His action is not, as I said before, for the exhibition of deeds to make out his claim, but to deliver the deeds to him, he founding upon the right of property in the deeds. He says, he has been served heir. Be it so; still he has not established his right to the dignity, and unless your Lordships have recognised his claim, he cannot say that he is entitled to the dignity of the Earldom of Craufurd and Lindsay. Upon these grounds, therefore, —that this is an action founded upon a right of property, and that he has failed in establishing that property upon his own showing; that in respect to the estates, he has not even claimed them; and that in respect of the dignity, he has not established any claim,—I think that these interlocutors must be reversed. Such a judgment will not prevent a proceeding on his part, on any future occasion, supposing him to have a ground for it. He may raise, if he is so advised, an action of exhibition ad probandum,—that accessary action to which I have referred,—or if at a future time he shall be found entitled to the dignity, the present form of action may be relevant. At present your Lordships see that the form of the action is founded upon the right of property, and the pursuer not having made out the right of property, it appears to me these interlocutors ought to be reversed, and judgment given for the appellant. May 26, 1826.

Respondent's Authorities.—Sutherland Case, p. 61.—1 Stair, 7. 14.—4 Ersk. 1. 52.—Lady Mary Campbell *v.* Earl of Craufurd, Aug. 8, 1783 (3973).—Earl of Hume *v.* Johnson, July 4, 1623. (Haddington.)—Earl of Bredalbane, Feb. 21, 1741. —1 Ersk. 3. 18.—Dunbar, Feb. 2, 1790 (7395).—MS. Index to Decisions of Hope, Durie, and Spottiswood, Ad Lib.—Ker, July 7, 1804 (7984).—Robertson's Ap. Cases, p. 400.—Kames' Hist. Law Tracts, p. 227.

J. RICHARDSON—J. CAMPBELL, *Solicitors.*

WM. MAULE, Esq., Appellant.—*Shadwell—Adam—Robertson.* No. 34.

HON. WILLIAM RAMSAY MAULE, and EARL of DALHOUSIE, Respondents.—*Brougham—Keay—James Campbell.*

Res Judicata—Circumstances in which it was held (reversing the judgment of the Court of Session), that a decree of the House of Lords did not form a res judicata as to a claim for certain leases; but affirming the judgment, in hoc statu, as to a claim to certain lands which had been found by an extracted decree to belong to the defender.

GEORGE Earl of Panmure, proprietor of the estates of Panmure, Brechin, Ballumbie, and Kelly, had two brothers, James and Harry. Prior to 1680, he disponed that of Ballumbie to his brother James, who, in 1681, made up titles in favour of himself and the heirs-male of his body; whom failing, to his younger brother Harry, and the heirs-male of his body, &c. under a strict entail. The estate of Kellie was purchased by May 26, 1826.

1st DIVISION.

Lord Alloway.

May 26, 1826. Harry from Earl George, and, in 1687, he settled it, by his contract of marriage, upon the heirs-male of his marriage; whom failing, those of any other marriage; whom failing, the heirs-female of his body.

Earl George having died without issue, was succeeded by his brother James, who, in 1713, granted a bond for £9000 to his wife. Having joined in the rebellion of 1715, Earl James was attainted, and his estates forfeited. Harry Maule, however, claimed the estate of Ballumbie, under the substitution in the entail of it in his favour, and was found to have right to it. Of the above marriage, he had four sons, George, James, William, and John, the former of whom died in infancy. Thereafter, in 1727, Harry Maule entailed the estate of Ballumbie in favour of James, (who was now his eldest son,) and the heirs-male of his body; whom failing, to William; whom failing, to John; and James was thereupon infeft.

On the forfeiture of Earl James, the Countess, founding on the bond of £9000, made a claim against his estates, and it being sustained, she assigned it to James, the eldest son of Harry, and his heirs, for certain causes expressed by him and his father in a back-bond.

The forfeited estates of Panmure and Brechin having been exposed to sale, were purchased by the York Building Company, and thereafter they granted leases of the mansion-houses and parks of these properties to the Countess, for 99 years from her death; and by her they were assigned to Harry Maule, his heirs, and assignees. Thereafter, his son James having died, William, the immediate younger brother, was served heir to him, both as to the Ballumbie estate and the bond for £9000.

In this way Harry Maule was the proprietor of the estate of Kelly, and had right to the above leases; while his son William was proprietor of Ballumbie and the bond for £9000.

Thereafter, the forfeited Earl having died without issue, Harry Maule, in 1730, executed an entail of the estate of Kelly, and of the leases, in favour of his son William, and the heirs-male of his body; whom failing, to John Maule, his youngest son; whom failing, to Dr Henry Maule, Lord Bishop of Cloyne, his next heir-male and the heirs-male of his body; whom failing, to James Maule, brother of the Bishop; whom failing, his nearest heirs. On the same occasion, his son William executed an entail in the same terms, and to the same heirs, of the estate of Ballumbie, and bound himself to employ the contents of the bond for £9000 in purchasing lands to be entailed in the same way.

The Countess died in 1731, and Harry Maule in 1734. His son William was afterwards created an Irish peer, by the title of Earl of Panmure, and John was appointed a Baron of Exchequer. May 26, 1826.

