the son; for upon the matter here, there was a contract of tailzie betwixt the father and son, and transfused into this contract of marriage, where the father must be understood to stipulate in favours of his own daughter *nominatim*; and this is evident, since it is expressly provided that there should be no alteration, except in the case, that the father and the son during their joint lifetimes, and with mutual consent, did alter. No. 122.

Answered for the defender, that the suppositions were only the pursuer's notions, without any foundation in law. For it has been sufficiently cleared, that the ordinary stile of contracts contains substitutions, in such manner as the parties please; but none of these disables the fiar to alter, order, and direct what concerns the substitutes at his pleasure. *2do*, Though such a contract had been betwixt the father and the son; yet it would be of the nature of an interdiction, which the law allows not.

The Lords found the irritancies and clause not to alter, contained in the contract of marriage, are binding on Sir John Shaw who made the tailzie, even supposing the pursuer were a gratuitous substitute; and assoilzied Houston and his Lady from the declarator, and ordained the contract to be registrated.

For Sir John Shaw, *Hew Dalrymple, Graham, &c.*
Alt. *Sir Walter Pringle & Colin Mackenzie.* Clerk, *Mackenzie.*

Fol. Dic. v. 2. p. 430. Bruce, No. 119. p. 149.

1771. *January* 25. & *August* 2.

ALEXANDER GORDON of Culvenan, and JEAN MACCULLOCH, Elder Daughter of John Macculloch, Elder of Barholm, *against* JAMES DEWAR of Vogrie, JOHN MACCULLOCH Elder, and JOHN MACCULLOCH Younger, of Barholm.

No. 123.
The proprietor of an estate having duly executed an entail in his own favour as liferenter, and to his son the institute as fiar, with a substitution of heirs; and the deed having been recorded, and an investiture expede thereon—the said liferenter and fiar cannot, by their joint

John Macculloch of Barholm, in 1742, executed a very strict and strange settlement and entail of his estate: He was succeeded by his grandson the defender; who being advised to challenge the settlement on account of its irrational and absurd conditions, for that purpose concerted matters with his sister Isobel, and William Gordon of Greenlaw her husband; Isobel, failing issue of his body, being the next heir of entail.

In the year 1751 an agreement was accordingly entered into; by which John Macculloch the heir, for himself, and as administrator in law for his children, on the one part, and Isobel and William Gordon her husband, as administrator for his children, on the other part, covenanted and agreed, under certain condition, specified in the contract, that Isobel and her husband should not oppose the intended reduction of old Barholm's settlement; and it was one of the conditions agreed on, that John Macculloch, in the event of his prevailing in the reduction, should execute a new entail of the estate, with a substitution in favour of his own issue and their heirs; failing of whom, Isobel and her heirs, according to their degree of relationship, were to be next called to the succession.

No. 123. act, alter or revoke the entail to the exclusion of the substitute heirs.

Old Barholm's settlement having been reduced, the present Barholm established titles to the estate in his own person as a fee-simple; but as he failed or neglected to execute this new entail, had contracted very considerable debts, and was proceeding to contract more, Isobel Gordon became alarmed; and in order to prevent any farther alienations or contractions, in 1761 executed an inhibition on the contract 1751. In 1762 Barholm executed a new entail of what remained of the estate, in favour of himself in liferent, and to John Macculloch his son in fee, and the heirs-male of his body; whom failing, to his other sons and their heirs; whom failing, to his daughters and their heirs; whom failing, to his sister Isobel Gordon; whom failing, to Alexander Gordon her eldest son, and the heirs-male of his body; and whom failing, to the said John Macculloch's nearest heirs whatsoever. This entail was secured with the usual prohibitory, irritant, and resolutive clauses; was recorded in the proper register; charter and infeftment was taken; in which all the necessary clauses were fairly engrossed.

Barholm continuing to be oppressed with debt, a trust was executed; but that also, on account of the extent of the incumbrances, failing to give relief, a sale of the estate was thought of; and with this view, in 1769, Barholm the elder, and maker of the entail, and Barholm the younger, the institute therein, concurred in executing a revocation of the entail, and in granting a disposition of the whole estate to James Dewar of Vogrie. In aid also of this revocation and conveyance, Isobel Gordon, in 1770, executed a discharge of the inhibition at her instance, raised upon the contract in 1751.

Immediately after this, Alexander Gordon, eldest son of Isobel, brought a reduction of the revocation and disposition, and of the instrument of sasine following thereon; and the title upon which he founded, was, as one of the heirs of entail, and next in succession, upon failure of the heirs of Barholm's body and his brother, in virtue of the entail 1762. Dewar of Vogrie, on the other hand, brought an action to have it declared, that Barholm, elder and younger, were entitled, by their joint act, to revoke and annul the said entail; that the same was annulled; and that he, Vogrie, had therefore the only valid title to the estate. The actions being conjoined, the clause was heard in presence, and thereafter stated in memorials.

