No. 19. J. M'CULLOCH, and Others, Appellants.—*Adam—Greenshields—Pyper.*

Sir ALEXANDER MUIR M'KENZIE, Bart. Respondent.
*Sol.-Gen. Tindal—A. Bell—Keay.*

*Title to Pursue.*—Held, (affirming the judgment of the Court of Session), 1. That a party pursuing, as heir of entail in possession, a reduction of a sale of part of an entailed estate, sold under a private Act of Parliament and relative decree of the Court of Session, had no title to pursue, in consequence of having made up his titles to and possessed the entailed estate in contravention of the original entail on which he founded his action; and, 2. That the principal pursuer having concluded that the defender should deliver up the lands to the pursuer, as heir of entail in possession, the substitute heirs of entail, who insisted with him in the same summons, were also barred.

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2D DIVISION.
Lord Cringletie.

JOHN M'CULLOCH (who may be called the first) of Barholm, executed certain deeds of settlement of that estate in favour of his grandson, John M'Culloch the second, whom failing, on a certain series of heirs. These deeds John M'Culloch the second (under a contract with his sister) reduced, and executed a strict deed of entail, on the 29th December 1762, which was recorded on the 13th January 1763, granting the lands of Barholm and others, in favours and for new infeftment of the same, 'to be 'made, given, and granted in due and ample form, to me, the 'said John M'Culloch, in liferent, and to John M'Culloch, my 'eldest son, and the heirs-male of his body; whom failing, to 'the heirs-female of his body; whom failing, to William 'M'Culloch, my second lawful son, and the heirs-male of his 'body; whom failing, to the heirs-female of his body; whom 'failing, to Henry M'Culloch, my third lawful son,' and a long series of substitutes. The entail then provided, that 'it shall 'not be lawful to nor in the power of the said John M'Culloch, 'my son, nor any of the heirs of taillie and provision, male or 'female, appointed by me, to alter, innovate, or change this pre-'sent taillie and order of succession before prescribed, or to be 'prescribed by me, by any nomination, or other deeds, as afore-'said, nor to do any other deed that may import or infer any 'alteration, innovation, or change of the same, directly or in-'directly.' Further, the deed, after the prohibitions against selling or contracting debt, required 'that the said John 'M'Culloch, my eldest son, and whole heirs general or of taillie, 'named, or to be named by me, shall possess and enjoy the said 'taillied lands and estate by virtue of this present taillie or no-

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'mination to be made by me, infeftments, rights, and convey-
'ances to follow thereupon, and by no other right or title what-
'ever; and that the said John M'Culloch, my son, and the
'whole heirs general and of taillie, named, and to be named by
'me, shall be obliged to obtain themselves timeously entered,
'infeft, and seized in the said lands and estate, and not to suffer
'the same to lie in non-entry, and also to cause engross and
'verbatim insert the whole order and course of succession here-
'in contained, and to be contained in the nomination to be
'granted by me as aforesaid, and the several conditions, limita-
'tions, provisions, irritancies, and others contained in this pre-
'sent taillie, in the instrument of resignation, charters, and in-
'feftments to follow hereon, and in all subsequent procuratories
'and instruments of resignation, charters, services, retours, pre-
'cepts thereon, precepts and instruments of sasine, and other
'conveyances of the said taillied lands and estate.' It was then declared, that all deeds granted contrary to the prohibitions of the entail shall be void and null; after which there occurred this clause:—'The person or persons contravening, by failing to
'obey the said conditions, or acting contrary to the said prohi-
'bitions, or any of them, shall, for himself or herself only, ipso
'facto amit, lose, and forfeit all right, title, and interest, which
'he or she hath to the said lands and estate; and the same shall
'become void and extinct, and the said taillied lands and estate
'shall devolve, accresce, and belong to the next heir of entail,
'albeit descended of the contravener's own body, in the same
'way as if the contraveners were naturally dead.' On this entail titles were completed in favour of the entailer, John M'Culloch the second, in liferent, and his son, John M'Culloch the third, in fee.

John M'Culloch the second having contracted debts both before and after the completing of this entail, he and his son adopted various methods to defeat it, but unsuccessfully. They then applied to Parliament, and obtained a private Act, for the purpose of selling part of the entailed estate for payment of the debt contracted prior to the completing of the entail; and an action of declarator, sale, and ranking, was thereupon brought in the Court of Session by John M'Culloch the second, John M'Culloch the third, and by the latter as administrator-in-law for Anne M'Culloch, his infant daughter. It is unnecessary to detail the precise steps which followed, but the result was the sale of a large proportion of the estate, of which a considerable

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part was bought by George Muir, (the father of the respondent, Sir Alexander Muir M'Kenzie), who was infeft under a decree of sale in 1777 and 1783.

