LORD COLONSAY.—My Lords, the views which I entertain upon this case both as regards the true meaning and construction of these issues, and as regards the exceptions which have been taken to the charge of the learned Judge, have been so fully stated by my noble and learned friends who have preceded me, that I do not think it necessary to make any addition to their statement. I think that, as regards the exception, the moment it is held, that the fourth exception must be disallowed, it follows almost of necessity from that itself, that the fifth exception cannot be maintained, because in that case the appellants would be required to shew what directions should have been given, that would be consistent with their contentions in this case. Any directions that could have been given consistently with the views which have been expressed by my noble and learned friends, and in which I entirely concur, must have been directions to the jury, not tending in favour of the appellants, but additional directions leading towards the verdict which the jury did find. I therefore concur entirely in the affirmance of the interlocutors complained of.

Interlocutors affirmed, and appeal dismissed with costs.

Appellants' Agents, White-Millar and Robson, S.S.C.; Simson and Wakeford, Westminster. —*Respondents' Solicitors*, Henry and Shiress, S.S.C.; W. and H. P. Sharp, Gresham House, London.

MARCH 30, 1868.

J. A. G. C. CAMPBELL of Glentalloch, *Appellant*, *v.* The EARL OF DALHOUSIE, and Others, Trustees of the late Marquis of Breadalbane, *Respondents*.

(*Two Appeals.*)

Entail — Improvements — Montgomery Act — Rutherfurd Act — Election — Signature of Heir's Accounts by Executors — Form of Decree — *B., while heir of entail in possession, expended moneys in improvements amounting to £25,000, and obtained decrees in his lifetime against the next succeeding heir; but whereas in 1859 he charged £20,000, part of the amount, by bond of annualrent on the estate, under the Rutherfurd Act, he had taken no steps to charge the remaining £5000, when he died three years afterwards.*

As to another expenditure for improvements, amounting to £3891, between 1861 and 1862, B. had not subscribed the accounts so as to charge the next heir, and B. died three days before Martinmas 1862. His executors then subscribed the requisite accounts and took the usual steps under the Montgomery Act.

In actions of declarator to ascertain the rights of parties:

HELD (partly varying judgment), (1.) *Where the next collateral heir has been duly called in the action raised by the heir in possession for a decree to charge improvements, all the heirs of entail are thereby bound, and the decree is final;* (2.) *where the decree on the face of it shews, that it is for entail improvements, conform to the Act 10 Geo. III. c. 51, it cannot be afterwards impeached on the ground, that the nature of the improvements is not set forth in such decree;* (3.) *if the heir in possession has, under the Rutherfurd Act 11 and 12 Vict. c. 36, charged part of the sums on the estate, he has thereby made his election, and cannot afterwards resort to the aid of the Montgomery Act to complete his claim against the next heir; but the sole remedy for the balance must be sought under the Rutherfurd Act;* (4.) *where the heir in possession, in the course of making improvements, has died before Martinmas without subscribing the accounts for improvemente, his executors may do so after his death, and recover the amount from the next heir.*[1]

First Appeal.

This was an action by the executors of the late Marquis of Breadalbane against the next succeeding heir of entail (1.) for a sum of £5202 16*s.* 2*d.*, being the balance of a total sum of £25,202 16*s.* 2*d.*, contained in five decrees under the Montgomery Act; (2.) for a sum of £21,354 16*s.*, being the amount of a sixth decree.

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[1] See previous reports 4 Macph. 775, 790; 38 Sc. Jur. 414-7. S. C. L. R. 1 Sc. Ap. 259; 6 Macph. H.L. 43; 40 S. Jur. 446.

As to the first item, the Marquis had charged by bond of annualrent £20,000 during his lifetime, viz. in 1859, but he had taken no steps to charge the remaining £5000 when he died, in 1862.

The defenders pleaded various pleas, of which the chief was, that the granting of a bond of annualrent for £20,000, and his failure to take further steps, operated as a discharge of the remaining £5000.

The Court, adhering to Lord Ormidale's interlocutor, (Lord Deas dissenting,) held, that the action was well founded, and repelled the pleas of the defenders, who now appealed.

Sir R. Palmer Q.C., *Mellish* Q.C., and *Young*, for the appellant.—The decrees obtained did not state what the improvements were, so that it might be seen they were within the Statute, and therefore they are void. The decrees, being *ex facie* void, are not made valid by the 26th section of the Montgomery Act—*Stirling's Trustees* v. *Stirling*, 24 D. 993. At all events, it was competent for the defenders to prove by evidence, that they were not improvements. The decrees do not purport, that the accounts were ever examined by the Court with a view to see whether the improvements were within the Statute. The conduct of the Marquis in so long neglecting to sue for the £5000 amounts to an abandonment—*Breadalbane's Trustees* v. *Breadalbane*, 4 D. 1259.

