No. 33. LADY MARY LINDSAY CRAUFURD, Appellant.—*Warren—Adam.*

COL. W. C. CAMPBELL, Respondent.—*Keay—John Campbell.*

Jurisdiction.—Exhibition.—Peerage.—Held (reversing the judgment of the Court of Session) that a party who had been served heir of provision under a charter conveying lands and the dignity of a peerage, but whose right to the peerage had not been ascertained or recognized by the Crown, was not entitled to insist in an action against another party having right to the lands, concluding for exhibition and delivery of all titles relative to the peerage as his own proper writs.

May 26, 1826.

1st DIVISION.
Lord Alloway.

JOHN Earl of Craufurd and Lindsay, Lord High Treasurer of Scotland, lived during the middle of the 17th century. On the 28th of April 1648, he obtained a charter, said to have been granted under the sign-manual of Charles I., proceeding on a resignation in the hands of the Crown of the estates and honours of the family of Craufurd and Lindsay, and by which his Majesty reconveyed them to the Earl in liferent, 'et Gulielmo 'Domino Parbroath ejus filio legitimo maximo et hæredibus mas- 'culis de corpore suo legitimè procreandis; quibus deficientibus 'Patricio Lindsay filio legitimo secundo dicti Comitis et hære- 'dibus masculis de suo corpore legitimè procreandis; quibus de- 'ficientibus hæredibus masculis quibuscunque dicti Comitis de 'suo corpore legitimè procreandis; quibus deficientibus natu maximæ hæredum femellarum procreandæ de corpore prefati 'Gulielmi Domini Parbroath illa omnimodo habente alicui cog- 'nominis Lindsay qui assumet cognomen et insignia domus et 'familiæ de Craufurd Lindsay et hæredibus masculis de corpore 'dictæ filiæ dictum cognomen et insignia de Lindsay geren- 'tibus.' The charter was recorded in the register of the great seal, and infeftment passed on it in June of the same year. The dignities and family estates descended through males to George Earl of Craufurd and Lindsay, who died without lawful issue in 1808.

In 1800, a new entail of the estates was executed, in virtue of which Lady Mary Lindsay Craufurd, sister of the last Earl, and heir of line of the Treasurer's youngest son, succeeded to the estates. Several competitors then appeared for the honours, and in 1820, the respondent, Colonel William Claud Campbell, founding on a copy of the above charter, (extracted from the register of the great seal,) as heir male and of line of Lady Mary Campbell, his grandmother, the nearest heir-female of the body of the eldest son of the Treasurer, obtained himself

served heir of provision in general of the last Earl in the honours. May 26, 1826.

Thereafter, Colonel Campbell raised in the Court of Session, an action of exhibition and delivery against Lady Mary Lindsay Craufurd, stating in the libel his service as heir of provision under the charter of 1648, and that, as such, he was entitled to call for exhibition and delivery of all writings and titles in which he had any interest under that charter; and concluding, that Lady Mary should be decerned and ordained to exhibit and produce certain writings there enumerated, and all other writings, rights, and titles, in her possession and custody, relating to the transmission of the honours, dignities, and estates of the Earldom of Craufurd and Lindsay, which should be condescended on by him in the course of the procedure to follow. In defence Lady Mary contended, that if the exhibition were required with a view to claim the family estates, the pursuer had no right to the estates, or to demand production of the deeds relating to them (a point settled in a former process); that if it was for the purpose of making out a claim to the peerage, the Court of Session was not the competent court; and that the deed 1648 was not under the sign-manual of Charles I., who was at its date a prisoner in Carrisbrook Castle, but had been granted by the Barons of Exchequer, and so was not capable of bestowing honours. Colonel Campbell then amended his libel, by restricting his demand of exhibition and delivery to the writings specified in his summons, in so far as they related to the honours and dignities—concluding, 'that such of the said writs as relate only 'to honours and dignities, should be decerned and ordained to be 'given and delivered up to the pursuer, to be used and disposed 'of by him as his own proper writs and evidents; and such of 'them as relate to the estates, as well as honours, ought to be 'made forthcoming to him on all necessary occasions, on receipt 'and obligation for re-delivery within a certain time, under a 'suitable penalty.'

