will and the altered state of circumstances, shall be fit; and declare that the defender is entitled to the patronage of the bursaries and scholarships that shall be so augmented; and also declare that the defender ought not to be decreed to account for or pay any of the surplus rents and profits of the lands over and above the sum of £1000 Scotch received by him prior to the date of the signetting of the summons, but let him account for, and pay in such manner as the Lords of Session shall direct, all the rents and profits of the said lands (including grassums, if any) that have come to his hands since the signetting of the summons, and let the costs of the appellants be paid out of the funds that shall be received by virtue of this order.

Lord Colonsay—My Lords, I agree in the opinion that has been expressed by all my noble and learned friends, that there is here no ground for the plea of prescription. I also am of opinion that the deed granted in 1656 is obligatory upon the defender, and that he can take no benefit from the circumstance that the further deeds which were then contemplated have never been executed. But still the question remains, what was the nature of the obligation so undertaken, and of the deeds so contemplated? Was it a disposal of the lands out and out? Or was it a grant of lands to the effect of securing in all time coming implement of the deed of the first Sir Alexander Irvine, so as to make payment to ten bursars of the sum specified in that deed? My noble and learned friends who have addressed the House entertain the former view, and in that view I think that the terms of the judgment which have been proposed are the proper terms. I may be permitted, however, with great deference to the opinions that have been expressed, to say that I doubt the soundness of that conclusion. My inclination is the other way. At the same time I express that with the greatest deference, and I think it quite unnecessary to go into a statement of the circumstances which raise these doubts in my mind.

Interlocutor reversed, and cause remitted to the Court of Session with a declaration.

Agents for appellants—M'Ewan & Carment, S.S.C., and Dodds & Henry, Westminster.

Agent for respondent—A. F. Gordon, W.S.

Thursday, March 12.

CAMPBELL *v.* BREADALBANE'S TRUSTEES.

(*Ante*, ii, 60, 66; and Macph., iv, 775.)

*Entail—Decree of Declarator of Improvement Expenditure—*10 *Geo. III., c.* 51—11 *and* 12 *Vict., c.* 36—*Charging with Debt—Finality.* In a question as to improvement expenditure between an heir of entail in possession of an entailed estate and the trustees of his predecessor in the estate, by whom the improvements had been executed, *held* (1) that a decree of declarator of improvements, obtained by such predecessor, was final and conclusive as against a person claiming as heir of the body of the heir of entail called in the process of declarator. Opinions—such decree was final against all succeeding heirs of entail; (2) that the decrees in question were not liable to certain objections in point of form stated against them; (3) the predecessor having obtained decrees of declarator of improvement expenditure to the extent of £25,000 under the Montgomery Act, obtained authority from the Court, under the Entail Amendment Act, to grant bonds of annualrent or bonds and dispositions in security for the amount. He executed a bond of annualrent for £20,000, and died four years after without taking any steps as to the balance. *Held*, that the proceedings taken under the Rutherford Act were an abandonment by the deceased of his position under the Montgomery Act, and that his executors were not entitled to proceed under the Montgomery Act personally against the succeeding heir for payment of the balance.

*Entail Improvement—*10 *Geo. III., c.* 51, *sec.* 12. The provisions of the Montgomery Act, sec. 12 sufficiently complied with in the case of an heir who died before Martinmas, by the lodging of accounts signed by his executors.

The appellant, John Alexander Gavin Campbell, Earl of Breadalbane, appealed against two interlocutors pronounced by the Court of Session in actions raised against him by the trustees of the late Marquis of Breadalbane. The first action concluded against the defender for payment (1) of £5202, 16s. 2d., being the balance of the sum of £25,354, 16s. 2d., contained in five decrees of declarator of entail improvements obtained by the late Marquis under the Montgomery Act; (2) of £21,354 16s., as due in terms of a certain other similar decree; (3) of interest on said sums till payment. The second action was an action of declarator and for payment of certain sums alleged to have been expended on the entailed lands of Breadalbane by the late Marquis, while heir in possession, in terms of the Montgomery Act. The contentions of parties appear sufficiently from the subjoined opinions. In both actions the claim of the pursuers was sustained by the Court of Session.

The defender appealed.

Sir Roundell Palmer, Q.C., Mellish, Q.C., and Young for appelant.

Lord Advocate (Gordon), and Watson, for respondents.