Lord Advocate (Gordon), and *Watson*, for the respondents.—The decrees are not invalid, and cannot now be impeached for irregularities—L. *Macdonald* v. *Macdonald*, 9 S. 460; *Lindsay* v. *Anstruther*, 12 S. 657. If it were alleged, that the decrees had been obtained by false and fraudulent representations, it might be different—*Macpherson* v. *Tytler*, 1 D. 718. This is not a case of the decrees being *ex facie* void, as was the case of *Stirling's Trustees* v. *Stirling*, 24 D. 996. A decree under this Statute has been held good, though it described the wrong heir—*Campbell* v. *Walker*, 3 Macph. 195. The proceeding under 11 and 12 Vict. c. 36, to charge the estate with a bond for the whole amount, was no abandonment of the residue, for that Act is an enabling Act, and does not alter the rights of parties.

Second Appeal.

This action was raised by the trustees and executors of the late Marquis of Breadalbane against John Alexander Gavin Campbell of Glenfalloch, the heir of entail, concluding for (1.) declarator, that, between Martinmas 1861 and 8th November 1862, the late Marquis expended, under the Statute 10 Geo. III. c. 51, sums amounting to £3891 17*s.* 1*d.*, three fourths of which, amounting to £2918 17*s.* 9¾*d.*, should be a debt against the succeeding heirs of entail; (2.) for payment of the said sum of £2918 17*s.* 9¾*d.*, with interest from the term at which the defender's right to the estates commenced.

The late Marquis died on 8th November 1862, three days before Martinmas, and the accounts had not been subscribed by him, but by the pursuers, his executors.

The defender relied, *inter alia*, on the plea that, as neither of the accounts had been signed by the late Marquis as required by 10 Geo. III. c. 51, no liability accrued for these improvements. The Lord Ordinary held the signature by the executors insufficient; but on reclaiming note the First Division recalled the interlocutor and repelled the plea.

The 10 Geo. III. c. 51, § 12, enacts, that the proprietor who lays out money, etc., shall annually, within four months after Martinmas, lodge with the Sheriff an account subscribed by him, with vouchers.

The defender appealed to the House of Lords.

Sir R. Palmer Q.C., *Mellish* Q.C., and *Young*, for the appellant.—The Statute 10 Geo. III. c. 51, § 12, is an enabling Act, and must be strictly complied with, inasmuch as it confers a power on the heir in possession to charge a succeeding heir. The Statute 1696, § 15, as to signature, has been held to be imperative—*Whitehead* v. *Galbraith*, 31 Sc. Jur. 425, *ante*, p. 1068. The 11th section of 10 Geo. III. as to notice before commencing improvements, has also been held imperative—*Thomson* v. *Mowat*, 3 S. 385; *Craufurd* v. *Torrance*, 2 W. S. 429. The case of *Fraser* v. *Fraser*, 14 S. 89, relied upon by the other side, was not applicable; but if it was, it was overruled by *Fraser* v. *Lovat*, 2 D. 684. The act must be done in the lifetime of the heir in possession, and cannot be supplied afterwards—*Robertson v. Robertson*, 2 Macph. 1178.

Lord Advocate (Gordon), and *Watson*, for the respondents.—The strict construction of the Statute relied upon is unnecessary, the object being merely to secure the authentication of the accounts. It was not necessary to hold, that this act on the part of the heir in possession was intended to be personal, for subscription by a factor has been held to satisfy the Statute—*Fraser* v. *Fraser*, 14 S. 89; *Stirling's Trustees* v. *Stirling*, 24 D. 993. Subscription by the representatives has also been held sufficient, and the case of *Hopkins, Petitioner*, 13 D. 958, is precisely in point.

LORD CHANCELLOR CAIRNS.—My Lords, these two appeals raise some questions which are

of importance to the parties, but which do not, as it appears to me, present any difficulty as to the conclusion at which your Lordships should arrive.

The questions may be conveniently divided into four—three arising out of the first appeal, and one out of the second.