The property of the parks and mansion-houses of Panmure and Brechin having been exposed to sale in 1765 and 1775, were purchased by Earl William, who continued to possess the estates on the original titles. In 1781, he executed an entail of them in his own favour, and the heirs of his body; whom failing, his nephew, the Earl of Dalhousie, in life-rent, and his second son, the Honourable Mr Ramsay Maule, in fee; whom failing, certain other substitutes. The deeds of 1730 had been placed in the custody of Baron Maule, but were never recorded, and remained latent during the life of Earl William.

On the death of Baron Maule, without issue, in 1781, these deeds were found in his repositories along with a testament bequeathing them to Lieutenant Thomas Maule. This gentleman was the grandson of Dr Maule, Bishop of Cloyne, and, failing heirs-male of Earl William, claimed right to the estates, &c. under the deeds of 1730. The Earl then brought separate actions, concluding for delivery to him of these deeds,—to have it declared that he was the unlimited proprietor of the estates, and not affected by the fetters in the entails of 1730,—and to have them reduced and set aside. His Lordship having died in the following year without issue (1782), Lieutenant Maule took out a brieve for being served, under the entails of 1730, nearest and lawful heir-male of tailzie and provision in general to him; and at the same time raised a reduction of the deed of 1781 executed by him in favour of Mr Ramsay Maule. An advocation of this brieve was brought by that gentleman, who got one for serving himself heir of tailzie and provision to the Earl, under the deed of 1781. These processes having come before the Court, and Mr Ramsay Maule, and his father, as his administrator, being sisted in place of the Earl, their Lordships, on the 1st of March 1782, 'found that the deed of tailzie, executed by the deceased 'Harry Maule of Kellie, with consent therein mentioned, in the 'year 1730, of his lands and estate of Kellie, and also the deed 'of tailzie executed by the late William Earl of Panmure, in 'the aforesaid year, of his lands and estate of Ballumbie, are 'cut off by the positive and negative prescriptions; and that the 'obligation for employing £9000 sterling, executed by the said 'William Earl of Panmure, in the aforesaid year, is cut off by 'the negative prescription; and therefore sustained the reasons 'of reduction of these three deeds, and reduced, decerned, and

May 26, 1826. 'declared accordingly: Found that the said William Earl of 'Panmure had full power to make the deed of tailzie executed 'by him, in favour of the said Mr William Ramsay Maule and 'his administrator-in-law; repelled the reasons of reduction of 'that deed of tailzie, and assoilzied the said William Ramsay 'Maule and his administrator-in-law, from the process of re- 'duction-improbation and declarator, at the instance of the said 'Lieutenant Thomas Maule against them, in so far as the same 'relates to the estates of Kellie and Ballumbie, and also from 'the process against them for implement and performance of 'the prestations contained in the obligation for the £9000: 'Found that the said Mr William Ramsay Maule was entitled 'to be served heir of tailzie and provision to the said deceased 'William Earl of Panmure, his grand-uncle, in virtue of the 'foresaid deed of tailzie in his favour, and remitted to the Ma- 'cers to proceed in his service accordingly, on the brieve brought 'before them by him and his administrator-in-law: Found that 'the said Lieutenant Thomas Maule had right to take up the 'lease of the house and parks of Panmure, and the house and 'parks of Brechin, and decerned against the said Mr William 'Ramsay Maule and his said administrator-in-law, in the conclu- 'sions of declarator and removing in the foresaid action, at the 'instance of Lieutenant Thomas Maule, so far as respects those 'leases, and remitted to the Macers to proceed in his service in 'so far as regards these two leases; but found that he was not 'entitled to be served heir-male of tailzie and provision to the 'said William Earl of Panmure, in virtue of the said deed of 'tailzie of the estate of Kellie, executed by the said Mr Harry 'Maule, nor in virtue of the deed of tailzie of the estate of Bal- 'lumbie, executed by the said William Earl of Panmure, and 'that his service on the brieve taken out by him could not pro- 'ceed with regard to the said estates of Kellie and Ballumbie; 'and remitted to the Macers to dismiss the same accordingly, 'in so far as concerned these two estates.'* Against this judg- ment Mr Ramsay Maule immediately entered an appeal on the subject of the leases; but this was withdrawn, and Lieutenant Maule did not reclaim, in consequence of an arrangement enter-

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* In his Appeal Case the Appellant stated, 'that the Judges, at that time, were redu- 'ced by sickness and other causes, from fifteen to nine, and out of those nine only six 'voted on the question regarding the leases. Of these six, Lords Alva, Braxfield, and 'Hailes, were for Thomas Maule, and Lords Monboddo, Ankerville, and the Lord Pre- 'sident (Dundas), for Mr Ramsay; but the Lord President, by an arrangement in those 'days, having no vote, when the Judges were equally divided, Thomas Maule thus 'gained the decision. Lords Gardenston, Kennet, and Westhall, were on the bench, 'and voted as to the other questions, but declined voting as to the leases.'

