within the statutory time of the declared insolvency of Robertson, he had granted two conveyances to his brother-in-law and cautioner, Thomson, of heritable subject. They were *ex facie* absolute, but were admitted to be securities only. Thomas raised an action to reduce these securities, and in the same action he concluded for reduction of a promissory-note granted by the bankrupt for the entire amount of his debt to Thomson. The reduction was libelled on two grounds: *first*, on the Statute; and *second*, on common law. There was also a conclusion for reduction of the promissory-note on both these grounds. Now, without going into details, the result of that action was, that Thomas, the pursuer, succeeded in reducing the securities on the common law ground of challenge, but he failed in reduction on the Statute, and he failed in reducing the promissory-note on any ground. It is also to be kept in view that, in so far as the heritable property was concerned, which was the only matter in which he was successful, his title was sustained only as a creditor, and not as trustee in the *cessio*, the heritable estate not being vested in him. So that Thomas' success in this action of reduction was only partial. But, so far as it went, it was undoubtedly an important success for himself and the other creditors, for the effect of the reduction is substantially to make that estate available for the general body of creditors, unless there be other preferable claims. Now in that action of reduction the Court awarded to Mr Thomas one-third of the taxed amount of his expenses. He obtained that from the other party under a decree of the Court, and what he says is, that after deducting the amount of expenses recovered from the defender he is entitled to claim the balance as a preferable debt from the funds in the sequestration, on the footing that that balance represents expenses fairly incurred by him in obtaining this benefit for the estate. It does not appear to me that this claim can be sustained, at least to the extent concluded for. The Court, in disposing of the question of expenses in the reduction, must be held to have intended to give Thomas the expenses of that part of the litigation in which he was successful, and if they had done it in that form, we should have seen then what was the amount of expenses applicable to the part of the litigation in which he was successful; and that would, according to the rule I have mentioned, have represented the true amount of expenses which he was entitled to demand from the estate. But the Court did not do it in that form. They considered what these expenses would probably be, and then they also proceeded on the footing that Thomas must be liable to the defender for the other part of the litigation in which he failed, the one part being deducted from the other between these parties; and therefore the expenses awarded to Thomas must be held to be the difference between Thomas' expenses applicable to the part of the litigation in which he was successful, and the amount of Thomson's expenses for that part of the litigation in which Thomas failed. It must be obvious that, if the award had been in the shape I have supposed, Thomas would never have asked that the whole of the expenses applicable to the part of the litigation in which he was successful should be deducted from the amount brought into the estate, for he would have already got payment of all these expenses, partly in money and partly by set-off. For his debt was paid by means of that set-off, and he could only claim the balance, and that balance is just the balance of which he has got payment from the defender Thomson. So that, on that footing, he has got payment of the whole expenses that, on the application of the general principle, he could be allowed to deduct from the fund which he has brought into the estate. But for this claim there is, so far, some difficulty, because what Thomas recovered from Thomson was expenses taxed as between party and party. Now, what he is entitled to deduct from the fund brought into the estate is, these expenses taxed as between agent and client. Clearly, he has not got that, but he is entitled to that, and therefore he is entitled to the difference that would arise on a taxation between agent and client and between party and party of his account of expenses which was applicable to that part of the litigation in which he was successful. We have no means of working that out. All we can do is to desire the trustee to work it out. It is impossible to arrive at the amount precisely, but an approximation may be made with sufficient fairness to satisfy the justice of the case. We shall therefore require to recall the interlocutor of the Lord Ordinary, and to make findings to the effect I have indicated, and remit to the trustee to rectify his scheme in accordance therewith.

The other judges concurred.

No expenses to either party.

Agents for Appellant—Hill, Reid, & Drummond, W.S.

Agent for Respondent—James Webster, S.S.C.

Friday, May 29.

BREADALBANE *v.* BREADALBANE'S TRS.

Entail Improvements—Decree—Montgomery Act—Reduction—Finality—Fraud. A decree obtained under the 26th section of the Montgomery Act, if allowed to become final, cannot be challenged except upon the ground of objections appearing *ex facie* of the decree itself. Averments which *held* relevant to found a reduction of such decree on the ground of fraud.

This was an action of reduction, at the instance of John Alexander Gavin Campbell, Earl of Breadalbane, against the trustees and executors of the late Marquis of Breadalbane, brought for the purpose of reducing six decrees obtained by the late Marquis for improvements on his entailed estates, in terms of the Montgomery Act, 10 Geo. III., c. 51, § 26; and also a decree obtained by the late Marquis authorising him to grant bonds for these improvements, or part of them. The grounds of reduction principally relied on by the pursuer were—(1) That part of the expenditure comprehended by the decrees related to operations which were not of the nature of improvements authorised by the statute; (2) that some of the alleged improvements were carried out on property other than the entailed estate; (3) that the decrees, or some of them, were to a certain extent inconsistent and contradictory in their terms, inasmuch as they were not in all respects supported by the accounts and vouchers on which they were founded, and in respect of which they were pronounced; and (4) that the decrees, or some of them, were obtained by the late Marquis of Breadalbane through false and fraudulent representations, whereby the party who had an interest to oppose his obtaining them, and the Court, were imposed on and deceived.