With regard to *the first* of these four *questions*, your Lordships have to consider what is the meaning and the effect of the Montgomery Act, the 10 Geo. III. c. 51. Under that Statute the heir of entail who proposed to execute improvements was to give to the parties who might succeed him certain notices of his intention to execute the improvements; and then if, after the improvements were executed, he desired in his lifetime, while the evidence was fresh in the minds of those who could speak to the expenditure, to have a judicial certificate for the same, provision was made for his obtaining a decree of Court, declaring the sum, in respect of which he was to stand, as being a charge on the estates. What he had to do was this: Under the 26th section he was to commence an action of declarator before the Court of Session, or a process of a similar kind before the Sheriff. In that action he was to call, not his own lineal descendants (for the Act appears to have assumed, that their interests would be sufficiently protected by him who was their immediate or remote parent,) but the next heir entitled to succeed after the heirs of his own body. And in that suit he was to produce proper evidence of the amount laid out in such improvements. And then that next heir who was so called, and any other heir of entail, whether called or not, was to be entitled to produce evidence to set aside or diminish the claim. And then it was to be lawful for the Court of Session, or for the Sheriff, to pronounce a decree for such part of the sum proved to have been expended, as, by the true intent and meaning of the Act, was intended to become a charge against the succeeding heirs in the entailed estate. And that decree, if pronounced by the Sheriff, was to become final, unless carried to the Court of Session by suspension within six months. And if pronounced by the Court of Session, either in such process of declarator or suspension, it was to be final if an appeal was not brought within twelve months. The late Marquis of Breadalbane, under this Act, commenced five actions of declarator in the Court of Session, and in all of them he obtained decrees amounting to a very considerable sum of money in the whole. In those actions the person called was the father of the present appellant, who, at the time, subject to the possibility of the late Marquis having issue of his own body, was the heir presumptive next entitled to the estates. The present appellant was not called, but his father, he being the next collateral heir in tail at the time. And the present appellant now contends, that, inasmuch as he was no party to those proceedings of declarator, he is not bound by them; he contends, that those decrees of declarator have not conclusively awarded, as against him, that the sums of money in question were properly expended; and he claims the right to open up the question as to the amount of the expenditure, and to contest the propriety of the sums included in the decrees of declarator being charges on the estate.

If that contention were right, very serious consequences would ensue; because your Lordships will readily see, that this Act of Parliament making provision for the calling in the action of one heir only in the entail, namely, the next collateral heir to the person making the improvements, if every person but the heir so called was to be free afterwards to dispute all that had been done, the chances would be very strong in favour of that collateral heir not happening to be the person on whom the succession would ultimately fall; and this provision of the Statute so carefully framed to all appearance for the purpose of preventing subsequent disputes, would probably, in many or in most instances, fail of having that operation.

It appears to me impossible to give a rational meaning to this section, where it provides, that a particular heir shall be called and gives a permission to other heirs not called to intervene and dispute the claims should they think fit, if the Statute meant to say, that the proceeding of declarator thus commenced was to be binding upon one heir, and no one else. If that had been the object of the Legislature, it might at once have been accomplished by saying, that that person who made the improvements might raise an action of declarator, and might call in that action whom he pleased, and that what was done in that action should be held to bind those whom he called, and no one else.

But I apprehend your Lordships will be of opinion, that the rational and common sense construction of the section is, that Parliament meant to provide for a means of setting at rest all disputes after the death of the person making the improvements, and for that purpose Parliament conceived, that the direct and lineal issue of the heir of entail making the improvements would be sufficiently protected by the calling of the first of those collateral heirs next in succession, and giving him an opportunity of appearing as a party disputing the claim, with the further privilege to the other heirs of appearing if they thought fit, and advancing any argument they could against the claim. For myself I have no doubt, and I think your Lordships will be of the same opinion, that the proceedings taken by the late Marquis of Breadalbane, so far as regards the persons bound by them, are proceedings which established conclusively the propriety of the expenditure made by him, and that there having been no appeal from these decrees, these decrees are final and are binding upon the present appellant.

We have next to consider the *second question* arising under the first appeal, as to the objection which was made to the form of the decrees themselves. And I think your Lordships will not find it necessary to consider for that purpose more than one of the decrees of declarator—the observations that occur upon that one being substantially the same as those that occur upon the other decrees of the same kind.

It is said, that under the Montgomery Act, any decree of declarator ought to shew, on the face of it, the character of the improvements which have been made, in order that any one reading the decree may see upon what kind of improvements the expenditure took place, and so may be able to judge whether the improvements were of the kind contemplated by the Act; for, as your Lordships know, the Act contemplated improvements of four specified kinds only.

Now the decree purports to be, "In a summons and action of declarator of entail, improvements constituted before the Lords of Session," etc. The words "entail improvements" are themselves technical words, and are obviously used in this decree, as they appear to have been used in many other proceedings, for the purpose of describing those improvements made by an heir of entail in possession, in respect of which he was to be entitled to charge under the Montgomery Act. But having so begun, the decree proceeds to state, that the action was brought by the Marquis of Breadalbane against Campbell of Glenfalloch, and that the summons is dated and signeted the 10th May 1844, and libels, *inter alia*, upon the Act of Parliament passed in the 10th year of Geo. III. (giving its title). That is to say, the libel is founded upon the Montgomery Act giving to an heir of entail in possession a right to compensation in respect of improvements. The decree then states, that the summons is founded "also upon the notices or intimations given in terms thereof," and that it concluded for decree as thereinafter expressed. Then the Lords of Council and Session find, that a certain sum was expended by the pursuer in improvements upon the lands and estate, and they declare three fourths of the same to be a debt existing against the heirs of entail who may succeed the pursuer in the said estate, and they further decern and ordain, that William John Lambe Campbell, or the next heir entitled to succeed to the estate immediately after the pursuer, on his so succeeding, should make payment of a certain sum in respect of that debt, and the whole concludes with these words, "conform to the said intimations, accounts, and vouchers libelled on, the said Act of Parliament, and laws and practice of Scotland."

