Resolved and adjudged, That Sir James Norcliffe Innes, Bart., hath made out his claim to the titles, honours, and dignities, of Duke and Earl of Roxburghe mentioned in his petition.

For Lady Essex Ker, *J. Henry Mackenzie, Alex. Maconochie, Henry Brougham, Fra. Horner.*

(Feu Cause, Fac. Coll. vol. xiv. p. 63.)

JOHN BELLENDEN KER, Esq. . . *Appellant;*

SIR JAMES INNES KER, Bart., and JAMES HORNE, W.S., his Commissioner, . } *Respondents.*

House of Lords, 6th July 1812.

ENTAIL—PROHIBITORY CLAUSE—GRANTING FEUS.—Here the entail of Roxburghe contained strict prohibitory clauses against alienation, contracting of debt, or doing any deed whereby the estate might be adjudged, or doing any other thing to the hurt and prejudice of the said tailzie and succession; but "reserving always liberty to "the said heirs of tailzie to grant feus, tacks, and rentals, of such "parts and portions of the said estate and living as they shall think "fitting, providing the same be not granted in hurt and diminu- "tion of the rental." An heir of entail having granted sixteen separate feus of the whole estate, Held, in a reduction of these feus, that this was not a proper exercise of the reserved powers in the entail. In the House of Lords, case remitted for reconsideration, and with special directions.

It has been seen, in the reduction raised as to the effect of the old entail of 1648, executed by Robert, first Earl of Roxburghe, that, in anticipation of disputes arising as to the succession to the estates and honours after his death, the late Duke of Roxburghe executed various deeds, having for their object the setting aside that entail, and creating a new one in favour of the appellant.

In that reduction, ante p. 362, it was decided by the Court below, and affirmed in the House of Lords, that the Duke held the estates of Roxburghe under a strict entail (1648) against alienation, or altering the order of succes-

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sion, or contracting debt, and that he could do no act in contravention of these prohibitions.

New entail trust-deed, dated 18th June 1804.

The judgment in that question went to sustain the entail of 1648 as the standing investiture, and at same time set aside the new deed of entail and trust deed executed on 18th June 1804, by Duke William, calling by this entail, failing the heirs of his own body, Lady Essex and Lady Mary Ker, they being the heirs of line of the marriage between Sir William Drummond and Lady Jean Ker, by the eldest branch of that family; next the appellant and his brother, Mr. Henry Gawler, and the heirs of their bodies, they being heirs of line of the same marriage by the junior branch of that family; and after them certain other substitutes, and it also set aside the subsequent entails of 11th Jan. and 8th June 1805. The trust deed, which was executed separately, and of same date with the first of these entails, conveyed the estate in trust to certain trustees, for payment of the Duke's debts, legacies and annuities, and after that to pay the residue of the rents, to renounce their infeftments, and to convey the estate, to the heir for the time appointed to succeed by the above entail. The other trust deed was executed of even date with the feu-dispositions.

Sept. 26, 1804.

Among other deeds, he executed sixteen feu dispositions of separate parts of the estate, in favour of the appellant, which feus comprehended the whole estate; and after this, he executed a second entail, revoking the one of 18th June 1804 in favour of Lady Essex Ker and Lady Mary Ker, and declaring, that the parties called to the succession, immediately after the heirs of the Duke's own body, to be the appellant and his brother.

Jan. 11, 1805.

A third entail was executed, of this date, setting forth that, as he had no prospect of heirs of his own body, he disponed the estates directly to John Bellenden, the appellant, and the heirs male and female of his body; whom failing, to the heirs called by the preceding entail.

June 8, 1805.

It appeared that, at a former period, many feus of the estate had been granted by Earl Robert and his successors. In particular, Sir William Drummond, who became the second Earl of Roxburghe, feued out large estates, which, it was stated, were still held by different proprietors. In 1663 the same Earl William entered into a contract of feu with Sir Andrew Ker, whereby the lands of Greenhead were conveyed to him in feu, the deed expressly referring to the Earl's title containing the reserved power. "*Et secundum libertatem et pri-*

"*vilegium nobis inibi reservat.*" The feu duty payable yearly, for the whole of these lands, in this feu, amounted to £25. 12s. 4d.; and it was stated at the time of the present action, the value of these lands thus feued, would be not less than £50,000 or £60,000. Earl William, it was stated, granted many other feus of lands, amounting in value to £150,000, although the only return was a feu-duty of £200 Sterling.

It was stated by the appellant that it did not appear that any of those feu rights were challenged except one, being that of the lands of Broomlands, granted by Earl William to Alexander Don in 1650, which being afterwards challenged, in a process of reduction raised by John, Duke of Roxburghe, in 1732, was ultimately reduced and set aside.

Duke of Roxburghe *v.* Don, 19th Dec. 1732, House of Lords, March 1733, ante vol. i. p. 126.

The feus, in the present case, were granted under two conditions; 1st, That the Duke having executed the entail above specified in favour of his own relations, *failing heirs of his own body;* these heirs, in case they should exist, were to be preferred to the persons who were to be benefited by the feus; 2d, But if the Duke had no heirs of his own body, and the entail made by him should stand good in law, and the heirs therein succeed to the estate, the feus were to be at an end, and to be "void and null." In order to accomplish this transaction more effectually, according to the designs of the parties, it was necessary that other deeds should be executed simultaneously with the feu dispositions. The feu rights were divested of all but the necessary clauses between the superior and the vassal, and the irritant clauses above noticed. What remained of the agreement of parties, and was generally alluded to in the feu dispositions by the words, "for certain onerous and sufficient causes and con-
"siderations," was contained in a separate contract between the Duke and the appellant, and was executed on the same date with the feu dispositions. This contract narrated the trust deeds, the deed of entail 18th June, and the feu dispositions; and in this contract the appellant bound himself in several obligations, 1st, To grant to the Duke a deed of entail of the whole lands disponed to him by the sixteen feu dispositions to himself in liferent, and to his brother, Henry Gawler, and the heirs, male or female, procreate or to be procreate of his body, in fee, &c. It was also conditioned, that during the Duke's life that he and the appellant, or after his death, the institute and heir of entail, might alter and revoke or annul, in whole or in part, the said deed of entail (of the

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feus). In the next place, the appellant is taken bound to pay a variety of sums to the amount of £30,000, besides annuities to divers persons to the amount of £2900. Accordingly, the entail of the feus was executed in terms of the above contract, and of same date with it.

Afterwards, the Duke executed his second entail, the destination in which has already been mentioned; and this was followed by the third entail, also above referred to. All these deeds were prepared by the Duke's own agent, Mr. James Dundas, W. S., under the assistance of counsel; and the feu dispositions, after having been regularly executed at Fleurs, were delivered to the appellant; and two copies of this contract having been executed, one was delivered to the Duke and the other to the appellant.