In the action of declarator, the pursuer alleged,

numerous accounts and relative notices and vouchers were produced and founded on by the late Marquis.

"Cond. 12. By so producing and founding on these accounts and relative notices and vouchers, and including in the sums for which in the said summonses and actions of declarator respectively he concluded for decrees of constitution, the sums expended on the said operations and others, and which sums amount to several thousand pounds, the said Marquis of Breadalbane, contrary to the fact as known to him or his agents in connection with the said proceedings, and for whom he is responsible, stated and represented to the said William John Lambe Campbell, to the pursuer, and to the Court before whom the said accounts, notices, and vouchers were produced, that the said operations were improvements of the nature specified in and recognised by the said Act 10 Geo. III., c. 51, the fact being, as the said Marquis or his said agents knew, that the said operations were not improvements within the meaning of the said Act, and that the outlay thereon could not lawfully be made a charge against the said William John Lambe Campbell, or the pursuer, or any other of the heirs succeeding to the said entailed lands and estate of Breadalbane.

"Cond. 13. Notwithstanding of this knowledge on the part of the said Marquis or his said agents, he insisted for and obtained the pretended decrees of declarator, or of declarator and payment, 1, 2, 3, 4, 5, and 6, above libelled. These pretended decrees were pronounced by the Court in absence, and without due examination of the nature of the alleged improvements referred to in the various summonses respectively in which these pretended decrees were pronounced, but which alleged improvements were not specified or set forth in any of these summonses, and were not duly brought before the notice of the Court.

"Cond. 15. Various of the notices purporting to be given, in terms of the Act 10 Geo. III., c. 51, from time to time to the said William John Lambe Campbell during the period from 22d September 1834 to 17th November 1848, or about said dates, contain intimations of the intention of the said Marquis to execute certain operations, as therein specified, which were, contrary to the fact as known to the said Marquis or his said agents, represented to be improvements of the nature specified in or authorised by the Act 10 Geo. III., c. 51, on the entailed lands and estate of Breadalbane, as aforesaid, the fact being, as the said Marquis or his said agents knew, that the same were not of that character or nature.

"Cond 16. By the notices, Nos. 3538, 3544, 3552. and the accounts, Nos. 22, 24, 27, 30, 32, 34, and 37, and others of the said last mentioned process, it was, contrary to the fact as known to the said Marquis or his said agents, stated or represented to the said William John Lambe Campbell, to the pursuer, and to the Court, before whom the said notices and accounts were produced, that a certain house or building, therein specified and described as the Breadalbane Arms Inn, and which house or building is situated in the district of Aberfeldy and county of Perth, was built upon and formed part of the said entailed estate of Breadalbane, and that the outlay on the operations on or in connection with the said Breadalbane Arms Inn and offices, proposed to be made, and which was afterwards alleged to have been expended thereon, could legally be made a charge upon the succeeding heirs of entail, or against the entailed estate, the fact being, as the said Marquis or his said agents knew, that the said Breadalbane Arms Inn was not built upon and formed no part of the said entailed estate of Breadalbane, and that for the outlay on said operations no charge could be legally made against the succeeding heirs of entail, or against the entailed estate.

"Cond. 17. The said notices and accounts, and others, and relative vouchers, were produced and founded on by the said second Marquis of Breadalbane in all or one or more of the actions of declarator at his instance, in or under which the pretended decrees of declarator, or of declarator and payment 1, 3, and 6 above libelled, were pronounced in absence as aforesaid, and in consequence of the said erroneous statements or representations made or contained in the said notices and accounts and others, and relative vouchers, the said William John Lambe Campbell, the pursuer, and the Court, were thereby deceived, and the said pretended decrees of declarator, or of declarator and payment, in which are embraced, as forming part of the sums of alleged improvement expenditure bearing to be thereby constituted, various large sums of money laid out upon operations on the said Breadalbane Arms Inn, were allowed by the said William John Lambe Campbell, and by the pursuer, to pass in absence, and without objection on the part of either of them, and were pronounced by the Court in ignorance of the true facts of the case.

"Cond. 26. The Court were consequently deceived, and the said pretended decree of declarator and payment, or of declarator 6th above libelled, was allowed by the pursuer to pass in absence, and without opposition on his part. and was pronounced by the Court in ignorance of the true facts of the case, and on a wilful misrepresentation or wrongous concealment of the same by the said second Marquis of Breadalbane."