Now the Act of Parliament itself prescribes no form whatever for the decree. The decree, as far as regards form, is left to the discretion of the Court in which the proceedings take place, and all, as it appears to me, that your Lordships have to determine is, whether, with a reasonable certainty, you can find upon the face of the decree, that the improvements there spoken of are improvements claimed for and recognized in pursuance of the Act of Parliament. And I think, that no doubt can be entertained by any person reading this decree, that what the Court of Session intended to affirm was, that the money alleged to have been laid out had been laid out in improvements under and according to the Act of Parliament, and that they were declaring, that the pursuer was entitled to charge for those improvements as improvements warranted by Act of Parliament. Therefore I have no hesitation in expressing my opinion, that, upon the second objection, the appellant has failed to advance any argument which should entitle him to succeed in objecting to the finality of these decrees of declaration.

And now we come to the *third question* arising upon the first appeal—namely, as to the effect of the proceedings taken by the late Marquis of Breadalbane under the Rutherfurd Act. For the purpose of considering those proceedings, I must remind your Lordships, that the scheme of the Rutherfurd Act appears to be this: In place of leaving the heir in tail to pursue the somewhat cumbrous and tedious remedy of the Montgomery Act, it provides, that, if the heir in tail had obtained a declarator as to the amount of money expended on improvements, he might come in under the Rutherfurd Act; and with a view immediately to realize the sums which he had expended, or to raise money upon the security of the charge to which he was entitled, he might obtain the permission of the Court of Session to execute a bond either for an annual rentcharge with reference to the amount of the expenditure, or a bond for a gross sum of money, being two thirds of the sum for which he had a charge.

The late Marquis of Breadalbane availed himself of the advantages of the Rutherfurd Act. He instituted a proceeding in the Court of Session, founding himself upon the decrees of declarator which he had obtained, and asking to be allowed by the Court of Session to issue a bond or bonds of the kind which I have described. He obtained the authority of the Court of Session in the form of a decree, and he acted upon the decree to the extent of executing a bond with the approbation of the Court, to the extent of £20,000 for an annual rent charge. The whole sum for which he was entitled to claim was more than that, namely, £25,000. For the difference between those two sums, namely £5200, no bond was executed; but the decree of the Court of Session under the Rutherfurd Act professed to authorize the issuing of a bond or bonds for the whole amount.

It was, in the first place, contended, on the part of the appellant, that, under the 19th section of the Rutherfurd Act, the giving of one bond, even although it was for a smaller amount than the amount for which the late Marquis was entitled to stand as creditor, annihilated his claim

for the whole of his expenditure, whatever it might be. And the appellant founded his argument upon the wording of the 19th section of the Entail Amendment Act, which enacts:—"That the granting under the authority of this Act of any bond of annualrent or bond of disposition in security, in respect of any improvements executed or to be executed on an entailed estate in Scotland, shall operate as a discharge of all claims for or on account of such improvements against such estate and the rents and profits thereof, and the heirs of entail succeeding thereto, save and except the claims under such bond of annualrent, or bond and disposition in security themselves."

It would be one of the most unreasonable interpretations that could be conceived of that section, to hold, that if an heir in tail had a claim for £25,000 under the Montgomery Act, and came into the Court of Session for leave to execute a bond under the Rutherfurd Act, and obtained from the Court of Session that leave, and if he, not being able perhaps to obtain a customer for the whole sum, executed a bond, in the first instance, for £1000, part of the £25,000, that he should therefore be considered to have annihilated his claim for the remaining £24,000. I think there is no occasion so to interpret the section; and any such interpretation would be an unreasonable one. It would be unreasonable, even if we had not regard to the ordinary clause at the end of the Act of Parliament, that a singular term includes the plural, and that the word "bond," may include "bonds." Having regard to that interpretation, it appears to me, that this section is to be read distributively; and that it means, that the giving of any bond under the Rutherfurd Act shall, as to the amount of that bond, be a valid discharge of any claim that might exist against the estate under the Montgomery Act.