ed into between the parties on the 20th March 1782, stating that 'to avoid further proceedings at law, the parties have agreed to 'settle matters by arbitration. Therefore, the said George Earl 'of Dalhousie for himself, and as administrator-in-law for his 'second son, the Honourable William Ramsay Maule and his 'whole other children, and the Honourable Lieutenant-Colonel 'Malcolm Ramsay, his Lordship's brother, on the one part, and 'Thomas Maule for himself, and as administrator-in-law for '(the Appellant) William Maule, his only son, on the other 'part, have submitted and referred, and do hereby submit to 'the amicable final decision and sentence and decreet-arbitral 'of Mr Alexander Wight and Mr Ilay Campbell, advocates, ar- 'biters mutually chosen by the said parties submitters; and, in 'case of variance between the said arbiters, to the Honourable 'Robert M'Queen, Esquire, one of the Senators of the College 'of Justice, oversman, mutually elected by the said parties, all 'questions between them, or which either of them may or can 'have with the other in relation to the premises; and particu- 'larly the whole of the said processes and claims, with the in- 'terlocutor thereon pronounced, and appeal thereon entered, 'and cross appeal competent to have been entered, both of 'which are hereby agreed to be departed from.' On the 2d of April this award was issued: '1st, We find that the said 'leases of the house and parks of Panmure, and castle and en- 'closures of Brechin, obtained by the Countess of Panmure and 'Mr Harry Maule, from the York Buildings Company, in '1724, are now at an end, in consequence of the late Earl of 'Panmure having purchased the property, and that the tail- 'zies of them executed in 1730, and founded on by the said 'Thomas Maule, Esq. are at any rate cut off and extinguished 'by prescription, as well as upon other grounds of law, and are 'not now subsisting deeds; and therefore, we reduce the same, 'and assoilzie the said George, Earl of Dalhousie, as liferenter, 'and the said William Ramsay Maule, his second son, as fiar 'of the estate of Panmure, and the other heirs of entail of the 'said estate, from all claim and demand upon these leases, or 'upon the tailzies thereof, at the instance of the said Thomas 'Maule, Esq. or his son, or any other persons claiming under 'those deeds in 1730, and we so far alter the interlocutor of 'the Court of Session, recited in the submission pronounced 'on the 5th of March last; but we adhere to the said interlocu- 'tor in all other points, and declare the same to be final and 'unalterable. And as we conceive it to be just and reasonable, 'that the said Thomas Maule, though not entitled to make any

May 26, 1826.

May 26, 1826. 'legal claim upon the foresaid deed executed in 1730, should 'have the following provision in money settled upon him and 'his heirs undermentioned, in consideration of our having, by 'this decreet-arbitral, deprived him and them of the benefit of 'the leases, which the Court of Session had adjudged in their 'favour, we decern and ordain the said George, Earl of Dal-'housie, for himself, and as administrator-in-law for his second 'son, and taking burden as aforesaid, and his heirs and succes-'sors in general, to make payment to the said Thomas Maule, 'and his heirs under mentioned, of the sum of £3500 sterling, 'in manner and at the terms following, viz. £500 thereof to 'the said Thomas Maule himself, immediately after this decreet 'is registered, and the remaining £3000 at Whitsunday next, 'but which £3000 is then to be laid out on good and sufficient 'security, to be taken in the name of two trustees,' &c.

The instrument then provided, that Thomas Maule was to receive the interest of the money during his life, and the appellant the interest of it after his death, till the term of Whitsunday 1831, when the leases would expire, at which term the Appellant was to be paid the principal sum, and then the trust was to be at an end—but this was under the following declaration: 'And we further declare, that if either the said Thomas Maule, 'or his said son William Maule, or any other heir-male of his 'body, or subsequent heir called by the said deed in 1730, now 'reduced, shall hereafter attempt to make any claim upon the 'said deeds, or any of them, under the pretence of their not 'being bound by this submission, or on any other ground what-'ever, it shall be competent for the said George, Earl of Dal-'housie, or his said second son, or the other heirs to the estate of 'Panmure, in their order, immediately to insist for repetition 'of the trust-money, so far as the same is unuplifted at the time, 'or so far as it has been uplifted by the person making such 'claim, or by any other whom he represents, and for damages 'against the said Thomas Maule, and his heirs.'

The decree of the Court was then extracted, and the arrangement was acquiesced in by Lieutenant Maule, who died in 1789, leaving a son (the appellant) who was then sixteen years of age. In 1809, he raised an action of reduction of the service of Mr Ramsay Maule, and of the submission and award, and concluded for decree of removing from the lands of Brechin and Panmure, and count and reckoning for the rents. His reductive conclusion was in these terms:—'Therefore, and 'for other reasons to be proponed at discussing hereof, the said 'pretended submission, whole proceedings had therein, and 'decreet-arbitral pronounced therein, and general service fore-

'said, and whole grounds and warrants thereof, with all that May 26, 1826.
'has followed, or is competent to follow on the same, ought and
'should be reduced, retreated, rescinded, cassed, annulled, de-
'cerned and declared, by decreet of our said Lords, to have
'been from the beginning, and to be now, and in all time
'coming, void and null, and of no avail, force, strength, or
'effect, in so far as regards the pursuer, and not binding on
'him.'

The Court having, on the 9th March 1813, assoilzied the respondent,* and the appellant having appealed, the House of Lords, on the 10th May 1816, found, 'that in this action and 'proceeding between the present appellant and respondent, the 'alleged submission and alleged decreet-arbitral, of the respec-'tive dates of 30th March 1782, and 2d April 1782, ought not 'to be considered as being, or having in law the effect of a sub-'mission or decreet-arbitral, but as a form adopted, in which 'an agreement previously made between Thomas Maule, the 'appellant's father, and George, Earl of Dalhousie, parties to 'the said submission, was concluded; and with this finding, it 'is ordered, that this cause be remitted back to the Court of 'Session in Scotland, to review the interlocutor complained of 'in the said appeal, and upon such review to do therein as is 'just and consistent with this finding.'