The defenders pleaded:—"1. The pursuer has not set forth facts and circumstances sufficient or relevant to infer reduction of all or any of the decrees libelled. . . . . 3. The first six decrees called for in the conclusions of the summons are regular and valid decrees under the Act 10th Geo. III., c. 51, and the present action, in so far as directed against these decrees, is excluded by the express provision of the statute."

The Lord Ordinary (Ormidale) sustained these pleas, and dismissed the action.

The pursuer reclaimed.

Young and Duncan for reclaimer.

Clark and Watson for respondents.

The case was advised on 4th March last.

Lord President—The object of this action, at the instance of the present Earl of Breadalbane, is to set aside seven decrees pronounced by this Court. Six of these decrees were obtained by the late Marquis of Breadalbane under the authority of the 26th section of the Montgomery Act, and the seventh is a decree authorising him to grant bonds for these improvements, or for a part of them. The seventh decree is one which follows almost as a matter of course upon the other six, and therefore the main question is, whether the six decrees pronounced under the authority of the 26th section of the Montgomery Act, are in any respect invalid—invalid, that is to say, in such a sense and to such an effect that they can be set aside by the pursuer as the next succeeding heir of entail. Now the grounds upon which these decrees are challenged

may be shortly described as being, in the first place, that the money for which the decrees are granted was in whole or in part expended upon improvements not of the nature contemplated by the Montgomery Act; in the second place, that, as regards some portion of the money for which these decrees were granted, it was expended upon subjects that did not form part of the entailed estate; and, in the third place, that the decrees themselves are inconsistent with the accounts and vouchers upon which they bear to proceed. There is a fourth ground of reduction which I shall deal with separately; it is founded upon allegations of deceit practised against the pursuer as the next succeeding heir of entail, or against his father, who, at the time of the pronouncing of this decree, was the heir next entitled to succeed; and of deceit also practised upon the Court who granted these decrees. That is obviously a ground of reduction of a very peculiar and a very serious character, and requires separate consideration. But, in the meantime, I deal entirely with the first three grounds of reduction. Now the answer which appears to me conclusive as regards the whole of these three is, that they do not appear *ex facie* of the decrees themselves. They require to be substantiated either by evidence or by an appeal to the accounts and vouchers of the expenditure, which do not form any part of the decrees, and, upon that ground, I think these three objections which are stated as grounds of reduction are not well founded. I have had occasion to consider this question previously, but it is a matter of so much importance—as being a question of very general application—that it may not be amiss that I should as shortly as possible give my reasons for thinking that these decrees cannot be challenged, except upon the ground of objections appearing *ex facie* of the decrees themselves. This depends upon a consideration of the Act of Parliament, and of the force and effect intended by the Act to be given to such decrees. The heir who proposes to make improvements of the kind that we are dealing with here, is desired to begin his proceedings by giving three months' notice, in writing, to the heir of entail next entitled to succeed to the estate after the heirs of his own body. And in that notice he is to specify the kind of improvements intended, and the farms or parts of the estate upon which the improvements are intended to be made; so that the next heir—who has the most material interest in seeing that the heir in possession does not exceed his powers conferred by the Montgomery Act, or does not abuse these powers to purposes not beneficial to the entailed estate and the succeeding heirs—has the most precise and specific notice, before-hand, of what is intended to be done. Having given that notice, the heir in possession may then proceed to make his improvements; but, during the currency of these improvements he is under the further obligation of lodging annually, within four months after the term of Martinmas, with the Sheriff or Steward-clerk of the county, an account of the money expended by him in such improvements during the preceding twelve months, subscribed by him, with vouchers by which the account is to be supported when payment shall be demanded or sued for, and these accounts and vouchers are to be preserved and recorded by the sheriff-clerk, and he is to give certified copies and extracts of them to any person who desires to have them, and to give inspection of the books in which they are recorded. Now, here again, the next heir in succession after the heirs of the present possessor's own body,—the person who has the best title and the greatest interest to watch the proceedings—has an opportunity again of seeing that the precise improvements of which notice was given are in the course of being actually carried into operation, and that the accounts which are lodged specifying the amount of money expended upon these improvements are duly vouched. All this is very precise and very complete, and that being done, this effect follows, that when the heir in possession dies his executors or his assignees become creditors of the next heir of entail for the amount of the improvement expenditure within a certain limit, and subject to certain conditions. They became creditors, and highly privileged creditors—creditors who have a preference in competition with the personal creditors of the next heir; and this advantage is accorded to them very naturally, because of the great public advantage, as the Act itself expresses it, of encouraging heirs of entail in possession to make such expenditure. But then it was also thought, and most reasonably, by the framers of this Statute, that where the heir of entail in possession of an estate was a young man, and likely to live for a considerable time, and the question, therefore, of demanding payment of the proportion of the improvements authorised by the Statute would not arise until the lapse of a great many years, when there might be a difficulty in supporting the claim by evidence, that is to say by evidence beyond the accounts and vouchers, as that might probably occur in such a case, it was not unreasonable that the proprietor making such expenditure should have an opportunity of constituting his claim during his own lifetime. But it was equally clear that if he could only constitute his claim during his lifetime by a decree in absence, that would be of no use to him, because then, after his death, that decree could be opened up and the whole matter must be judged of upon its merits, and therefore the Legislature provided by the 26th section of the Statute that he should have the opportunity of obtaining, on certain conditions, a decree of declarator constituting the amount of his expenditure on entailed improvements, which should have the effect not of a decree in absence, but of a decree *in foro*. That, I apprehend, is the effect of the 26th section; and, when we look to the safeguards and precautions with which it is surrounded, it seems to me to be a most reasonable provision in favour of the heir. Not only has the next heir of entail who is to succeed to the estate had ample notice of the precise nature of the improvements which are to be made, but he has had an opportunity, by inspecting the accounts and vouchers, of watching every year's operations in carrying through these improvements by the heir in possession; and if he had any objections to state to what had been done, nobody could have a better opportunity or more complete knowledge of the circumstances than he might have if he chose. But still when the action is brought by the heir in possession under the 26th section of the Statute, it is not by any means to pass as a matter of course; the decree which he has so obtained is not to pass as a matter of course, and not to pass on the mere production of the accounts in Court. That is not contemplated at all. On the contrary, the decree is to proceed *causu cognita*, whether the next heir of entail chooses to enter an appearance and make a defence or not. If he appears and defends that action, which he is quite entitled to do, he has then an opportunity of