Such being the nature of the deeds granted by the Duke, the question was, Whether, as to the feus, they were such as were covered by the powers (duly exercised) of the entail 1648?

This depended on the prohibitory clauses in that entail of
Tailzie 1648. 1648, which were as follow:—"It sall not be lawful to the "persons before designit, and the heirs male of their bodies, "nor to the other heirs of tailzie above written, to make or "grant any alienation, disposition, or other right or securi- "ty qtsomever of the said lands, lordship, baronies, estate "and living above specified, nor of no part thereof; neither "zit to contract debts, nor do ony deeds qrby the samen, "or any part thereof, may be apprisit, adjudgit, or evictit "fra them; nor zit to do any other thing in hurt and pre- "judice of thir pntis, and of the foresaid tailzie and suc- "cession, in haill or in part; all quhilk deidis 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 privi- "lege to our saids airis of tailzie, to grant* FEUS, *tacks, and "rentals of such parts and portions of the said estate and "living as they shall think fitting*, providing the samen be "not made nor granted in hurt and diminution of the rental "of the samen lands, and others foresaidis, as the samen "sall happen to pay the time the saids airis sall succeed "thereto."

The respondent's action of reduction, was identically the same action with that reported, ante p. 362; but that action naturally dividing itself into two parts, the one having reference to the reduction of the entails and trust-deeds, the other having reference to the reduction of the feus; the Court

ordered them to be separately discussed. In this, the feu cause, tho respondents maintained, besides the other reasons there set forth, that the feu dispositions were all, on the face of them, so many fraudulent and unlawful contrivances and devices to defeat the standing entails and investitures of the family of Roxburghe, and to break down and diminish the said estate; and that they were obtained from a person having no power to grant such deeds, he having held the estate fettered by prohibitions against granting such deeds; that they were alienations, and that they were devised to effect an entire alteration of the order of succession. This question was reported to the Court; and the Court, of this date, pronounced this interlocutor:—"The Lords of Council and Session having ad- Jan. 16, 1808.
"vised the memorials in this case, find, that the late Duke
"of Roxburghe held the estate of the dukedom of Rox-
"burghe under the fetters of a strict entail; find, that the
"deeds now challenged were not granted in the due exer-
"cise 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."*

Though the above interlocutor was pronounced by a narrow majority, yet the appellant, without reclaiming, thought it best to appeal to the House of Lords.

Pleaded for the Appellant.—1. The late Duke of Roxburghe held the estate in question under investitures containing the most ample powers to grant feus, expressed in the deed 1648, and repeated in all the subsequent titles of the estate, by the clause, "Reserving liberty to our said "heirs of tailzie to grant feus, tacks, and rentals, of such "parts and portions of the said estate and living as they "shall think fitting, providing the same be not made nor "granted in hurt and diminution of the rental of the samen "lands and others foresaid, as the same shall happen to pay "the time that said aires shall succeed thereto." 2. The Duke did accordingly exercise his undoubted power of granting feu rights, by granting those now in question, all of which are perfectly regular in point of form, and sufficient

* For Opinions of the Judges, vide Faculty Collection, vol. xiv. p. 73, et seq.

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in law for vesting the right of property in the appellant, as feuar or vassal of the Duke. 3. The Duke and the appellant, the parties to these feu contracts, did not, in entering into the same, make any private agreement, or come to any private understanding whatever, that the feu dispositions should be held by the appellant in trust for the Duke, or that they should in any respect be subject to his disposal, or that he should have power, in any respect whatever, to alter, revoke, burden, or control the rights thereby conveyed. 4. The objection to these grants, that they are *alienations*, and therefore fall under the prohibition, either of sales or alterations of the order of succession, is entirely frivolous, groundless, and affected; alienations by way of feu not being prohibited, but being expressly allowed by the entail. 5. The objection to the magnitude or extent of these feus is equally ill founded, as the right to grant feus is unlimited by the entail, and is as effectual in the grant of a large feu, or even a feu of the whole estate, as it is in the grant of a small feu. 6. The objection to the feu rights, that they are declared to be void and null, in case of the granter having heirs of his body, is totally ill founded, in respect that no condition or irritant clause, by which, in a certain event, the feu was to return to the granter or his heirs, is inconsistent with the nature or object of a feu right, and that more particularly this condition is not inconsistent with such feu right. 7. The objection to the feu rights, that they were to become void, in case the appellant should afterwards establish in his person a title to the superiority, under the entail executed by the Duke, or under any other entail to be executed by him, is also ill founded, in respect that such condition is not inconsistent with the nature of a feu. 8. The objection, that the feudal casualties were discharged, is ill founded, in respect that this condition is not inconsistent with the nature of a feu, *that it is the most common of all conditions in such rights*, and that it is allowed by the entail, which contains no other restraints upon the reserved faculty to grant feus, than that they should not be granted in diminution of the rental. 9. The objection to the feu rights, that they were granted as in trust, in the person of the appellant, for the benefit of the Duke himself; that they were subject to his revocation or alteration; and that he must have had power to charge these rights with burdens in favour of his creditors or legatees, is an objection founded upon groundless averments in

point of fact, in favour of which there is no evidence or presumption whatever, and which is actually disproved by the strongest evidence; and particularly by the last settlement of the Duke himself, in which he charged the trustees upon his real estate with his legacies and annuities, without so much as alluding to the appellant as being liable to such a charge. 10. The allegations of the respondents, besides being unfounded in fact, are totally irrelevant, as it was in the power of the Duke of Roxburghe to grant the feus in question, under all the supposed and fictitious circumstances which the respondents have been pleased to represent as the most exceptionable.

Pleaded for the Respondents.—1. The Duke of Roxburghe was prohibited, by the entails under which he held his estates, from granting even *bona fide* feus, of the nature and extent of those ostensibly granted in the present case. 2. The feu dispositions in question being merely gratuitous deeds granted *mortis causa* to a trustee, and forming part of a system, the whole of which was liable to revocation, were no other than a device, under a simulate form, to alter the order of succession, which was expressly prohibited by the entails. 3. There is direct evidence from all the deeds executed, and from the subsequent conduct of the parties, that no real interest *de presenti*, was either conferred, or meant to be conferred, on the pretended vassal. The estates were not taken possession of by him in virtue of the conveyances in question; but, on the contrary, continued to be managed and enjoyed by the very person who is pretended to have been divested of them, down to the hour of his death, while no attempt to give the slightest publicity to the feu contracts was ever made till the life of the granter was despaired of. Under such circumstances, it is submitted, that it is impossible to maintain that the feu dispositions under reduction possess any one characteristic of fair, legal, or *bona fide* conveyances.

