Street, Glasgow, under which the said Robert Paterson agreed to execute the digging, mason, and brick work of three tenements proposed to be erected by the defender, for the contract price, in whole, of £2366, 4s. 0½d., from which the said Robert Paterson afterwards made a deduction of £100: Finds that his contract included, *inter alia*, the work of digging a foundation for the intended buildings, and also that of taking down a certain old building on the ground; Finds that the work of digging the foundation was in greater part performed by the pursuers William Henry & Company, as was also that of taking down the old house in question: Finds that the pursuers have not proved, by sufficient evidence, that this work was done by them on the employment and responsibility of the defender, and not as sub-contractors under Paterson, or otherwise under his employment: Assoilzies the defender from the conclusions of the action and decerns: Finds the pursuers liable to the defender in the expenses of process," &c.

The pursuers reclaimed.

WM. N. M'LAREN for reclaimers.

FRASER and STRACHAN, for respondent, were not called on.

The Court adhered.

Agent for Pursuers—J. M. Macqueen, S.S.C.

Agent for Defender—John Galletly, S.S.C.

Friday, May 29.

THOMAS *v.* STIVEN.

(*Ante*, p. 504.)

Expenses—Bankrupt—Trustee in Cessio—*Unsuccessful Litigation—Taxation of expenses as between agent and client, and party and party.* A., as creditor and as trustee in B.'s *cessio*, litigated with C. for recovery of part of B.'s estate. He was partly successful, and obtained decree against C. for a certain sum of expenses. B. was thereafter sequestrated, and A. claimed in the sequestration the balance of his law expenses after deducting the sum received from C. *Held* that the sum paid to A. by C. represented the difference in A.'s favour between his expenses for that part of the litigation in which he had been successful, and C.'s expenses for that part of the litigation in which A. had failed, and that A. had thus already got payment of the expenses of his *successful* litigation, which was all he was entitled to; but that as the expenses paid by C. to A. were taxed as between party and party, and A. was entitled to expenses taxed as between agent and client, A. was entitled to claim from the estate the balance arising in his favour between the two modes of taxation.

Thomas lodged in Robertson's sequestration an affidavit and claim for the following sums:—"1*st*, The sum of £338, 0s. 7d. stg., being the amount of expenses incurred and payments made by him for behoof of the estate and creditors of the said David Robertson, as trustee foresaid, conform to State No. 1," annexed to the said affidavit; and "2*d*, The sum of £689, 10s. 5d., being the balance of expenses incurred and payments made by the deponent (appellant) as trustee, and as a creditor foresaid for behoof of the estate and creditors of the said David Robertson, conform to State No. 2," thereto annexed. The said sum of £338, 0s. 7d. consists (with the exception of £80, 13s. 11d.) of accounts incurred and paid by the appellant to his law-agents in connection with the said Sheriff-court process and relative advocation, and to some extent in connection with the said action of reduction, and the said £80, 13s. 11d. is the account of the expenses found due and paid by the appellant to the said William Thomson in the said process of advocation. The said sum of £698, 10s. 5d. consists of the balance of the accounts incurred and paid by the appellant to his law-agents in connection with the said action of reduction, after deducting the proportion thereof found due and paid to the appellant by the said William Thomson. By the said claim the appellant claimed to be ranked for the said sums 'preferably to the whole ordinary creditors of the said David Robertson, and that the said sums should be paid to him out of the said estate immediately after payment of the expenses of taking out sequestration.'"

The trustee rejected the claim, and the Lord Ordinary (BARCAPLE), on appeal, sustained the deliverance of the trustee.

Thomas reclaimed.

CLARK and BALFOUR for reclaimer.

SHAND and WATSON for respondent.

At advising—

LORD PRESIDENT—The claim which has been disposed of by the trustee, and by the Lord Ordinary on appeal, is a claim by Thomas (*reads claim, ut supra*). The trustee rejected the claim, and the Lord Ordinary has substantially confirmed that deliverance, although not on the same grounds. The Lord Ordinary goes on the ground that the expenses incurred in litigation for the purpose of making available a part of a bankrupt's estate, can only be claimed in so far as the litigation has been successful, and the expenses to be deducted from the estate must be reasonable expenses incurred for the benefit of the estate. As to the general application of that rule there can be no doubt. The only doubt is as to its application here. The facts of the case are these. Robertson, the bankrupt, was contractor for building an infirmary in Dundee. It turned out to be an unfortunate contract, and in the course of its execution Robertson became insolvent. His brother-in-law, Thomson, was cautioner, and had advanced money to enable him to carry on the contract, and the consequence was that Thomson became a large creditor of the bankrupt, so as, in fact, to swallow up his whole estate if he could secure a preference, and leave nothing for the other creditors. In these circumstances Robertson obtained a *cessio*. In the decree of *cessio*, the moveable estate, but the moveable estate only, was adjudged to belong to Thomas, as trustee. In that character he raised an action against Thomson to obtain payment of money alleged to belong to the bankrupt estate, and which had been paid to Thomson under circumstances which were thought not to justify such payment. The first claim is for expenses incurred in that litigation. But in that litigation Thomas, as trustee in the *cessio*, was entirely unsuccessful. The proceedings were entirely unproductive to the creditors of the bankrupt, who have got no benefit from them, and never can get any. The action was found irrelevant, and the defender was assoilzied. Therefore, as to that part of the claim, the application of the general rule stated above is clear.

But then there is a second sum of £698, 10s. 5d., which stands in a different position. It seems that,

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,