stating every defence that may be competent to him, every objection to any of the improvements that are proposed to be charged. But if he does not appear, the heir in possession must satisfy the Court, and the Court is just as formidable a contradictor as the next heir of entail, because nothing but complete and satisfactory evidence will satisfy them, that they should grant the decree required. Accordingly this section of the Statute provides that when he raises his action of declarator before the Court of Session, or process before the Sheriff, he shall call the heir next entitled to succeed after the heirs of his own body, and shall in such suit produce proper evidence of the money laid out in such improvements, and the said next heir or any other heir of entail shall be entitled to produce proper evidence to set aside or diminish the said claim; and that being done, it shall be lawful for the Court or Sheriff to pronounce a decree for such part of the said sum as, according to the true intent and meaning of this Act, is intended to become a charge against the succeeding heirs of the entailed estate. The Court are therefore bound to apply their minds to the consideration of the question as applicable to every item in the accounts, whether those items fall within that description of improvement which, according to the true intent and meaning of the Act, is intended to become a charge, and it is only after a full consideration of all this, that the Court is authorised to pronounce the decree. Now, really, after such precautions as these, after requiring so full and complete an inquiry before the Court, and with all the additional preliminary safeguards in the way of notice, and lodging and recording accounts and vouchers, one is not surprised to find the Legislature going on and providing that this decree, if pronounced by the Sheriff, shall become final, unless carried to the Court of Session by suspension within six months after the same shall have been pronounced, and if pronounced by the Court of Session, either in such process of declarator or suspension, shall be final if an appeal is not brought within twelve months. Now, what does this mean? Does not that plainly mean that no man after the lapse of that time shall be entitled to quarrel or challenge this decree upon its merits, or upon any ground that could have been stated as a defence before the decree was pronounced. What is it that the Court are required to consider? Why, the very objections that are now stated as grounds of reduction. They are required to consider whether the improvements which have been made are within the true intent and meaning of this Act proper improvements. That is one of the grounds of challenge. They are necessarily to consider whether they are made upon any part of the entailed estate. That is clearly a question upon which the Court must be fully satisfied before they can pronounce decree; and, lastly, they are most assuredly not entitled to pronounce any decree which shall be in the slightest degree inconsistent with the accounts and vouchers which the pursuer of the action produces in support of his summons. And yet these are the three grounds of challenge now before us. It seems to me, that to sustain these as grounds of reduction would be simply to open up such a decree as this as if it were a decree in absence. It was suggested, indeed, by the learned counsel for the pursuer, that such a case might occur as would be quite irresistible as a ground for opening up such a decree as this, and in regard to the application of money for improvements upon subjects not belonging to the entailed estate. All that is said in the present case is, that the subject called the Breadalbane Arms Inn is beyond the boundary of this estate, and that in another case a wire fence has been so extended as to include some lands that do not belong to the entailed estate. These are very small objections in themselves, but, said the learned counsel, suppose that we undertake to show that the money, instead of being expended upon the entailed estate in the Highlands, was expended upon the late Marquis' house in Park Lane, London. All I can say in answer to that is, that it would be a very different ground of reduction from the present; because, to have expended money upon a house in London, and represented to the Court that it had been expended upon an estate in the Highlands, would have been a simple fraud. And that is the ground of reduction that I am now going to consider. But the extreme case which is thus put—as if it belonged to the grounds of reduction that I have hitherto spoken of—is not a case within that category at all, but a case within the remaining category of fraud, Now, we are told that, as regards this last ground of reduction, viz., that the Court were deceived and imposed upon in granting these decrees, it is not intended by the pursuer to allege fraud, and, in consistency with that announcement, the word fraud does not occur in the record. But we must consider whether the allegations which are contained in this record do not amount to fraud; and if they do amount to fraud, we shall compel the pursuer, whether he will or no, to deal with them as fraud, unless he retracts these averments. Now, what is it that is said? [*reads 12th article of condescendence*]. Now, it appears to me that that is an averment of fraud; otherwise it means nothing. If it means merely that the Marquis of Breadalbane and his advisers made a mistake in the construction of the Act of Parliament, and thought that things were improvements within the meaning of the Montgomery Act which were not such improvements, then that really is utterly irrelevant. But that is not the meaning of it as I read it. As I read it, it means that they were perfectly aware and had full knowledge and belief that what they were constituting as improvements against the estate were not Montgomery improvements at all, but something quite different. [*Reads cond.* 13.] I do not think that a very important article, because, if it means anything at all, it means to impute negligence to the Court. Then, he says further in the 15th article [*reads*]. Now, that is an averment of the same kind as we have in the 12th article. [*Reads art.* 16.] Now, here again still more clearly what is alleged against the Marquis and his advisers is a fraud. Here there can be no question about the construction of an Act of Parliament, or a mistake as to the legal character of the improvements, because no man could be so stupid as not to know that this Act of Parliament never contemplated the making of improvements which should be chargeable against heirs of entail on subjects that were not to come to them, and which were not part of the entailed estate. Nobody could make any mistake about that; and, therefore, if it be true that the late Marquis, well knowing that this inn was not part of the entailed estate, represented it to be such, and so obtained his decree for the sum expended upon his improvements, there cannot be the smallest doubt that he committed a clear and direct fraud. [*Reads art.* 17.] This is all that is necessary to complete a case of fraud. Misrepresentation of facts, in the full knowledge of the falsehood of the