When the case returned to the Court of Session, the respondent maintained that the right to the leases in favour of the appellant was cut off by prescription; and that, although the decreet-arbitral had been set aside by the House of Lords, it was binding as a concluded agreement or transaction. The appellant, on the other hand, contended that the discussion of the question of prescription of the leases, was not hujus loci, as it was not embraced under the summons; and that the alleged decreet-arbitral was null to every effect. The Court, however, on the 2d December 1817, held that they could competently enter upon the question of prescription, and on considering informations, and the whole circumstances of the case, they sustained the defences, and assoilzied the defender.†

The appellant again appealed, and after parties had been heard, the Lord Chancellor prepared a draft of a judgment to this effect (as the appellant alleged,)—'Reverse the interlocutor of 'the 2d December 1817, so far as it is inconsistent with the 'order of your Lordships, of the 10th May 1816, remitting the 'cause back to the Court of Session, to review the interlocutor 'of 9th March 1813, complained of in the former appeal, and

* Not reported.

† See Fac. Coll. No. 139.

May 26, 1826. ‘ so far as it sustains generally the defences pleaded for the de-
‘ fender, and except as is hereinafter excepted: And order and
‘ adjudge, that the instrument of 2d April 1782, purporting to
‘ be a decreet-arbitral, ought to be set aside, and reduced as a
‘ decreet-arbitral, affecting any rights of the appellant; and
‘ declare, that under the circumstances of this case, this in-
‘ terlocutor, of 1st March 1782, is not to be considered as final
‘ and conclusive against the respondent, with respect to the
‘ leases in question; but their Lordships are of opinion, that
‘ the appellant is barred by prescription of the right to take up
‘ such leases, and that the defences of the respondent ought, on
‘ that account, to be sustained, as to so much of the appellant's
‘ action of reduction and declarator, as seeks a declaration of
‘ the rights of the appellant to such leases; and so far their
‘ Lordships affirm the judgment of the 2d December 1817, but
‘ without prejudice, as to any question between the parties,
‘ touching any property comprised in the deeds of tailzie, in the
‘ pleadings mentioned, except the said leases.’

Thereafter, the appellant submitted remarks upon this draft, and the following judgment was pronounced by the House, on the 10th of July 1819:—‘ It is ordered and adjudged, by the
‘ Lords Spiritual and Temporal in Parliament assembled, that
‘ the said interlocutor therein complained of be, and the same
‘ is hereby reversed, so far as it is inconsistent with the order of
‘ this House, of the 10th of May 1816, remitting the cause back
‘ to the Court of Session in Scotland, to review the interlocu-
‘ tor of 6th March 1813, complained of in the former appeal, in
‘ so far as it sustains generally the defences pleaded for the de-
‘ fender, and except as hereinafter expressed: And it is further
‘ ordered and adjudged, that the instrument of 2d April 1782,
‘ purporting to be a decreet-arbitral, ought to be set aside and
‘ reduced as a decreet-arbitral, affecting any rights of the ap-
‘ pellant. And it is declared, that, under the circumstances of
‘ this case, the interlocutor of 1st March 1782 is not to be con-
‘ sidered as final and conclusive against the respondent, with
‘ respect to the leases in question; and, therefore, as to so much
‘ of the appellant's action of reduction and declarator, as seeks
‘ a declaration of the rights of the appellant to such leases, it is
‘ further ordered and adjudged, that the said interlocutor of
‘ the 2d December 1817 be, and the same is hereby affirmed,
‘ but without prejudice as to any question between the parties
‘ in any other action touching any property comprised in the
‘ deeds of tailzie in the pleadings mentioned.’

The case having returned to the Court of Session, the judg-

ment was applied, and the interlocutor of the Court extracted on the 7th March 1820. May 26, 1826.

Thereafter the respondent raised an action to recover, and did recover from the appellant, the sum which had by the annulled decreet-arbitral been awarded.*

The appellant then raised a new action against the respondents, in which, after libelling on the deeds of entail executed in 1730, and reciting that which had been made by the Earl of Panmure, and on which the respondent possessed the estates, as also certain other previous deeds made by the Earl, he concluded to have it found, 'that the whole of the foresaid disposi-'tions and settlements executed by the said deceased William 'Earl of Panmure, whereby he conveyed the estates of Kellie 'and Ballumbie, and others, contained in the foresaid deeds of 'tailzie and obligation foresaid, were all made and granted in 'direct violation of the obligations and prohibitions, and other 'provisions and conditions therein contained, for the purpose of 'altering the order of succession, and disappointing the pursuer 'and the other substitutes called to the succession by the said 'deeds of tailzie, and the said William Earl of Panmure had no 'power to grant the same.' He therefore concluded for decree of reduction of these deeds, and of removing from the lands, and of count and reckoning; but he did not conclude for reduction of the decree in 1782. In defence, the respondent contended that the judgments already pronounced, both as to the estates and the leases, formed res judicata in his favour. The Lord Ordinary, after having appointed copies of all the judgments on which the respondent rested his plea of res judicata to be produced, found that, 'by the extracted decreet of the Court of 'Session, 5th March 1782—by the judgment of the Court of 'Session, 9th March 1813—by the judgment of the House of 'Lords, 10th May 1816—by the judgments of the Court of Ses-'sion, 21st May 1816, and 4th March and 2d December 1817 '—by the judgment of the House of Lords, 10th July 1819, and 'by the extracted decreet of the Court of Session, 7th March '1820, all right and interest which the pursuer claims under the 'present summons of reduction and declarator are totally ex-'cluded, and the subject-matter of this action is res judicata by 'the judgments above referred to, and therefore assoilzied the 'defender.'