The deeds called for were—Patent in favour of Ludovic Earl of Craufurd, 12th October 1641, or January 1642,—Ratification of the entail recited therein by Charles I. in Parliament, 1641,—Mutual entail or contract between Ludovic and John Earl of Lindsay,—Instrument of resignation thereon,—Decreet of forfeiture by Parliament of Scotland against the Earl of Craufurd, dated 25th July 1644,—Ratification by the Scotch Parliament in favour of Earl of Lindsay, anent his right or patent of Earl of Craufurd, 25th July 1644,—Parliamentary ratification in favour of John Lord Lindsay, of his patent of Earl

May 26, 1826. of Lindsay, 18th May 1633,—and of a charter of part of the estates, reciting and confirming the charter of resignation or patent of Ludovic Earl of Craufurd, 1642,—Disposition or deed of entail about 1648, by John Earl of Craufurd and Lindsay, of the honours and estates of Craufurd and Lindsay, in favour of himself and the heirs-male of his body, whom failing, to his heirs-female, &c.,—Instrument of resignation in terms thereof, about 1648,—The charter in terms of the above deed, 1st March 1648,—The signature,—The instrument of seisin, 9th June 1648, —Ratification of the Parliament of Scotland to the Earl of Craufurd and Lindsay, and Lord Parbroath, his son, 11th May 1648, and ratification in favour of the Earl of Craufurd, of the Earldom of Craufurd, 12th July 1661.

The Lord Ordinary having reported the case on informations,

Lord Hermand observed—This is truly an action of exhibition ad deliberandum—to judge of the prudence and expediency of claiming the peerage. The pursuer is entitled to the exhibition. It is admitted that he cannot obtain it in the House of Lords. If, therefore, we refuse it, there will be a wrong without a remedy. But we are bound to do justice, and to cause these deeds to be exhibited in which he has an interest. This, however, ought to be done under the superintendence of the Clerk of Court.

Lord Gillies.—Lady Mary is legally in possession of the title-deeds. This is an action calling on her to exhibit and deliver them, and the ground on which this demand is placed is, that Colonel Campbell has been served heir to the honours. He admits that he has no right whatever to the lands, and that his sole object is to support his right to the peerage, which, he alleges, belongs to him. So far as any question of a patrimonial nature arises, we are entitled to judge incidentally of a claim to a peerage: but where no such patrimonial right is involved, we have no jurisdiction whatever. The peerage is to us a mere nonentity, which cannot form the subject of decision. But what right has Colonel Campbell to make his present demand? He says that the peerage belongs to him, and that he will prove it by the deeds condescended on. We are thus called on to judge of his right to the peerage, not incidentally, so as to decide a patrimonial question, but to the effect of supplying him with the proof of that peerage. In relation to us, however, the peerage is a mere nonentity, and if so, how can we entertain an action relative to the evidence of it? In whatever light the case is viewed, it is altogether novel and anomalous. Colonel Campbell must present a petition to the Crown, and a remit

will then be made to the House of Lords, to inquire, and, of course, with power to cause the means of evidence to be produced. We, however, have no authority to do so.

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Lord Balgray.—I agree with Lord Hermand. By our law it is competent to raise an action for exhibition of titles which contain the evidence of any right in favour of the pursuer. See the example of a summons of exhibition given by Lord Stair. A peerage is a right suæ naturæ. Lady Mary does not claim it. Colonel Campbell has been served heir to it. The titles of that peerage are in the same deeds as those which contain the titles of the estates. Colonel Campbell has, therefore, as much right to have access to these deeds, in order to show the right to the peerage, as Lady Mary has to instruct her right to the lands. The inspection, however, must be made by one of the Clerks of Court.

Lord Succoth.—I concur with Lord Gillies. Colonel Campbell has no right to insist here for production of the title-deeds. He says, that the House of Lords cannot grant an order for production. I do not think that can be correct. If the House of Lords be authorized to inquire and investigate, they must have the power of doing so, and, consequently, of ordering evidence to be produced. But what title has Colonel Campbell to pursue this action? It is said that he has an interest, and must therefore have a title. But what is his interest? It is that he has right to the peerage. We cannot, however, inquire whether he has or has not. He is seeking merely for evidence, and not to vindicate a patrimonial right.