misrepresentation, operating upon the minds of others and deceiving them—that is fraud, if I understand what fraud is at all. And, again, not to multiply examples of the manner in which these things are averred in this condescendence—after having specified the manner in which the Marquis brought the case up to the point at which he was entitled to obtain his 6th decree of declarator and payment, the pursuer says this—"The Court were consequently deceived" [*reads art.* 26]. Now, I do not think that the Court can allow the pursuer of an action of reduction who makes such statements as these to say that he has not alleged fraud; and I should be very sorry indeed to dispose of a record like this, upon the footing that it is irrelevant, because it does not allege fraud. Being of opinion that it does allege fraud, I think it is relevant, or at least I think it so far relevant that the pursuer must be allowed an opportunity of putting in an issue for the purpose of trying this part of his case. There can be no doubt that if a judgment of a Court is obtained by fraud—that is to say, if the person who obtains the judgment, although it be a judgment *in foro*, comes into Court with false representations, which he knows to be false, for the purpose of obtaining his decree upon these false representations, and succeeds in deceiving both his opponents and the Court—that is a relevant ground of reduction. That was certainly affirmed without the smallest hesitation by the House of Lords in the case of *Shedden* v. *Patrick*, with reference to a judgment of the Court of Last Resort, and I cannot doubt, as a general doctrine, that that is perfectly sound. The only question may be whether the fraud here alleged is sufficiently well alleged in point of specification and detail. We have not heard anything from the parties upon that subject. The argument has hardly been directed to this part of the case, but there is certainly enough in this record to satisfy me that the pursuer intends to aver, and has in point of fact averred, that these decrees which he seeks to reduce were obtained by the late Marquis of Breadalbane by fraud upon the part of himself and his agents. And, therefore, upon that part of the case, I would suggest to your Lordships to put the case in such a shape as would enable the pursuer to proceed to the trial of the case either by lodging an issue, or in such other way as may seem most expedient. As regards the other grounds of reduction, for the reasons that I have stated, I concur with the Lord Ordinary in thinking that they ought all to be repelled.