After hearing counsel,

LORD CHANCELLOR ELDON said,*

" My Lords,

" This is the case of an appeal from an interlocutor pronounced in the Court of Session in Scotland, in a cause in which John Bellenden Ker, Esq., is appellant, and Sir James Norcliffe Innes, Bart.,

* From Mr. Gurney's short-hand notes.

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and Mr. James Horne, his commissioner, are respondents. That interlocutor appealed from was dated the 12th, and signed upon the 16th of January 1808, by which this judgment was pronounced, 'The 'Lords of Council and Session having advised the memorials in this 'case, (the action of reduction), find that the late Duke of Rox-'burghe held the estate of the Dukedom of Roxburghe under the 'fetters of a strict entail.' I pass over so much of this interlocutor, by stating, that after long and various proceedings in this House, your Lordships were pleased to affirm that proposition of the learned Judges below, namely, that the late Duke of Roxburghe held the estate of the Dukedom of Roxburghe under the fetters of a strict entail. That Court in Scotland further found, 'That the deeds now 'challenged,' and which I shall have occasion to represent severally to your Lordships, 'were not granted in the due exercise of the re-'served powers in that entail, of granting feus, tacks and rentals, 'and therefore sustained the reasons of reduction thereof, and of the 'sasines thereon, reserving all objections to the title of the pursuers, 'and to them their answer as accords.' Your Lordships will recollect, that amongst those deeds were sixteen feus, and it is represented in the cases now upon your Lordships' table, and has been stated at your Lordships' bar at great length, and with great truth, that this finding embodies a principle in the law of Scotland, of decisive importance in the general adminstration of the laws of that part of the United Kingdom, as to the due exercise of the power of feuing, which may be given in deeds of strict entail. The effect of these feus, if they had been sustained, would be to reduce the Duke of Roxburghe to the character (if I may so represent it) of an annuitant upon his own estate, and the persons claiming benefit from these feus would have the *dominium utile* of these lands, and after paying the feu-duties, might, in process of time, be benefited to the amount of £30,000 or more per annum. From the vast importance of this interlocutor, as it affects property in general in Scotland, at least as to those persons whose properties are protected by strict entail, and the pointing out the true meaning of the power of feuing, I need not inform your Lordships, that you have before you a case calling for the utmost attention and circumspection in regard to your decision. Against this interlocutor, which I have stated as pronounced by the Court of Session, an appeal has been lodged in your Lordships' House, and the opinion formed by the Judges of the Court of Session does not appear to have been again submitted to the consideration of that Court itself. I mention the circumstance, because, speaking with all the respect that I know to be due, and which I profess myself unfeignedly to feel, towards the Judges of that Court, yet I must say, that if this had been done, their Lordships would have had their attention anxiously called to the grounds of their decision, which are to be found in the opinions of the different Judges, (the notes of whose opinions we have upon the table), and they

might have embodied their reasons in their judgment. We might have derived great advantage from this, and have found such a statement highly useful. It would have been beneficial in the formation of our judgment, to have found it therein stated, that these deeds were not granted by virtue of that power of granting feus, but that they have been granted for the reasons upon which each of those learned persons had given his assent or dissent to that doctrine, with a view of seeing the legal grounds upon which they severally maintained that these deeds were not granted in the due exercise of that reserved power in the deed of entail of granting feus. The humble individual who now addresses your Lordships, certainly has great reason to lament that that has not been done which I have just now alluded to, and which I think ought to have been done. But, conceiving it to be the first duty, the most pressing, and most important duty upon me, to offer my advice to your Lordships, either to affirm or negative the interlocutor appealed from, I have found it my duty, in absence of any such grounds, to take the following view of this case. Before the year 1648, which is the date of the deed of entail of the Roxburghe estate and dignities, which have been so much under consideration before your Lordships, it appears that this family had certainly granted feus ; and I mark the circumstance, because it was argued at the bar, and was intimated below, (but I cannot find any distinct opinion upon this point in the notes upon your Lordships' table), that this power of feuing, is the power of feuing which may be called the administration of an estate. Your Lordships are to conceive, that a family, of this dignity and magnitude, when settling their estate or property by a strict entail, would provide that no more than a few parcels of land should be feued out, to increase villages or towns, all of which would augment the value of the estate in general, instead of diminishing it, as might otherwise happen, and this you find was a power conferred by a deed which prohibited all alienation, contracting debt, altering the order of succession, or doing any thing in diminution or hurt of the estate, or the succession to it. As to the limitations of the estate made in 1648, I need not trouble you with them, but merely state that the limitation will be found exceedingly different as to feus before that period, and between that and the succession of the late Duke of Roxburghe to the estate, and that it is not easy to reconcile those feus with those of the years which I have mentioned. In 1648, your Lordships will recollect that an entail was made, under various limitations as to different parts of the family, which I need not recall wholly to your attention ; suffice it to observe, that that deed contains the following prohibitions, fenced with irritant and resolutive clauses, viz. 'That it shall not be lawful to the persons before 'designit, and the heirs-male of their bodies, nor to the other heirs 'of tailzie above written, to make or grant any alienation, disposition, 'or other right or security whatsomever, of the said lands, lordships,

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'baronies, estate and living above specified nor of no part thereof, 'neither zitt to contract debts, nor do any deeds whereby the same 'or any part thereof may be apprisit, adjudgit, or evictit fra them, 'nor zitt to do any other thing in hurt and prejudice of thir pntis, 'and of the aforesaid tailzie and succession, in haill or in part, all 'quhilk deedes sua to be done by them are by thir pntis declarit to 'be made null and of none avail, force, nor effect.' With respect to the meaning of this clause, in Scotch deeds of entail, it will be necessary to say, that there must be in these instruments, prohibitions, not only against alienation, but against contracting debt, and against altering the order of succession. It is natural to suppose what has been the legal adjudication of this subject; for when we consider the effect of the reservation, if it have the construction which was contended for by Mr. Leach on the part of the appellant, it being in truth, (as far as £30,000 a year goes), an alteration of the succession, and one that has the effect of contracting debt. It is not unimportant, that if there be a direct prohibition, it should be seen that it is not an alteration of the deed of succession, or making a disposition, and contracting debt, which would alter the order of succession. We cannot construe an instrument of this sort, sitting as the Court of Session do, for we do it, so as not to put a construction upon these Scotch deeds of entail which would operate as an actual disposition. Then there follows this reservation, 'reserving always liberty and privilege to our sds airis of tailzie to 'grant feus, tacks, and rentals, of such parts and portions of the 'said estate and living, as they shall think fitting, providing the 'samen be not made and granted in hurt and diminution of the 'rental of the samen lands, and otherwise aforesaidis, as the samen 'sall happen to pay the time that the saids airis shall succeed 'thereto.' And I beg to chain down to your Lordships' attention, (if I may use the expression), that this is not a separate reservation as to granting feus, but a reservation as to the power of granting tacks, feus, or rentals; and therefore the construction your Lordships are to put upon this clause must be one which is apt, suitable, and fitting to all the objects of it. Then follows this *proviso*, 'as they 'shall think fitting.' '*They*' must mean heirs of tailzie for the time being, as is proved by what immediately follows, viz. 'providing the 'samen be not made nor granted in hurt and diminution of the 'rental of the samen lands, and others foresaidis, as the samen shall 'happen to pay the time that the saids airis shall succeed thereto.' The consequence of this is, that the general prohibitions against alienating the lands, contracting debts, or altering the order of succession, are qualified by a *proviso*, which we in England should call a species of alienation, although it would not be so denominated in the Scotch law; that is, the making feus, rentals, and the granting of leases, as the heirs of tailzie in possession shall, from time to time, see fitting, providing the rent be reserved upon all those portions of