John M'Culloch the second having died during the dependence of the action, the residue of the estate came to John M'Culloch the third, who, as 'heritable proprietor of the lands 'and others underwritten,' executed, on the 18th January 1791, a procuratory of resignation for new infeftment in the remainder of the estate, 'to be made, given, and granted, in due and am-'ple form, to me the said John M'Culloch in liferent, and to 'John M'Culloch, my eldest lawful son, and the heirs-male of 'his body; whom failing, to the heirs-female of his body; whom 'failing, to James Murray M'Culloch, my second lawful son, 'and the heirs-male of his body; whom failing, to the heirs-'female of his body; whom failing, to William M'Culloch, my 'third lawful son, and the heirs-male of his body; whom failing, 'to the heirs-female of his body,'—and so forth, to his other sons and daughters; and he then called the substitutes in the entail of 1762. A Crown-charter followed on the 13th December, by which the lands were conveyed 'semper cum et 'sub diversis oneribus, conditionibus, provisionibus, restric-'tionibus, limitationibus, clausulis irritan. et resolutivis, reser-'vationibus aliisque content. in literis dispositionibus talliæ, 'lie deed of entail, de data 29no. die mensis Decembris Anno 'Domini 1762, et registrat. in Archivo Talliarum de data 13. 'die mensis, postea script. quarum omnes in resignationis in-'strumento cartis et sasinæ instrumentis super presentibus se-'quend. et in omnibus subsequend. servitiis retornatibus pro-'curatoriis, et resignationis instrumentis, cartis, præceptis, ver-'batim inserendæ sunt, viz.' &c. After which followed verbatim the conditions in the original entail. On this deed infeftment was taken on the 13th of August 1792. At this time John M'Culloch the fourth (the appellant) was a minor, and alleged that he knew nothing about, and had not been consulted as to theso proceedings. On his father's death he entered into possession under the entail of 1791.

In 1823 the appellant, John M'Culloch the fourth, his three daughters, (his only issue), his sister and brother, brought an action against Sir Alexander Muir M'Kenzie, who had succeeded to his father, for the purpose of reducing the above sale in 1777 and 1783, and recovering the lands. The summons called for production of the whole procedure in the declarator, sale, and ranking, with the titles made up to those

parts of the estate acquired by George Muir, 'with the whole 'grounds and warrants whereupon the same proceeded, made 'and granted or conceived in favour of the said defender, or his 'predecessors or authors, or obtained by him or them, or at his or 'their instance, or to which he or they may have acquired right, 'and by, on, or through which the defender may found any 'claim, right, title, or interest, mediate or immediate, direct or 'indirect, any wise affecting or relative to the lands and other 'subjects before described, and sold in the said process of de-'clarator and sale as aforesaid, or which may any wise affect the 'lands and other subjects which belonged to the said deceased 'John M'Culloch of Barholm, the grandfather of the pursuer; 'to answer at the instance of John M'Culloch, residing at Bar-'holm-house, who is heir of entail of the lands and other subjects 'underwritten, in virtue of a contract entered into betwixt the 'deceased John M'Culloch of Barholm, grandfather of the pur-'suer the said John M'Culloch, on the one part, and Mrs 'Isobel M'Culloch or Gordon, of Culvennan, on the other part, 'dated the 1st and 6th days of March 1751 years; and also in 'virtue of a deed of taillie executed by the said deceased John 'M'Culloch on the 29th day of December 1762 years, and re-'corded in the Register of Taillies on 13th day of January 1763 'years, and who stands duly infeft as heir of entail in the said 'estate of Barholm, conform to charter of resignation and novo-'damus in favour of the now deceased John M'Culloch, last of 'Barholm, the pursuer's father, in liferent, and of the said pur-'suer, his eldest lawful son, in fee, under the seal appointed by 'the treaty of Union to be kept and used in Scotland in place 'of the Great Seal thereof, dated the 13th day of December 1791 'years, and written to the seal, and registered and sealed the '27th day of January 1792 years, and the instrument of sasine 'following upon the charter in favour of the pursuer's said 'father and himself, dated the 13th day of August 1792 years, 'and recorded in the General Register of Sasines, &c. at Edin-'burgh the 1st day of October same year. And also our 'other lovites, (viz. his three daughters, his brother and sister, 'by name), all substitute heirs of entail of the said estate of 'Barholm, with concourse,' &c. Various allegations as to fraud and irregularity in the proceedings were then introduced into the summons, which it is unnecessary to detail, as the question ultimately turned on the title of the pursuers to insist in the action as libelled. It is sufficient to state, that they resolved into charges of a collusive arrangement to defeat the rights of the heirs