Lord Curriehill—I concur with your Lordship in all the remarks which you have made upon all the conclusions of the action, and I would only make one additional observation as to what appeared to me to be a fallacy which pervaded the whole of the pursuer's argument in the case. He made some very pointed allegations as to the mistakes in these accounts, and in particular the allegations your Lordship has alluded to of some of these improvements not having been made upon the entailed estate, but upon properties that were not part of the entailed estate. Now, throughout the whole argument these allegations were founded upon what was alleged to appear on the face of the accounts or vouchers which had been lodged in the Sheriff-clerk's office. But the fallacy, I think, was this, that it was overlooked that all these were investigated by the Court in the action to which your Lordship has referred, and it is to be presumed that if there were any charges in these accounts for subjects that were in the position I have referred to, they were disallowed by the Court in the accounting. That is the presumption; and the finality clause in the Act of Parliament raises that to a presumption *juris et de jure*, and that excludes any inquiry as to what articles were allowed and what were disallowed, so that we must hold that if there were any charges of that kind in these accounts, they are not in the decrees. That is an observation that has very powerful influence on my mind in support of the conclusion which your Lordship has come to. As to the allegations of fraud, I entirely concur in what your Lordship proposes to do.

Lord Deas—With the exception of objections upon the ground that some of these improvements were executed upon other subjects than the entailed estate, I think all the objections that are stated here were brought before the Court in a different form in the case between the same parties upon the 6th of June 1866. I do not look upon the judgment in that case as *res judicata* here; but upon reconsidering these objections in this case, taking it as an action of reduction, giving full effect to any difference in the form of process, I do not see any reason to form a different opinion upon those objections than I did when they were before us at that time; and therefore I do not think it necessary to say any more about these. I shall only make this single observation with reference to the finality clause in the Statute Geo. III., § 26, that it did occur to me for consideration whether the declaration of finality there, if an appeal is not taken within a certain period, might be held only to give that kind of finality which results from there being no appeal. But I am quite satisfied that that would not be a correct construction of the clause. All the reasons which your Lordship has fully stated why a judgment of the kind that was pronounced in these improvement cases should be final, are reasons for construing the 26th section of the Statute as making it final. They are reasons that go in that direction, and would be unreasonable in any other view; and, over and above that, there is the introductory clause, that whereas questions may arise concerning the amount of sums laid out under the authority of this Act at a great distance of time, &c., it is enacted so and so, and one of the enactments made in that preamble is "which decree being pronounced by the Sheriff shall be final [*reads*]. Now, that introductory clause of itself shows that it was not a shortening of the time for appeal merely that was in view, but it was in respect that questions might arise in a reduction, for instance, of the decree at a great distance of time, when the witnesses were dead, and so on,—that therefore the thing should be ascertained within a limited time, and that all parties should be brought into the field. An observation was made in the course of the discussion, that it was only the amount of the sums to which this introductory clause refers, but it is quite plain that that is not so. It is concerning the amount of the sums laid out under the authority of the Act, and for ascertaining in due time the amount of the sums so expended; and then it goes on "It shall be lawful for the Court of Session or Sheriff to pronounce a decree for such part of the said sums as, according to the true intent and meaning of this Act, is intended to become a charge against the succeeding heirs in the said entailed estate." So that the preamble and the whole clause refer not