Lord President.—I am of the same opinion as Lords Hermand and Balgray. I do not mean to judge of the right to the peerage. Colonel Campbell has been served heir to it: and, by virtue of this service, he claims right to the title-deeds which are accessary to it. I apprehend that he has right to exhibition of these titles. It is said that Lady Mary has possession of the titles. No doubt she has; but the titles may contain other rights than those in which she is interested. In relation to such deeds she has no exclusive property. She holds them like an heir-portioner, for behoof of all concerned. So far, therefore, as they form part of the titles to the peerage, Colonel Campbell is entitled to see them, through the medium of an officer of Court.

The Court, therefore, on the 9th July 1823, sustained the amendment, and before further answer, 'remitted to Sir Robert 'Dundas, Mr Macdonald Buchanan, or Mr Colin Mackenzie, '(Clerks of Court,) or either of them, to examine Lady Mary

May 26, 1826. 'Lindsay Craufurd's charter-chest, or other repositories, contain-'ing the family papers, for the deeds called for by the pursuer in 'his information, and to select the same if found; and with full 'power to take the depositions of havers, and granted commis-'sion and diligence for that purpose accordingly,' and to report the same.

Lady Mary having presented a petition against this judgment, and answers having been ordered and thereafter advised,—

Lord Hermand observed—Lady Mary complains much that we have given an order to Colonel Campbell to rummage her charter-chest. We have not done so. We have empowered the officers of Court to examine it, and select those deeds in which Colonel Campbell has an interest. This has been often done before, and unless we authorize it to be done, there is no other Court which can give redress. In questions of this kind the House of Lords are merely the Commissioners of the King, not a Court of justice.

Lord Balgray.—I never saw any difficulty in this case. Such a search as we have authorized must take place daily where heirs exist having different rights constituted by the same deeds. Here Colonel Campbell has shown by his service a right of a particular nature, and he is entitled to have access to the titles connected with it. By the service his name is as it were inserted in these deeds, and if this had been done de facto, could it be maintained that he was not entitled to delivery of them?—Certainly not. But Lady Mary says she wishes to know what he intends to do with the deeds. She has no right to know this; and it is sufficient that we have effectually protected her interests from being injured. Being heir of provision, and served as such, Colonel Campbell has clearly a right to demand all the deeds connected with the title so constituted in him.

Lord Gillies.—I see great difficulty and much danger if our judgment stand. There is nothing which ought to be kept so sacred as a charter-chest. It is impossible to know what may be discovered or what injury we may inflict by allowing it to be searched. See the terms of the interlocutor. You have authorized a search to be made into the 'charter-chest or other repo-'sitories containing the family papers.' But there has been already a litigation for this very estate, and it may happen that the very first deed which is turned up may be of a nature to give rise to a new lawsuit, as being noviter repertum. I can never give my sanction to such a search-warrant. But, in considering the question of right we must revert to elementary principles. It is undoubted that there can be no property nor

right in title-deeds except what flows from a right or title existing in the party claiming those deeds, and thereby constituted in his favour. It follows, therefore, that it is only that Court which has jurisdiction to judge of the principal right that can decide as to the accessary. But here it is admitted that there is no patrimonial claim even to the extent of one sixpence. There is nothing but a claim for a peerage, the right to which has not been ascertained. How is it possible then to listen to the demand made by Colonel Campbell? We have no jurisdiction to entertain that question.

Lord Succoth concurred.

Lord President adhered to his former opinion.

The Court, therefore, on the 25th of February 1824, adhered.*

Lady Mary appealed.

Appellant.—The Court, before deciding on the respondent's right, have exposed the appellant's charter-chest and other repositories, containing the family muniments, to be broken open, rummaged, and made patent to all the world. It is no answer to say that if she refuses exhibition the Clerks have only to report that fact,—for she would thereby be guilty of a contempt,—to avoid which she must open, or allow to be forced open, any place or spot where they may even suspect the deeds to be. Even in the case where the production of the deeds is necessary, the party making the requisition must show that he has a positive interest in the writings called for. But, prior to 1648, female succession had no place in this family, either as to estates or honours. The charter of that year did not pass under the royal sign-manual, and can be of no avail to the respondent as to honours. If it do exist, it is a title to the appellant's estates, in which the respondent has no interest. Even if he had an interest, he should betake himself to the usual remedy, and not arm himself with what is equivalent to a general search-warrant. Besides, these deeds being movables, do not descend to the heir.