land which was then the rent payable for the same. To English lawyers it would be a material consideration that the rental at the time the leases, feus, &c. were made, was a rental made at the time the heir succeeded to the estate. If this were an English case, nobody could deny, that if I had succeeded to this estate at the age of twenty-one, and it were rented at £21,000, and that I had lived to be ninety years of age; and when at that age the rent amounted to £90,000, nobody, I say, could deny that it would be competent to me to make a lease of that estate in trust to my family, at the rent of £21,000, and not of £90,000, that sum of £21,000 being the amount of the rental at the time I succeeded to the said estate. We shall stop here a moment, to comment a little upon these words, 'feus 'tacks, and rentals.' What the feu was originally we certainly have not had any assistance from these notes to learn. It appears to have become a naked dry civil property, not in any ways connected with military service. At least we are not able to collect that it was so from these notes. In the course of my attention to this subject, I have been able to peruse various books, in order to get better information upon this matter. These feus now, I take it, may be represented to be something of this sort. They were granted to a vassal and his heirs, reserving certain services, which are called casualties, and which your Lordships have heard a great deal of in the course of this argument. As to leases particularly, speaking of the law of Scotland, they differ very much from leases speaking of the law of England; and if your Lordships look into authors in general, you will find they tell you that they must have a termination, or what is called an ish or issue. Now the term of 999 years *here* is like a perpetuity,—an issue that may never come,—and therefore is much the same as a perpetuity; and there have been instances of late in which undoubtedly it has been held by courts repeatedly, that the power of leasing found in a deed of strict entail, is a power of administration for the benefit of the estate, and therefore they hold that you must make such leases as are likely to be a benefit to the estate, *arbitrio boni viri*, not for the purpose of your acquiring property, but for the beneficial interest of those concerned. A rental is another species of grant, which differs (as far as I can understand it from the books) from the other two, being, generally speaking, to successors, but which would only go to the first succession of heirs. The clause must be considered with reference to all the three subjects I have mentioned. I should tell your Lordships that we have not had many of these sort of cases before us; but our assistance is chiefly to be drawn from cases in which the author of the deed has described nothing about a feu, a tack, or a rental; for the question is not here, what part of a lease, rental, or feu could be granted? which would be the case, if the author of this entail had not stated what sort of rental should regulate those grants. The *proviso* is, that there shall be granted, at the rent payable for said lands at the

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time the heir of tailzie succeeded; and the question is, first, Whether he have not intimated that as a condition? and, in the next place, whether he have not intimated *that*, as being the heir of tailzie by the construction of the Scotch instrument? (that being the construction of an English one), I thought that an heir of tailzie could let a lease at the rent payable at his own time of succession, which is given in the *proviso* itself, which makes it difficult to consider it merely as a power of management. If the case had rested here, and if there had been but one feu granted, suppose the feu of the policy of Fleurs, with the exception of the mansion house and forty-seven acres of land, (which are excepted, because I may venture to mention, that the Court of Session has held that the mansion house shall not be considered as included, whatever be the extent of the terms which describes it), and supposing your Lordships could lay out of your consideration at present that material circumstance, (speaking of it as an English lawyer), that that feu of the policy of Fleurs contains a feu of a very considerable portion of land which paid no rent at all at the time of the succession of the late Duke of Roxburghe, and which was in his own possession. This would be considered as a strong circumstance in an English deed. Supposing that the question had been in this case, Is that feu good? and that the Court of Session had not to look at the fifteen other feus, which I will represent by and bye, leaving the question then to be, whether that feu be or be not a good one? a consideration I have not seen any trace of, nor heard either in judgment nor in argument in this case. If the party were right in saying that this power of feuing was only to be exercised for the purpose of enabling them to erect houses in towns or villages, or in other places, where houses might give an additional value to the rest of the estate, if that could be made out, it would be difficult to say that, independent of the fifteen other feus, such a feu as that could stand, as that is a feu (whether the rent be £700 or £1400 a year) which is not made for any such purpose as that; and yet the first question that occurs is this, Would that one feu have been good without more? I can assure your Lordships that I have not been able to find, that which I confess I always look very anxiously for, not as deciding my judgment (because I could not be here in a Court of appeal to have any thing to decide it, but merely to assist it in its decision), I have found nothing to show me, whether it would be good or bad. Having stated that, I proceed to recall to your Lordships' recollection, not what issue they had, and what they formerly decided, as you are fully acquainted with these circumstances, but to state the facts generally. It appears, that in the month of March 1804, the last Duke of Roxburghe succeeded to this estate. I forbear to say one single word about the acts of that noble person, about his motives in the settlement, or his purposes, either as purposes worthy of him, with reference to the Gawler family, or whether or not he sufficiently attended to the old heirs of entail. I have

