of availing himself of the provisions of the beforementioned statutes 11 and 12 Vict., c. 36, and 16 and 17 Vict. c. 94, and particularly of the provisions contained in the 13th and 18th sections of the said 11 and 12 Vict., c. 36, by granting a bond of annualrent, or a bond and disposition in security, and then he prays for authority of the Court to authorise him to grant either the bond of annualrent or the bond and disposition in security. That, like all the proceedings under this Act, is a judicial proceeding in which next heirs are called for their interest, and the Act provides further, that any person interested may appear and object. He calls all those parties into Court, upon the statement that these are the remedies of which he is to avail himself; and then he gets decree of Court, by which the Court interposes its authority, and authorises him to grant the bond of annualrent, or bond and disposition in security. I have no doubt that after obtaining that authority to grant the bond, it was competent for the Marquess to go back to the Court and get authority to grant another bond for the remaining £5000. The question is whether he had not exercised his option, and limited himself to the remedy introduced by the Entail Amendment Act, or whether that remedy was cumulative with that already provided by the Montgomery Act. It is a question of construction of the statute, and I have great difficulty in taking the view that it is cumulative. I suppose that when heirs of entail are called into the field in this way they are no longer to be held liable to be called upon to pay the sum. They are entitled to make their arrangements and provisions for their children, upon the footing that they should not be called upon to pay that money. I am disposed to think this is a matter judicially settled amongst those parties. I think there is no doubt that the Entail Amendment Act was made for the benefit of the heir who made the improvements; but it was also made, and largely made, for the benefit of the heirs who are to succeed. Does not the very circumstance that, by granting this bond, the heir making improvements gives great relief to those who are to succeed, just suggest the question, whether the object of the Legislature was not to give that advantage, and whether the next heir was not entitled to hold it as a settled matter, that the other portion of the money was to be dealt with in the same way?

Lord ARDMILLAN—I am of opinion that the objections taken to the terms of these decrees are not well founded. On the other question, although I was very much struck with the views of Lord Deas, I have come to be of opinion that this is the true remedy, and a remedy which is quite legitimate. I think there is no doubt that the Act 10 Geo. III., c. 51, constitutes the heir of entail who makes these improvements a creditor, and that he has not only in law a right and claim as creditor, but a right to use diligence under the Montgomery Act, in order to make his claim effectual. The question is, what has discharged his claim as creditor, and what has discharged his rights under 10 Geo. III., c. 51, to make it available. Since by 10 Geo. III. he has both these rights, I have no doubt that the mere passing of the Entail Amendment Act did not affect either his claim as creditor or his right to enforce it. It is not an Act creating a new or substituted remedy—it creates an additional remedy. In the next place, I think that when procedure under the Entail Amendment Act is taken, it is not necessary that it should be conducted throughout under that Act to the exclusion of other remedies. I think the party who has obtained decree under the Entail Amendment Act is entitled to grant either a bond of annualrent or to grant a bond and disposition in security. I do not think that when he proceeds to grant the one he in the least cuts himself out from the power of granting the other. I think, also, that he might grant a succession of bonds of annualrent, or of bonds and dispositions in security; and I think that the only discharge of the claims which the heir making the outlay has, is not the judgment of the Court allowing him to grant the bond, not the granting of one bond, and starting upon a course of proceeding under the Entail Amendment Act, but is the bond itself, and I hold that to mean the bond according to its measure. It discharges *pro tanto* the claim of the heir who gets decree. Upon looking to the decree itself, I think this comes out plainly. The petitioner prays for "authority to execute bond or bonds of annualrent, or bond or bonds and dispositions in security for entail improvements over the said entailed estates, to the effect hereinafter expressed." And then the decree sets forth that the sums expended by him on improvements of the kind contemplated by the Montgomery Act amount to £33,603, 15s. 2¾d.; that three-fourths of these are £25,202, 16s. 2¾d.; and that this last sum is declared to be a debt against the succeeding heirs of entail in the estate. The decree then proceeds to interpone the authority of the Court, and to authorise the petitioner "to grant a bond or bonds of annualrent corresponding to the said sum of £25,202, 16s. 2¾d. over the said lands, or a portion thereof, or bonds and dispositions in security, one or more, charging the fees and rents of the said lands, or a portion thereof, with two third parts of that sum, being £16,801, 17s. 6d.—*all in terms of the statute.*" That includes the 19th section of the Act, and that 19th section declares that the claim of the heir who has made the outlay is discharged by granting the bond. The phrase "to the effect hereinafter expressed," I read to mean to the effect of extinguishing the debt to the amount of the bond. When you come to the particular bond which is granted and approved of by the Court, the words in which the Court approve of it are to be considered. The decree states that the Court approve of the bond of annualrent No. 57 of process, in favour of the Colonial Life Assurance Company, for annualrents effeiring to the sum of £20,000, part of the sum of £25,202, 16s. 2¾d., as executed. That amounts to a declaration that the decree remains available for everything beyond the £20,000, which is designated as part of the £25,000.

