GARDENSTON. The regulations of the Act 1696 are only applicable to a river altogether in Scotland.

MONBODDO. Of the same opinion. Immemorial possession is one circumstance; a joint concern of a party not subject to the jurisdiction of this Court is another. I am clear also upon the principles of common law. Every river, *juris publici*, between two nations, is common to both. The old Scottish statutes are nothing to the purpose. The Act 1696 relates to dam-dikes within this kingdom.

PRESIDENT. I do not agree with some of the doctrines laid down in Lord Tankerville's memorial. We will judge over our half of the river, and leave the English courts to judge over the other. But I incline to alter upon immemorial usage. I consider this fishing just as a common between the two nations.

ALEMORE. If the Tweed is a common river, there is an end of the question. It has now changed its nature, and has become extraparochial.

On the 28th June, 1768, the Lords altered the interlocutor of 22d July 1767, and found that, in the circumstances of this case, the Act 1696 does not extend to this fishing; and assoilyied.

On the 25th November 1768, they adhered.

Act. H. Dundas, P. Murray. *Alt.* A. Lockhart, D. Rae, R. Kennet.

Diss. Alemore; Hailes at the second interlocutor. Alemore absent, and Hailes, in the Outer-House, at the third interlocutor.

[Reversed on appeal.]

1768. *November 25.* SIR ALEXANDER MACKENZIE of Gairloch *against* HECTOR MACKENZIE and His TUTOR.

HOMOLOGATION.

When challenge of an Entail, for limiting a fee destined to the pursuer in a contract of marriage, is excluded by homologation.

[*Faculty Collection, IV.* p. 298; *Dictionary,* 5665.]

KENNET. There are two points, power and homologation. The Court has always avoided determining the first point. Homologation seems plain by the entail upon record, which must have been known to the present pursuer.

MONBODDO. The only provision to Sir Alexander, by the contract 1755, was upon a narrative of the entail.

PITFOUR. As to the first point, I do not say but that a father may make an entail notwithstanding a marriage-contract. Yet I do not think that he can make an arbitrary entail. A father, in such circumstances, may make a rational entail; but I never saw any such made. It must be of a large estate which can admit of an entail, and a power to provide a wife and children must be left. *Here* the entail is irrational, because the provisions to children are too small.

The first entail, made in such circumstances, that was sought to be reduced, was that in the case of *Gordon of Achlyn;* and yet 40 years had then elapsed after the statute authorising entails; and most entails had been made by married men. The reason was, the sons liked the entails as well as the father did, because the fathers were thereby prevented from dilapidating the subject. But here, as to the second point, Sir Alexander homologated. He must have known of the marriage-contract 1730, and also of the entails.

KAIMES. I doubt as to homologation. I do not like the plea. Sir Alexander was in his father's power. He had no bread. This is like the homologation of an heir apparent to the death-bed deeds of his predecessor. If any deed had been done in order to ratify, this would have been good; but there is no such deed here. The entail is only mentioned by the way. Possibly young Sir Alexander did not know that he had power to call the entail in question. A man cannot give up a right which he does not know. At the same time I would hesitate to reduce the deed altogether.

COALSTON. Homologation is an arbitrary question. Before we find that a man homologates, we must be satisfied that he knew whatever ought to have been known respecting the matter homologated. That there was, for instance, a marriage-contract, and that he had right by that marriage-contract. As to the general point, I have great doubts.

GARDENSTON. There never was a rational, if a strict entail. I do not think that there was any homologation here. Here the son is only described, *narrative, as heir of entail.*

JUSTICE-CLERK. I cannot presume that in this case the young man had any idea of his mother's marriage-contract, or that, in the contract 1755, he meant to renounce his *jus quæsitum.*

COALSTON. The pursuer's prevailing in the reduction would not free him from the obligations in the marriage-contract.

JUSTICE-CLERK. I now see the question in another light. There were first articles, and then a marriage-contract. The bride's friends must have known the entail and contracted upon the faith of it.

AUCHINLECK. Here it is not a question between father and son, but between a son and third parties. The son enters into a marriage-contract. In such contract there is always some settlement upon the heirs of the marriage. The son and father set forth that the estate was devised to heirs-male. What shall be the consequence if the son should afterwards say, I did not know but I might have quarrelled: he comes too late, the marriage having intervened. This would be clearly *contra fidem tabularum nuptialium.*

PRESIDENT. I do not touch upon the question of homologation. On the faith of an entail, a marriage was entered into. It is now too late to challenge it. Such references in general, to an entail, are not unusual in marriage-contracts. It was my own case. There is thereby *a jus crediti* to the children.

On the 4th December 1767, the Lords "found that the pursuer is barred, by his contract of marriage, from reducing the entail in question."

On the 25th November 1768, they adhered.

Act. W. Mackenzie, R. M'Queen. *Alt.* J. Boswell. *Rep.* Hailes.

Diss. Strichen, Kaimes, Gardenston, Coalston; Elliock. At the second advising, *Diss.* Gardenston. (Coalston absent.)

1768. *November* 25. MRS CATHARINE SINCLAIR and OTHERS *against* DAVID THREIPLAND SINCLAIR.

PROVISION TO HEIRS AND CHILDREN.

Extent of the father's power of distribution of the conquest provided to the children of the marriage.

[*Sel. Dec.* p. 338; *Dictionary*, 13,007.]

COALSTON. Where a father obliges himself to provide a sum, or conquest, to the children of the marriage, they are partly heirs, partly creditors. As creditors, they may take, without service, and may reduce fraudulent grants. A father has a power of division, not arbitrary, but rational. He cannot disappoint any one. If he divides, he must divide the whole. Yet he may transact with his children, and take discharges. If he does this as to the whole children, there will be an end of the obligation. The only question is, as to the effects of this case, where one or more children discharge, and one does not discharge. The obligation is *familiæ*, but still each is an heir and creditor conditionally, if alive at the death of the father. Here is distinction: When one or more grant a discharge to the father, and die before him, that will only enable him to impute. But, if otherwise, there must be a bipartite division. The case of *Allardice* seems in point; and I would give great authority to a decision of the House of Peers. The only difference between that case and the present, is, that *there* the discharge was granted after the dissolution of the marriage; but that matters not, because children may die after the dissolution of the marriage, and before their father. One may discharge a conditional uncertain obligation. Marjory's *share* was the conquest, and her share is discharged.

ALEMORE. I cannot see what advantage children can gain by the defender's doctrine. Besides, not only their interest, but that of the bride's friends, must be considered. A father is bound to perform specially, though he may divide rationally. The difference of *Allardice's* case from this, is, that, at the period of the decision, it was supposed that children had a right to an equal share of the subject.

KENNET. This is a general and a delicate question. Great regard ought to be had to marriage-contracts, so also great regard to the father's powers. What Marjory accepted must stand for her half; the children are creditors, and may transact: this is for the benefit both of father and children. I think that Marjory is bound by her marriage-contract; for she is a party, and signs it, in an obligation, for a precise sum. The father is debtor to the children, and he may transact; why should his transaction benefit third parties? If there had been