Against this judgment the appellant reclaimed; but the Court adhered on the 1st June 1824.†

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* See 2 Shaw and Dunlop, No. 27.

† See 2 Shaw and Dunlop, No. 26.

May 26, 1826.

Lord Hermand.—In considering whether there is a res judicata, we must not look at each judgment separately, but at them taken all together. In this view, it is perfectly plain that the defence is well founded. Indeed, this is just a revival of the old action in 1782. The interlocutor there sustains the defence of prescription as to the lands; and were it necessary to enter on the merits, I think that judgment perfectly correct. Then there was a compromise, which was acted on for many years. At last the pursuer attempted to open up matters; but the defender was assoilzied, and the House of Lords in substance affirmed that judgment. There appears at first sight some confusion as to the lands and leases, but, on attending to the procedure, it is clear the question is at rest as to both of them.

Lord Balgray.—It is perfectly plain that there is a res judicata as to the leases. I cannot explain the judgment of the House of Lords in 1819 to any other effect. As to the lands, I am not so clear. Perhaps the pursuer may be entitled to get at them in proper form. The House of Lords have set aside the submission in toto; and it may, perhaps, still be competent to reduce the judgment in 1782. But it is not before us, and while it stands, it must form a res judicata against the pursuer as to the lands.

Lord Gillies.—We have nothing to do with the merits. The only point brought under our review is that of res judicata. With regard to the lands, there is an extracted decree in favour of the defender, and which affords to him a valid defence. Possibly it may be affected by the submission being set aside; but no reduction of it has been brought, and therefore it must receive full effect. The decree-arbitral has, however, only been set aside as such. The claim to the leases is not touched by the reservation in the judgment of the House of Lords; and it is plain, when you look back at all the judgments, in a complex view, there is a res judicata also as to them.

Lord Succoth.—I am of the same opinion.

Lord President.—I concur. The decree-arbitral, settling the rights of the parties, both as to the lands and leases, was acquiesced in till 1809. Then a reduction was brought of it as a decree-arbitral, but not as an agreement, and the judgment of 1782 was not complained of. The House of Lords have set aside the decree-arbitral as such, but not as an agreement; and indeed it would have been ultra petita to have done so. This Court assoilzied from the action, and that judgment has been affirmed, except to the effect of finding that the decree-arbitral is not valid as such. Therefore, the absolvitor from the claim to

the leases remains effectual, and the decree of 1782 is a bar as to that for the lands. May 26, 1826.

William Maule appealed.

Appellant.—By the judgment of 1782, the claim to Kellie, Ballumbie, and the £9000, was rejected—to the leases the claim was sustained. The operation of this decree was stayed by the award under the agreement. This agreement and award, and nothing else, the appellant challenged in his former action; and the award has been reduced to all effects. The conclusion as to removing was not equivalent to a claim, on the merits, to the leases, or such as would have warranted a decree or decerniture on the merits. But it was necessary in point of form, as, in consequence of the award, the respondent had entered into possession; and it was requisite that matters should be put exactly as if no such decree had been pronounced, so as to give effect to the appellant's rights under the judgment of 1782. While, however, the House of Lords set aside the decree-arbitral, they thought, that under the circumstances of the case, the finding in the judgment 1782, as to the leases, ought not to be final against the respondent. But in so setting aside the decree, matters were laid open to both parties, and it became competent to the appellant to proceed in any other action to vindicate his rights. All that was, therefore, decided by the House was, that the decree-arbitral was ineffectual, and that the door was still open to the respondent to claim the leases, and of course to the appellant to claim the estates of Kellie and Ballumbie, and the bond of £9000. It is impossible, therefore, to contend that the judgments subsequent to that of 1782 afford a plea of res judicata; and as to that judgment, it has in effect been entirely laid open by the proceedings which have taken place.

Respondent.—The conclusions of the appellant's action were perfectly sufficient for trying the question of right to the leases; and accordingly that very point was discussed before the Court of Session, and was set at rest by the judgment of the House of Lords, in 1819. There was then no discussion as to the estate of Kellie, Ballumbie, or the £9000; and therefore the reservation could not apply to them. The right to these estates had long since been settled by the extracted decree in 1782. The appellant's plea in the Court of Session was, not that the conclusions of his action would not admit an inquiry into the merits of the claim to the leases, but that his right to the leases was finally fixed by the judgment 1782. Looking at the judg-

May 26, 1826. ments pronounced in this litigation, taken altogether, it is impossible to get over the respondent's defence of res judicata.