But the question still remains, whether the effect of the Marquis of Breadalbane constituting himself a creditor under the terms of the Rutherfurd Act, was not an election by him to stand upon that Act, and that alone, and to abandon the position which he previously had under the Montgomery Act. When we look at the different provisions of these two Statutes, it appears to me, that it is impossible to arrive at any conclusion but this, that the proceedings taken by the late Marquis of Breadalbane under the Rutherfurd Act, were an abandonment by him of his position under the Montgomery Act. Under the Montgomery Act, the charges which were defined by the decrees of declarator were all subject to this contingency or condition, that it should turn out, at the death of the Marquis, that these charges did not exceed in amount a certain number of years' value of the estates. The Rutherfurd Act appears to have dispensed altogether with that condition, and to have treated any person who obtained a decree of declarator as entitled to stand absolutely as a creditor for the amount of that decree, whether the sum might or might not exceed the supposed number of years' value of the estate. It would, therefore, be very strange if an owner in tail, who had taken the benefit of this subsequent Act, were afterwards to go back to the former Act, and to reopen the question as to the amount of charge which it might thus be necessary to consider. But the difficulty becomes much greater when we remember that a bond for £20,000, part of the £25,000, had actually been issued, and is in force under the Rutherfurd Act. For the question immediately arises thereupon—If the £5200 is to be recovered, not under the Rutherfurd Act, but under the Montgomery Act, in what way can you apply the provisions of the Montgomery Act, as regards the relation between the sum charged and the annual value of the land which is to be taken into account? It appears to me, that, upon that ground alone, it would be impracticable for the representatives of the late Marquis to work out any remedy in respect of this sum of £5200 under the earlier Act of Parliament. Further than that, we must remember, that the consequence of holding both these Acts of Parliament to be operative as to one charge, would be this, that the present heir in tail would have to pay, in respect of the bond issued under the Rutherfurd Act, a certain annual sum, or a certain gross sum. If the Montgomery Act is also to be put in force against him, and if he were unable to pay the sum of money in respect of which it was put in force, his only alternative would be to surrender one third of the annual income of the estate for the purpose of payment. He might thus be harassed in the most serious and inconvenient way by the double operation of the two Acts of Parliament. I think your Lordships would be slow to arrive at the conclusion, that that could have been the intention of the Legislature. In my opinion, and I hope your Lordships will concur with me, the proper and fair construction of the provisions of the Rutherfurd Act is, that the person who proposes to avail himself of them, puts the rights which he previously had in a position to be governed, and operated upon by the later Act of Parliament. It is not in this proceeding that your Lordships will express any opinion as to what ought to be done with respect to the £5200, which, in my view of the case, if recovered at all, must be recovered under the Rutherfurd Act. That will be for consideration in some other proceeding. For in the conclusions of the present summons no application is made to the Court by the pursuers for relief under the Rutherfurd Act in respect of that sum.

If your Lordships concur with me so far as I have gone, the result will be that the first appeal must fail in all respects, except as regards the sum of £5200. As to that your Lordships will assoilzie the defenders from the conclusions of the summons, without prejudice to proceedings that must be taken, if so advised, in some other form in respect of that sum.

I now come to the *second appeal*, as to which only one question arises. It appears, that in addition to the sum covered by the five decrees of declarator to which I have referred, certain further sums are alleged to have been expended by the late Marquis of Breadalbane upon improvements which never became the subject of any decree of declarator, and his representatives claim against the present Earl for the amount. The appellant contends, that the conditions of the Montgomery Act under which those sums are claimed have not been complied with in this respect. The 12th section requires "that the proprietor of an entailed estate who lays out money in making improvements upon his entailed estate, with an intent of being a creditor to the succeeding heirs of entail, shall annually, during the making such improvements, within the space of four months after the term of Martinmas, lodge with the Sheriff or Steward clerk of the county within which the lands and heritages improved are situated, an account of the money expended by him in such improvement during twelve months preceding that term of Martinmas, subscribed by him, with the vouchers by which the account is to be supported when payment shall be demanded or sued for."

Now here no such account subscribed by the late Marquis was lodged in the manner prescribed by the Act. In point of fact no such account could have been lodged, because the late Marquis died, I think, four days before the term of Martinmas, which I believe is the 11th of November.

The question, therefore, which the second appeal raises is in substance this:—Whether the clause I have read is an absolute condition to the right of claim for improvements, or whether it is a clause of direction only, with respect to which, if an adequate reason for non-compliance, such as the act of God, is shewn, the non-compliance would not disentitle any person who, otherwise, has a proper title to compensation for improvements—beyond all doubt the clause relates to an Act to be done subsequently to the expenditure, and in addition to it. And it appears to me, that there is nothing in the words of the clause which should lead your Lordships to hold that it is even a subsequent condition. The words are simply by way of enactment, although the section commences with the term "provided"—the enactment being for the purpose of securing, if it can be secured, the written testimony and statement of the person who has made the improvements, that they have been made in the manner in which they ought to be made in order to found a claim. If by the act of God it becomes impossible that the claim can be signed, it appears to me, that it would be construing the Act of Parliament in a way in which no clause of the kind has ever been construed, if we held, that where the act of God thus prevented a compliance with the words of the Statute, the proprietor or his representatives should thereby be prevented from making a claim for improvements. No authority has been mentioned to your Lordships which has gone to such an extent. Certain cases were referred to, where the proprietor being in existence, who might have subscribed the statement which the Act prescribes, an attempt was made to substitute the signature of the factor or agent for the signature of the principal. In such cases it may have been very well decided, and it may be that your Lordships would hold, that if the proprietor were capable of signing this statement of expenditure, he ought not to be excused from doing it. But it becomes altogether different when, from no act or default on his part, his subscription became an actual impossibility.