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of entail under the deed 1762, by rearing up debts which either had no existence, or were not debts entitled to the protection of the statute, and selling, for the benefit of the heir in possession, part of the estates, which might and ought to have been preserved,—of wilful and mala fide neglect of the provisions of the statute, and of legal forms—particularly not calling the proper parties, who were minors. The summons then concluded, that the whole writs and documents should be reduced; 'and being 'so reduced, improven, and set aside, it ought and should be 'found and declared, by decree aforesaid, that the pursuer, the 'said John M'Culloch, has the only good and undoubted right and 'title, not only to the whole of the said lands and others which 'were sold in the said action of declarator and sale, and to which 'the defender now pretends to have right, but also to possess the 'same, and to uplift the rents, maills and duties, profits and 'produce thereof, in terms and under limitations and conditions 'of the said deed of entail in all points, and that the defender 'has no right thereto,' &c. Then there was a conclusion for removing, 'to the effect that the pursuer, the said John M'Culloch, 'and the succeeding heirs of entail, by themselves, their servants, 'cottars, tenants, and others foresaid, may enter thereto, and 'possess, labour, bruik and enjoy the same, and dispose there-'of at pleasure, in so far as is consistent with the said deed of 'taillie, in all time coming.' And farther, that the defender should be ordained 'to discharge and renounce in favour of the 'pursuer, and the other heirs of entail of the foresaid estate of 'Barholm, any pretended right he has to, or grounds of debt and 'diligences against the said subjects, &c. and to deliver up the 'same, and any writs and evidents he has of and concerning the 'said subjects, to the said John M'Culloch, pursuer, as heir of 'entail in possession aforesaid.'

A similar action was raised against other parties who had acquired right to other portions of the estate in the like manner.

Sir Alexander Muir M'Kenzie gave in preliminary defences, which were overruled, under reservation of all objections to the pursuers' title, in so far as they might be blended with, or might arise out of the discussion of the merits of the cause:* And certain procedure took place, which it was alleged, de-

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* The Lord Ordinary found Sir Alexander liable in the previous expenses, (except of the summons); but the Court altered, and reserved entire all question of expenses hinc inde till the final issue of the cause. This point was also appealed.

prived him of the right to an objection which he afterwards stated. That objection was, that as the pursuer, John M'Culloch, founded his title to pursue on the entail of 1791, and the relative sasine in his favour, and insisted for reduction on the ground that the sale had been made in violation of the entail 1762; and as the entail 1791 called the daughter of the pursuer in preference to his brother, contrary to the entail 1762, and, therefore, was in contravention of that entail, the pursuer was not entitled to insist in the reduction. The Lord Ordinary appointed informations to the Court, and their Lordships, on the 17th May 1826, found, 'that the pursuer, John M'Culloch, 'by accepting and making up titles under the procuratory of 'resignation dated the 18th January 1791, which alters the des- 'tination and order of succession prescribed by the deed of 'taillie 1762, and therefore imports a contravention of that 'taillie, cannot maintain this action, founded on the provisions 'thereof; and, that the other pursuers cannot insist in the 'conclusions, either reductive or declaratory, of the libel for his 'benefit; and therefore sustained the objection to the title of 'the pursuers, assoilzied the defender, and decerned, with ex- 'penses since 8th March 1825.'* July 28. 1828.

The pursuers appealed.

*Appellants.*—1. The defence which the Court sustained was raised too late. A defender cannot offer first one and then another dilatory defence, but must make them all at once. But the respondent's dilatory defences had all been already disposed of, and of these the present did not form a part.