nothing to do with these circumstances; as a judge, I have only to consider the legal effect of them. Whatever were his motives, they make no difference here; if they were not good, they will not make the deeds not good if they be otherwise good; nor will they make them good if they be otherwise bad. In other words, they will not affect the validity of these deeds. I therefore pass over that part of the subject with this single remark. He then executed a trust-deed, the particulars of which I will not trouble you with.—On the 18th June 1804, by a trust disposition, he conveyed to Mr. Henry Gawler Ker, and Mr. Seton Ker, the whole estate of Roxburghe, for the purpose of paying the sum of £3000 to the Duchess, as an additional annuity, together with the sum of £6000, in addition to the sum of £4000 provided to her in her contract of marriage, and also for paying any sum or sums not exceeding £100,000 in whole, to such person or persons, and subject to such conditions as the said Mary, Duchess of Roxburghe, my wife, in case she shall survive me, shall, by any writing or writings to be executed by her, in due and legal form, direct and appoint to be paid to such person or persons after her death.' The trustees are thereby enjoined to pay £10,000 to Mr. Hamilton Fleming, therein described as Earl of Wigton; and they were authorized to borrow the above sums, and grant heritable securities for the same. The trustees were further enjoined to pay a variety of annuities to different persons, objects of the Duke's regard, to the amount of several thousand pounds a-year, so that the interest of the debt which the trustees were authorized to borrow on heritable security, to pay his legacies, joined to the yearly annuities, amount to no less a sum than £13,500 per annum. This deed contained an express power of revocation. His Grace executed the first entail upon the 18th of June 1804, by which he disponed the whole estates of Roxburghe to and in favour of himself, and the heirs male of his body, and the heirs of their bodies; whom failing, to the heirs female of his body, and the heirs of their bodies —the eldest being always preferable—and succeeding without division, after which the destination is thus continued, ' whom failing, to Lady Essex Ker, sister of John, last Duke of Roxburghe, and the heirs male and female to be lawfully procreated of her body; whom failing, to Lady Mary Ker, also sister of John, last Duke of Roxburghe, and the heirs male and female lawfully to be procreated of her body; whom failing, to John Bellenden Gawler, Esq., eldest son of the deceased John Gawler of Ramridge, in the county of Southampton, Esq., procreated between him and my cousin-german, Caroline Bellenden, his wife, eldest surviving daughter of John. 3. Lord Bellenden, and the heirs male and female lawfully to be procreated of the body of the said John Bellenden Gawler; whom failing, to Henry Gawler, Esq., his brother-german, and the heirs male and female lawfully to be procreated of his body; whom failing, to the heirs male and female lawfully procreated of the body of the de-

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ceased Diana Bellenden, daughter of the said John, third Lord Bellenden, with John Bulteel of Membland, in the county of Devon, Esq., her husband; whom failing, to his own nearest heirs and assigns whomsoever, the whole landed estates of Roxburghe, and also the honours and dignities of the family.' This deed contains ample powers of revocation, in the following words: 'Reserving full power to me, at any time of my life, by any writing or writings under my hand, executed in legal and proper form, not only to revoke and alter these presents in whole or in part, but also to sell, alienate, or dispose the aforesaid lands, earldom, lordships, baronies, and others, or any part thereof, or to contract debt thereon, upon, or even gratuitously to dispose thereof, or burden the same as I shall think proper, as fully and freely as if these presents had never been granted; but declaring, that any alteration or revocation shall not be inferred by implication or construction.' And, subsequently, there were deeds of entail, with references to the power of revocation contained in all of them, and it has been contended at the bar, that, all taken together, revoke the grant of the feus. These entails themselves, your Lordships will recollect, have been entirely set aside; but, upon the question whether these entails did or did not revoke the grants, if that were argued much in the Court below, I have not been able to find any thing said in the notes of the judges, or in the judgment of the Court of Session. I might make the same observation as to another point, viz. as to whether these settlements were to be considered as *mortis causa* settlements. I do go the length of saying that there is nothing in the notes that gives any information upon that point. Upon the 26th of Sept. 1804, the Duke executed a second trust deed in favour of the same persons, and giving power to trustees to sell as much of the estate as was necessary to pay off all the legacies enumerated in the previous trust deeds. The device of making these feus was this; it had been represented that the late Duke, being advised that his former deeds of entail were ultra the laws, and would not permit him to make such an entail, he proceeds, by the assistance of lawyers, to execute what is called a subsidiary settlement; that is, to execute a power of granting feus. Whether they must have advised him to grant the whole beneficial interest of this estate (except so much as was constituted by the actual rental of the estate at the time, by the deeds of the grantees of the feus), or whether they thought themselves under an obligation to attend to his interest in these instruments, that it should itself be made a subject of entail, leaving out Lady Essex and Lady Mary Ker, these are motives which I do not enter into. By making an entail similar in limitation as to the granting of the feus, viz. that if granting the feus, in the exercise of the power connected with the effect of the entail of the feus, would tend not to keep the alienation exactly the same in point of property to the Roxburghe family, as in the alteration of the entail itself, if that had been consistent with the deed of 1648. If the rental had

become £40,000 a year, it would have been an alienation of the property to that extent. With this view, they say, (and I do not apprehend that, unless there be a law of Scotland which we have not heard much of, nor found in the decisions of that Court, upon the execution of a power to feu,—unless there be authority enough in point of principle and decision to say, that if a man do a thing in the form prescribed, it shall not have the effect unless it answers the form and purposes of the author), it would be difficult to substantiate it in the English law. We have some few cases that go to that proposition. If a power be given to appoint a sum of money, to be paid in such parts and proportions as a father shall think proper, to his children, we have said in our courts of equity, You shall not execute it in an illusory manner; nothing can be allowed to answer the purpose as to one, and to elude it as to another. It is a bequest to children, and it shall be executed according to the nature of the trust. If a father see a child about to die, and, knowing that he is to be administrator of that child, make a settlement in favour of that child, a court of equity says that it is a fraud, as it is for his own benefit. The true question, in these cases, is this, whether the thing done be effected by altering the power intended? but if it answer the purposes intended as to some, and is less beneficial as to others than he meant they should take, then it is impossible for one to say, that the power is executed as the man has given it, if it shall not have the effect which naturally should flow from it. With respect to bishop's lands, where they had a power of granting leases for seven years, it was never intended that they should,—the law has said so, and nothing can alter it. If there be an old rental preserved, a tenant for life may make a lease at the old rent, if it were intended to be preserved, or if the author said he should not preserve the old rent, he cannot mix himself so as to reform it. The true question is this, (one which we cannot get at till we have resolved a great many upon which no cases are to be found at all), Whether those sixteen feus, every one of the same date, all drawn or granted by the same person, with many of them containing estates never let at any rent at all, but in the natural possession of the Duke; Whether these deeds are or are not granted in the due execution of the power which authorized feus, and whether they comprehend the whole estate? 2dly, Whether they can be possibly rendered invalid by the heirs of entail of the deed of 1648, from the circumstance that it was intended to substitute another species of heirs. 3dly, What was the worth of one of these feus, if no more feus, nor any other deeds, had been granted? *That* I would wish to know; and next, I would wish to know whether, if one will do, two will also do; if two will do, will six do; if six will do, will eight do; and if eight will do, will sixteen do; or will any intermediate number between these be deemed proper to be substantiated? Your Lordships will think I am making very nice and curious inquiries; but I must ob-