I therefore humbly advise your Lordships, that, as regards the second appeal, the foundation for it altogether fails, and I would suggest that it ought to be dismissed with costs. As regards the first appeal, if your Lordships concur with me, you will vary the interlocutors to the extent which I have mentioned, namely as to the £5200. Probably your Lordships will think it right that nothing should be said with regard to the costs of that appeal.

LORD WESTBURY.—My noble and learned friend on the woolsack has expressed so fully and so clearly the grounds on which I think your Lordships' concurrent opinion will be founded, that it is unnecessary for me to follow him in detail. Upon the first point, that of finality, if we were to listen to the argument of the appellant, the Act of 10 Geo. III. would certainly be deprived of its utility, and would fail to attain the purpose for which it was passed. Its object unquestionably was to ascertain and settle, once for all, the amount of the expenditure, and the manner in which that expenditure was made. Accordingly it proceeds upon two principles, first, that the act of the heir of entail shall be considered without the necessity of judicial inquiry as conclusive upon the heirs of his body; and then with regard to all those who are interested in the ulterior destination, it imposes upon the heir of entail the obligation of calling into Court the person first entitled, but it opens the door for all those who are entitled under the ulterior destination to come in and make themselves parties to the cause. But although that is my opinion with regard to the effect of the enactment, I am very desirous of pointing out, that the full extent of your Lordships' judgment will only carry this proposition, namely, that the decree is final against the person claiming as heir of the body of the heir of entail, who was called in that proceeding. It is perfectly consistent with natural justice and with the words of the Statute, to hold, that the proceeding was final against the person called, and those who claim under him, namely, the heirs of the body, just in like manner as the Statute does not impose

upon the heir of entail making the improvements any obligation to call his own issue in the proceeding under the Act.

With regard to the next point, namely the form of the decrees, it is perfectly clear, that if a decree, which otherwise might have been final, is expressed in terms, that shew conclusively upon the face of it, that it is not in conformity with the Statute making it final, the Court may decline to enforce it. But that cannot be asserted of the decrees in the present case, because they all profess to be (and credit must be given to their statements), in strict conformity with the provisions of the Statute, and no obligation being thrown upon the Court of embodying in the decree a statement of the improvements that were actually effected, the decree is in conformity with the ordinary style of Court, and it is impossible, consistently with the provision that the decree shall be final, to permit a party to say that, *ex facie* of the decree, it is a decree that ought not to be held final. Credit must be given to the language of the Court, unless it is perfectly clear from the language itself, that the Court is mistaken in the decrce which it has made.

The next point arises upon the concurrent remedies which are given by the two Statutes to the heir of entail. By the old statute, the Montgomery Act, no proceeding could be taken by the proprietor making the improvements for the purpose of raising money during his own life; but at the time of the passing of the Rutherfurd Act, in conformity with later usage, it was seen that it would be beneficial to give to the proprietor the power of raising money to a certain extent during his own life, to repay part of the expenditure which he had made. And accordingly it gave him an option of adopting a different remedy from that provided by the Montgomery Act; the remedy under the Rutherfurd Act being this, that he might get authority either to make a mortgage for a certain amount, or to grant a rentcharge issuing out of his estate for a certain limited amount. But it is clear, that of the two alternatives one must be taken by the party. That is clear from the language of the Statute, and by attending to the argument *ab inconvenienti* independently of the language of the Statute, we shall be led to the same conclusion. For it is scarcely possible to make a remedy given by one Statute applicable to a portion only of a sum of money, and to leave the remedy given by another Statute fully competent to the party with respect to the remaining part of the sum. A particular reason in illustration of this point was given by the counsel for the appellant, namely, that the aggregate sum stated in the application of the late Marquis under the Rutherfurd Act was a sum constituted of items with regard to which there were different rights and remedies under the Montgomery Act, and that if you take out of that aggregate sum another sum, namely, £20,000, you render it impossible to ascertain with anything like certainty how much of the remaining £5000 was to be attributed to that outlay in respect of which there was a more restricted right, and how much was to be attributed to the outlay in respect of which there was the larger right under the Montgomery Act. I have no hesitation therefore in acceding to the conclusion of my noble and learned friend, that it is a case of election, necessarily so by reason of the inconvenience attending any other course; and that the late Marquis here did make his election, for in his petition under the Rutherfurd Act he expressly desired, that the whole of the outlay should be dealt with under the provisions of that Statute, and the Court accordingly interposed its authority to the extent of that prayer.