Alexander Gordon, the pursuer, pleaded:

1*st*, It was in the power of every person, *major*, *sciens*, *et prudens*, to bind himself to the performance of a lawful obligation to a third party. When this was done, there was a *jus quæsitum* acquired to that party in whose favour it was granted, which could not by the granter be revoked. In the present instance, as Barholm had *de facto* executed the entail in question, pure and absolute, reducing himself to a liferent, and vesting the fee in his son, without any reserved power in his own favour, and had completed it, by recording the deed, and expeding charter and infeftment, it was incompetent for him, by any after deed, to assume powers not reserved to injure the heirs of entail; who, to the remotest generation, had such a *jus quæsitum* as could not be defeated.

No. 123.

The concurrence of the son, the institute in the entail, could not validate what severally, neither the one nor the other had power to effect. The father, as a naked liferenter, could do nothing; the son, vested in a fee-tail, not a fee-simple, had as little power as the father to alter the course of succession, or to do any thing to the prejudice of the remoter heirs; who had each in their order an equal right with himself, and hence it was impossible to conceive, that the junction and combination of those who had no right should have the effect to create a right which had, in fact, no prior existence.

The decisions referred to, when accurately examined, were not adverse to these general principles, That of 15th June 1716, Hamilton of Orbiston *contra* Hamilton of Dalzell, No. 35. p. 14929. related to the import and effect of a particular clause in an entail, and the consequence of that deed having been repudiated by the institute; so that it had truly no connection whatever with the present question. That of Dalrymple, 8th December 1714, Lord Lindores *contra* Stewart of Innernytie, No. 13. p. 7735. had as little relation; for as the entail, in that case, had never been recorded, and no charter or infeftment passed thereon, the maker never had been denuded of the fee-simple, nor was there a *jus quæsitum* vested in any person to make him denude. In the case, No. 121. p. 15569. 23d June 1713, Scott against Scott of Highchester, the *ratio decidendi* expressly stated was, that as the former tailzie remained in the terms of a personal right, without having been perfected by charter and sasine, the maker of the entail, fell of course to be regarded as not denuded of the fee-simple, or reduced to the situation of a limited fiar, subject to the conditions and limitations of the entail. And in the case, 17th November, 1743, Earl of Moray against Ross of Balnagown (not reported; See APPENDIX), it appeared from the printed papers, that, on the general abstract point, the Court actually gave judgment, that the institute, fiar, and liferenter, under an entail, could not defeat the deed; though, as this point did not, on account of specialties, affect the precise case submitted to judgment, the opinion of the Court upon it was not inserted in the interlocutor, or entered on the record.

2do, The principle of the preceding argument must operate with more force in the present case; where the executing this entail was not Barholm's spontaneous deed, but the result of an onerous contract with his sister Isobel, the next heir of entail under the old settlement; and by which he became bound to execute this new entail in favour of the same series of heirs. The obligation on the part of Barholm, to execute an entail, was explicit; the natural prestations on the part of Isobel and her husband were no less clear; and hence, according to the common principle of law, an entail, made in consequence of these mutual obligations would have stood firm, and been effectual, though it had not been perfected by infeftment, or recorded. Hope, Min. Prac. Tit. 16. § 8. Durie, 14th Jan 1631, Sharp against Sharp. No. 117. p. 15562; 31st December, 1695, Innes against Innes, No. 119. p. 15566.

No. 123. *3tio*, As to the discharge of the inhibition raised upon the contract 1751, it was sufficient to observe, that Isobel Gordon had entered into that agreement in the character for heir of entail, and consequently for behoof, not only of herself, but of the other heirs. It was not therefore personal to her, but for the common benefit of the whole; and hence it was not in her power, by any subsequent gratuitous deed, to countenance the infringement of this contract, or discharge the inhibition by which it was rendered effectual, without the consent of all the heirs of entail.

The defenders pleaded:

1*st*, It was an established principle in law, that no man could tie himself down in his own favour, in such a manner as that he could not alter any obligation, or revoke any limitation or restraint he may have imposed for that purpose. L. 22. D. De Legatis, § 3. It was equally clear, that tconditions and provisions, inconsistent with the nature of the deed or right to which they were adjected, could have no effect; and what was more directly applicable to the present question, quod voluntas testatoris ambulatoria est usque ad mortem; and hence when a person, in his testament, inserted a clause, obliging himself not to alter, such obligation, as repugnant to the nature of the deed, was of no avail. Voet. in Tit. D. De Injur. Rupt. Test. § 10. These principles were equally applicable to whatever settlement a man might make of his heritable estate. The *institutio hæredis* was likewie ambulatory till death; and hence, when one made a deed, and took the subject thereof in the first place to himself, it was understood to be clear, that though the deed should contain an obligation not to alter or contract debt, his debts would notwithstanding be effectual, and the deed itself alterable at pleasure, 11th December, 1714, Lord Lindores against Stewart of Innernytie, No. 13. p. 7735.