Lord Chancellor.—My Lords, these two appeals, brought by the Earl of Breadalbane against the respondents from certain interlocutors pronounced by the Court of Session in Scotland, raise some questions which are of importance certainly to the parties, but which do not, as it appears to me, present any difficulty as regards the conclusion to which your Lordships should arrive. My Lords, the questions may be conveniently divided into four—three arising out of the first appeal, and one on the second appeal. With regard to the three questions which arise on the first appeal, there is, in the first place, a question as to the finality and conclusiveness of certain proceedings taken by the late Marquis of Breadalbane in his lifetime for the purpose of having an expenditure made by him in improvements on his estates charged upon those estates. The second question relates to the form and wording of the decrees by which the improvements were to be constituted a charge on those estates. And the third question relates to the effect of the proceedings taken by the same Marquis of Breadalbane in his lifetime under the Act ordinarily termed the Rutherfurd Act, on the position in which the Marquis previously stood with reference to the prior Act, namely, the Montgomery Act.

With regard to the first of these questions, your Lordships have to consider what is the meaning and the effect of the provisions of the Montgomery Act, 10 Geo. III., c. 51. Your Lordships are well aware that the object of that Act was to facilitate the making of improvements by heirs in tail of entailed estates in Scotland, and the charging of those improvements, or a certain part of them, upon the successors in tail. The scheme of the Act appears to be this—the heir in tail who proposed to execute those improvements was to give certain notices to the parties who might succeed him 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 *constat* 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 having 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 descendents, if he had any (for the Act appears to have assumed that their interests would be sufficiently protected by him who was their more immediate or remote parent), but he was to call the heirs next 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 called to the Court of Session by a 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.

My Lords, what was done by the late Marquis of Breadalbane was this, under this Act he 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 that 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 expenditure, and to contest the propriety of the sums included in the decrees of declarator being charges on the estates.

My Lords, 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, every person but the heir so called was to be free afterwards to dispute all that had been done in that action, 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 instances fail of having that operation.

My Lords, beyond that, it appears to me that it is impossible to give a rational meaning of the terms of this section where it provides that a particular heir shall be called, and gives permission to other heirs not called to intervene and dispute the claim if they think fit, if the statute meant to say that the proceeding of declarator, then 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 the 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.

My Lord, I apprehend that your Lordships will be of opinion that the rational and common sense construction of the section is this, 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 their ancestor, in whose loins they were, and who would care for their interest; and that the persons next in succession, the collateral heirs, would in their turn 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, and the further privilege to the other heirs of appearing if they thought fit, and advancing any argument they could against the propriety of the claim. For myself, my Lords, 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 appeals from these decrees, these decrees are final and are binding upon the present appellant.

But then, my Lords, we have to consider in the next place 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, for the observations that occur upon that one are substantially the same as those that occur upon the other decrees of the same kind.

My Lords, it is said that, under the Montgomery Act, any decree of declarator ought to show 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 of Parliament, for, as your Lordships know, the Act contemplated improvements of four specified kinds only.

Now the decree of declarator runs in these terms: It purports to be "In a summons and action of declarator of entail improvements instituted before the Lords of Session," &c. 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 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., c. 51, 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 concludes 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 decerned and ordained 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, my Lords, 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 recognised 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 the 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 declarator.

My Lords, we then come to the third question arising upon the first appeal, namely, as to the effect of the proceedings taken by the late Lord 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 realise 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 annualrent charge with reference to the amount of expenditure, or a bond for a gross sum of money being two-thirds of the sum for which he had a charge.

My Lords, the late Lord Breadalbane availed himself of the advantages of the Rutherfurd Act. He came in. 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 annualrent charge. The whole sum for which he was entitled to claim under the Montgomery Act was more than that, namely £25,202. For the difference between those two sums, viz.:—£5000 and £202, no bond was executed, but the decree of the Court of Session under the Rutherfurd Act professed to authorise the issuing of a bond or bonds for the whole amount.

My Lords, 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 a 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 and 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."

My Lords, 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 that 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. My Lords, when we look at the different provisions of these two Acts of Parliament 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 £5000 is to be recovered, not under the Rutherfurd Act but under the Montgomery Act, in what way can you apply the provisions of the Montomery 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 Lord Breadalbane to work out any remedy in respect to 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 Rutherford 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 harrassed 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 this, 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, or whether anything ought to be done, with respect to the £5202, 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 would 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, my Lords, 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, a farther sum of £21,000 is 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 that sum.

The appellant contends that the conditions of the Montgomery Act under which that sum is 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 preceeding 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 terms 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 shown, the non-compliance would disentitle any person who otherwise has a proper title to compensation for improvements.

