GARDENSTON. The demand is, that the clerks be ordained to give up the pieces. As there has been no extract taken, this cannot be done.

ALEMORE. Till the price of extract is paid, the clerk must keep the pieces. Let the petitioners pay, and then bring an action against Sir Robert Pollock for his share of the expense, if such share is exigible by them from him.

On the 30th July 1771, "the Lords found the clerks entitled to retain the pieces, till a certificate of an extract is produced; and therefore refused the petition."

Act. J. M'Laurin. *Alt.* Ilay Campbell.

1771. *January* 22. ALEXANDER GORDON of Culvenan *against* JEAN MACCULLOCH, JAMES DEWAR of Vogrie, &c.

TAILYIE—JUS QUÆSITUM TERTIO.

The proprietor of an estate having duly executed an entail proceeding on a mutual contract, in his own favour, as liferenter, and to his 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 act, alter or revoke the entail to the exclusion of the substitute heirs.

[*Faculty Collection, V.* 300; *Dict.* 15,579.]

AUCHINLECK. The entail in question is nearly as foolish as old *Barholme's* entail: but, if people will play the fool, there is no help for it. We must judge according to the rules of law. When the maker of an entail has reduced himself to the state of a liferenter, and when the institute is reduced to the state of a limited fiar, they can do no more jointly than they can do severally. We might as well say that the institute and the next in the entail, may, by concurring, disappoint the entail. This indeed is more specious than the present case; for these two have a greater interest in the subject than the liferenter and institute have. Many decisions are quoted, but I wish to have seen principles. As to the case of *Lindores*, the entail there was not executed: it lay in the hands of the consignatar for the behoof of all concerned; and, therefore, first of all, for the behoof of the entailer himself. The case of *Balnagown* was determined, as the judgment bears, upon circumstances. How can we find that two men, under fetters, become free by joining together.

MONBODDO. Every settlement of succession by the law of Scotland, however different in form, is of a testamentary nature. It is of the essence of a testament that no man can so bind himself as not to reserve the power of altering. That a deed should be a testament, and yet out of the power of the testator, is a contradiction. Upon the supposition that the entail in question had been the sole work of the father, it would have gone for nothing; but the difficulty is, that the interest in the subject was divided betwixt the father and the

son. Of consequence, neither the one nor the other could alter,—but it does not follow that they cannot alter jointly. When they join, it is the same thing as if the fiar and the liferenter had been the same person: here there is an equivalent to a renunciation by the son in favour of the father. I am clear, however, that this entail cannot be revoked, as being made for an onerous cause. Mrs Gordon might, for herself, renounce any right in the entail, but she could not renounce for her children.

COALSTON. An entail made where the entailer remains fiar, may be altered. Another question, how far it may be altered where the entailer retains only a liferent? I think that the concurrence of the institute is sufficient in such case. An institute, by non-acceptance, may void the entail, why not by renunciation also? Without laying down this rule, I cannot reconcile decisions with principles. This argument relates only to entails made *proprio motu*, not to cases where there is an antecedent obligation, or mutual contract: here there is a mutual contract which cannot be set aside. Mr Gordon, for himself, and children, were as much contractors as Mrs Gordon was. Her consent cannot annihilate the mutual contract.

JUSTICE-CLERK. I have long had an opinion riveted in my mind, that by our law there is a distinction between a disposition and a testament. A testament, without a power to alter, is a contradiction; and yet a man may put prohibition on himself by a disposition or settlement of his land estate in the form of an entail. This maxim is laid down by Hope, Mackenzie, &c., and is, I think, agreeable to principles. Here there is more: still the entailer is reduced to the state of a liferenter, having no power over the estate: The institute is not a fiar at large, but under limitations. How can they two, who have not jointly a power over the estate, jointly set aside the entail? Mrs Gordon could only renounce for herself.

GARDENSTON. In part of my opinion, I have the aid of my brethren; in part I shall probably remain single. With some, I am clear that *voluntas est ambulatoria*; with others, that a liferenter and fiar may alter by their joint act. But I farther think that an entail, made upon a mutual contract between two parties, may be voided by mutual consent, although there be a provision made for heirs; because *unumquodque eodem modo resolvitur quo colligatum est.*

KENNET. I rather incline to think that a man may alter, although he reserved no power; and that the fiar and the liferenter, as in this case, might jointly alter. No decision says the contrary. The decision in the case of *Harden* is strong for my opinion. Nevertheless, we cannot give relief here, for the entail proceeded on a mutual contract. Mrs Gordon could not, by herself, revoke; for both her husband and her children had an interest.

PITFOUR. Many very ingenious arguments have been used to give relief, and I was very ready to be caught by any of them; but I have not been caught. Last wills are plainly out of the question here. It is said "that Barholme has not tied down the institute from giving back the estate to him." There is something plausible in this: but then, there are other parties, there are limitations to heirs of entail, and they have a *jus quæsitum*. Upon this footing all the securities of marriage-contracts stand. The only way to remedy the inconveniency which may hence arise, is by a temporary *salvo*, allowing an alteration

with the consent of certain persons: and yet even this is a precarious and imperfect remedy, for those persons may die. As to the case of *Orbiestoun*, it was rightly decided, but it does not apply to the present question; for there the first institute did not take at all. Neither do the cases of *Harden* and *Balnagown* apply. Various and particular circumstances occurred in both. In the first there was no infeftment; the second cannot be a rule, for the interlocutor itself proceeds upon specialties. Could we give a relief here, it would be too wide a relief, and would reduce the estate to a fee simple. But the House of Lords might authorise a partial or a total sale, and appoint the surplus to be of new entailed. This we cannot do.

