[Heard, 31st May. — Judgment, 11th August, 1842.]

THE HONOURABLE ARCHIBALD MACDONALD and OTHERS, Executors of the deceased ALEXANDER WENTWORTH LORD MACDONALD, *Appellants.*

THE RIGHT HONOURABLE GODFREY WILLIAM WENTWORTH LORD MACDONALD, *Respondent.*

Tailzie. — An heir making improvements on lands, possessed by him under an unrecorded entail, is not entitled to the benefit of the act 10 Geo. III. cap. 51, in regard to the cost of the improvements.

Ibid. — The limitation in the 26th section of 10 Geo. III., cap. 51, does not apply to actions in regard to improvements made by an heir possessing under an unrecorded entail.

Res Judicata. — The plea of competent and omitted, has no place against the pursuer of a reduction, in respect of *media concludendi*, different from those on which the original action was founded.

ALEXANDER LORD MACDONALD was proprietor of entailed and unentailed lands — the entailed lands being held by him under an unrecorded entail. In 1800, he intimated to his brother Godfrey, the father of the respondent, and next substitute of entail, his intention of making various improvements on his estates, and making them chargeable against the heirs of entail under the powers given by the 10 Geo. III. cap. 51.

In June 1815 Alexander obtained decree in an action raised by him against his brother Godfrey, declaring that Godfrey, and the next heir of entail entitled to succeed after him, were liable to his heirs and executors, or assignees, in L.9643, being three-fourths of L.12,857, the amount of expenses laid out by him in improving the estates.

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In June, 1824, Alexander died, and was succeeded in his honours and estates, by his brother Godfrey Lord Macdonald.

In 1830, Godfrey brought an action against the appellants, as executors of Alexander, for reducing the decree of June 1815, on these grounds: That it had been obtained in absence—that the statute had not been properly libelled—that evidence of the money expended had not been produced—that the provisions of the statute had not been complied with in many particulars, and that many of the articles of expenditure were not authorized by the statute. That action was dismissed in 1831, by an interlocutor, sustaining a defence that under the 10 Geo. III. cap. 51, the decree of June, 1815, was final, unless appealed against within twelve months of its date.

In October 1832, Godfrey Lord Macdonald died, and was succeeded in his honours and estates, by the respondent.

On the 11th of June, 1836, the respondent put the deed of entail upon record, which to this time had continued to be unrecorded; and in January 1838, he brought an action for reducing the decree of June 1815, upon the several grounds urged in the action, which had been tried by Godfrey Lord Macdonald, and upon the additional ground, which was the *third* reason of reduction in the summons, that the statute 10 Geo. III., cap. 51, did not apply to estates held upon entails not recorded; that therefore the money expended in improvements was not chargeable against the succeeding heirs, and that the decree was "null and inept, "inasmuch as the statute did not apply, and the estate was not "within the scope and provisions thereof, and the action pro-"ceeded, and the decree was obtained on the groundless repre-"sentation of the said Alexander Wentworth Lord Macdonald, "that he was entitled to such decree in terms of the foresaid "statute, and by the wilful concealment from our said Lords "and from the said Godfrey Macdonald, that the alleged deed of "entail had not been recorded, and therefore was not a settle-

" ment of strict entail, to which the foresaid statute is exclusively " applicable."

The pleas in law urged by the respondent in support of this additional ground of reduction were: —

" 1. The entail under which Alexander Wentworth Lord " Macdonald held the lands, not having been recorded during " his lifetime, he was not entitled to avail himself of the provi- " sions of the act 10 Geo. III. chap. 51, which is inapplicable to " any estates, except those held under strict entail executed in " terms of the act 1685, Paget *v.* Earl of Galloway, 24th Feb- " ruary, 1837.

" 2. As the proceedings adopted by Wentworth Lord Macdon- " ald, and the decree following thereon were not authorised by " the act 10 Geo. III. c. 51, but were *ab initio* null and void, the " pursuer is not barred from insisting in the present action of " reduction by the limitation contained in the statute."