My Lords, 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 testament 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 signa-

ture 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 £5202. Probably your Lordships will think it right that nothing should be said with regard to the costs of that appeal.

Lord Westbury—My Lords, my noble and learned friend on the Woolsack has expressed so fully and so clearly the grounds on which 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 are to listen to the argument of the appellant, the Act of 10 Geo. III. would certainly be deprived of its utility, and would fail for the purpose for which it was passed. For 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 more, 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, because the father of the present appellant 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.

My Lords, with regard to the next point, namely, the form of the decree, it is perfectly clear that if a decree, which otherwise might have been final, is expressed in terms that show conclusively upon the face of the decree 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 question, because they all profess to be (and credit must be given to them) 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 the 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 decree 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 Rutherford Act being this, that he might get authority to make a mortgage for a certain amount or to grant a rent-charge 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 not only clear from the language of the Statute, but 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 appellants—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, of £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 estate. 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 this 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 show that he has lodged the accounts required by the 12th section, and that those accounts were subscribed by him. But if it be 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 impossible* 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 shown 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 right through a provisionary or directory clause which it was impossible for him to comply with.

My Lords, 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 friend. 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—the Act 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 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 happens that the party who is the appellant here is the immediate heir of the party who got the notice, he is the heir in line with him. 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 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, my Lords, 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 at the whole procedure that has taken place, the Court must be presumed to have had their minds sufficiently directed to the form; and they have given a decree bearing that the 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 as contemplated by the Act 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 conformably 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 they had every opportunity of opposing, the improvements are described as improvements of the nature contemplated by 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 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 that 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.

My Lords, 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 Lordships.

Mr Mellish—Will your Lordships allow me, before the question is put, to call your attention to the question of costs. In the Court of Session the costs 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 defenders 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 cost 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 respondents 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 Lordships pardon for not having done it before, but I thought your Lordships' attention, not having been called to this clause—

Lord Westbury—If we heard you upon the question of cost 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 Lord, I think your Lordships will 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 appellants under those interlocutors to be repaid to the appellant by the respondents.

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 11 & 12 Vict., c. 36, and the proceedings 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 assoilzing the defender from the operation of the summons as to the sum of £5202, 16s., but without prejudice to any question in any other action, and ordering 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.

Agents for Appellant—Adam, Kirk, & Robertson, W.S., and Loch & Maclaurin, Westminster.

Agents for Respondents—Davidson & Syme, W.S., and John Graham, Westminster.

Monday, March 30.

ALEXANDER *v.* OFFICERS OF STATE.

(*Ante*, ii, 34; 4 Macph. 741.)

Appeal—Competency—48 Geo. III., c. 151, sec. 15. The 15th section of 48 Geo. III., c. 151, does not mean that, when a judgment is appealed from, all the preceding interlocutors may, as a matter of course, be appealed from, but only "so far as necessary" to enable the House to deal with the merits of the action. Opinions that the clause applies to interlocutory judgments of the Lord Ordinary as well as of the Court.

Title to Sue—Service—Reduction—Proof. Circumstances in which *held* that the Crown had a right to sue a reduction of services obtained by the defender. Opinion, that though a party might have no right to intervene in a service, he might yet, if his rights were affected by it, afterwards bring a reduction. On the proof, services reduced.

Expenses—Crown. The Act 19 & 20 Vict., c. 56, sec. 24, which allows costs to be given for or against the Crown, applies as well to all causes presently depending, as to those which shall come to depend.

The appellant in this case was Alexander Humphreys or Alexander, designing himself Alexander Alexander, Earl of Stirling, and the respondents, pursuers of the action in the Court of Session, were Her Majesty's Officers of State for Scotland.

The summons, which was one of reduction and declarator, was brought against the appellant and Thomas Christopher Banks for the purpose of reducing a special service and a general service, by which the defender was served "lawful and nearest heir in general to William the first Earl of Stirling, his great-great-great-grandfather," and also to have it declared that "the defender is not the great-great-great-grandson of William first Earl of Stirling, and that he is not lawful and nearest heir in general, nor nearest and lawful heir in special, of the said William Earl of Stirling in the lands, territories, and others above mentioned, and that he has no right, title, or claim whatsoever to the lands, territories, and others, or to any part thereof.

The defender offered, as preliminary defences, that the summons did not set forth any interest on the part of the Officers of State which entitled them to prosecute the action, and therefore that the sum-