As to the nature of the transactions challenged. If these deeds were unexceptionable in their form, and free from those peculiar circumstances and modifications by which they are vitiated, they would nevertheless be of a nature unauthorised by the entail.

1*st*, The 16 feu-rights are inseparable, and constitute one great whole. The chain of deeds, already enumerated, renders their unity indissoluble. But if it be true, as already shewn by the fairest rules of interpretation, that feus can only be granted on the principle of obvious utility in the administration of the estate, it follows that the alienation of the *dominium utile* of the whole of the estate, is in direct violation of the entail. Neither can it be maintained that such a feu can be sanctioned or justified from its fitness, by a reference to the leading or principal objects of the deed. As little does it correspond with the other criterion of relating only to parts or portions of the property. The device of dividing the transaction into sixteen parts, while it cannot obtain for each a separate discussion, only exposes more distinctly the fraud of the measure. By making the feu commensurate with the extent of the property, the court is relieved both from the delicate task of assigning limits to the discretionary power, under this clause, and, at the same time, from any hesitation in determining that the present exercise of it is beyond the debateable bounds of validity.

But even the rights of superiority have not been preserved. The casualties are taxed at an illusory sum; and the feudal revenues, which would average many thousands a-year, are commuted at a few shillings. The casualties are the essentials and legal accompaniments of a feu. At the date of the entail, a vassal could not compel the superior to receive a singular successor; and it was not till the 20th Geo. II. that the general provision was made for the entry of singular successors, on payment of a year's rent. In granting the permission to feu, the entailer considered that the heir had the power of rejecting, and had therefore the choice of the singular successor. The permission must be interpreted and understood as qualified by the state of the law at the date of the entail; and there can be no question that it would have been incompetent in any heir of this entail to have executed a deed previous to the ward act, which could have deprived the subsequent heirs of this power of rejection. But that act has substituted a certain advantage in place of that right; and the Duke had as little power to dispense with the year's rent, as any for-

mer heir to have dispensed with the power of rejection. These deeds, if they could be viewed as transactions *inter vivos*, are therefore substantial alienations of the property, and as such are struck at by the prohibitions of the entail. No. 18.

But, 2*dly*, They cannot be viewed in this light, for they do not possess the genuine character or legal privileges of feu rights. From the system created of simultaneous deeds, each affecting and controuling the other, the whole measure assumes the form of a posthumous settlement, a destination *mortis causa*, to which the defenders have been driven after their first unsuccessful attempt to defeat the entail. The separation of the property from the superiority, and the simultaneous settlement of the former by the feu-disponee, on the same series of heirs in whose behalf the previous unsuccessful experiment of an original entail by the Duke himself had been made,—the obligation on the feu-disponee to convey to the Duke during his life the whole surplus rents,—the reserved right to exercise all the acts of property,—and the obligation to grant, when required, a liferent to the Duke of the whole property; finally, the nullity of the feus in case of the Duke's having issue,—all combine to constitute the character of a *mortis causa* settlement, and exclude the remotest resemblance to a *de presenti* conveyance. It is not a *bona fide* feu, but an indirect and most substantial infringement of the prohibitions of the entail.

To the same conclusion the delay to take infeftment directly leads. During the Duke's life, and while he was capable of enjoying the estate, infeftment was not taken. In fact the right was not completed till the Duke was *in extremis*.

If any thing could increase the strength of the evidence, that these were not feus *in commercio de presenti* available to the defender, all doubt must be removed by the fact that he appears as an instrumentary witness to a lease granted by the late Duke after the alleged feus were executed.

In denying effect to this transaction, no one entitled to the favour of the law will be injured. This question does not involve the right of an onerous creditor or purchaser. The only effect will be to frustrate the hope of a gratuitous disponee, and an attempt by one heir to disappoint the rest of the series.

The practice of the ancient heirs of this estate has been referred to as containing the best explanation of the extent of the reserving clause, and reference is made to the instance of the feu of the estate of Greenhead. But that estate had been possessed by Sir Andrew Karr and his predecessors, as ancient *and native tenants, feuars, rentallers, and tacksmen;* and the contract, which is the foundation of the feudal grant, only *ratifies and approves all former feus*, &c. It was thus only a ratification of a subsisting right.

The charters of Maxwellheugh, &c. on which the defender likewise founds, were truly granted by the Earl of Roxburghe only as superior of lands

No. 18. which had for centuries been held in possession by cadets of the family of Cessfurd.