The pleas urged by the appellants in defence were: —

" 1. The action is excluded by the decreet pronounced in the " prior action of reduction, which now makes *res judicata* in " favour of the defenders, as the representatives of the late " Alexander Wentworth Lord Macdonald.

" 2. At least this action is now barred by the limiting enactment " in the statute.

" 3. The action and whole reasons of reduction are farther " groundless in themselves, being either unsupported in fact or " irrelevant in law."

The Lord Ordinary, (*Cunninghame,*) after advising cases for the parties, " upon the third reason of reduction, founded on the " non-registration of the entail," pronounced the following interlocutor on the 14th January, 1840 :—" The Lord Ordinary " having heard counsel on the record, and thereafter considered " the revised cases, and whole process: In respect it is either " admitted on record, or otherwise proved by the documents

" produced,—1*mo*, That Wentworth Lord Macdonald succeeded " to the tailzied estates specified in the libel, prior to the year " 1800, and that he possessed them under the tailzie alone, and " never wilfully violated any of the conditions thereof, previous " to his death in 1824; 2*do*, That in or about the year 1800, he " gave notice to his brother Godfrey, afterwards Lord Mac- " donald, then the next heir of tailzie, that he meant to perform " certain permanent ameliorations on the entailed estate, under " the act of 10 Geo. III. cap. 51, and that the said next heir " received the intimation and acknowledged the same as a notice " under the statute; 3*tio*, That the said Wentworth Lord Mac- " donald, for a series of years after the said period lodged annual " accounts of his meliorations, in obedience to the provisions of " the said act; 4*to*, That he obtained a decree of constitution " before this court in 1815, against his said brother and next " heir of tailzie, liquidating his claim for the advances made at " and prior to citation in that action, against which decree the " then defender entered no appeal in terms of the statute; 5*to*, " That the said Wentworth Lord Macdonald was succeeded in " 1824 by his said brother Godfrey, both in the entailed estates " and in the valuable unentailed property; 6*to*, That the said " Godfrey Lord Macdonald never complained of the said decree " on any ground during his brother's life, but soon after his " death he caused an action of reduction of the same to be " raised; which action was dismissed, first by Lord Moncrieff, " Ordinary, and afterwards by the Court, on the 17th day of " February, 1831, against which judgment neither the said " Godfrey Lord Macdonald, nor the present pursuer as his heir, " entered any appeal; 7*mo*, That it was not set forth as a plea " in the said action of reduction, that the prior decree of consti- " tution in 1815 was not authorized by, and did not fall within " the said statute in respect of the non-registration of the tailzie, " but that such plea, if competent, was omitted; 8*vo*, That the

" pursuer, on the whole, has failed to establish any ground on " which he should now be allowed to object, in respect of the non- " registration of the tailzie, to the meliorations constituted by the " said decree forming charges on the said estate, under the said " act. Under these circumstances, finds that the challenge " maintained by the pursuer in the present conjoined actions, in " so far as founded on the non-registration of the tailzie at the " date of the expenditure, is incompetent and irrelevant: " Therefore repels the first and second pleas urged by the " pursuer on record, and decerns; and appoints the cause to be " enrolled *quam primum*, that the other pleas on record may be " discussed."

The respondent reclaimed; and after Lord Probationer Ivory had delivered an opinion at great length, adverse to the interlocutor of the Lord Ordinary, the Court, (*First Division*,) on the 28th May, 1840, altered the Lord Ordinary's interlocutor, by one in these terms: — " The Lords having advised this reclaim- " ing note, and heard counsel for the parties, alter the interlocu- " tor reclaimed against, sustain the third reason of reduction, " and decern; but find no expenses due."

The appeal was against this interlocutor of the Court.