Lord Gifford.—Is there any precedent for such an order?

Warren.—We deny that there is. The order of which we complain is altogether different from the conclusions of an usual action of exhibition. The respondent's object is quite different. He claims the property of the deeds, not the mere access to them.

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* See 2 Shaw and Dunlop, No. 676.

May 26, 1826. *Respondent.*—This is a substantive action for recovery of deeds, on the ground of the respondent's right of property in them. It is an action known in the Scotch Law, and is the competent process recognised in practice. The deeds are not to be regarded as mere parchment and wax, and so executry, but as patents of nobility, and the property (sole, or in common, according as they do or do not include title to the lands) of the respondent. It is a mistake to say that the respondent could force open the repositories.—Doors cannot be opened without letters of 'open doors.' Even messengers-at-arms must have that diligence. If Lady Mary, when asked, declares that she has not the deeds—or refuses access to them, or will not give them up—the Clerks can only so report. If the Court considered this a contempt, they may proceed in the way they think proper; but under this order, the premises cannot be forced. The Clerks have no such powers. If refused admission they must withdraw. Their power may be compared to a mandamus, with a return to the day named in the order. It is a danger common to all actions of exhibition that the supposed custodier may deny the possession. The respondent asks nothing unreasonable; if he be entitled to production, and eventually to delivery, it is the same to him in what mode the order is to be executed. It is not the respondent or his agent who goes to make the search, but the Court, represented by their officers. The respondent's interest is undeniable—and the appellant does not pretend any right to the honours of the family. If the Court of Session were not competent to entertain the question, the respondent has no other tribunal from which to require redress. Besides, this is truly an abstract point involving a civil right of property, and must be judged of by the Court below. In the Court of Session, the appellant never complained of the manner in which the order was worded—but merely that the respondent had no interest to seek exhibition.

Lord Gifford.—One of the Judges considered this as a novel proceeding.

Campbell.—But his Lordship rested that opinion on the ground that there could be no property in the title-deeds—not that there was anything informal in the shape of the proceedings, if the respondent had an interest. We maintain that a right belonging to the respondent flows from, and is dependent on this charter of 1648, whose production we seek. The respondent is not a stranger, but the party interested. A committee of privileges could not enforce the delivery.

Lord Redesdale.—The power of taking the proof is commit-

ted to a committee of privileges. But all orders emanate from this House. The King constitutes this House with power to judge instead of himself.

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Campbell.—Therefore the committee of privileges could not decide on any question of property. Recourse must be had to the Court of Session. A prima facie evidence of right is sufficient to warrant the conclusion in an action of exhibition. If, on the death of a Peer, his heir were deprived of his patent, could not the heir institute an action to recover it? Aware of this, the appellant maintains that the respondent cannot make out a prima facie case; and alleges that the charter 1648 bears date at Edinburgh, where his majesty was not; and that the resignation was made not in his hands, but in the hands of the Barons of Exchequer (according to the office copy), and therefore cannot bear the royal sign-manual, nor confer honours. But when the time for entering on that point arrives, the respondent will show that the charter does convey the peerage, and that he is entitled to the honours.

Lord Redesdale.—The charter 1648 being on the public records, what does the respondent want more?

Keay.—In the register of the great seal, there is lodged only an office copy of the charter. The original is not left. The copy we have had access to, has been somewhat injured by time; and we have an interest to have inspection of the original, to see whether it is open to any objections, before incurring any expense of further procedure. The charter is the common property of both parties.

Lord Redesdale.—But you must establish your right to the charter 1648, before you found on the preceding titles.

Keay.—The charter 1648 is not an original grant. It proceeds on a resignation; but we are entitled to see the right of the Earl to make the resignation. We must see the original charter.

The House of Lords ordered and adjudged, that 'the said interlocutors complained of in the said appeal be, and the same are hereby reversed, and that the defender be assoilzied.'