The House of Lords ordered and adjudged, 'That the interlocutors complained of in the said appeal be, and the same are 'hereby affirmed, with respect to the estates of Kellie and Balumbie, and the bond for £9000 in the said interlocutors mentioned, so far as the said interlocutors find that all right and 'interest in the said estates and bond which the appellant claimed under the summons of reduction and declarator, in the said 'interlocutors mentioned, were totally excluded, and the subject matter of the action then before the Court as to such 'estates and bond was res judicata by the judgment contained 'in the decreet of the Court of Session of the 5th of March 1782 in the said interlocutors mentioned, inasmuch as it appears to their Lordships that it was not competent to the appellant, by the summons of reduction and declarator, in the said interlocutors mentioned, to impeach such decreet of the 5th of March 1782, so far as the same respected such estates and bond, and such decreet has not been impeached by reclaiming petition or appeal, or any other proceeding competent to impeach the same: And it is further ordered and adjudged, That the interlocutors complained of be, and the same are hereby reversed, so far as the same find that all right and interest which the appellant claims in the leases of Brechin and Panmure, under the summons of reduction and declarator, in the said interlocutors mentioned, were totally excluded, and that the subject-matter of the action then in question, touching such leases, was res judicata by all the several judgments referred to in the interlocutors complained of, inasmuch as the said decreet of the Court of Session of the 5th of March 1782, instead of excluding, expressly affirmed the title under which the appellant claimed such leases, and the judgment of this House of the 10th of July 1819, in the said interlocutors mentioned, expressly left all questions open to both parties with respect to the said leases, notwithstanding such judgment, or any of the proceedings in the Court of Session to which such judgment referred, such judgment of this House having declared, that under the circumstances of the case the said decreet of the 5th of March 1782 was not to be considered as final and conclusive against the respondent with respect to such leases; and having, therefore, as to so much of the appellant's action of declaration and reduction then before the

'House as sought a declaration of the rights of the appellant to such leases, founded on the said decreet of the 5th of March 1782, affirmed the interlocutor of the 2d of December 1817, then complained of, but having also expressly declared that the affirmance of such interlocutor by this House was without prejudice to any question between the parties in any other action touching any property comprised in the deeds of tailzie therein mentioned; the intent and meaning of the whole of such judgment being to leave all questions respecting the right to the said leases, as well as to the rest of the property comprised in the deeds of tailzie therein mentioned, open to be discussed in such manner as the same might be properly discussed in any future proceeding properly instituted for that purpose: But, as it appears that the Court of Session, in pronouncing the interlocutors complained of, have not entered into any question touching the right to the said leases, except the question, whether, by the several judgments in the said interlocutors mentioned, all right and interest, which the appellant claimed under the summons of reduction and declarator then before the Court, were totally excluded; and whether, therefore, the subject-matter of that action respecting such leases was res judicata by the judgments referred to in such interlocutors, so that the right of the appellant to the benefit of such leases has not been properly discussed in the action of reduction and declarator then before the said Court, according to the reservation contained in the judgment of this House of the 10th of July 1819, and the true intent and meaning of that judgment: It is further ordered, That this cause be referred back to the Court of Session, so far as the same respects the right and title to the said leases; and that the said Court do proceed therein in such manner as shall be consistent with this judgment, and with the former judgments of this House, and as shall be just.' May 26, 1826.

LORD GIFFORD.—My Lords, there was a case heard before your Lordships, a short time ago, in which your Lordships had the assistance of a noble and learned lord (Lord Redesdale), who is not now present, but with whose opinion I have had the benefit of being made acquainted; I mean the case of Maule *v.* Maule. My Lords, I think I shall be enabled, very shortly, to state to your Lordships the nature of the question which has been brought before you for judgment, though that question arises out of a very complicated state of facts, and a long series of litigation, commencing so long ago as the year 1782.

The present appellant's father, Mr Thomas Maule, claimed to be en-

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titled, under old entails, to estates, called Ballumbie and Kellie. He claimed, also, to be entitled to a bond for £9000, given by James Earl of Panmure to his countess; and he claimed, also, to be entitled to the benefit of certain leases of lands, called Brechin and Panmure. In the year 1782, various actions were pending between him and the other parties, who contended that his claim under those entails had been cut off by the Scotch law of prescription, and that they were entitled to the estates; and, my Lords, these actions being conjoined, a judgment was pronounced on the 5th of March 1782, to which it is necessary to call your Lordships' attention. (His Lordship then read the judgment.)

My Lords, it is stated that Mr Ramsay Maule being dissatisfied with this interlocutor, and to avoid farther litigation between these parties, an agreement was entered into on the 30th of March 1782, to settle all matters by arbitration. The arbitrators were, Mr Alexander Wight, a very learned counsel in the Courts of Scotland, Mr Ilay Campbell, afterwards Sir Ilay Campbell. There was an instrument, prepared in the common form of such instruments in Scotland, which, after the usual preamble, proceeded as follows. (His Lordship here read the terms of it.)

These gentlemen made what is termed, but what has since been found not to be regular, a decreet-arbitral. (His Lordship then read the decreet.) Thus your Lordships see that, in fact, their decision was wholly against the appellant's father, for they adhered to the interlocutor of the Court in so far as it had established the right to the estates of Kellie and Ballumbie, and the £9000; and they altered the interlocutor of the Court of Session, with respect to Lieutenant Maule being entitled to the leases.

My Lords, whether this instrument was entitled to the character of a decreet-arbitral, or not, is of no importance to inquire, after what I shall state to your Lordships relative to the proceedings which have passed, and particularly after the decision in your Lordships' house. It was acquiesced in by Mr Thomas Maule till his death. His son, the present appellant, upon his death, did not take any step to impeach this proceeding, until, I think, the year 1809. The appellant's father died in November 1789. In the year 1809, an action was brought in the Court of Session for the purpose of setting aside this decreet-arbitral, as far as affected the leases, because, by so doing, the appellant thought that he would set up the judgment in the Court of Session in favour of his father. In that action he was unsuccessful in the Court below, but upon an appeal to your Lordships' house, your Lordships, in the month of May 1816, pronounced this interlocutor; you 'find that in this action, and proceeding be-'tween the present appellant and respondent, the alleged submission and 'the alleged decreet-arbitral, of the respective dates of the 30th of March '1782 and 2d of April 1782, ought not to be considered as being or bear-'ing in law the effect of a submission, or decreet-arbitral, but as a form 'adopted, in which an agreement previously made between Thomas 'Maule, the appellant's father, and George Earl of Dalhousie, parties to 'the submission, was concluded;' and with that finding your Lordships

ordered the cause ‘ to be remitted back to the Court of Session in Scot- May 26, 1826.
‘ land, to review the interlocutor complained of in the appeal, and upon
‘ such review to do therein as is just and consistent with this finding.’
Your Lordships, therefore, perceive that the House determined that this instrument was not to have the effect of a decreet-arbitral.