Pemberton and Anderson for the Appellants. — I. The policy of the 10 Geo. III. cap. 51, was to encourage the improvement of land, held under entail, by enabling the heir in possession expending money for that purpose, to charge the heir succeeding him in the lands with the payment of the greatest portion of the money to his representatives. The discouragement to the improvement of lands held under entail, prior to the passing of this statute, lay in the circumstance that the benefit of money spent in that way, might go to a succeeding heir of entail, no way, or distantly, related to the improver, to the prejudice of his own near relatives. This effect

took place equally whether the entail had been put upon record or not — the policy of the statute, therefore, was applicable to both of the cases, and there is nothing in its terms which can make it applicable to the one more than the other. No doubt, the heir, possessing under an unrecorded entail, required to borrow the money to make improvements; he had greater facility in doing so, inasmuch as he had the security of the lands to give to the lender, to whose diligence they would be open; but the great obstacle, which it was the policy of the statute to remove, still remained, the heir's aversion to make improvements out of his own purse, the benefit of which might redound to others. Accordingly, the expression of the 9th section is, that "every proprietor " of an entailed estate," without any qualification as to recording, or otherwise, who lays out money in improving the lands, shall be a creditor to the succeeding heirs of entail, for three-fourths of the amount, and all the other clauses are in the same general and unqualified terms. And the 23d section, by providing that no money expended in the improvements, should be the ground of adjudication of the lands, shews, that lands held under unrecorded entails were in the view of the legislature; for lands held under a recorded entail were, independently of the statute, free from the danger of adjudication.

The preamble of the 10th Geo. III. recites the act 1685, which requires the registration of entail, but that recital had reference only to those changes made in the law regarding questions between heirs of entail and third parties; not questions *inter hæredes* only, for as to them the act 1685 had no operation, Willison, *Mor.* 15369; Hall, *Mor.* 15373. *Ersk.* III. 8. 27. At all events, the enacting parts of the statute make no reference to the act 1685, or to the recording of the entail, and there is sufficient in the enacting clauses to satisfy the reference in the preamble, without making it applicable to the improvement clauses, more especially as these clauses have a special pre-

amble in the 9th section, where no mention is made of the act 1685.

II. If the 10th Geo. III. cap. 51. does not apply to lands possessed under an unrecorded entail, that is a defence which might have been stated against the decree of June, 1815, and which is now barred by the plea of competent and omitted. At all events, the decree of 1831, in Lord Godfrey's action, forms *res judicata* between the parties, and it is not now possible to challenge the decree of June, 1815, upon any ground which might then have been proponed.

III. This ground of reduction is farther excluded by the 26th section of 10 Geo. III. cap. 51, which declares, that decree in the action brought by the heir making the improvement shall be final, unless an appeal be brought within twelve months of its date. If a defence to the action may be brought forward at any distance of time, in the shape of a reduction of the decree, this will go far to do away the whole efficacy of the statute, the policy of which was to hold out an inducement to the making of improvements, that, within a certain limited time, what was done should be beyond the power of challenge; there is no distinction between this ground of challenge, and those founded on non-compliance with the provisions of the statute, in cases under recorded entails. In these last cases, the improvements, it has been argued, were not protected by the statute; but this argument has been disregarded, because the challenge was not made until after expiry of the statutory limitation; so, in the present case, though the provision of the statute may not have been complied with, in regard to recording the entail, and this was a good ground not for reducing the claim of the party making the improvements, but in the language of the statute of "setting it aside," the challenge comes too late to receive effect. Lindsay *v.* Anstruther, 12 *S.*

and *D.* 657; Johnstone *v.* Carlisle, 10 *S.* and *D.* 657; Macdonald *v.* Macdonald, 9 *S.* and *D.* 460.

Solicitor General, and Bruce, for the respondents.— I. The title of the statute 10 Geo. III. cap. 51, is for the improvement of lands held under settlements of "strict entail;" but an unrecorded entail, whatever may be its effect *inter hæredes*, is not a strict entail, or in any way effectual against third parties, *Ersk.* III. 8. 25, Ross *v* Drummond, 14 *S. B.* and *D.* 454. Heirs therefore possessing under an unrecorded entail, did not require the inducements or the protection held out by the statute; it was within their power effectually to burden the lands with the expenses of improvements. Accordingly, the preamble of the statute speaks of tailzies, "completed and published in the manner directed" by the act 1685, and of the impediment to the improvement of the lands, so long as the law allowing "such entails" subsists; and all the enacting clauses, particularly the 15th, are expressed in terms which can only apply to recorded entails, and the 23d section, so far from affording evidence that unrecorded entails were intended to be embraced, does the reverse; for if the statute did so apply, it would work this injustice, that if a creditor, trusting to the absence of any entail upon the record, should lend money to an heir in possession, and he should apply it in improving the estate, the creditor would be exposed to the loss of one-fourth at least of his money, under the clause declaring that only three-fourths should be chargeable against the succeeding heirs, and this twenty-third section prohibiting adjudication; while in another view, the heir succeeding to the party making improvements, might be exposed to this hardship, that after making the improvements, the heir in possession might borrow and expose the lands to eviction, and yet the heir entitled to succeed to him would remain personally liable under the statute for the expenses of the improvements, although the estate was gone from