PRESIDENT. The question is, Can the Court set aside this entail? I have long thought that a liferenter and a fiar could not jointly alter an entail in which the one has no right of property and the other no more than a limited right. I founded this judgment upon what I learned, when a bystander, in the case of *Balnagown*. It was there said, (by Lord Arniston,) that there was a great difference between personal and real rights. If once a feudal investiture is created, a man cannot alter, for he has no longer in him that estate which is requisite for the purpose of altering. The liferenter cannot, for he has no fee: the fiar cannot, for his fee is limited. There is another question, here, as to the effect of the mutual contract,—and there I have more difficulty. Barholme, by contracting debt, had made it impossible for him to execute the entail effectually: How then could he have been obliged to execute the entail? If by error he has executed it, and the party contracting with him is sensible of the error, and is willing to depart from the entail, what should prevent this? Had there been a declaratory conclusion in the summons, setting forth the circumstances of the case, it might have gone far in the Supreme Court, as it did in the cases of *Maulsley*, *Caringtoun*, and others.

On the 22d January 1771, "The Lords sustained the reasons of reduction of the trust deed, and assoilyied from the reduction of the entail."

Act. A. Lockhart. *Alt.* R. M'Queen. Hearing in presence.

Diss. Kaimes, Gardenston.

1771. *August 25.*—MONBODDO. I have always held, that any gratuitous deed of succession is alterable; and that no man can be creditor to his heir, unless in consequence of a previous deed. It does not move me, that the fee and the liferent are divided here, since both fiar and liferenter concur in altering: but *here* lies the difficulty: The parties to the contract are Barholme, for himself, and as *administrator-in-law for his children*, on the one part; on the other, Mrs Gordon and her family. He became bound to entail his estate on a series of heirs, whereof Jean Macculloch is one. One motive for this was, *the preservation of the family of Barholme;* the onerous cause was, that Mrs Gordon should not oppose the reduction of the old settlement: If the law of Scotland allows one party to stipulate for another, and thereby to acquire a right to another, *here* there is a right acquired to Jean Macculloch, whereof no one can deprive her.

PRESIDENT. My difficulty is from the nature of the transaction. The reduction of the old settlement was a beneficial act for all concerned; more so for the nearest in kin of old Barholme, than for Mrs Gordon, a remoter substitute. Barholme contracts for his children, though the thing was for their interest, independent of any contract. Mrs Gordon had no concern in contracting for them. Mrs Gordon and her family say, We do not desire to keep you bound,—we recal the inhibition, and we leave you at liberty to do what you please. Can Jean Macculloch insist that the contract shall remain binding, though it is ruinous to all concerned? She could not have inhibited, for she was not a party upon that side of the contract.

COALSTON. I am willing to proceed upon two suppositions, both which are very doubtful; 1*st*, That one may alter a tailyie containing clauses irritant and resolutive; 2*dly*, That, when he leaves no more in himself than a liferent, he may alter with consent of the fiar. But all this will not remove the difficulty; for *here* is a tailyie for an onerous cause; here is a *jus quæsitum* to Jean Macculloch: for, by the law of Scotland, one may acquire for another. Mrs Gordon had her own interest and that of her children chiefly in view; yet a contract was made, by which Jean Macculloch also was benefited. How can her right, once constituted, be disappointed? The entail, it is true, is ruinous; but so are many entails where the Court can give no relief.

PITFOUR. It would seem that the appearance of Jean Macculloch is intended for the benefit of the pursuers, yet the argument is fairly stated, and without collusion. The dumb point of law is the obstacle here. Suppose that no tailyie had been made, and that matters had stood *in nudis finibus contractus*, I should have thought that Jean Macculloch could not have forced implement; for that Barholme and his children, whereof Jean Macculloch is one, were the obligants, Mrs Gordon and her children the obligees: but *here* an entail *has* been made; the property is away. If parties forget to reserve a power of alteration, this Court cannot relieve them. During the last century it may have had such a power; *now* it has not. There must, however, be some court which can grant relief; for there cannot be a *right* where there is no *benefit*, or a *wrong* where there is no *remedy*. In such case the Legislature will interpose although we cannot.

GARDENSTON. I do not see a substantial difference between the contract before and after the tailyie: all the parties concerned may still agree to resolve the contract and tailyie.

KENNET. As a tailyie has been made, it is a great question how far the life-renter and fiar can concur, so as to alter effectually.

On the 30th July 1771, "The Lords found that the reduction could not proceed in respect that Mrs Gordon and her family did not insist; but found that Jean Macculloch had a title to defend in the declarator,—that there was a *jus quæsitum* to her by the entail, and assoilyied from the conclusions of the declarator."

Act. H. Dundas. *Alt.* G. Wallace.

No vote. President and Gardenston doubted.