Upon its going back to the Court of Session, various proceedings were had there; and the cause came back to your Lordships' House by a second appeal; the Court of Session having sustained the defences pleaded for the defender, assoilzied him, and decerned. I should have observed, that there was a most elaborate discussion of the question agitated in 1782, as it regarded the leases only. The object of the action was merely to set aside the decreet-arbitral. It contained no other conclusion in the summons, but that the decreet-arbitral should be set aside, as a decreet-arbitral, and, accordingly, your Lordships have declared it was merely a form adopted, in which a previous agreement was concluded. My Lords, on the case coming before your Lordships' House a second time, an interlocutor was pronounced, to which it is most important to call your Lordships' attention, because it does appear to me, as it has appeared to the noble and learned Lord to whom I have referred, who heard this case, that the Court of Session have not accurately considered the import of that decision of your Lordships' House. It was ordered on the 10th July 1819, that ‘ the interlocutor therein complained of be, and the same is
‘ hereby reversed, so far as it is inconsistent with the order of this House,
‘ of the 10th May 1816, remitting the cause back to the Court of Ses-
‘ sion in Scotland, to review the interlocutor of the 6th of March 1813,
‘ complained of in the former appeal, in so far as it sustains generally the
‘ defences pleaded for the defender, and except as hereinafter excepted.’

My Lords, one of the defences was that the decreet-arbitral was binding on the parties. Your Lordships had determined it had not that effect. Then the judgment goes on to say, ‘ that the instrument of the 2d of
‘ April 1782, purporting to be a decreet-arbitral, ought to be set aside and
‘ reduced as a decreet-arbitral affecting any rights of the appellant, and it
‘ is declared that under the circumstances of this case, the interlocutor
‘ of the 1st of March 1782,’—the interlocutor to which I have called your Lordships' attention,—‘ is not to be considered as final and conclusive
‘ against the respondent with respect to the leases in question; and there-
‘ fore, as to so much of the appellant's action of reduction and declara-
‘ tor as seeks a declaration of the right of the appellant to such leases, it
‘ is further ordered and adjudged that the said interlocutor of the 2d of
‘ December 1817 be, and the same is hereby affirmed, but without pre-
‘ judice as to any question between the parties in any other action touch-
‘ ing any property comprised in the deed of tailzie in the pleadings men-
‘ tioned.’

In consequence of this decision the appellant states in his Case, that he regarded this judgment as not final against his claim to the leases:—I mean, my Lords, particularly the question of prescription, upon which the arbitrators found that his ancestors had been barred. He likewise considered whether he could not, in some way or other, call in question

May 26, 1826. the decision of the Court of Session, with respect to the estates of Kellie and Ballumbie, and the £9000; and he says, he considered whether he could now appeal against that decision; or, whether he could get that decision reviewed by the Court of Session,—but at last he determined to institute a new and substantive action, founded upon his claims, not only on the estates of Kellie and Ballumbie, but on the leases of Panmure and Brechin, and on the bond for £9000; and accordingly he instituted an action of declarator, and which is the action upon which the present appeal is brought.

My Lords, when that action came before the Lord Ordinary, the appellant was met by several defences,—first, that all the parties having interest were not called,—next, that the subject-matter of the action was res judicata, in all points, by the judgments of the Court of Session, from the first of March 1782; that the principle of that judgment was confirmed by a late judgment of the House of Lords, with regard to the leases of Brechin and Panmure; and as to the said leases, there was a separate res judicata, by the judgment of the House of Lords, dated the 10th July 1819; that there was no action of reduction of the decreet of the Court of Session, and that therefore the present action was totally incompetent. Then the third defence was, that the claimant in his present action was cut off by prescription, both positive and negative, even if there were any room for entering into the merits of the case.

Upon the case being debated before the Lord Ordinary, he first appointed the defenders to produce copies of all the judgments on which they founded the plea of res judicata;—the case came on before the Lord Ordinary afterwards, who pronounced the following interlocutor: 'The 'Lord Ordinary having considered the memorials for the parties and 'whole process, finds that by the extracted decreet of the Court of Session 'of the 5th March 1782, by the judgment of the Court of Session of the '9th March 1813, by the judgment of the House of Lords of the 10th 'May 1816, by the judgments of the Court of Session of the 21st May '1816, and the 4th of March and the 2d of December 1817, by the 'judgment of the House of Lords of the 10th May 1819, and by the ex-'tracted decree of the Court of Session of the 7th March 1820, all right 'and interest which the pursuer claims under the present summons of re-'duction and declarator are totally excluded, and the subject-matter is 'res judicata, by the judgments above referred to; therefore assoilzies the 'defenders from this action, and decerns.'

My Lords, that judgment was brought under the review of the Court of Session, who affirmed this interlocutor of the Lord Ordinary; and those matters have now been brought again before your Lordships for your opinion.