As the maker of an entail therefore could alter it *ad libitum*, it made no difference where, instead of resigning the estate in his own favour, he had disponed it to the institute. The institute thereby acquired a right; but the interest of the heirs of entail was no stronger than if he had acquired none. The whole right and interest remained with the maker of the entail and the institute jointly. As the interest of the heirs was created by their joint act, so might it, in like manner be defeated; and as they could take only as heirs under the settlement, they could not contravert the acts and deeds of those by whom they were brought into existence. If the disponee chose to give up the right he had acquired, the disponer came to be precisely in the same situation as if he had taken the fee directly to himself. If the institute repudiated the entail, the right of the substitute heirs would be cut off; Hamilton of Orbiston *contra* Hamilton, No. 35. p. 14929. and if, in this manner, the right of the substitutes could be defeated, it was impossible to see any reason why the disponee's conveying to the disponer, or concurring with him in making a deed derogatory to the former settlement, should not have the same effect. The joint act, of the two parties interested, was tantamount to the single act of any other proprietor. The remote interest of heirs, who were the creatures merely of the entailer, could not be regarded; and

hence an entailer and first institute might jointly revoke the deed, charge the estate with debt, or convey it in fee simple to any third person. These principles were supported by the following authorities and decisions: Sir T, Hope on Tailzie, No. 362. Dirleton, p. 151. Principles of Equity, fol. p. 171. 22d June 1713, Scott *contra* Scott of Highchester. No. 121. p. 15569. 17th November, 1743, Earl of Moray *contra* Ross of Balnagown, (not reported) in which itwasexpressly found, that it was in the power of Francis Stewart the fiar, in a deed of entail recorded, and upon which infeftment had been taken, and David Ross the liferenter and maker of the deed, jointly, to make another settlement, altering the former; and that settlement was accordingly sustained both in the Court of Session and the House of Lords. See APPENDIX. No. 123.

2do, The contract entered into in 1751, with the inhibition raised on it, could have no effect on the present question. An obligation to execute an entail, never could have the effect of one duly executed and completed by infeftment and registration, which alone could have barred the present alienation. An inhibition was not a competent mode of securing the interest of the heirs of entail.

The circumstances also occurring in this case, put the fulfilment of the contract out of the question. The object of the parties contractors was the preservation of the estate of Barholm; but as, from the debts affecting it, the only mode of preserving even any reversion was by a sale, *res devenit in alium casum;* and hence, as the heirs of entail could qualify no damage by what was proposed, they had no proper interest to contend that the contract should be observed; 11th February 1630, Kerr *contra* Limpitlaw. No. 4. p. 95.

3tio, Whatever may have been the effect of this coutract, it was now, by Mrs. Gordon, the only proper party, having discharged the same, completely at an end. In the case of mutual entails, which were understood to be onerous contracts betwixt the parties, the supposed interest of the heirs of entail could not hinder the makers to discharge one another, or to alter these deeds by mutual consent. In the present instance, Mrs. Gordon was the only substitute in the entail who entered into the contract: She contracted only for herself; and as she had now discharged the obligation, it did not appear upon what ground the pursuer, or any of his children, who were not parties, could found upon it, or object to what she had done.

In giving judgment, the Judges confined themselves chiefly to the first point; and as to that, were, with a few exceptions, of opinion, that the liferenter and fiar could not, by their concurrence, alter or revoke an entail: So long as the settlement continued personal it might be altered; but when once a feudal investiture was expede, the heir of entail had a *jus quæsitum* in the preservation of the destination. The case of Balnagown hinged upon many specialties, and was not a decision to be followed upon the abstract point; and, in the present instance, the only relief that could be obtained was by an application to Parliament. Upon the second point, a great majority thought, that as the entail had proceeded on an onerous mutual contract, it could not, at any rate, be revoked; and that Mrs.

No. 123. Gordon could renounce only for herself, not for her children, who, as substitutes, had a right to oppose any alteration of the settlement to their prejudice.

The following interlocutor was pronounced: "Sustain the reasons of reduction of the revocation made by Mr. Macculloch the Elder and Younger of Barholm, of the deed of entail of the estate of Barholm, made by Mr. Macculloch the Elder in the year 1762, and of the disposition of the said estate made by them to Mr. James Dewar, in consequence of the said revocation and infeftment therein; and farther assoilzie Mr. Gordon of Culvenan, and the other defenders, in the process of declarator at Mr. Dewar's instance."