Lord Gifford.—There is a case which stands for the judgment of your Lordships, in which Lady Mary Craufurd is the appellant, and William Claud Campbell, Esq. is the respondent. The interlocutor which has been brought before your Lordships arises out of an action instituted by the respondent, Colonel Campbell, against the appellant, Lady Mary Lindsay Craufurd, seeking to recover from her various documents in her possession, relating to the titles and dignities of the Earldom of Craufurd and Lindsay. The original summons in this case on the part

May 26, 1826. of the respondent Colonel Campbell, stated, 'that he had been served 'heir of provision in general to the deceased George Earl of Craufurd 'and Lindsay, in terms of a charter of Resignation under the Great Seal, 'dated March the first, 1648, granted by King Charles the First to 'John Earl of Craufurd and Lindsay, then Lord High Treasurer of 'Scotland, in liferent, and William Lord Parbroath, his eldest son, in 'fee, and the heirs-male lawfully procreated of his body,—whom failing, 'to Patrick Lindsay, second lawful son of the said John Earl of Craufurd 'and Lindsay, and the heirs-male lawfully procreated of his body,— 'whom failing, to the heirs whatsoever of the said John Earl of Craufurd 'and Lindsay, lawfully procreated from his body,—whom failing, to the 'eldest heir-female procreated of the body of the said William Lord 'Parbroath, she always marrying one of the surname of Lindsay, or one 'who should assume the name and arms of the house and family of Crau-'furd and Lindsay, and the heirs-male of the body of the said daughter 'bearing the said surname and arms of Lindsay,—whom failing, to the 'other heirs and substitutes therein mentioned, conform to retour of the 'pursuer's general service expede before the Bailies of the Canongate, 'dated the 21st day of March 1820, and duly retoured to Chancery. That 'by the charter his Majesty gave, granted, and conveyed to the said 'John Earl of Craufurd, William Lord Parbroath, and the other heirs 'above-specified, inter alia, the surname, designation, title, honour, and 'dignity of Earl of Craufurd and Lindsay, and all the privileges, pre-'eminences, immunities, rights, and honours whatsoever thereto belonging 'in any manner of way. That the pursuer, as heir of provision served 'and retoured as aforesaid, has good and undoubted right to call for ex-'hibition of the several writings, writs, and titles after-mentioned; and 'also of all other writings and titles in which he has any interest under 'the foresaid charter of Resignation.' Then he enumerated the instruments which he alleged ought to be produced by Lady Mary Craufurd.

My Lords, Lady Mary Craufurd put in defences to this action, in which she alleged that 'If the pursuer calls for the titles narrated in the 'summons, with a view to substantiate a claim to the estates of the family, 'he has no right to demand the exhibition. The defender is infeft in these 'estates, conform to a precept issuing from Chancery, and upon a desti-'nation totally different from that contained in the charter 1648, and no 'previous entail existed to prevent the estates being settled in that manner; 'her right to them was ascertained by the judgment of the Court of Ses-'sion in 1771, and the pursuer has no title whatever either to these 'estates, or to demand production of the title-deeds relating to them; and 'if the titles called for are intended to enable the pursuer to make out a 'claim to the Peerage, then his demand is incompetent in the Court of 'Session; the title of any claimant to honours and dignities must be esta-'blished in the House of Peers, the only Court competent to try ques-'tions of that description, and the demand for the production of papers 'which are to establish it must be made before the same tribunal.'

After this the respondent amended his summons. Your Lordships will perceive that by the original summons he called upon Lady Mary

Craufurd to exhibit all writings and titles in which he had an interest under the charter, and I shall hereafter mark the distinction in the law of Scotland as to actions of this nature. He amended his summons, and stated that he had a title and interest in these title-deeds so far as they related to the honours and dignities, but he expressly disclaimed having any right to them in respect of the estates, and therefore he amended his summons by inserting these words, namely, 'such of the said writs as 'relate only to the honours and dignities;' and he altered his summons also by calling not merely for an inspection, but a delivery of the deeds, and that Lady Mary Craufurd should be 'ordained to give and deliver 'them up to the pursuer, to be used and disposed by him as his 'own proper writs and evidents, and that such of them as relate to the 'estates, as well as honours, ought to be made forthcoming to him, the 'pursuer, on all necessary occasions, on receipt and obligation for re-de-'livery within a certain time, under a suitable penalty.'

To this amended summons Lady Mary Craufurd put in a defence stating, that if Colonel Campbell claimed those deeds on the ground that he was entitled to the dignity of Earl of Craufurd, that till he had established the right to that dignity, he could have no right to the deeds, and if they were called for to support his claim, then she contended that that would come before your Lordships' House, and that the Court of Session could have no jurisdiction upon the subject.