My Lords, with respect to the decision of the year 1782, relative to the estates of Kellie and Ballumbie, the leases of the estates of Panmure and Brechin, and the bond for £9000, it does appear to me, and also to the noble and learned Lord to whom I have referred, that in the present action that decision may be considered as res judicata. It has not been appealed against, nor reviewed, and I apprehend, it has not been touched by

any decision of the House of Lords relative to the leases. Whether the present appellant can by any measure get rid of that judgment, is not for your Lordships to decide. The present is a substantive action, for the purpose of establishing the right to this property. That decision in the year 1782 does appear to me to be a res judicata; but I do not apprehend the subsequent judgments, which are mentioned in the Lord Ordinary's interlocutor, have anything to do so as to affect the claim to the leases; but with respect to the Kellie and Ballumbie estates, and the £9000, that judgment in the year 1782 does appear to me to constitute a res judicata against the appellant as to those subjects. May 26, 1826.

With regard to the leases, the respondents say that the decision of your Lordships' House in the year 1819 is res judicata as to them in all points. Now, my Lords, looking at the action in which that judgment was pronounced, and looking at the very cautious terms in which your Lordships' judgment was couched—the very guarded terms in which that judgment was expressed; it appears to me that it was the express intention of your Lordships to do nothing more than reduce the decreet-arbitral. For your Lordships will observe, the judgment states that, 'as to 'so much of the appellant's action of reduction and declarator, as seeks a 'declaration of the rights of the appellant to such leases, it is further or- 'dered and adjudged, that the interlocutor of the 2d of December 1817 'be, and the same is hereby affirmed, but without prejudice as to any 'question between the parties in any other action, touching any property 'comprised in the deeds of tailzie in the pleadings mentioned.' It has been considered below, that in as much as in the course of that action, which was brought before your Lordships in the year 1819, not only the effect of that decreet-arbitral was discussed, but incidentally other questions were raised in the papers, with respect to the right of the present appellant to those leases, they were to be considered as absolutely decided; but I apprehend, that looking at the foundation of that action, and the conclusion of the summons, and still more, looking at your Lordships' judgment, it is clear you did not mean by that judgment to prejudge any of those questions, which were not strictly before your Lordships or the Court below. But your Lordships have gone on further to state, that the interlocutor of 1782 is not to be considered as final and conclusive against the respondents, with respect to the leases in question. Your Lordships have expressly declared, that with regard to that finding of the Court of Session in 1782, it is not to be considered as final against them. Your Lordships have by this judgment left the other questions open,—the question of prescription, or other questions affecting the claim of the appellant,—the effect of your judgment being to disaffirm the operation of the decreet-arbitral. My Lords, this being the view we have taken of the case, a judgment has been prepared, which I shall use the liberty of reading to your Lordships, for the purpose of carrying into effect the view which I have thus endeavoured to present to your Lordships,—to affirm the interlocutors complained of in the said appeal; and the same are hereby affirmed, with respect to the estates of Kellie and Ballumbie, and the bond for £9000, in the said interlocutors mentioned, so far as the said

May 26, 1826. interlocutors find that all right and interest in the said estates and bond, which the appellant claimed under the summons of reduction and declarator in the said interlocutors mentioned, were totally excluded, and the subject-matter of the action then before the Court, as to such estates and bond, was res judicata, by the judgment contained in the decreet of the Court of Session of the 5th March 1782, in the said interlocutor mentioned, inasmuch as it appears to their Lordships that it was not competent to the appellant, by the summons of reduction and declarator in the said interlocutors mentioned, to impeach such decreet of the 5th March 1782, so far as the same respected such estates and bond; and such decreet has not been impeached by reclaiming petition or appeal, or any other proceeding competent to impeach the same. And then, my Lords, with respect to other parts of the interlocutors complained of, that they be, and are hereby reversed, so far as the same find that all right and interest which the appellant claims in the leases of Brechin and Panmure, under the summons of reduction and declarator in the said interlocutors mentioned, were totally excluded, and that the subject-matter of the action then in question touching such leases, was res judicata. And then, my Lords, the judgment goes on to state the substance of your Lordships' judgment in this House,—that the Court of Session may see distinctly the ground on which your Lordships reverse that interlocutor, the substance being with respect to the leases, however unfortunate it is, that the cause should be continued, that the case must be reviewed, and that the Court of Session proceed further in respect of the leases, and the other defences, as to them shall seem meet; it being clear that the only effect of your Lordships' judgment in 1819, was to shut out the effect of the decreet-arbitral.

A. FRASER—J. CAMPBELL, *Solicitors.*

No. 35. THE OFFICERS OF STATE, Appellants.—*Sol.-Gen. Wetherell—Miller.*

THE EARL OF HADDINGTON, Respondent.—*Shadwell—Robertson.*

et e contra.

King's Park—Clause—Prescription.—Held (affirming the judgment of the Court of Session) that a Charter granting the Office of Keeper of the King's Park did not confer any feudal right to the property of it, although it was alleged, that acts of proprietorship had been exercised by the Keeper for more than forty years; but a remit made to review and take the opinion of the other Division of the Court, as to whether the Keeper of the Park be entitled, under the terms of the grant and alleged possession for more than forty years, to work quarries in the Park?

May 26, 1826.

2D DIVISION.
Lord Pitmilly.

THE Palace of Holyroodhouse, in the immediate vicinity of Edinburgh, has attached to it a Royal Park, in which are situated the hills, or rising grounds, called Arthur's Seat and Salis-