After this judgment was given, Gordon of Culvenan for himself, and his son an infant, in conjunction with his brother and sisters, executed a revocation and discharge of the contract 1751, in which they consented to the sale of the estate of Barholm. Upon this the defenders gave in a reclaiming petition; in which it was maintained, That as all the argument formerly reared upon the contract 1751 was at an end, the question turned upon the abstract point of law, how far the entailer, with consent of the first institute, had power to revoke a deed of entail, and convey the estate in fee-simple, which it was affirmed, after the decisions in the cases of Scott of Highchester and Ross of Balnagown, was decidedly in their favour?

To this petition, an answer was given in by Jean Macculloch, eldest daughter of John Macculloch Elder of Barholm, who insisted upon the argument formerly used, That as soon as an entail was executed and completed by infeftment, it was not revocable by the joint act of the liferenter and fiar; but that being so rendered absolute, a *jus quæsitum* was thereby created even to the remotest heirs of entail; who being constituted creditors, their right, unless the deed reserved a power to alter, became irrevocable. Hope, Min. Prac. Tit. Tailzie, § 1.

At advising this petition and answers, the Court appointed memorials to be given in as to the effect of the contract 1751 *quoad* Jean Macculloch, who had now become the pursuer; and she accordingly

Pleaded:

By the law of Scotland, there was nothing inconsistent in a person stipulating for another as well as for himself. Dict. *voce* JUS QUÆSITUM TERTIO. In like manner, one could contract for another; and an obligation, conceived in favour of one person, was not less binding that it made part of a covenant, containing other obligations in favour of third parties. In the present case, Barholm came under an explicit obligation to execute the entail in favour of the pursuer as well as the other substitutes mentioned. The obligation became effectual to all concerned as soon as it was executed; and as it had not been discharged or renounced by her and her brothers and sisters, but by Mrs. Gordon and her children alone, it still, *quoad* them, remained in force. Instances of a similar nature occurred in marriage contracts, where a *jus crediti* was acquired to children *nascituri* by the stipulation of the parties; and upon the same principle had the pursuer, by this contract, acquired a right of which she could not be deprived? more especially as it had been carried into complete execution by an entail, on which charter and sasine had followed.

No. 123.

The defenders pleaded:

That neither by the intention nor words of the contract in question, could Mr. Macculloch's younger children be held or construed to be parties. The parties contractors shewed this to be the fact; there was no stipulation made on behalf of the pursuer or the younger children; nor was there any person named in the contract who was intended to contract for them. Mr. Gordon and his wife acted for their own children alone. The pursuer's father neither did nor could mean to become bound to her; and as both were interested to have the deeds of settlement set aside, nothing was promised upon his part, and nothing undertaken upon hers. The case had no resemblance to the obligation in a marriage contract: the pursuer's situation, on the contrary, was like that of heirs called in a marriage settlement other than the children; every obligation in favour of whom could be rendered ineffectual by the gratuitous act of the husband. As this pursuer therefore was no party to this contract, her discharge was unnecessary; and as that deed had been renounced by Mrs. Gordon and her issue, and the renunciations and discharges accepted of, it was as much at an end as if it never had existed, and could be no bar to the revocation of the entail having full effect.

The majority of the Judges, at advising, were of opinion, That the contract was no longer obligatory; but as they adhered to their former opinion upon the first point, *viz.* the incapacity of the liferenter and fiar, by their joint act, to alter or revoke an entail, having no reserved power so to do, the decision may truly be considered as having been given upon that abstract question alone.

The judgment was in these words: "In respect of the discharge and renunciation now produced, find that the decree of reduction formerly pronounced falls by defect of a pursuer; but as to the processes of declarator, sustain the defence pleaded for Jean Macculloch, and refuse to declare in terms thereof."

Lord Ordinary, *Stonefield.*

For Gordon and Macculloch, *A. Lockhart, Crosbie, G. Wallace, Ilay Campbell.*

For Dewar, &c. *Ad. Montgomery, Macqueen, A. Murray, Sol. H. Dundas.*

Clerk, *Campbell.*

Fac. Coll. No. 101. *p.* 300.

1783. *February* 25.

SIR THOMAS DUNDAS *against* THOMAS DUNDAS and Others.

No. 124.
Whether a settlement of a landed estate may be effectually revoked by a testamentary deed.

Sir Laurence Dundas, on occasion of the marriage of his son, became bound, by the marriage-articles, to execute in his favour a disposition of his estates in Scotland, "for his liferent-use of the rents, profits, and issues of them after the death of Sir Laurence; and in trust *quoad* the fee and property of the lands and estate, for the use and behoof of the sons of the said marriage, and their issue-male;" but subject to certain reservations, and in particular one of "a power and faculty to destinate and carry on the line of succession, and thereby to impose such