" Young, and remit to the Lord Ordinary to proceed accord-
" ingly. On reclaiming petition, the Court adhered.

1771.

HUTCHISON *v.* REPRESENTATIVES OF JAMES YOUNG, &C. Feb. 9, 1769.

From these interlocutors, so far as they refused to open up the decree under reduction as to the interest of Dr Mackinlay and James Young, and so far as they did not find the appellant entitled to redeem and recover his estate, the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Jas. Williamson, Robt. M'Queen, H. Dalrymple, Jas. Boswell.*

For the Respondents, *Al. Wedderburn.*

[Barholm Entail. Hailes, Dec., Vol. i., p. 432.]

1772.

MACCULLOCH, &C. *v.* MACCULLOCH.

JAMES DEWAR, Esq. of Vogrie; JOHN MACCULLOCH, the Elder; and JOHN MACCULLOCH, the Younger of Barholm, } *Appellants.*

JEAN MACCULLOCH, eldest Daughter of the said John Macculloch of Barholm, the Elder, *Respondent.*

House of Lords, 18th May 1772.

ENTAIL—REVOCATION—CONTRACT AND DISCHARGE.—John Macculloch executed an entail in favour of himself in liferent, and John Macculloch, the younger, his eldest son, and the heirs-male of his body; remainder to the heirs-female of his body; and remainder to other heirs-male named. The entail was recorded, and charter and infeftment followed upon it. Some time thereafter, he, with consent of his son, revoked this entail and sold the estate. Held that the father and son could not, by their joint act and deed of revocation, recall and rescind the entail, or sell the estate of Barholm.

John Macculloch the elder, executed an entail in 1762, of the estate of Barholm in favour of himself for life, and to John Macculloch the younger, his eldest lawful son, and the heirs-male of his body; remainder to the heirs-female of his body, remainder to William Macculloch, his second lawful son, and the heirs-male of his body, and this entail was duly recorded, and charter and infeftment followed. 1762.

There had been a previous entail (1742), but which was brought under reduction; and by a contract in 1751, between John Macculloch of Barholm, on the one part, and Isobel 1751.

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MACCULLOCH, &C. *v.* MACCULLOCH.

Gordon, a sister of Mr Macculloch, with consent of her husband, William Gordon, for themselves and children, on the other part, it was agreed under certain conditions specified, that Isobel (who was the next heir of entail), should not oppose the reduction of the entail 1742, and one of these conditions was, that John Macculloch should execute a new entail in favour of his own issue and their heirs, whom failing, to Isobel and her heirs.

The appellants, John Macculloch, elder and younger, being advised, that by their joint act and consent, they might revoke the entail made by them in 1762, and sell and burden the

Dec. 2, 1769.

estate, they of this date, executed a revocation of the entail, and conveyed the same to James Dewar of Vogrie, the other appellant, in trust, in the first place, for selling a part of the estate for payment of the debts; and, in the next place, to settle the remainder upon the same series of heirs, and to the same uses and purposes as in the entail 1762.

Alexander Gordon, the eldest son of Isobel Gordon, as one of the heirs of entail, brought an action against the appellants for voiding the said revocation and conveyance, and instrument of sasine following thereon. The appellants brought a counter action against the said Alexander Gordon and the other heirs of entail, now existing, for the purpose of having it found and declared that the appellants, John Macculloch, elder and younger, could, by their joint act and deed, *revoke* or *recall* the entail, and sell and dispose of the estate. A third action was also brought at the suit of the appellant, James Dewar, against William Gordon, only child of the aforesaid Alexander Gordon, for declaring that the entail was effectively revoked. These three actions were conjoined; and the Lord Ordinary reported the cause to the Court on memorials.

It was contended by the appellants; 1st, That where a person executes an entail, settling the fee upon the institute, and reserving his own liferent, it is in the power of the maker of such entail, with consent of the institute, to revoke or alter such entail.

2d, That the contract entered into between John Macculloch the elder, and his sister in 1751, cannot bar him and his son from exercising such power of revocation, as it was in effect no more than a promise to settle without an onerous cause, and the terms of that agreement were counteracted by the opposition made to the reduction; in which, notwithstanding, the appellant prevailed.

The Court pronounced the following interlocutor:—"On "report of Lord Stonefield, Ordinary, and having advised

" the memorials of both parties, *hinc inde*, and heard parties' 1772.
" procurators in their own presence thereon, and also advised MACCULLOCH,
" the further memorials for both parties upon the said debate, &c.
" the Lords sustain the reasons of reduction of the revoca- *v.*
" tion made by Mr Macculloch, the elder and younger, of MACCULLOCH.
" Barholm, of the deed of entail of the estate of Barholm Jan. 25, 1772.
" 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 thereon; and, further, they assoilzie Mr Gordon
" of Culvenan, and the other defenders in the processes of
" declarator at Mr Dewar's instance, from the said several
" processes, and decern accordingly."*

After this, judgment was pronounced, Gordon of Culvenan, for himself and infant son, and for his brothers and sisters, executed a revocation and discharge of the contract 1751, in which they consented to the sale of the estate. But the respondent, Jean Macculloch, then appeared in the action, and gave in a reclaiming petition, insisting that the entail could *not* be put an end to by the joint act of the liferenter and fiar. The Lords then pronounced this interlocutor: " In respect of Aug. 3, 1771.
" the discharge and renunciation now produced: Find the de-
" creet of reduction formerly pronounced falls for defect of a
" pursuer. But as to the processes of declarator, sustain the
" defence pleaded for Jean Macculloch, refuse to declare in
" terms thereof, assoilzie, and decern."