2. But the defence has no solid foundation. The appellant, John M'Culloch the fourth, has two distinct and independent titles to pursue:—1. The entail of 1762: Under it an effectual and indefeasible right, a jus crediti, vested in him ipso jure the moment he was born. On this entail the appellant founded: to it he referred for his character of heir of entail; and on it he claimed the right he is vindicating. The summons merely mentioned the charter 1791 and sasine 1792, in order to shew that the appellant is heir of entail at present in possession.† 2. Under the

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* See 4. Shaw and Dunlop, No. 377. p. 598.

† In support of this plea, the appellant referred to the instance of the summons, (ante, p. 355.), and to the fourth reason of reduction. 'Quarto, The foresaid deed of 'taillie, granted by the said deceased John M'Culloch, elder, on the 29th day of

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private statute: It was there enacted, that all the substitute heirs of entail in being at the time should be called as defenders, and if they were not, each heir can insist in a reduction of the sale.

3. But even if the title under the entail 1792 had been different from the title under the entail 1762, that is jus tertii to the respondent. No doubt each substitute heir of entail may protect his right from infringement by the act of the heir in possession; but the substitute heirs need not make the challenge unless they please, and if they do not, no other person can. The cases of Little Gilmour, and Gordon, were marked by the specialty (which does not occur here) that the contravener forfeited for his descendants; and, in pronouncing these judgments, the Court overlooked the judgment in the House of Lords in the case of the Duke of Roxburghe. Even, however, if there had been a contravention pleadable by others than the heirs of entail, it can have no effect until declared by decree of the Court to have been incurred. But there was no contravention. The destination in the title of 1792 corresponded with the destination in the entail 1762. If an heir-male of the body be called, no person can take who is not an heir, a male, and of the body. But the appellant's brother, alleged by the respondent to be preferred by the deed of entail 1762 to the appellant's daughters, although a male, and of the body, is not the heir. The instant the appellant dies, then the heirs-male of the body of John M'Culloch the third are extinct, and the appellant's daughters come in, both as heirs-female of John the third, and of the appellant, John the fourth. The whole tenor of the deed of 1762 demonstrates that this construction is correct. The entailer never could intend to put the institute in a more unfavourable situation than the substitute. At all events, even if there has been a contravention on the part of the appellant, John M'Culloch, there has been none on the part of the other appellants, the next heirs substitute, and therefore they have sufficient title to insist in the action. The title vests in them at their birth, and it is of no consequence whether they be near or remote. It is a mistake to suppose that the other appellants insist for John M'Culloch's

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'December 1732 years, was a valid, complete, and effectual, and also an onerous 'deed, &c.; and also entitles the pursuers, and all other substitute heirs under it, to 'insist for reduction of every thing done, act committed, or deed granted, incon-'sistent, or in any degree at variance, with the said deed of taillie, or in contravention 'or violation thereof; and in particular, the whole foresaid process, sales, and other 'proceedings, and the subsequent conveyances and transmission of the parts of the 'estate of Barholm, sold as aforesaid.'

benefit. It is sufficient that they have an interest, and it is of no consequence that it may first, and for a time, be beneficial to the heir at present in possession. July 28. 1828.

*Respondent.*—1. There is no foundation for the allegation, that the plea maintained by the respondent is too late. All objections to the title were reserved, and the present one was therefore stated in time. It is indeed not properly a dilatory defence, because it goes directly to the merits; for if the appellant has no title to found on the entail of 1762, then the respondent's right cannot be challenged.

2. The entail of 1762 called the heirs-male of John the third, the institute, in preference to the heirs-female. But the appellant's brothers are the heirs-male of John the third, and must come in before the appellant's daughters. The entail, therefore, of 1792 is a direct contravention of the entail 1762. This contravention is admitted in the very summons raised to protect the provision of the entail 1762, thus confessing the vice in the appellant's title. It is true, that a party having two titles in his person, may possess on both, but only where they are not inconsistent with one another. But here it is declared, that the heir shall possess upon a particular title, and no other; and if, nevertheless, the heir makes up a different title, he cannot ascribe his possession to the entail excluding the other title. Now, the appellants found, as their title, on the entail of 1792, on which they have been infeft, and which is in direct contravention of that of 1762. It is absurd to pretend, that a person cannot hold the character of heir-male without being also heir of line; and therefore, the attempt to shew that there is truly no inconsistency between the titles necessarily fails. But if the deed of 1792 is inconsistent with, and in contravention of the entail of 1762, then the appellant, John M'Culloch, is a contravener, has forfeited his right under the entail, and holds at variance with it all that remains of the estate. He has therefore disclaimed that entail as the estate of his possession. But if so, how can he found on that entail for the purpose of affecting the rights of parties dealing with a former heir? His summons is grounded on the alleged contravention, by his father and grandfather, of the provisions of the entail 1762. But all the appellant's right under that entail is not only forfeited, but abandoned. The cases of Little Gilmour, and Gordon, rule this case. The previous case of Roxburghe proceeded on the supposed impossibility of enforcing a resolutive clause after the death of the contravener. But the appellant is himself the contravener.