On the other hand, it will be noticed, that the feu of Broomlands by Earl William to Sir Alexander Don of Newton, in 1650, although sustained in this Court, was reduced in the House of Lords by an interlocutor, finding that 'William, Earl of Roxburghe, had not sufficient powers to grant the charter 'and conveyance, (5th March 1733.')

Neither can any thing favourable to the defender be drawn from the feu granted to Lord Milton of a house and ground in the Canongate of Edinburgh, whether it was *ultra vires* of the granter, it is now too late to enquire, from the expiry of the period of prescription. At any rate, it was a detached part of the estate, which, from the transference of the seat of the Legislature, had ceased to be a residence of the Dukes of Roxburghe, and was disposed of at an adequate price.

Finally, the case of Sir John Shaw and Lord Cathcart, No. 33. p. 15399, establishes the principles on which this case must be decided. The clause of reservation was equally broad as in the present case; but it was decided that the power of the heir exercising the reserved faculty, although discretionary, admitted of controul by the obvious intention of the entailer.

Argument for the defender.

I. A reservation or exception from any rule, declaring that it shall not extend to a certain case, is a limitation of that rule. If the rule receive a strict interpretation (and the rule in the present case, from the indisputable acceptation of the law, is so interpreted) it follows that the limitation of the rule must receive a liberal interpretation; for a strict interpretation of the one, and a liberal interpretation of the other, are the same thing. To say that the rule must be strictly interpreted, and that the exception also must be strictly interpreted, is an obvious contradiction. Accordingly, it is an established principle that *pacta liberatoria* have liberal interpretation. It must be admitted that prohibitory clauses in entails are limited by a strict interpretation; and that, in cases of this nature, indisputable intention is often defeated from imperfection or deficiency in the expression; and there is nothing in the present case to remove it from that class to which strict interpretation is applied.

It is impossible, by any commentary, to render the clauses which have been quoted more distinct. Alienations are prohibited, reserving power to grant feus without diminution of the rental; the prohibition to alienate is unlimited, but the exception is as extensive as the prohibition. By the reservation, the power to grant feus is as unlimited as the power to alienate would have been without the prohibition. The clauses are co-relative and co-extensive in their operation. The one contains a general rule, the other an exception to that rule, which, from its nature, must defeat the rule in every case which falls under the exception.

No. 18.

That no restriction was intended, but the single one of not diminishing the rental, is apparent from other considerations besides the literal expressions in the deed. There is no power to grant provisions to children, or remunerations to those dependants on whose allegiance the influence of so great a family naturally rested at the date of the entail. The power to feu was intended to supply this defect; and, from the nature of the object, there could be no limitation to it. It could not be meant that one heir should be enabled to provide for his kindred or pay his debts of gratitude more than another; nor is any period or limit set where the right should cease. The entailer obviously meant to trust, and has trusted, that those who might represent the family would repair by a judicious employment of the great revenues, the dilapidations of his predecessor, and thus sustain the splendour of the house.

But if it might be exercised in this unlimited manner by the successive acts of successive heirs, it may be exercised without limit by the successive acts of the same heir; and it would be a legal absurdity to prevent a person from doing that by one act, which he may validly accomplish by successive acts. In short, by this reserved claim, the heir, so far as concerned the power of granting feus, was placed in the situation of a proprietor in fee simple.

II. To form a just decision on this point, it is necessary to examine the import of each deed. If each, separately, contains nothing to derogate from the validity of the feu-rights, the combination of the whole must be equally innocent. Even regularity of form is not necessary to validate the feu rights. Missives, provided they had been such as to create an obligation as to heritage, would have sufficed; but the deeds are perfectly regular.

1*st*, The clause, that the grant shall be void provided the disponer have issue, is not inconsistent with the nature of a feudal grant.—See *Craig de Feud.* L. 1. Dieg. 9. § 5, 19, 28.—Dieg. 10. § 2,—wherein it is clear, that, even in the purity of the feudal law, such a clause would not have vitiated the grant.—Ersk. B. 2. Tit. 3. § 11. The clause indeed is just an irritancy, arising on a contingency which has never happened; and an irritancy is certainly not inconsistent with the nature of a feudal grant.