Against the interlocutors of 25th January and 3d August 1771, the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—Where settlements are made and delivered to the grantee during the granter's life, it is in the power of them jointly to revoke, alter, and change these settlements. Where such settlements are made with remainders over to remote heirs, and with limitations and prohibitions, they are of the nature of contracts between the granter and grantee. The grantee is bound to the granter so long as he lives, solely for the performance of the condi-

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* NOTE.—The Court, in giving the above judgment, proceeded principally on the first point. On the second point, they seemed to be of opinion that the contract 1751, being a mutual one between John Macculloch, the elder, and his sister and her children, he was thereby barred from doing any act contrary to the covenants of that contract, to the prejudice of her and her issue. For opinions of Judges *vide* Hailes, Dec., vol. i., p 432.

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tions in the settlement; the remoter remainder men have no action against him, so long as the granter lives, who may release him from the conditions and obligations of the settlement, and to whom he may surrender the estate he has received. After the granter's death, the grantee becomes bound to all the remote remainder men to perform and observe the limitations of the settlement, having taken and accepted the estate under these conditions.

2d, The entail in question was made by John Macculloch, the elder, to himself for life, and to John Macculloch, the younger, in fee, with several remainders over, and under several limitations. The granter was under no restriction not to alter; and he and the grantee are both alive, and have jointly revoked this entail, which revocation is valid, agreeable to the principles of the law of Scotland, as well as the decisions of the Court of Session, affirmed by your Lordships.

3d, It does not vary the case, that infeftment was taken on this entail; for, as the law considers the grantee bound solely to the granter during his life, the infeftment will not make that contract broader than it was before. Infeftment upon an entail respects solely the security of creditors, but has no operation whatever in questions between the heirs of entail themselves. There was a charter and infeftment in the case of the Earl of Moray *against* Ross of Balnagown, 17th November 1743, quoted by the appellant, but your Lordships gave no effect to that.

Vide infra, p. 801.

4th, The respondent, Jean Macculloch, is no creditor under the contract 1751; she is no party to it; she is not bound to do or perform any act, nor does any person undertake for her. The party on the one side is John Macculloch, the elder, *solely*. The party on the other side, is Isobel Gordon and her children. These last have all of them released their interest, and discharged the contract, which must now be considered as dissolved and annihilated.

5th, On the supposition that the respondent was a party to the contract, she has forfeited every right or interest she could have claimed under it. The great object was to avoid and set aside old Macculloch's settlements, and the whole parties were taken bound not to give any obstruction or opposition to the action raised by the appellant, John Macculloch, the elder, for that purpose; but the respondent did, in fact, by the aid of her grandmother, give every possible opposition to that suit.

Pleaded for the Respondent.—1st, The appellant, John Macculloch, elder, being, by the entail of 1762, which was

not a voluntary act of his, but a deed executed in consequence of the contracts 1751, reduced to the state of a liferenter, he could not thereafter, either with or without the fiar's joining with him, revoke or annul the entail to the prejudice of the substitutes or persons appointed to take in remainder; and, supposing such power competent when the entail remained personal and incomplete, yet, when recorded in every way required by the Act 1685, relative to entails, there was such a *jus quæsitum* created to the heirs of entail, as could be defeated by no after deed or transaction, and which is corroborated by the inhibition raised upon the contract 1751.

2d, It is an undeniable proposition, that any person who is not under a legal disability, may bind himself personally to the performance of any lawful obligation in favour of any third person, and subject his estate to whatever lawful limitations and conditions he pleases; and the *jus quæsitum*, or right thereby accruing or arising to such third parties, cannot, by any after deed, be revoked or annulled. It is not denied that such would have been the law had John Macculloch, elder, pretended to do this of himself, without the concurrence of his son, the fiar; but the respondent maintains, that as John Macculloch, elder, was reduced to the state of a liferenter, he could neither by himself, nor in concurrence with the fiar, do any thing to the prejudice of the entail; for the fiar being bound, in the strictest manner, to do no deed to the prejudice of the remoter heirs, who, each in their order, have an equal right with himself, it is inconceivable how the junction of these two, the one having no right, the other a limited one, should create a right which had no prior existence; and so it was decided in the case of Sharp *v.* Sharp, 17th January 1631 (Mor. 15,562), and Innes *v.* Innes, 31st December 1695 (Mor. 15,566). The case of Balnagown hinged on specialities. The contract or agreement 1751, was not personal to Isobel Gordon, she having contracted for herself and all the heirs of entail; and her right not being better or stronger than that of any of them, except standing nearer in order of succession; the discharge, therefore, granted by her of the contract 1751, can be of no avail.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *Jas. Montgomery, Al. Wedderburn.*

For the Respondent, *John Dalrymple, Thomas Lockhart.*