With regard to the remaining point, unquestionably its determination admits of very little difficulty. The Statute that gives the remedy gives the right, and constitutes the proprietor making the outlay a creditor of the estates. The Montgomery Act is most definite and precise. It is there enacted, positively, and without reference to any subsequent provision, that a party doing so and so shall be a creditor to the succeeding heirs of entail for three-fourth parts of the money laid out. That constitutes his right; the collateral provision contained in the 12th section (for it is in reality collateral,) is consistent with the view, that though he has got this right, yet the enforcing of it shall be subject to the obligation of first complying with the direction contained in the 12th section, provided he is not upon any legal ground discharged from that obligation. If the proprietor is alive, before he can sue for the money, for which he is made a creditor, he must shew, that he has lodged the accounts required by the 12th section, and that those accounts were subscribed by him. But if it is impossible for him to fulfil that requisition, not by reason of his own default, or his own act, why then, there are benignant maxims well known to the law, and constantly acted upon, such as *nemo tenetur ad impossibile*, and *actus dei nemini facit injuriam*. And in such a case as this, the subscription of the accounts by the personal representatives of the party must be held to satisfy the obligation. The only question is, whether there is any impediment to the recovery of the debt for which he is constituted a creditor by reason of there being a non-compliance with this provision? and if that compliance is shewn to have been rendered impossible, not by his neglect or in consequence of his own act, but by the act of God, it would be impossible, consistently with the established principles of law, to hold, that he has lost his rights through a provisionary or directory clause, which it was impossible for him to comply with.

On all these grounds, therefore, I assent, without going further into the reasons already so fully given, to the conclusion proposed by my noble and learned friends. The appellant succeeds upon

one point, merely limited to a declaration, that the House is of opinion, that the remedy, in respect of the £5000, was sought by the party under the Rutherfurd Act, and that he made an election, which renders any resort to the Montgomery Act of the 10 Geo. III. no longer competent to him. Upon all other points, I think the appellant must be considered to have failed entirely, as well upon the technicalities of the matter as upon the merits and justice of the case. Therefore the second appeal will be dismissed, and in the first appeal the interlocutor will be varied by a declaration.

LORD COLONSAY.—My Lords, upon the question of finality, I cannot say that I have at any time in the course of the discussion of this case had any serious difficulty. It appears to me, that the argument, in the broad shape in which it was contended for by the appellant, is not only a novel argument, but one that would go far to deny the beneficial effect of the Act of the 10 Geo. III. It seemed to be contended, that the finality could only extend to the party who had notice, and was called in the course of the proceedings. The Statute has been in operation for considerably more than a century, and I have not known any case in which that was seriously contended for; but in the circumstances of this case it happened, that the party who is the appellant here is the immediate heir of the party who got the notice; he is his heir of line. But although this may be a circumstance in this case, I do not wish that my opinion should be rested upon that circumstance. I am not at all prepared to say, that there is any important distinction between the case of an heir succeeding to the estate in virtue of the entail, being the immediate descendant of the party who got the notice; and the case of an heir otherwise claiming the estate through the same instrument, through which alone that party can obtain the estate. And I think there are several clauses in the Act of 10 Geo. III. which place all heirs succeeding to an estate, by virtue of an entail, from whatever distance of propinquity they may come, precisely in the same position as to obligations. It is not necessary in this case to decide that point, but I wish to guard against my opinion being supposed to be rested upon the limited ground, that this party is the immediate descendant of the party who got the notice.

Then, as to the form of the decrees here, I think the decrees are quite good. I see no difficulty with regard to their form. I think, on looking to the whole procedure that has taken place, the Court must be presumed to have had their minds sufficiently directed to their form, and they have given a decree bearing that expenditure has been made, and that the party is entitled to a decree for a certain proportion of that expenditure, all "conform" to the Act of Parliament. I think there is no difficulty at all about it. The question raised is, that the decree did not say in so many words, that the improvements made were those prescribed or contemplated by the Act of 10 Geo. III. The principle of the application to the Court was, that they were improvements of that description, and it must be presumed, that when the Court pronounced that decree, they pronounced it conform to the Act of Parliament. It appears also with respect to the proceedings under the Rutherfurd Act, in which the parties interested, the heirs of entail, were called and a decree was pronounced, that, in the very decree which these parties had every opportunity of opposing, the improvements are described as improvements of the nature contemplated by the 10 Geo. III. I have no difficulty upon that.

Then comes the question which has always appeared to me to be the only question, and a somewhat difficult question in this case, namely, whether the Marquis of Breadalbane having availed himself of the provisions of the Rutherfurd Act in regard to the whole of that large sum, his representatives are entitled now to refer to the Act of the 10 Geo. III. to render effectual the charge for a certain portion of that sum which was not covered by the bonds of annualrent or dispositions in security that were granted. I have had considerable difficulty upon that question, and when extreme cases are put, it may be, that the difficulty appears greater than it does at first sight, but dealing as we are now doing with that question, I believe for the first time in interpreting this Act, and looking at the whole of the provisions of the Statute, and the inconveniences which would attend the construction contended for by the respondents (which have been pointed out now more forcibly than they were when the case was before the Court below,) I think the construction, that is proposed by the noble and learned Lords who have spoken already, to be the most reasonable construction of the Statute, and looking at it in that light, I am disposed to concur in the judgment upon that point also.