2*d*, The clause declaring the grant to be void in case the defender should establish in his person a right to the estates under the entail 18th June 1804, is exactly of the same nature, and defensible on the same principles with the former. It is a conventional irritancy on an event within the power of the disponee, and which it was optional in him to incur.

3*d*, The clause taxing the casualties is not inconsistent with the nature of a feu. Such an assertion is contradicted by every authority and usage of feudal law. Neither does the taxing of the casualties violate the clause, that the rental shall not be diminished. The obvious meaning of the clause is, that the feu-duties shall equal the rental from the tenants, and in fact they exceed the rental. But even if, by accident, the feu-duties should have been less than the

No. 18. rental, there is a clause in the grant obliging the disponee 'to pay the difference between the amount of the said feu-duty and the said full rental.' So much with regard to the regularity of the feu dispositions.

In the contract, it is clear that there is nothing to affect the validity, though there is much to lessen the value of the feus.

The stipulations of the contract were the price of the acquisition; and even by the pursuer's argument, whatever excludes the notion of their being gratuitous must strengthen their validity in law. If, instead of these various stipulations, the defender has contracted to pay a sum of money, the constitution of the feu rights would have been still less lucrative, but not less legal.

The feu-duties, the entail, the legacies, and annuities, and the right to cut the wood, combine to constitute an onerous consideration on the part of the defender. If a variety of strangers had acquired them under these burdens, and at a diminished price, there could have been no dispute as to their validity.

It is said that, from the concatenation of simultaneous deeds, there arises a presumption that it was not the intention of the Duke really to bind himself, but merely to create a colourable title to exclude the heir of the old investiture. This is a presumption deficient in relevancy, and of which, without injury to his cause, the defender might acknowledge the truth. This is a question of power; and, if the feus have the requisites of law, the pursuers have no right to enquire into the motives of its exercise. But against this presumption the defender appeals to the deeds themselves, which are the best evidence which the law can either afford or require, and bear an instant obligation. To complete the regularity of the transaction, they were delivered to the defender at the time of their execution. This must be presumed from the fact of their having been in the defender's hands, and produced by him after the Duke's death.

Neither does the delay to take infeftment afford room for argument. In a competition of real rights, indeed, it would have been an important fact. But in a question between granter and grantee, it is of no moment. In truth, however, the plea of the pursuer on this point is inconsistent with the rest of his argument. It is said that the delay to take infeftment proceeded from fear of the Duke, who might have been induced to revoke the grants, But if these were *simulate* deeds, as is elsewhere argued, if it was a transaction vitious in its constitution, and destined to have no force, there was clearly no necessity for this delay. The multitude of anxious and minute stipulations equally militate against the plea of simulation. To have incumbered a revocable transaction, which was not meant to be binding, with so many and various obligations, would have been unnecessary; and their introduction proves (if proof was wanting) that the parties were serious in their arrangement.

Respecting the fact, that the Duke's commissioner subscribed certain leases after the date of the feus, it might be enough to state, that this proceeded from a misconception of form on the part of the defender; and, at any rate, that they were not subscribed till his consent was obtained. The inference from this circumstance, however, that, in the contemplation of the parties, the feu rights were *simulati*, and not binding, is unwarrantable. No. 18.

The extent of the plea is, that the defender homologated the act of the Duke's commissioner. To infer homologation, it is necessary that the act be such as to authorise no other supposition but that contended for, (Ersk. B. 3. Tit. 3. § 48.) but a multitude of considerations present themselves to account for the act, without resorting to the most improbable of all suppositions, that the defender intended to admit away his own right.

The assertion, that the feu rights amounted to no more than a posthumous settlement, or *mortis causa* conveyance, is equally insupportable. They have not a single characteristic of such deeds,—They were delivered,—They were instantly binding,—They could not be revoked; and by them the Duke was completely denuded. Whatever modifications they might have undergone by personal obligations on the disponee otherwise constituted, it is clear that the feus cannot be classed with those deeds which, in the view of the law, are *mortis causa*. It is admitted, that provisions might have been made on children by feus under this entail. Such might have been equally termed posthumous settlements; but, having the legal requisites of a feu, they would have been sustained.