merely to the amount of the sums, but also to the question whether, according to the true intent and meaning of this Act, the sums ought to be a burden upon the estate. Now, I do not make any objection to saying that if a decree of that kind had the force of a decree *in foro*, it is not necessarily, because it is a decree *in foro*—it is no matter whether it is called a decree *in foro* or not. The natural thing is, that be what it may, the Statute says it shall be final. It is more final if possible than a decree *in foro*. It is absolutely declared by the Statute to be final; and, as I read the section, not merely as to the amount of the sums, but whether the sums be of the kind intended to be charged. It is a statutory declaration of finality, and all the reasons in favour of that, as your Lordship stated, go to that construction. The only new matter that is brought into this action that was not in the former, is that which relates to money which is said to have been expended elsewhere than on the entailed estate. In what your Lordship said about that, apart from any allegation of fraud, I quite agree. Apart from that, it just falls under the principle we have gone upon as to the other. Then as respect what your Lordship said about fraud, I agree likewise. I have no doubt that fraud is a good ground for reducing a decree of this kind, notwithstanding the finality clause. The finality clause never can be understood to mean that a thing which is got by fraud is to be final. Now your Lordship has minutely gone over the averments on this record, and I need not go over them again. As respects those which relate to the knowledge of there being improvements not of the kind contemplated by the Statute, I doubt if there is any relevancy in that at all. It is a matter of opinion—it is a matter of law—a matter of opinion out of which I think it would be excessively difficult to make any charge of fraud in any way that it could be stated. But when we come to the other averments, they just come to this, that the Marquis of Breadalbane, and the agents of the Marquis of Breadalbane, knew quite well that this Inn and certain other subjects afterwards mentioned did not form any part of the entailed estate, and they nevertheless have made a claim for the improvements made upon that which was no part of the entailed estate, and, by false representations, they succeeded in the purpose of getting those sums made a burden upon the entailed estate which they knew should not be burdens upon it at all. They succeeded in deceiving both the opposite party and the Court, so as to get a decree declaring that these were sums which should be laid on the estate, which they never would have got otherwise. Now, I observe that in the Outer-House the pursuer maintained this, according to the note of the Lord Ordinary "fraud indeed is not expressly charged anywhere in the record in the present case. It is not to be found either in the pursuer's condescendence or in his pleas in law. He maintained however at the debate that his statements as made in the record, taken in connection with his fifth plea in law, amounted to a charge of fraud sufficient to entitle him to investigation." That is what they maintained in the Outer-House as being the import of these averments. There is no doubt, however, that at your Lordship's Bar it was just as explicitly, and if possible more explicitly, maintained by the pursuer that they did not amount to fraud, that he never meant to charge fraud, that he meant to say the thing he says here, and that he avoided calling it fraud because he did not consider it to be fraud; and therefore, in place of asking an investigation on the ground of fraud, as he did from the Lord Ordinary, asked your Lordships to allow no investigation because fraud is not charged at all. I agree with your Lordship upon that point; a party says, "You the proprietor of the estate, and you the agents of the proprietor, knew that those subjects on which you expended money were no part of the estate at all, but, in order to get them made a burden on the estate, you set forth that they were, and you succeeded in deceiving your opponent, and in deceiving the Court, and in making them believe that they were, and therefore you got that amount of money which you never would have got otherwise." Does any man maintain, as it seemed to be maintained by my friend Mr Young, that there is nothing morally wrong in that? I do not know what moral wrong is if that is not moral wrong. And moreover, I do not know what legal wrong or legal fraud is if this is not legal wrong and legal fraud. You may not give the thing a name in so many words, but is it to be listened to that because you do not sum it up in a name, and because you do not christen it, you are to be held as charging nothing morally wrong or legally wrong? There was no man in the country that was supposed to be a more honourable or more truthful man than the late Marquis of Breadalbane, and I do not know any agents in the City of Edinburgh who were supposed to be more honourable or truthful men than his agents were; nevertheless it is quite within the bounds of possibility that they did these things; but if they did them, I must say that a grosser or more palpable fraud could not possibly have been committed. I cannot express the view that I take of Mr Young's argument on this subject, when he said that they purposely sustained from averring fraud when they made these allegations, than in the words of Lord Brougham in the case quoted to us the other day, *Galbraith* v. *Armour*, where he says, "My Lords, I observe a very great slowness in those who maintain the other side of the question to follow it to its consequences. If the consequences are legitimate, then there cannot be a clearer matter than this, that he who will have the proposition cannot repudiate its consequences; if he were, the most evident truths in mathematics would cease to be true, because a man might say 'I only say so and so—I do not go the length of saying so and so.' Ay, but you must go the length, because, if you say so and so you must say so and so too." Then he says, "according to the mode of reasoning with which I am dealing, people might very easily assert the most absurd propositions, things evident to asses they would deny, because they would say, 'Oh, I only say so and so, but I do not say so and so.' No, no, you must take the consequences of your proposition. *Qui vult antecedentem, non debet nolle id quod consequitur.*" Now, I just adopt the words of his Lordship as applicable to this case, if they are applicable to any case at all; and I agree with your Lordship that, in the first place, the party making such an allegation is well entitled to investigation if the contention is serious, but if he does not mean to follow it out and to prove it, it ought not to have been there. I cannot conceive anything more improper than its being there—anything more irrelevant to the whole case than allegations of this kind—unless the party is prepared to prove them; and, therefore, I agree with your Lordship that he must either prove them or give them up,—abandon them and repudiate them, and it would be an abuse of the whole forms of process if we were to allow statements of this kind,

which may turn out to be mere slanders, to be introduced, without the purpose either of following them out on the one hand, or of abandoning them on the other.