him. But this question was deliberately determined in favour of the respondent's argument, Paget *v.* Earl of Galloway, 15 *S.* and *D.* 667.

II. Reduction is not barred by the limitation in the 26th section of the statute. The statute only applies to a certain class of persons, and no other therefore can claim the benefit of the limitation. If the party making the improvement is within the class contemplated by the statute, he is within its policy, and professing to act, and ostensibly acting under the statute, those who challenge his acts must do so within the time allowed by the statute, otherwise its object would be defeated, and the encouragement it intended to offer for the expenditure of money would be greatly impaired. But persons like the appellant not coming within the class contemplated by the statute, are not within its policy, and no way protected by its litimation.

III. If the statute does not apply to heirs possessing under unrecorded entails, then the decree of June, 1815, is an ordinary decree, liable to be opened up within the long prescription; and inasmuch as it was obtained in absence, without any pleas in defence having been stated, the plea of competent and omitted cannot have any place; and with regard to this particular ground of reduction not having been taken in the action of reduction brought by Lord Godfrey, competent and omitted has place only against defenders not against pursuers bringing different actions on different *media concludendi*, Paton *v.* Stirling, *Mor.* 12,229; *Ersk.* IV. 3; *Stair.* IV. 40, 16.

LORD CAMPBELL. — My Lords, This was an action of reduction commenced by the present Lord Macdonald, heir of entail of certain estates in Skye and Uist, against the executors of the

late Alexander Lord Macdonald, to set aside a decree obtained by him, in the year 1815, constituting a sum of L.9643, a debt upon the entailed estates, as being three-fourths of certain sums laid out by him upon them in permanent improvements, under statue 10th of George the 3rd, chapter 51, commonly called the Montgomery Act.

The chief ground for the reduction now relied upon, was, that at the time of this charge, the entail had not been recorded, and that the statute does not apply to an unrecorded entail.

Three defences were set up, — First, That the action was brought too late, as by the 26th section of the act the decree became final, there being no appeal against it within twelve months after it was pronounced. — Secondly, That there having been a former action to reduce the decree, in which this ground was not taken, and which failed, the maxim of "competent and omitted" applies, and the plea of *res judicata* is a bar. — Thirdly, That the statute does extend to unrecorded entails.

The Lord Ordinary, Cunninghame, intimated an opinion in favour of the defenders on all these defences. But, on a reclaiming note to the First Division of the Court of Session, they were all overruled, and the reason of reduction that the entail was not recorded, was sustained. The present appeal is against this interlocutor.

The interlocutor is, according to the opinion of Lord Probationer Ivory, who proposed it in a very learned judgment, shewing his high qualifications for the office of judge, and was unanimously concurred in by the Lord President, Lord Gillies, Lord Mackenzie, and Lord Fullerton. The House has taken time to consider, not from any difficulty felt during the argument, but from the great importance of the main question to the law of Scotland, and from due respect to the opinion of so great a judge as Lord Cunninghame. But after the best attention I have been

able to bestow upon the subject, I cannot hesitate to advise your Lordships to affirm the interlocutor appealed against.

First, the limitation in the 26th section of the act is expressly confined to cases where money has been laid out under the authority of the act, and the object of the limitation is declared to be to ascertain definitively the amount of the sums so laid out, so that there may be no dispute upon that subject when material witnesses are dead, "for remedy whereof the decree, if pro- "nounced by the Court of Session, shall be final, if an appeal is "not brought within twelve months." I humbly conceive, my Lords, that this enactment cannot possibly apply to a case where the money has not been laid out under the authority of the act, and there being no dispute as to amount, the ground of reduction is that there was no authority under the statute to charge the entailed estate with any part of the debt.