It is said, however, that these feus, from their magnitude, are alienations, and have been made with the fraudulent view of defeating the entail. The term *to defeat* is here improperly applied; and is borrowed from questions on another branch of the law of entails. This term implies, that the heir does, or attempts to do, in prejudice of the entail, that which he has no right to accomplish, *i. e.* If taking advantage of an unrecorded entail, he sells or contracts debt, or if the investitures are changed, leaving out the limitation of the entail —here the act of the heir is against law and good conscience, and he may be liable in damages to the heir's substitutes. But in the present case the heir has merely exercised the powers committed by his title. This belongs to the class of cases in which he is entitled to sell or contract debt, or alter the order of succession, either by express permission or by omitted prohibitions, and in which no wrong is in law understood to be done to the substitutes.

To attach to these transactions the legal character of prohibited alienations is equally erroneous. If they are alienations, they are such as the entail permits. In the same view, any feu, whatever be its cause or extent, is *pro tanto* an alienation; and this effect would be denied to this clause altogether. The principle of law applicable to these transactions, is *majus et minus non variant speciem*. Where is the line which separates the legal from the illegal exercise of this power? The acknowledged impossibility of defining the line, proves that the

No. 18. power is without legal limit. It has been granted in an unlimited degree by the entailer, who was *rei suæ arbiter*. And if by it the entail is defeated, it is enough to say, that by the will of the entailer the heir has such power.

That this discretionary power should be controuled at all, has not been dictated by the entailer. That a Court of justice should sit as commissioner to controul its exercise, is an arbitrary duty foreign to that of such an institution, and inconsistent with any notions of settled law.

But if it be thought that a total feu is illegal, while a partial one may be sustained, the transaction, from its nature, admits of a distinction. There are sixteen feus of which the feu-duties accord with the rent of the different parcels, and each feu stands on its own legality. The objection to the feus round the house of *Fleurs* do not apply to the rest. If the circumstance of the defender having been an instrumentary witness to the lease of Byrecleugh be fatal to the existence of that feu, this objection cannot touch the remainder.

The fact, that the deeds are of the same date, is no objection to this argument. This is a question of power; and it might have been exerted in favour of different persons and at different dates. Its exercise is as valid in favour of one as of many persons. If it has been exceeded, the excess may be corrected with more ease in the case of one than in that of numerous grantees. But if it be illegal to exercise this power to an excess, it is no less illegal to deprive the heir of power of exercising it at all.

The cases referred to as parallel, wherein long leases were reduced as alienations, have no application to the present. In the case of Turner as well as in that of the Duke of Queensberry, the granting of long leases was not permitted by the entail.—Whereas, in the present, there is a distinct and unlimited power to grant feus.

The practice of the early heirs under this entail ought not to be disregarded, and is too notorious to be denied. It appears from the chartulary of the family, that, both before and after the entail, many estates of immense value have been at different times feued out by the different heirs.

By the decision in the Greenock case, a principle of interpretation was established very favourable to the defender. The clause permitting to feu was not so extensive and unqualified as the present; but feus of the greater part of the estate were sustained, with the exception of one, which was reduced on a specialty. In the particular circumstances of the case, it was thought that a feu of the family mansion-house, garden, and policy, could not be sustained. But none of the feus in the present case are of that description; 31st January 1755, Stewart Nicolson Schaw against Lord Cathcart, No. 33. p. 15399.

Three opinions were entertained on the Bench.

1*st*, Several of the Judges adopting the general argument of the defenders, as already detailed, were for sustaining the feus *in toto*.

2*d*, A majority of the Judges, proceeding on the argument maintained for the pursuers, were for sustaining the reasons of reduction. They considered the sixteen feu-dispositions, modified by the contract and deed of entail, as one

indivisible transaction, which was reducible on two grounds: 1*st*, Because it was vitiated by the palpable characters of a posthumous settlement, and was in substance a *mortis causa* deed. The operation of the feu-rights had been suspended during the Duke's life; and, whether delivered or not, they had remained entirely in his power. They were not, therefore, feus *in commercio* instantly available to the disponee, and such as the entail warranted, but were trust-feus executed as a cover to accomplish other purposes. 2*dly*, Because from their magnitude, they were an unwarrantable exercise of the reserved faculty. But as these opinions rested on the whole of the pursuer's argument, a detail of them would be nothing more than a repetition of what has been already stated. No. 18.