The Court accordingly adhered to the interlocutor of the Lord Ordinary.

Agents for Pursuers—Davidson & Syme, W.S.

Agents for Defender—Adam, Kirk, & Robertson, W.S.

BREADALBANE'S TRUSTEES *v.* CAMPBELL.

Entail—Improvement Expenditure—10 *Geo. III., cap.* 51, *sec.* 12. Held (alt. Lord Ormidale) that the executors of an heir of entail, who had expended certain sums of money in improvements, were entitled to recover the statutory portion thereof from the succeeding heir of entail, although the account of the sums expended during the twelve months preceding the term of Martinmas were not subscribed by the expending heir within four months after the term, this having become impossible by reason of his death three days before it. Held further, that the proper parties to sub-

scribe the account in these circumstances were the executors.

This was an action of declarator and payment raised by the trustees and executors of the late Marquess of Breadalbane against John Alexander Gavin Campbell of Glenfalloch, heir of entail succeeding in the entailed lands and estate of Breadalbane, concluding (1) for declarator, that between the term of Martinmas 1861 and the 8th November 1862 there was expended by the late Marquess in improvements upon the said entailed estate of Breadalbane, in terms and of the nature contemplated by the Act 10 Geo. III., c. 51, sums of money amounting in all to £3891, 17s. 1d., three-fourth parts of which being £2918, 17s. 9¾d., should be declared to be a debt existing against the succeeding heirs of entail; and (2) for payment of the said sum of £2918, 17s. 9¾d., with interest from the terms at which the defender's right to the said entailed lands commenced, and in all time thereafter during the not-payment.

The late Marquess having died on the 8th November 1862, three days before the term of Martinmas of that year, the accounts relative to the said improvements (Nos. 45 and 46 of process) were lodged and subscribed by the pursuers as his trustees and executors on the 7th March 1863; and the defenders founding on that fact, pleaded (5) that as neither of these accounts was signed by the late Marquess as required by the Act 10 Geo. III., c. 51. no liability attached to him as heir of entail foresaid, for or in respect of outlay on any of the alleged improvements or operations specified or referred to in either of these accounts.

The Lord Ordinary (Ormidale) pronounced the following interlocutor:—

Edinburgh 14th November 1865.—The Lord Ordinary having heard counsel for the parties, and considered the argument and whole proceedings—Finds, in point of fact, that the accounts of alleged improvements, Nos. 45 and 46 of process, on which the present action is laid, are not subscribed by the late Marquess of Breadalbane, in terms of the Statute 10 Geo. III., cap. 51; and therefore, in point of law, finds that the defender's fifth plea in law is well founded, and sustains the same accordingly; assoilzies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to the expenses of process, allows him to lodge an account thereof, and remits it, when lodged, to the Auditor to tax and report.

R. MACFARLANE.

Note.—Both parties concurred in asking the Lord Ordinary at once to dispose of the defender's fifth plea in law, which, if well founded, is sufficient of itself to entitle the defender to absolvitor.

The fifth plea referred to, now sustained by the Lord Ordinary, involves a question of importance, and is one which does not appear to have been hitherto decided.