The matter coming before the Lord Ordinary, he reported it on informations, when the Court pronounced this interlocutor, which has been admitted at the bar to be one for which no instance or authority can be found: 'Having advised the informations for the parties, with the amend-'ment of the libel and additional defences, they sustain the said amend-'ment; and before further answer, remit to Sir Robert Dundas, Mr 'M'Donald Buchanan, or Mr Colin Mackenzie, or either of them, to 'examine Lady Mary Lindsay Craufurd's charter-chest, or other reposi-'tories containing the family papers, for the deeds called for by the pur-'suer in his information, and to select the same if found,'—so that the Court delegated an authority to one or other of these three gentlemen, to examine the charter-chest and repositories of Lady Mary Craufurd at their pleasure, and to any extent, and to select from those repositories the deeds in question, if they were there to be found.

My Lords, Lady Mary Craufurd complained of this finding by a petition to the Court, and on the case again coming before them, the Judges differed materially—the extreme injury to Lady Mary Craufurd, by having her deeds examined by any gentleman whatever, being strongly represented. However, the majority appear to have been of opinion that the interlocutor upon the whole was a right interlocutor, and they adhered to it, and in consequence of that an appeal has been brought to your Lordships' House.

I have stated that I would call your Lordships' attention to the nature of this action and of other actions, for the exhibition of deeds in Scotland. It appears that there are two kinds of actions of this description, one founded upon a right of possession, or right of property in the subjects them-

May 26, 1826. selves, in which the party calls upon the defender to deliver up the title-deeds. The one of these actions is called a substantive action, and the other is called an accessary action. If a party want, for the purpose of supporting any claim, the production of deeds or writs in the possession of another person, he institutes an action—which is called an action of exhibition ad probandum, and which is an accessary action,—not seeking to have the deeds delivered to the pursuer, but merely to have the benefit of them by way of evidence to support the claim upon which he is founding. There is also another action for exhibition, which is called an action of exhibition ad deliberandum, which is, where the heir, by the law of Scotland, being liable to his predecessor's debts, has a right to consider whether he will enter heir or not; and therefore he may call for production of the instruments for his inspection, in order that he may determine whether he will enter or not; and in both of these actions it seems that it is referred to the oath of verity of the party against whom the action is brought, to say whether the deeds are in his possession or not. In this case, your Lordships perceive there is no such claim in the summons, nor does the respondent seek to proceed in that mode touching these deeds. It is stated in the respondent's case, and was admitted in the Court below, 'that the action was a substantive action for the exhi-'bition and delivery of writs, upon the sole ground of a right of property 'in them.' Then, my Lords, the question is, what right has this gentleman at present in these deeds? He can only have a right of property in them, either as making a title to the lands to which they relate, or to establish his claim to the dignity. As to the lands, he has expressly stated that he does not claim the deeds in respect of any right in the lands. With respect to the dignity, he admits that at present his claim has not been sustained; he styles himself in his summons, as your Lordships observe, 'Colonel Campbell.' Has he therefore a right of property in the deeds? It appears to me, with great deference to the Court of Session, that in order to make out his title to them he must make out, in one way or the other, a right of property in them. If it was for the production of them to support a claim which had been made, the action would have been of a very different description; it would be, not to give them up to the pursuer, but for the production of them by Lady Mary Craufurd; and according to the form of summons which my Lord Stair has given in his book, the conclusion of the summons would refer the matter to the oath of verity of the party, and in that view of it, I apprehend it would be impossible to sustain such an interlocutor as this; for your Lordships see by this interlocutor, the gentlemen appointed have not only a right to have access to the charter-chest, but to the house, and on its being put to the counsel, they said they did not know that they could force an entry into the house; but they seemed to admit that if Lady Mary Craufurd had refused them admission, she would have been guilty of contempt, and therefore an entrance into her house and her private repositories was necessarily implied. But, my Lords, I will not go into that. It appears to me, after considering this case, that the pursuer has failed in the present state of things to make out any title to the deeds.

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.

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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.*

No. 34.

Wm. Maule, Esq., Appellant.—*Shadwell—Adam—Robertson.*

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.

May 26, 1826.

1st Division.
Lord Alloway.

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