3*dly*, One of the Judges delivered a third opinion. He held it clear, that here an ample power of feuing was conferred by the entail; so ample and so unguarded by qualifications or conditions, that without exceeding the verbal limits of it, or violating any of the known rules of law as to creating feus, the exercise of it now under consideration might be maintained in case this power was to be exercised by the same rules as powers of alienation,—contracting debt,—altering the order of succession, and the like, whether expressly conferred, or resulting from the imperfection of fetters. But he thought himself warranted under the authority of the case of Greenock, decided in the times of President Craigie and the Earl of Hardwicke, to hold that the power here granted, was a power of administration of the estate only; and, however ample, was to be exercised by the heir in possession, *tanquam vir bonus*; and if exercised otherwise, and to the destruction of the estate, or in a manner grossly exorbitant, courts of justice would interpose to afford redress. At the date of the entail, feuing was an ordinary act of administration for obtaining the profits of an estate, for rewarding the services, and confirming the attachment of retainers, and even for providing the cadets of the family of the proprietor. In short, it was a principal instrument for sustaining the revenue, and the strength and the splendour of a great family. And while the entail in question reserved no particular faculties for providing wives or younger children, it allowed of feuing generally, which, as the law then stood, it never could enter into the imagination of any person, could have been employed for supplanting the representative of the family, and conferring the whole estate on a favourite, under a character so inferior and dependant as that of feuar then *in forma verborum*, was. And here the power granted, though without restriction, except the discretion of the heirs, is plainly bestowed as in a matter of ordinary administration, 'Reserving to our said heirs to grant feus, tacks, and rentals, of such 'parts and portions of the said estate as they shall think fitting,' and not in diminution of the rental at the time. Now, in the entail of Greenock, executed half a century afterwards, the reservation to the heirs is, to 'grant feus or 'long tacks for such spaces as they shall think fit, of any part or portion of 'the said lands, the feu or tack-duty not being under 20*s*. Scots for each fall of

No. 18. 'dwelling-houses, and 5*s.* for the fall of yards and office-houses.' But this power obviously also in a matter of administration, though also without any restriction in words as to the parts and portions of the estate to be feued, except the mere discretion of the heirs, was held in the middle of the last century as insufficient to warrant either a feu of a barony forming nearly half the estate, or the feu of those acres adjacent to the mansion-house and gardens, though with an increase of rental. And, at the same time, under this power, a feu of nineteen acres, convenient for the extension of the town of Greenock, was sustained, though obviously conferred at a great under value on the daughter and heir-of-line of the granter, otherwise very well endowed. He considered that on the authority of this decision much property may have been arranged: And though he saw the controul, which it sanctioned, could hardly be exercised according to precise and definite rules, he did not think himself at liberty to depart from it, founded, as it appeared to be, on a general and just principle: That with respect to powers of management and administration, the will of the entailer was to be observed; and that a power granted for the comfort and advantage of the *familia predilecta*, was not to be preverted to its destruction, or for the conversion of a princely estate entailed upon it into a mere annuity. He observed that destruction was not too strong a word; for as the law now stood, the feuar, if the feus were sustained, might purchase the entailed superiority at 18 or 19 years purchase; and the lands acquired with the price, at 28 or 30 years purchase, might be again feued, and the superiority again sold, till, by the mere operation of conveyancing, nothing was left for the heir of entail. On these grounds, he was against either sustaining or cutting down the feus generally; but being of opinion that Duke William was entitled to make a liberal and ample provision for the defender in the situation in which he stood, by a reasonable exercise of the power of feuing, and that the method followed of making separate feus, enabled the Courts to sustain what was adequate for this purpose, while they reduced what was exorbitant, and *in fraudem* of the entail; he concluded that the parties should be heard upon this matter, as to which there had as yet been no discussion.

A great majority of the Court, however, concurred in pronouncing the following interlocutor: '12*th January* 1808.—Find that the late Duke of Roxburghe held the estate of the Dukedom of Roxburghe under the fetters of a strict entail: Find that the deeds now challenged were not granted in the due exercise of the reserved powers in that entail, of granting feus, tacks, and rentals, and therefore sustain the reasons of reduction thereof, and of the sasines thereon; reserving all objections to the title of the pursuers, and to them their answers as accords.'

Lord Ordinary, Alt. *John Clerk.* and *Alex. Goldie*, W. S.

Act. *Rob. Craigie, Thomas Thomson* et *Ad. Gillies.* Agents, *James Horne*, W. S. *Hotchkis* and *Tytler*, W. S. *Buchanan*, Clerk.

J. W. *Fac. Coll. No. 22. p. 63.*