The question, whether the plea referred to has been properly sustained, depends upon the statute 10 Geo. III., cap. 51, sec. 12, which requires that the proprietor of an entailed estate who lays out sums in improvements, "with an intent of being a creditor to the succeeding heir of entail," shall annually during the making such improvements, within four months after the term of Martinmas, lodge an account of the sums expended by him in such improvements "during twelve months preceding that term of Martinmas *subscribed by him*, with the vouchers," &c. The accounts in question in this action, and which relate to improvements made in the course of the twelve months preceding Martinmas 1862, were never subscribed by the late Marquess of Breadalbane, who died on the 8th November of that year, but were afterwards subscribed and lodged by the pursuers as his executors. No doubt the late Marquess' rights, as well as his obligations, passed on his death to his representatives; but, *first*, the terms of the statute make it imperative that he should himself have subscribed the accounts in question; and, *secondly*, these accounts never having been subscribed by him, the statutory right in them as against the succeeding heirs of entail never was in any way constituted or vested in the Marquess, and consequently there was no right to pass from him to the pursuers as his executors. It is impossible with certainty to say that the late Marquess, however long he might have survived, would have subscribed the accounts. In this view, and for the reasons thus briefly adverted to, the Lord Ordinary has felt himself obliged to sustain the defender's fifth plea-in-law.

The case of Hopkins, 11th March 1851, 13 D. 958, was referred to in the course of the argument, but as the disposal of it was entirely of consent of the parties, it is of no importance as a precedent.

R. M'F.

The pursuers thereupon reclaimed.

At advising,

The LORD PRESIDENT—This action has reference to the improvements made during the year preceding Martinmas 1862, by the late Marquess of Breadalbane. And an objection has been raised against the demand for having the provisions of the Montgomery Act applied to that expenditure, on the ground that the accounts were not signed by the late Marquess, but were signed by his trustees and executors. The question is whether all power of recovery of any portion of that expenditure is cut off by reason of the non-signing of these accounts by the late Marquess. That comes to be an important question when viewed with reference to the circumstances under which that occurred. The provision of the Act on that matter is contained in section 12, which enacts "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 in the manner above expressed, shall annually, during the making of such improvements, within 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 improvements 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." And the objection taken turns on the words "subscribed by him." It is limited to that objection. The accounts were lodged subscribed by the trustees and executors, and the question comes to be whether, the Marquess having died upon the 8th November, being three days before Martinmas, the accounts not having been subscribed by him, there is an end to the right in his executors to recover. It is to be observed that, according to the provisions of the Act, the accounts to be subscribed by the party are accounts for the twelve months preceding Martinmas, and lodged within four months after Martinmas. Therefore the provisions of the Act are not complied with if these are lodged before Martinmas; they must be lodged after Martinmas. It follows from that that the period at which the accounts were to be lodged had not arrived at the date of the Mar-

quess' death. That is the condition of matters. Not that there has been any neglect on the part of the Marquess, but that by the intervention of death the fulfilment of the provisions of the Act was rendered impossible. And the question is, whether in that state of matters the expenditure laid out is to be altogether lost because the person who made the improvements had died. Now, the provisions of the statute in section 9 are important. It is a statute passed for a very important purpose —or rather for very important purposes—and that section proceeds—"Whereas it may be highly beneficial to the public, if proprietors of entailed estates were encouraged to lay out money in enclosing planting, or draining, or in erecting farmhouses, and offices or out-buildings for the same, upon their entailed lands and heritages; and whereas such proprietors may be induced and encouraged to do so, if they, their executors and assigns, were secured in recovering a reasonable satisfaction for the money expended in making such improvements, from the succeeding heir of entail, be it therefore enacted by the authority aforesaid, that every proprietor of an entailed estate who lays out money in enclosing, planting or draining, or in erecting farmhouses, and offices or outbuildings for the same, for the improvement of his lands and heritages, shall be a creditor to the succeeding heirs of entail for three-fourths of the money laid out in making the said improvements." The Marquess, it is not disputed, gave notices and laid out the money; and then the Act says that he shall be a creditor provided certain things are done. The clause I formerly read was one of proviso, applicable to the case of a person who intends to be the creditor of succeeding heirs. The question comes to be, is the non-execution, from whatever cause, of these provisos of the statute fatal to the right of the expending heir as a creditor of succeeding heirs. The particular proviso here is that the accounts shall be subscribed by him. But the clause also adds, "Provided the proprietor who lays out money shall lodge accounts." The whole of that is laid as an obligation upon the proprietor who lays out the money. Now, there are undoubtedly some things which don't require to be done by his own hands—lodging of accounts, for example. The obligation of doing so certainly lies with him, but it does not follow that it cannot be done without the intervention of his own hand in the doing. But even a literal compliance with the subscribing proviso is not necessary. That is decided in the case where a party cannot subscribe. Now, I ask myself what is the object of the proviso. The object of it is for authentication of the accounts by the party who has interest in them. When the person who has laid out money on improvements is cut off a day or two before it was possible for him to lodge the accounts, the party who comes in his place, and to whom the statute gives his right—his executor or assignee—comes into his place in reference to the authentication of these accounts. He represents the original proprietor, and in reference to the objects of the statute is the same as the original proprietor himself. I think that is in substance the meaning of the statute.