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3. The plea of jus tertii does not apply. The respondent is not attempting to lead evidence of contravention to destroy the appellant's title to the estate, but is defending himself from a challenge on an entail which the appellant has disclaimed. If the appellant will enforce fetters, the question necessarily arises, Whether he has a title to found on these fetters or not? The concurrence of the other substitutes does not correct the evil. The contravention by John M'Culloch the fourth is confessed on the face of the summons, and he concludes, that the lands sought to be recovered may be restored to him, *i. e.* to the contravener. The only true result of the concurrence therefore is, that these substitutes having adopted his disclamation of the entail 1762, do not invalidate his title, but destroy their own. It is not necessary to have the irritancy declared by a decree of the Court, for the irritancy is set forth in the summons itself. The appellant may, or may not, be able to purge the irritancy; that, however, is not hujus loci. But independent of these considerations, the appellant, by accepting from his father a procuratory of resignation inconsistent with the entail 1762, and possessing on titles made up on that procuratory, has rendered himself liable for all the debts and obligations of his father, and is thus barred from reducing a sale, which, as his father's representative, he is bound to warrant. If the sales were brought about by the fraudulent contrivance of John the third, he could not have reduced them; and neither can his representative the appellant.

The House of Lords ordered and adjudged, 'that the appeal 'be dismissed, and the interlocutors complained of be affirmed.'

LORD CHANCELLOR.—My Lords, In the case in which M'Culloch is the appellant, and Sir Alexander M'Kenzie the respondent, and which was argued some time ago at your Lordships' Bar, the facts, as far as is necessary to state them to render intelligible the judgment I shall recommend to your Lordships to pronounce, may be stated in a very short compass. A person of the name of John M'Culloch, who, in these papers, is designated as John M'Culloch the second, in the year 1762 made a settlement of the estate of Barholm, in Scotland. By it the estate was limited to himself in liferent, and then to his eldest son, and the heirs-male of his body; whom failing, to the heirs-female of his body; whom failing, to the entailer's second son, and the heirs-male of his body, and so on. That settlement contains all the strict clauses usual in deeds of entail. It provided, 'That it shall not be law-'ful to, nor in the power of the said John M'Culloch, my son, nor any 'of the heirs of taillie,' &c. It farther went on to state, 'That the

'said John M'Culloch, my eldest son, and whole heirs, general or of 'taillie,' &c.; and farther, 'That the person or persons contravening,' &c. So that your Lordships find, that which I have before stated, that all the strict clauses inserted in deeds of this description were introduced into this settlement in the year 1762. July 28. 1828.

In the year 1791 or 1792, John M'Culloch, who is described in these proceedings as John M'Culloch the third, made a new settlement of the greater part of this property. The reason why the settlement did not extend to the whole of the property was, that a part of it had been alienated, to which I shall by and bye refer. In that settlement, John M'Culloch the third settled the property upon himself in liferent, then upon his eldest son, and the heirs-male of his body; whom failing, upon the heirs-female of his body; whom failing, upon his second son, and the heirs-male of his body; whom failing, upon the heirs-female of his body, and so on. My Lords, it is quite obvious, in the first instance, on looking at that settlement, which was made by virtue of a charter of resignation and infeftment thereon, that the provisions of that settlement were completely inconsistent and at variance with the instrument of 1762. By the settlement of the year 1762, the brothers of the present appellant, who was the son of the third John M'Culloch, were to take before any female descendant of the present appellant was to take; whereas by the settlement of the year 1792 it was provided, that the line of female heirs should come in earlier. It is quite plain, therefore, that the terms of the provisions of the settlement of 1792, were directly inconsistent with, and at variance with the terms of the settlement of 1762; and by the terms of the settlement in 1762, any party taking under that settlement, would, by contravening the provisions of that settlement, incur a forfeiture.