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serve, they are such as I am bound to make. The Judges in the Court below have stated, that these feus have not been granted in due execution of the power of feuing; and I ask, why? The Lord Justice Clerk, in an able argument, says that fifteen of these feus will do, and the sixteenth will partly do, meaning the feu of Fleurs; and the reason assigned for this is, that forty-seven acres of land are so little, by way of an appendage to the mansion house of Fleurs, that if they have no more than that number, they may as well have a stone quarry as a house; in fact his opinion is, that fifteen of these feus will stand, but there should be 700 more acres given to the mansion house of Fleurs. I ask, then, upon what principle is this said? It may with equal propriety be said, if one of these feus be bad, then all of them are bad; or if one of them be good, then the others are good. If you mean to say, that because this is an alienation of the whole estate, it is connected with those back deeds or settlements of the feu property, and therefore altogether not a grant of feus, but an alteration of the succession, by frittering away the estate; upon that principle it should not stand, although, as an English Judge, I might understand it; but to say that the fifteen feus shall stand good and the sixteenth not, is really a principle which I do not know how to grapple with. Another learned Judge, in a most able argument too, says he reserves to himself the consideration whether the policy of Fleurs and Broxmouth will do at all. He has not stated what is the principle upon which I am to say, that fourteen feus will do upon general terms, but, in all human probability, two will not do. There is another learned Judge of that Court, to whose opinion I bow with respect, from his high situation, and his knowledge of the law of that country, who expresses himself very much in the manner that an English lawyer would do, viz.—that you are to look at the terms of the power granted, and that nothing should be avoided by a judge so much as the assuming a discretionary power; but that he is to execute according to the dictates of the public law, and the will of the individual who has tested, in the actual execution of a settlement, as far as is consistent with those laws. After stating these sentiments, he says that he thinks he must support one half of those feus, and no more. Upon what principle he can support this opinion I really cannot tell. Another difficulty is, to ascertain who is the person who is to make choice of the half I am to support, or who is to distinguish it from the other half? Before your Lordships come to grapple with the great and general question, we ought to know what the law of Scotland is upon those points. It is incontrovertible that, upon this occasion, there was a contract, or something like a contract,—a binding agreement, or an honorary agreement,—that these feus should be made the subject of an entail; and I do not hesitate to say, that, speaking of these feus of entail together, they would certainly operate as an alienation in common parlance; but whether an alienation within the terms prohi-

biting an alienation in a Scotch entail, or an alteration of the order of succession, is quite a different question from what is an alienation in common parlance, and upon which I shall not pronounce.

"There were other deeds executed by the Duke affecting the entail. They have been represented as deeds which are expressly or impliedly revoking the grants of those feus, or, in other words, as *mortis causa* deeds; but whether, strictly speaking, they be or be not so, is the question; yet they have been represented as *mortis causa* deeds.

With respect to what has been urged and what has been said as to the infeftment, and as to whether there were infeftment or not, during the life of the Duke, the question stands upon the general effect of those deeds, as operating upon the feus. These are questions upon which I have only to say, that I have looked in vain for that degree of information which I have always derived from papers laid upon your Lordships' table from the Court of Session; and I am not ashamed to say, that, after spending many hours in perusing them, I should be afraid indeed to determine a case which so deeply affects the laws of property in Scotland, and which so materially interests in point of value the persons who are at present suitors before your Lordships, upon such slight information as we at present have laid before us. Now it is in this view of the case that, after reading the opinions and doctrines of the Judges of the Court below, after reading all the papers, and abstracting from them with my own hand all the material matter upon every point therein stated, with an inclination to pronounce a decisive opinion, my real conviction is, that I cannot come to a proposition, either negative or affirmative, upon this subject. There is another view which is most important, if this were a case to be decided by the law of England, and it may by possibility, be the influence of the view taken from the knowledge of the law of England, by which my mind may feel more upon the subject than is justly due to it. This power, in the present case, is a power to grant feus, tacks, and rentals, provided the rent is preserved which was paid for the lands at the time of the heir of tailzie executing that power came to the estate. It would be no objection, unquestionably, that such feus, tacks, or rentals, were granted before, but that which appears to me to be extremely doubtful, or at least to admit of considerable doubt, is, whether it be possible to make any of these feus, which contain lands and subjects never feued before, and which had no rents fixed upon them on being leased or granted, so as to support those feus either wholly or in part. It appears to me that such a feu cannot be wholly supported, for it is not a feu complying with the condition imposed. If those words, for a yearly value, be to be relied upon, your Lordships would have to consider, whether the rent reserved was of adequate yearly value. But the question is, whether it were not rated at the rent which was actually paid, and not that at which it may be valued at.

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It is extremely material, as it strikes me, in another point of view, viz. with respect to the mines and minerals. In looking into the Scotch law books upon the subject, I find it was not very usual, but the question still would be, What the tack was? Where are you to find a grant that contained a stipulation for what was to be paid for mines, if reserved in the leases? Then it may be said, that although these feus may be good in one respect, yet they may be bad as to the power here exercised; but as far only as that is consistent with the number that may be granted, they ought to be good. Now, apply this to the whole sixteen feus. If you say some feus may be made, but sixteen is an excess, then the question comes to be, What is the excess? Is it one half of the whole number, or is it only an excess of two, or is it an excess of all above part of one? Where is the line by which your Lordships are to mark out what is the excess, and what is not the excess? Then, I say, apply that reasoning to any one feu. Take that, for instance, as to the policy of Fleurs. Under the meaning of this clause, if the mines could be feued out at the rentals that were then paid, what becomes of such as never have been leased, and have no rent ascribed to them? The feu-duty being that which has reference to the entire rent of the whole of the premises, and being an entirety, what rule has the author of that deed given you so as to enable you to separate the whole of them the one from the other, or to part them so as to apply a part of the rent which would be applicable to such part of the lands as have never paid rent? The matter, I must say, appears extremely difficult of consideration in that point of view. Upon the whole, it is not my intention to go through cases which might by some be deemed proper to be alluded to, because, I say, in the first place, that cases as to the power of granting leases are not applicable to this particular case, in any one view you can take of it, for, in determining this case judicially, your Lordships ought to know what is the effect of every instrument taken separately as to its clauses, and what is the effect of them taken together; and further, we ought to be able to learn upon what ground it is that the decision in the Court below has proceeded. We find one judge attributing great weight to the circumstance of taxing the casualties; in some cases it would be no objection in my opinion; in other cases you find some judges saying that it is a decisive objection to those feus. It is fit that we should know the sentiments and reasons of these judges much more fully than we do at present upon that point. In speaking of the application of cases, your Lordships have the Greenock case. I can take that case, without bearing upon this case at all. If you can apply the principle of the *arbitrium boni viri*, then you can so determine that fifteen out of sixteen feus are to stand; but I confess I cannot see the application of that case to this complicated one. It is upon these grounds, assuring your Lordships, at the same time, that I have taken as much pains as I could, not to