Lord CURRIEHILL—I think this case is attended with very great difficulty in consequence of the manner in which the statute is expressed; and I have therefore found it necessary to examine the whole statute. There is no question before us at present that the money was expended, and that it was so expended for improvements prescribed by the Act. We are only dealing with the fifth defence; and the question is whether it is indispensable that the accounts should be signed by the noble person who has laid out money upon these improvements. It is of importance to us to determine who were the creditors of this claim at the time of the death of the late Marquess, and when this action was raised. Now, the proposition upon which my opinion rests is, that a right to these improvements had vested in the late Marquess during his lifetime, and that proposition is founded upon section 9 of the Act 10 Geo. III., c. 51. I think the view that the Legislature had in this enactment was this:—The entailed estate belongs to the heir in possession only for his own lifetime. His interest in it is a liferent interest. Beyond that, the estate belongs to other persons—strangers to him—and the object of the Legislature is to encourage the person in possession to lay out money upon the estate which is to belong to other persons. It is therefore an inducement to the heir of entail to lay out money that he has a claim of recompense; and the enactment is that that person shall be the creditor of succeeding heirs. There are conditions attached to that right; but the question comes to be, what is the character of these conditions? Are they suspensive of the vesting of the right provided by section 9? Are they conditions precedent of the vesting? I think not. They are conditions, and must be fulfilled, otherwise the right will be lost. They are resolutive conditions. Sections 10 and 11 of the Act have certain conditions introduced by the words "provided always." The object of section 11 is to make it clear that the proprietor intends to avail himself of these rights. If that is his intention, he is bound to give notice of it to subsequent heirs, that they may watch the improvements, and see if they are of the proper character. And section 12 provides that the accounts for these improvements shall be subscribed by the heirs making them. Now, who is to subscribe? If I am right in my assumption that the right vests in the heir who makes improvements, I think that is an important element in deciding the question. Section 26 provides—(reads). But the heir of entail who makes these improvements may have completed them before Whitsunday. He is entitled to make these improvements without signing any account at all. He may bring an action of declarator himself, and call the next heir as a party; and if he produce proper evidence in that action, he may obtain decree declaring them to be improvements before Martinmas arrives. And in that case, there is no use of lodging accounts at all; he has obtained his decree. I mention this to show that the conditions of the 12th section are not suspensive of vesting. Suppose these rights vested in the late Marquess of Breadalbane. He dies on the 8th November. He leaves a trust-settlement in favour of the pursuers; and on the 8th November the right as to these improvements vested in them, and they are the proper creditors. That is the state of matters when the term of Martinmas arrives. Then the right having vested in them, they are the persons who are to lodge the accounts; and I think that it is the true reading of the statute, that the persons who lodge the accounts are the persons to sign them, and that these persons are those who are creditors in the claim for the time being. The trustees here are trust-assignees and executors; but they are executors-nominate, and the right vests in them by law by 4 Geo. IV. c. 98. I don't think there is any direct authority hitherto on this point. But so far as the matter has been noticed, this is the view the Court has taken. I

don't much found on the case of Fraser, Dec. 2, 1835, 14 S. 89, where a person's factor was allowed to sign for him. But there are two cases, the decisions in which, I think, I cannot support on any other ground than that on which I rest this case—that it is the creditor for the time being who is to lodge the accounts and to sign them. The one is the case of Stirling's Trustees, May 23, 1862, 24 D. 993; the other is that of Hopkins, March 11, 1851, 13 D. 958. In Hopkins, the next heir lodged a minute of consent, and the Court delayed judgment till that was considered. But the next heir had no power to authorise such decree; and the Court would never have pronounced that decree, unless they had thought it quite clear that the persons who signed the accounts were the creditors. I cannot reconcile either of these two cases with any other principle than this.