In the interval between 1762 and 1792, John M'Culloch the second, and John M'Culloch the third, conferred together for the purpose of disposing of a part of the property: that property was disposed of under the authority of a private Act of Parliament, and under the authority of one of the Courts in Scotland. It is submitted by the present appellant, that that disposition of the property was irregular and improper—irregular in point of form—and improper, in as much as there was fraud, as far as related to the vender, mixed up with it. The property was sold to Mr Muir, the father of the present respondent; but with respect to the merits of that sale and disposition of the property, we have at present no concern. For the question now before your Lordships for your decision, is not as to the merits of that disposition of the property, which will have to be considered, or may be considered in some future proceeding; but the question is, whether, on a title so acquired, the pursuer, who is the present appellant, has a right to proceed in this action?

My Lords,—If we look at the summons and to the nature of the case, the point is substantially this: The party who is the pursuer in the action, is complaining that his father, holding under the deed of taillie of

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the year 1762, appropriated and improperly disposed of a part of the property; but in setting out the title of the pursuer, although he refers to the deed of 1762, he refers also to the charter of resignation and the new infeftment taken in the year 1792; which new infeftment in its terms and provisions is utterly inconsistent with, and at variance with the terms of the settlement of 1762. How then is it possible for a person, setting out a title under the settlement 1792, which is utterly inconsistent with, and at variance with the settlement of the year 1762, and which is a contravention of the terms and provisions in that settlement, to complain of any thing that was done under the settlement of 1762, by persons claiming under that settlement, and having a title under that settlement?

The answer to this objection, which has been in the first instance stated by the present appellant, is, that the objection came too late; that it was a mere dilatory defence; and being a mere dilatory defence, the party attempting to avail himself of that defence, was out of time. But, my Lords, when we come to look at the nature of the defence, it is not a mere dilatory defence, but, as one of the Judges in the Court below stated, it goes to the merits, as far as relates to the present claim; for the effect and object of it is, the destroying the title under which the appellant comes into Court, to endeavour to recover possession of this property from the respondent. I think it is sufficient to refer to that observation to satisfy your Lordships, that it is not a mere dilatory defence, so as to deprive the defender of the right to avail himself of it.

Another observation was, that there was in fact no difference between the destination of the estate under the settlement of 1762, and the destination of the estate under the settlement 1792. I have already stated to your Lordships what I conceive to be the esential difference between these two settlements,—that the brother is postponed for the purpose of interposing another line of heirs, who would take the estate he would have enjoyed under the settlement of 1762. We heard in the course of the argument a great variety of cases cited; a few from the law of Scotland, but many more from the law of England, said to be well suited to the purpose of shewing that there was in fact no difference between these destinations. I attended to these cases at the time; I have referred to them since; and I think I may say, without speaking disrespectfully of the gentlemen who cited them, that they appear to me to have no bearing upon the present case; and the reference to them has arisen from a misapprehension of the question. I am quite satisfied that the settlement of 1792 is inconsistent with, and directly at variance with the settlement of 1762; and that, my Lords, brings us to the principal question that was intended to be agitated, and the principal question which, in point of fact, was agitated at the Bar in the course of the argument of this case; namely, whether the respondent has a right to avail himself of this defence? The argument at the Bar was this, and it is the argument in the papers

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on your Lordships' table, that the respondent is a stranger to these deeds and this settlement; and that, being a stranger to these deeds and this settlement, he has no right to interpose to object; that any person who claims under the original entail may avail himself of these objections, but that a stranger has no right to come in to avail himself of these objections. In fact, that it results to that which is called jus tertii. My Lords, that appears to me a misapprehension of the case; we have only to look at the summons to see that the respondent has a right to avail himself of this objection. He is standing in a Court of Justice as a defender; the plaintiff is seeking to deprive the defender of his property, which his father purchased from one of the ancestors of the present appellant. The defender says, 'before you have a right 'to take from me this property, you must make out your title; you 'must shew by what right and title you claim.' The defender has a right, therefore, to look at the summons, for the purpose of seeing what is the title set out in the summons,—what is the nature of the title on which the pursuer insists; and he finds a title of this description: Reference is made to an entail in the year 1762; the parties holding under that entail sold the property. The complaint is, that that property was improperly disposed of,—improperly sold: the party making the complaint claims the estate, not under the settlement of the year 1762, but under the settlement of the year 1792, a settlement totally at variance in its provisions with the settlement of the year 1762. By the new settlement of the year 1792, he has taken the property in new terms; he has entirely disclaimed the settlement of the year 1762. According to the language of the instrument, he is a contravener of that settlement; he does not hold under that settlement, but holds under the settlement of the year 1792. How can he, then, claiming his title under the settlement of the year 1792, and disclaiming to hold under the instrument of the year 1762, complain of what was done by a party under the settlement of 1762, before his the complainer's title under the settlement of 1792 took its rise? And, my Lords, this is quite clear when you come to look to the terms of the summons. It concludes, 'to deliver up the same,' the land, 'and any writs and evidents 'he has of and concerning the said subjects, to the said John M'Cul-'loch, pursuer, as heir of entail in possession as aforesaid;' that is, which he is in possession of as heir of entail under the settlement of 1792: That is his title; the one made up in the year 1792, and made in contravention of the former settlement; and he claims that the property, in the terms of the summons, may be delivered to him, 'as heir 'of entail in possession as aforesaid,' which is as heir of entail under the deed of 1792, and not as heir of entail under the deed of 1762. It appears to me he can have no right to recover this property.