Lord Ardmillan — I have no hesitation in agreeing with your Lordship entirely on the first part of the case. I think it is very clear that the finality clause in the Montgomery Act has the force which your Lordship gives to it. I think that decrees obtained, though in point of fact in absence, are, by the force of the finality clause, to receive the effect of decrees *in foro*, which are pronounced by statute to be final. I therefore take the next step without any doubt,—that finality excludes all the grounds of action here excepting the last one mentioned. It is the policy of this Montgomery Act to give the utmost possible facility for appearance throughout the proceedings to the heirs. They have notices which are very minute; there is the laying of vouchers (which are very minute and elaborate, and must be carefully prepared) before the Court; there is consideration by the Court, and there is an opportunity to the heirs at every turn and every step of the proceedings; and that is all in order that when you come to the time that the decree is pronounced, which the Statute declares to be final, the door may be shut against opening up these matters again. I have no doubt therefore, with your Lordship, that all the objections, with the exception of the last one, are excluded now. On the last objection I have without much difficulty come to the same opinion with your Lordship. I think it has been well said that a person cannot be allowed to charge fraud by merely using the word fraud, and not alleging acts which imply fraud. There have been several cases in which a party has come into Court with a general averment of fraud, but has not alleged the particular conduct to which he attaches the character of fraudulent. The Court never allow that. You cannot scatter before the Court words of that kind. You must state what is the conduct to which the pursuer attaches the character of fraud. But, on the other hand, neither can a party come into Court and allege that which is fraud, and then escape from the responsibility which attaches to a man who makes a charge of fraud by saying,—"You knew the truth, and you alleged the falsehood; you intended to deceive the Court, you intended to deceive the heirs of entail; you succeeded in deceiving the Court, and in deceiving the heirs of entail; you did so by wilful deception and misrepresentation; but, because I do not use the word fraud, I do not incur the responsibility of making a charge of fraud." The Court cannot listen to that. If this pursuer does not charge fraud, he does not seriously charge the acts which he has here alleged. If he does charge these acts with the motive and the knowledge which he alleges, he makes a charge of fraud; and therefore I think that the finality clause does not protect against a conclusion for reduction on the head of fraud relevantly alleged; and that fraud is relevantly alleged here, excepting merely that the word is not used, and that that advised reticence (for we were told it was advisedly done) in refusing to characterise as fraud what is fraud or nothing, cannot avail the party. The party must make the charge, or he must withdraw the charge. No man can make a charge which implies fraud, and escape responsibility by refusing to give it the name.

Lord President—Then we recal the Lord Ordinary's interlocutor, which dismisses the action; repel all the reasons of reduction, except such as are founded on allegations that the decrees under reduction were obtained by the late Marquis of Breadalbane by means of fraudulent representations and fraudulent concealment, practised by the said Marquis and his agents; and appoint the pursuer to lodge, within eight days, a draft of an issue or issues for the purpose of trying the said last-mentioned reasons of reduction.

On the suggestion of the pursuer's counsel the Court gave ten days.

The pursuer lodged no issue, and after the meeting of the Court in May, stated that he did not propose to lodge any. The Court accordingly repelled the remaining reasons of reduction, and dismissed the action.

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

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

Friday, May 29.

BLANTYRE *v.* CLYDE NAVIGATION TRUSTEES.

Statute—Clyde Navigation Consolidation Act 1858—*Construction — Interdict — Channel of River — Public Trust. Held,* on construction of 21 & 22 Vict., c. 149, that a riparian proprietor on the river Clyde was not entitled to an interdict against the Clyde Navigation Trustees, which would in effect compel them to lay the soil dredged by them in performance of their statutory duties, on the banks of the river *ex adverso* of the proprietor's lands, at such part as he might approve.

This was a note of suspension and interdict presented by Lord Blantyre, proprietor of certain lands on the river Clyde, against the Clyde Navigation Trustees, craving the Court to interdict the "respondents, and all others acting under their orders or authority, from using or disposing of any soil or other matter cut, dredged, or otherwise taken from any part of the banks, channel, or bed of the river Clyde, upon or *ex adverso* of the complainer Lord Blantyre's lands and estates of Erskine, Northbarr, and Bishopton, on the south side of the said river Clyde, and the complainer's lands of Kilpatrick, Shorepark, Dalnottar, and Glenarbuck, on the north side of the said river, out to the central base line or *medium filum* of the said river *ex adverso* of the said respective lands, otherwise than by depositing or laying the soil or other matter so cut, dredged, or taken upon the most convenient banks of the river upon or *ex adverso* of the said lands, at such parts thereof as shall be approved of by the complainers; or at least to interdict, prohibit, and discharge the respondents, and all others acting under their orders or authority, from using or disposing of any soil or other matter cut, dredged, or otherwise taken from any part of the banks, bed, or channel of the said river above the present low-water mark, or above low-water mark as it existed prior to the operations of the respondents and their predecessors, under their various Acts of Parliament, situated upon or *ex adverso* of any of the said lands, otherwise than by depositing the soil or other matter so cut, dredged, or taken upon the most convenient banks of the river upon or *ex adverso* of the said lands, at such parts thereof as shall be approved of by the com-