send the parties from this bar, but to have come to the conclusion, either of reversing or of affirming this judgment, and that I have bestowed as much attention and assiduity upon this important question as I have ever done upon any question whatever. I confess I cannot come to a decision, that this judgment, pronounced in the Court below, is either right or wrong. In a question, therefore, of this great magnitude and value, I should advise your Lordships to do that which Lord Thurlow and Lord Rosslyn, and others, had done under similar circumstances. In calling upon your Lordships to review the whole question, and not only to review it, but submit to your consideration and adoption, a resolution by which we respectfully call upon the learned Judges of the Court of Session to state specifically the grounds upon which they consider these feus, as either granted in the due exercise, or not in the due exercise of this feuing power. Conceiving this question to be, both in point of value of property to the individuals concerned, and as involving a doctrine in the law of Scotland of the most vital importance to all concerned in estates tailzied in Scotland, it does appear to me that this is a case, perhaps the first, but unquestionably a case which requires us to make use of every means to get that information which the act of 1807 has enabled us to call for; and, in pursuance of that intention, I should propose to remit this again to the Court of Session in Scotland, and to request the Judges to state their opinions, and the reasons for the opinions which they have formed, as to all or each of the deeds sought to be reduced, taking into consideration whether they are to be looked upon as general or special; and, in their future judgment to state, specifically, whether all or any of the deeds in question were granted in conformity with the power of feuing contained in the original deed of entail; and with the request that that Division of the Court of Session under whose more immediate deliberation this question has come, shall require the opinion of the Judges of the other Division. His Lordship then concluded, with submitting to the consideration and adoption of the House, the following resolution:—

(*Vide* this at the end of Lord Lauderdale's speech.)

EARL OF LAUDERDALE said,

"My Lords,

"I felt great regret formerly in differing from the noble and learned Lord who has just now addressed your Lordships, when another point in this important cause was under consideration in this House. It was my resolution this day not at all to interfere in the discussion of this other very important point, if I had had the misfortune once more to differ from that noble and learned Lord, but, entertaining the sentiments I do entertain upon this occasion, I cannot avoid offering a few observations. I have read the whole of the proceedings upon this case; but finding the difficulties that

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arose, in coming to a decision under the present circumstances, I had fixed the determination, in my own mind, to take no part whatever in the discussion of it, should I happen to differ from the noble and learned Lord upon the Woolsack, knowing, as I do, that he takes upon all occasions such pains in these sort of questions, and possesses such extensive legal knowledge, that he is much better able to form a correct judgment of what line of conduct should be adopted by this House, in a case involving such intricacies and difficulties, than I can possibly pretend to ; but as I find the opinion I had myself formed, so completely coincides with that of the noble and learned Lord who has stated it to your Lordships, I cannot but observe, that he has taken that view which tends, under the existing circumstances of the case, most certainly to effect the purposes of justice, those purposes which he, upon all occasions, aims at. After what has fallen from the noble and learned Lord, I shall but shortly trouble your Lordships with stating my view of the case. It is a case which arises from the deed of entail 1648, a deed of entail which stands by decisions of this House, perfect as to its clauses against alienation, and which prohibits the contracting of debt or altering the order of succession and a deed which is guarded by, and fortified with irritant and resolutive clauses. It is true, however, that this deed of entail contains a clause which reserves power and privilege to heirs of tailzie, as in the words of the deed itself, 'to 'grant feuis, takis, and rentallis, of sik partis and portiounes of 'the said estait and leiving as they sall think fitting. Provyding 'the samyn be not maid nor grantit in hurt or diminution of the 'rentall of the samyn landis and utheris forsaidis, as the samyn sall 'happen to pay the tyme that the said airis sall succeed yrto.' Now it is obvious, in the first place, that the power of granting feus is not only reserved in this clause to those who should subsequently succeed to this estate; but, in the second place, it is reserved under certain specific conditions, distinctly expressed by the feuar. In the first place, it is said, that they shall be such feus as the heir in possession shall think fit, a circumstance which makes me feel considerable astonishment, after hearing the opinions of the Judges below ; after stating the proper allotment of land to be feued out, saying, that it is not the heir that shall judge, but we shall be looked upon as the judges in such a case as has occurred, and shall assume the power of saying what was fit for such an occasion. I must express, in conjunction with the noble and learned Lord who addressed your Lordships, my astonishment at the judgment delivered by one of the learned Judges of the Court of Session, who, in my opinion, lays down, in the commencement of his speech, a most accurate view of the law upon the subject, and a lawyer for whose learning and judgment nobody can possibly have a greater respect than I have, for I am convinced that an abler judge does not exist. After explaining the law upon the subject, in the commencement of his opinion, he next

states how much of the land was fit to be feued out. A judge is to be looked upon in the same light as a member of a committee of Parliament, and not authorised as such to determine what part of these feus was fit for him to confirm, and what part was not fit to be confirmed. He says, in the conclusion of his opinion, in a most arbitrary manner, he says he is ready to give one half of the estate; but upon what ground he takes upon himself to say this, I confess I am as much at a loss to discover as the noble and learned Lord who has addressed you. In short, I am completely in the dark about either the motives or the reasons of his decision. Now, in this clause, in adverting to what forms your Lordships' discussion, there is a further condition, upon which the noble and learned Lord has commented, and which is highly deserving of your Lordships' consideration, and that is, that these feus shall be so granted as that there shall be no diminution of the rental as it stood at the time when the heir in possession executed the deed. I should be at a loss to know how that clause, even standing in that shape, should, by construction, be deemed to imply nothing, for if these feus are to be set aside, it is the same thing as if that clause had actually never existed. That your Lordships can draw by inference from that clause, that it is the same as if it had not been introduced at all, is what I cannot conceive. I find this accurate and distinct condition, which shows that the entailer had his object in granting these feus in the manner he has done in this clause, which was to show that it was his intention to reserve for the future Duke, or Earl of Roxburghe, to retain that which would maintain the value of the estate, knowing that it would increase. To set aside this clause, and to imagine that the judges had full power and scope to impose what conditions they might think proper, appears to me extraordinary; and I cannot find a distinct reason in the opinions of the Judges of the Court of Session, which tends to convince me of its justice, or to point out to me the grounds upon which they went. If, instead of setting aside the clause, they said these feus were good, even in no case, I do not know but the noble and learned Lord would have done right to send the whole matter back to that Court below before closing it in this House; at the same time, I should have been much readier to have heard that decision, that declares these feus invalid *in toto*, than any decision that declares them valid in some cases, and invalid in others. The general tenor of decisions, as to questions of entail, in the Court of Session, when the intention of the entailer is clear that he means to prohibit alienation, contracting debts, or altering the order of succession, shows that if there be a doubt in one of them, it is the custom of that Court to find, that if the clause of alienation be deficient, it cannot be carried into effect, and may even defeat the other two prohibitions. If there be a flaw in that part of the clause against contracting debt, there would be also a flaw or de-