Lord DEAS—I concur. One of the objects of this Act of Parliament is, as set forth on the face of it, public benefit. It is an ameliorating statute. And this case must be settled in the way we read a statute of that kind. Another of its objects is for the encouragement of heirs of entail to make improvements. It would be a great discouragement that by the death of the heir in possession a day or so before Martinmas in any particular year the whole amount expended on improvements made in that year should be lost. A third observation is, that as regards the signature of these accounts, strict compliance with the statute is impossible. The question occurred in the case of Hopkins, and there the Lord Ordinary seemed to think the case was to be decided on the consent of the next heir. It again occurred in Fraser, in which during the lifetime of a party the subscription was adhibited not by the party but by his factor, and that subscription was held sufficient. The question was again considered by the Court in Stirling's Trustees, where the question was raised as to the signature of trustees under a trust-settlement by a party for behoof of his creditors. An observation was made there by the present Lord Justice-Clerk, with reference to that case of Fraser, to the effect that it would be very dangerous to call that decision into account. But I look upon this as a clearer case than any of them; for supposing that the direction in the statute was to be read as imperative, it does not follow that it would be necessary to restrict subscription only to cases where the signature is adhibited by the person himself. There might be a party who could not write, either from blindness or from not having been taught to write. It would be reading the statute very strictly to hold that a party who could not write could not subscribe a document in the ordinary way. But the present case was one which no legislator could provide for. I come to this conclusion from a fair construction of the statute. The only perplexity I have had arises from an observation of Lord Curriehill in the course of the debate, that an heir of entail in possession has always the option either to burden the entailed estate or not as he pleased. There is very little ground here for supposing that the Marquess would not have burdened the succeeding heir of entail. But there might be cases; and that raised a difficulty in my mind in applying the principle. But I think the procedure adopted here must be held to indicate, in the absence of proof to the contrary, that the Marquess did not mean to give the heir of entail the benefit of this, but to give it to his executors. All that the 9th and 11th sections of this Act require was done. The Marquess, before he began to execute the improvements, gave written notice; and the import of this whole procedure was that he intended to lay out money on improvements, and become a creditor of the succeeding heir. I think it is clear that he exercised his option; and in the absence of proof to the contrary, I think there is sufficient to show that he did not mean the heir of entail to get the benefit, but his executors. And if that be so, the executors come into his place, and are entitled to do all that he could do himself.

LORD ARDMILLAN—The ground on which I rest my opinion is, that the subscribing of the accounts is not an *actus legitimus* in course of the procedure necessary for ascertaining the intention of the person. I think the provision in the Act as to subscription is for the purpose of authentication, and is not intended to serve as a declaration of the intention of the party. He gives notice of his intention when he gives the notices required by the statute; and he does not leave matters entire; he goes on. It is not for completion of his intention that he is called on to subscribe. The Marquess died on 8th November. By statute, the accounts were for the year preceding Martinmas, and up to that term, and must be subscribed within four months after Martinmas. It was impossible for the Marquess to subscribe the accounts up to Martinmas. I think that unless we are compelled to hold the act of subscription under the statute as a party's own personal act, for which we can have no substitute, we are entitled to hold the subscription of his executors as sufficient.

Their Lordships accordingly recalled the interlocutor of the Lord Ordinary, and repelled the fifth plea-in-law for the defender.

Agents for Pursuers—Davidson & Syme, W.S.

Agents for Defender—Adam, Kirk, & Robertson, W.S.

JURY TRIAL.

(Before Lord Kinloch)

LAWSON *v.* FERGUSON.

Proof. In a trial of an action for breach of promise of marriage, held (per Lord Kinloch) that a party could not ask a witness what he had been told by himself on a particular occasion.

In this case the following issue was sent to trial:—

"Whether, in or about the month of December 1865, the defender promised and engaged to marry the pursuer; and whether the defender has wrongfully failed to implement the said promise and engagement, to the loss, injury, and damage of the pursuer?"

Damages laid at £1000.

In the course of the evidence it was proposed by the counsel for the defender to ask one of his own witnesses what the defender had said to him on a particular occasion.

MILLAR for the pursuer (BURNET with him) objected that the question was incompetent.

GIFFORD, for the defender (MAIR with him), urged that as the defender was not a competent witness in a breach of promise of marriage case, the evidence proposed should be allowed.

Lord KINLOCH sustained the objection.

The jury, after an absence of three hours, returned a unanimous verdict for the pursuer; and by a majority of 9 to 3 assessed the damages at £50.

Agent for Pursuer—W. S. Stuart, S.S.C.

Agent for Defender—W. Officer, S.S.C.