My Lords,—There were two cases stated at the Bar, one the case of Little Gilmour, and another the case of Gordon of Carleton; one of which was, I think, as far back as the year 1749, and the other in the year 1801; both of which in point of principle, when they come to be

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considered, apply to and support the judgment in the present case. There were cases cited on the other side, which when they come to be sifted and examined, and minutely investigated, are different in principle, and different in their facts, from that now before your Lordships; and under these circumstances, as far as relates to Mr M'Culloch's title to pursue, I think your Lordships will have no difficulty in concurring in the judgment of the Court below.

But, my Lords, it is said, though Mr M'Culloch himself may have no right to pursue, the other persons who are co-plaintiffs with him have that right, they being substitutes in the entail. But if your Lordships look at the summons, to which they are parties, it appears that they in fact adopt, as far as this cause is concerned, that which is done by Mr M'Culloch. They adopt his disclaimer of the original settlement of the year 1762, and join in that prayer in the summons to which I have directed your Lordships' attention, and (which is material to be considered) that the property may be delivered up to the pursuer as heir of entail in possession under the deed of 1792; and therefore, I apprehend, the Court were perfectly correct in considering that the situation in which these other pursuers stood, did not differ from the situation in which Mr John M'Culloch himself stood. It is on these grounds that I would humbly submit to your Lordships the propriety of affirming the judgment of the Court below. It is proper that I should state to your Lordships, that it was the unanimous judgment of the Court, after much argument and deliberation. It was stated at the Bar, as I observe it was also in the speeches of one of the learned Judges, that a similar case was at the time depending in the other Division of the Court of Session. That, I am informed, has been since decided conformably to the decision of this case.* I think, therefore, that your Lordships will have no difficulty in affirming this decision.

*Appellants' Authorities.*—4. Ersk. 1. 67.; Simpson, Jan. 6. 1697, (15,353.); Irvine, Jan. 1723, (15,369.); Dundas, Nov. 29. 1774, (15,430.); 3. Ersk. 8. 32.; Lord Ballenden, Jan. 12. 1698, (7811.); Lord Ballenden, Feb. 3. 1702, (7816.); Duke of Roxburghe, March 5. 1734, (Craigie and Stewart's Ap. Cases, No. 27. p. 126.); Campbell, Feb. 5. 1760, (7783.); Creditors of Cromarty, Feb. 25. 1762, (15,417.) Turner, Nov. 17. 1807, (App. voce Taillie, No. 16.); 2. Ersk. 5. 25.; Hamilton, July 23. 1748, (7281.); Ross, Nov. 18. 1766, (7289.); Bargany, March 27. 1739, (Craigie and Stewart's Ap. Cases, vol. i. p. 237., and English Authorities quoted in the papers of that case).

*Respondent's Authorities.*—Little Gilmour, March 6. 1801, (App. voce Taillie, No. 9.); Gordon of Carleton, Nov. 14. 1749, (15,384.); Cromarty, Feb. 25. 1762, (15,417.).

FRASER—RICHARDSON and CONNELL,—Solicitors.

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* His Lordship was understood to refer to the case of Dickson *v.* Cunninghame, in which all the Judges were consulted, and whose opinions were laid before his Lordship; but the case was not at this time decided, judgment having been delayed till the result of the case of M'Culloch should be learned.—See 7. Shaw and Dunlop, No. 257. p. 503.; 3d March 1829.