As to the non-signing of the accounts, I really have never felt any difficulty at all. I think it would be a very extraordinary construction to hold, that where compliance with the direction of the Statute has been prevented by the death of the party, that should destroy the right of the creditor to the recovery of his expenditure. The Statute provides, that the accounts shall contain the whole of the expenditure up to a particular date, and that therefore they shall not be lodged or signed till that date has come, and if, one or two days before the arrival of that date, the party dies, being a creditor for that expenditure, so far as it has been just and proper, it would be a singular construction of that provision to hold, that those who come in and succeed him as creditors should not be entitled to supply what his death prevented from being done, and, that they should consequently be deprived entirely of the right of recovering what is due to them. Therefore, upon all the points, I quite concur in the judgment proposed by your Lordship.

Mr. Mellish.—Will your Lordship allow me, before the question is put, to call your attention to the question of costs. These are regulated by the 25th section of the Montgomery Act, which, in substance, enacts, that, where the executor of an heir of entail recovers the full sum which he has demanded, then the defender shall be liable to full costs of the suit; but if the decree is not obtained for the full sum of money of which payment has been required, it shall be in the discretion of the Court to award costs of suit to either party, as the justice of the case shall direct.

Now, in the Court of Session, the Lord Ordinary declared full costs against us under the first provision of this section, because the respondent recovered under the decree of the Court of Session the full sum demanded. But now, in consequence of your Lordships—

LORD WESTBURY.—It is a most inconvenient thing to have any argument upon costs after judgment. When the counsel for a party considers that there is any question of costs in the case to which he wishes to address himself, he must make it part of his original argument, and not wait till after judgment has been pronounced, and then claim to be heard with respect to costs.

Mr. Mellish.—I beg your Lordship's pardon for not having done it before, but I thought your Lordship's attention not having been called to this clause—

LORD WESTBURY.—If we heard you upon the question of costs, we might have a long argument in consequence of your observations, because the other side would have a right to a reply.

LORD COLONSAY.—I do not think that section applies to the circumstances of this case.

LORD CHANCELLOR.—My Lords, I think your Lordships will not be disposed to hear any argument upon the subject of costs. According to your Lordships' usual practice, as your Lordships do not concur with the interlocutor pronounced by the Lord Ordinary in all respects, it would follow, that the costs ordered to be paid under that interlocutor should be repaid to the appellant.

LORD WESTBURY.—So far as the interlocutors require to be altered by reason of the particular point on which we agree with the appellant, I apprehend, that the judgment of your Lordships, after specifying distinctly the point on which we differ from the judgment below, and on which you reverse the interlocutors of the Court below, will direct the costs paid by the appellant under those interlocutors to be repaid to the appellant by the respondent.

Mr. Mellish.—They have not been paid; they are only ordered.

LORD WESTBURY.—That is immaterial; reversing the interlocutors in that respect, you will reverse the direction as to costs.

LORD CHANCELLOR.—The question in the first appeal is, that the interlocutors complained of should be varied, by declaring, that the late Marquis of Breadalbane, by presenting his petition under the Act of 11th and 12th Vict. cap. 36, and the proceeding thereon, elected to adopt the remedies given by that Statute, and to abandon the remedies given by the Act of 10 Geo. III., and therefore assoilzieing the defenders from the operation of the summons as to the sum of £5202 16*s.*, but without prejudice to any question in any other action, and order any costs paid by the appellant under those interlocutors to be repaid. And on the second appeal, that the interlocutor complained of be affirmed, and the appeal dismissed, with costs.

In first appeal, interlocutors varied, with direction as to costs in Court below, and cause remitted.

In second appeal, interlocutor affirmed, and appeal dismissed, with costs.

Appellant's Solicitors, Adam, Kirk, and Robertson, W.S.; Loch and Maclaurin, Westminster. —*Respondents' Solicitors*, Davison and Syme, W.S.; John Graham, Westminster.

MARCH 26, 1868.

THE UNIVERSITY OF ABERDEEN and Others, *Appellants*, *v.* ALEXANDER FORBES IRVINE of Drum, *Respondents.*

Trust—Charity—Increased Rents and Profits—Prescription—Long Irregularities—*A.*, *in* 1629, *left and mortified* £10,000 *Scots to be bestowed by trustees upon land and annualrent in all time thereafter for the use of bursars in a grammar school. In* 1633, *on action brought, the Court of Session decreed that A.'s heir should provide lands worth* £1000 *Scots yearly rent to be bought and acquired by him heritably. And in* 1656 *A.'s heir by bond mortified certain lands then belonging to him worth* £1000 *Scots per annum for the use of the bursars as set forth in the*