Secondly, I think the dicta from institutional writers, and the decisions brought before us, are conclusive to shew, that the doctrine of "competent and omitted" applies only to defenders who cannot challenge a judgment regularly pronounced against them, on the ground that there was a defence, which it was competent to them, but which they omitted to set up. With regard to pursuers, on the other hand, in proceedings of this nature, there may be as many actions of reduction as there are *media concludendi*; a pursuer cannot a second time set up a ground of reduction, on which there has been judgment against him. But this is no bar to his bringing a fresh action on a totally different ground of reduction, although both might have been included in the first action.

This brings us therefore to the great question upon the construction of statute 10 Geo. III., chapter 51, and I am of opinion, that the provisions of that statute respecting the burdening of an entailed estate for improvements, do not apply where the entail

had not been recorded. It is impossible to extend them to every entail, for wherever the settlement of an estate, by simple destination departs in any particular from the common law line of descent, without any conditions, forfeitures, or fetters whatsoever, it is, in one sense an entail. But, looking to the title, the preamble and the enactments of the statute, I think it is confined to lands held under "strict entail," and that lands cannot properly be said to be held under "strict entail," where the deed of entail is unrecorded. An unrecorded entail does not seem to have been in the contemplation of the Legislature in passing this act. Where the entail is unrecorded, the estate may be alienated, and the heir of entail may raise what money he pleases upon it for improvements, or any other purpose. If he wishes to have the benefit of the statute, and to raise money without incurring an irritancy, he has only to record the entail. The Legislature meant to relieve proprietors of estates, bound by the fetters of a strict entail, who were precluded from charging it with any debt for any purpose beyond the usual permission expressly given to provide for wives or children.

Great injustice might follow from any other construction of the act, for though it supposes that the proprietor, in the first instance, will lay out his own money in improvements, it likewise supposes that he will assign the security he obtains on the entailed estates; and if the proprietor of an entailed estate, the entail being unrecorded, might obtain the security, and assign it to a person who advances him money upon it, the assignee might be injured by the competition of general creditors, with whom the heir of entail subsequently contracts debts. In practice, it makes no difference whether money is lent to improve, and security is directly given to the lender, or the security is given to the proprietor of the estate, and he assigns it to the lender. The object of the legislature cannot be fully accomplished, unless the person who lends

the money on the faith of the security, has a prior charge as against any subsequent creditors; which he would not have if the entail were unrecorded, and the estate might be adjudged by common process of law.

I therefore think, that in the case of Paget *v.* Lord Galloway, and in this case, the right construction was put upon the statute by the Court below, and that the interlocutor appealed against, should be affirmed with costs.

Lord Brougham. — My Lords, I entirely agree with my noble and learned friend in the view he has taken of this case. He has correctly stated,—my recollection entirely agrees with his,—that it was not so much from any grave doubts we entertained upon the point at the argument, as on account of the authoritative opinion delivered by that most learned and able judge, Lord Cunninghame, (the Lord Ordinary,) whose interlocutor was altered, I believe, by the unanimous concurrence of the other judges, including the very able judge then acting as Probationer, who gave his probationary judgment upon this case.

My Lords, I have the authority of my noble and learned friend the Lord Chancellor, for stating, that he entirely concurs in the view we take of this case, and had he been able to be present, — he is prevented by official duties elsewhere, — he would have concurred entirely in the proposition of my noble and learned friend, that the interlocutor appealed from be affirmed.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed, and that the said interlocutor therein complained of, be, and the same is hereby affirmed. And it is hereby farther ordered, that the appellants do pay, or cause to be paid to the said respondent, the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant. And it is also farther ordered, that unless the costs certified, as aforesaid, shall be

paid to the party entitled to the same, within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills, during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

TILLEARD and SON — HAY and LAW, Agents.

END OF VOL. I.