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ficiency considered to exist in the other parts. I do not recollect a case where there has been a deficiency in the clause of altering the order of succession, but in my opinion it would certainly render nugatory the other two prohibitions. If I am bound to alter the order of succession, from that moment the heirs of entail lose all right, as it is they that are recently called by me, and who derive their right from me. I stand as the original entailer, and my acts could not be challenged by them. I hold that if there be a deficiency in either of these clauses, the practice of the Court is not to prop up the other two. The clause, in the present instance, that has been deficient, has been allowed to be acted upon, and yet in a manner so as to defeat the other two prohibitions. I cannot but express my surprise at the manner in which this clause of feuing is expressed, which renders nugatory these three prohibitions which the entail contains, when we consider that a deficiency in either of these prohibitions would invalidate the other two. How much farther then does this go, when we see that it is the express intention of the entailer to feu so and so, as it would partially defeat the other two prohibitions, and would be going quite contrary to those rules, as to the law of entail, by which we ought to be governed. With these opinions, I confess, that if the judgment of the Court had been directly urged, either in one way or another, but at the same time involved in all those various doubts which have been stated by the noble and learned Lord who has addressed your Lordships, I should still have thought that it was a question which, under all circumstances, ought to be remitted. I have not been able to form any opinion whatever as to how this claim will affect the lands at the time of the death of the Earl of Roxburghe, for, as far as I have read the opinions of the Judges, and other cases of a somewhat similar nature, I think I may pronounce it to be a case hitherto untouched. There are a variety of cases upon which I confess I should have liked to have heard the reasons for the Judges' opinions. In the present instance, one Judge talks of one, another of two, and a third of three of these feus, that ought, in their opinions, to be supported ; and there is also another who thinks that only part of one out of the whole sixteen feus should remain valid. Such being the case, I ask your Lordships in what state would you leave the law of Scotland upon this most important point? With the clause similar to this, in the deed of entail of Robert Earl of Roxburghe, by what rule could I, as an heir of entail, have proceeded in making use of this power? If these feus were executed in a manner so as to invalidate themselves, it would invalidate the right of a future Duke of Roxburghe, even provided his feus were properly executed. Under these circumstances, I should like to know how the Duke of Roxburghe could guide himself as to a price of land for building? How many fields could he grant? He could say, that he well knew that

his ancestors acted under this very clause; and therefore he could take it to regulate him in his conduct as to those feus that were ascertained, but I desire to know how he, or any other person who possesses an entailed estate in the country, is to regulate his conduct as to other particulars that may occur. Now, by the proposal of the noble and learned Lord to remit the case back to the Court of Session, our decision will be regulated, by the Judges informing us of the grounds upon which they can take upon themselves to say they are to set aside all or any of these feus; and when it comes back again, we will be in such a situation as to make the law of that country perfectly certain, and our decision will have the effect, in regard to any proprietor of an entailed estate, to regulate his conduct, and to tell him how far he may go, and to inform him when he is to stop, and go no farther; and, in short, to give him such directions that he may regulate his conduct in a manner that will assure him that he does not incur an irritancy. As to the Greenock case which has been alluded to, I can discover nothing which can lead your Lordships to imagine it ought to regulate your opinions in the case before you. It was a case relative to feuing, but there were specific reasons in that case which are not even alleged in this one, and I can only say, I am astonished to hear such authorities given in support of it. To conclude, I shall observe, that it is with the utmost satisfaction I take this opportunity of expressing my approbation of the mode of proceeding by this Resolution, which goes materially, not only to do ample justice to the parties, whose great interest and important and valuable property is involved, but, what is much more material to the country, as tending to place the law of Scotland upon such a footing, upon the point in question, as to enable persons concerned in entailed estates, to know what ought to be their line of conduct in future.

The Lord Chancellor then again read the Resolution, remitting the question to the Court of Session, which was unanimously agreed to.

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

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belong, shall require the opinion of the Judges of the other Division in matters or customs of law.

For the Appellant, *Tho. Plumer, Wm. Adam, Mat. Ross, John Clerk, James Moncreiff.*

For the Respondents, *Ar. Colquhoun, David Boyle, Sir Sam. Romilly, Ad. Rolland, Robt. Craigie, Wm. Horne.*

ARCHIBALD FLEMING, Merchant in Groenock, *Appellant;*
JOHN M'NAIR, Agent at Greenock for the Bank of Scotland, ... } *Respondent.*

House of Lords, 16th July 1812.

PARTNERSHIP—LIABILITY AS PARTNER—ELECTION.—The partnership of Hugh Mathie and Co. consisted of three individuals, who carried on business in Greenock. They had an interest in a separate adventure or concern, with other individuals, at Nassau, one of whom was Fleming in Greenock, the other Howie, in Nassau. Hugh Mathie and Co. managed this foreign business in Greenock. Mathie and Co. became bankrupt, with large bills due to the Bank of Scotland at Greenock, where Mathie had discounted them. The question was, Whether Fleming was a partner of the Company of Hugh Mathie and Co., and liable on these bills? Held him liable for three of them, upon this principle, that his connection with them in the foreign adventure, was such as led to the belief that he was a partner, and made him liable as such. In the House of Lords, it was affirmed, but by applying the doctrine of election to the case.

The company of Adam and Mathie, merchants in Greenock, was dissolved on the death of Mr. Adam, on 26th July 1799. Before that event, they had projected a plan of carrying on a separate concern in Nassau, in New Providence, with the aid and assistance of James Howie, who was to conduct the business at Nassau, receive a salary, and a certain share in the concern. But this project came to nothing by the death of Mr. Adam.

After his death, Mr. Mathie formed a new partnership, consisting of himself, John Parker, his brother-in-law, and James Jamieson, who carried on the old business, under the firm of Hugh Mathie and Co.

The appellant, a merchant in Greenock, then a partner of the firm of Archibald Fleming and Co., and who had become