considering. Both points, therefore, are of difficulty, and the consequence too great to be determined without your Lordship, but I would be very loth to give your Lordship the uneasiness of putting the parties to expense, much less to lay you under any temptation to come out too soon, or to look into very disagreeable lumber, when you are not well.

"What I would propose, therefore, is to hear the counsel to day, (probably nothing new will be said, if there should, your Lordship may be apprized of it), and then to adjourn judgment until after the recess, the first Committee day. I believe my Lord Chancellor has not much attended to it, and if I am to open the opinion, I am not clear upon either point to be able to do it so soon as Monday next. In truth, I am very unwilling to fix my own judgment without first communicating with your Lordship, and knowing your sentiments. I am,

"MANSFIELD."

Adjourned accordingly.

Lord Hardwicke's Note.

"After time taken for consideration, on debate, but without any division, the Lords resolved, That Sir Thomas Kennedy, as heir male, was entitled to the titles and honours of Lord Kennedy and Earl of Cassils; and so reported it to the King.

"The grounds were two:—

"1*st*, That no particular limitation or constitution of the fief appearing, it ought to be presumed to be a male fief; that being the most usual and customary limitation in those ancient times, especially in the case of an earldom, which was originally an office.

"2*d*, That the resignations and new charters of 1642 and 1671 did not comprise or extend to the dignities and honours of the estate."—

"Lord Marchmont differed."*

Unreported in Court of Session.

[M. 14070.]

JOHN GORDON of Auchanachy, and ALEXANDER GORDON, his Trustee, - - } *Appellants;*

MISS GRIZEL OGILVIE, - - *Respondent.*

House of Lords, 22*d March* 1762.

REDUCTION—TRANSACTION—*RES JUDICATA*—REPRESENTATION—PRESCRIPTION.—Circumstances in which transaction with predecessor, was held to bar the challenge of the heir, though the deed of renunciation embodying this transaction was also sought to be reduced; and the heir insisted that he was not bound by his mother's

* In Lord Hardwicke's handwriting.

1762.

GORDONS v. OGILVIE.

deed, he not representing her, but passing by and claiming right from a more remote predecessor. Also. that *res judicata* barred action; but plea of prescription repelled, in respect of interruption.

Robert Middleton of Balbegno, was married to Anne Ogilvy, who was sister to the respondent's father; and by articles entered into on his marriage, he provided and declared, that the tocher given to the wife by her father, should return to her own relations, in the event of there being no issue of the marriage. He at same time took out charter of these lands of Balbegno, conceived in favour of himself and Anne his wife, and the survivor of them, in joint fee and liferent, and to the heirs of his body, of that or any other marriage, whom failing, to his own nearest heirs and assigns.

An heritable bond was thereafter granted over the estate, for the tocher, bearing the conditions on which it was given, and the return of the same to the wife's relatives, in the event of there being no issue of the marriage.

Thereafter, in the year 1710, Robert Middleton executed a gratuitous disposition of the said estate of Balbegno, in favour of John Ogilvie, his wife's brother, redeemable by the said Robert Middleton, for a rose noble at pleasure, and also redeemable by any heir male or female of his body, upon such heir attaining the age of twenty-one years complete.

Both parties having died without leaving issue of the marriage, the estate of Balbegno, in terms of the last deed, was taken up by John Ogilvie, who was infeft, and possessed for a considerable number of years without challenge.

Elizabeth Middleton or Gordon, was sister and heir of line to her brother Robert Middleton, and the mother of the appellant John Gordon, and the party entitled to succeed to the estate, but for the above deed.

Sometime before her death, she had raised adjudication against the estate, on bonds due to her two deceased brothers, who were creditors of Robert Middleton, and to which bonds she had succeeded by their decease; she had also threatened to raise a reduction of the disposition, in favour of

May 26, 1713. John Ogilvie, when these matters were arranged, by a transaction and agreement, by which Mrs. Elizabeth Middleton or Gordon and her husband, agreed to accept of £377 in full, and became bound, "that neither she, the said Eliz- "abeth Middleton, nor any of the children procreate or to "be procreate between her and the said Charles Gordon,

" their descendants, shall quarrel the said Mr. John Ogilvie, " nor his heirs and successors, their right, title, and posses- " sion of the said lands of Balbegno," &c.

Instead of abiding by this agreement, as to the lands of Balbegno, she thereafter revoked the same, by a deed of revocation, setting forth, that the same was impetrated from her, without any judicial ratification on the part of her husband; she also executed a trust bond to the appellant, who thereupon led an adjudication of the estate of Balbegno, and she also brought an action of reduction of the disposition to Ogilvie. Defences were lodged; and decree of absolvitor was pronounced therein.

After her death, the present action of reduction was brought by the appellant her son, against the respondent, the representative of John Ogilvie, on the ground, that at the time the marriage contract was entered into, and also at the time the heritable bond was granted, and also at the time the disposition above referred to was executed in 1710, the said Robert Middleton was of a facile and weak mind, and, therefore, that the deed ought to be set aside, as granted to the fraud and lesion of the pursuers, being the heirs to whom the estate ought to have descended. In defence, it was stated,

1. That at the time of Robert Middleton's death, the estate was incumbered with debt, to the extent of 20 years' purchase, and therefore no fraud in the conveyance. 2. That the taking of an heritable bond upon the estate, bearing the tocher returnable to the wife's relations, in the event of no issue, was a usual stipulation in marriage contracts. 3. That the deceased was of sound disposing mind. 4. That the defender and her ancestors have been in peaceful possession under infeftment, for the period of the positive prescription. And, 5. That the pursuers were barred from challenging those rights, by a transaction entered into with the said Elizabeth Middleton or Gordon, whereby she, for an onerous consideration, discharged all right and claim she had on the estate, which transaction was supported by *res judicata*, by a decree of absolvitor, obtained in an action raised by her for the same claim, after defences being stated to the same. The answer made was, that prescription did not apply, and that as he did not represent his father or mother, but took up the estate as in *hæreditate jacente* of Robert Middleton, he was not bound by the acts and deeds of his mother.

1762.

GORDONS v. OGILVIE.

Nov. 26, 1760.

On report of the Lord Ordinary, the Court found "that "the defenders and their father, John Ogilvie, have been "in possession of the lands and estate of Balbegno, by vir- "tue of a charter and sasine, upwards of 40 years, but re- "pelled the defence of prescription, in respect of the inter- "ruption thereof, by the process of reduction raised by "Alexander Gordon, on the trust bond granted to him by "Elizabeth Middleton in the year 1756: But sustain the "defence of *res judicata*, proponed by the defenders, in "respect of the decreet of absolvitor pronounced in the said "process of reduction and improbation in their favour. And "also sustain the defences that the pursuer, John Gordon, "represents his father, Charles Gordon, and is thereby bar- "red from challenging the deed of renunciation, of all "claim on the estate of Balbegno, and therefore the de- "fenders have produced sufficient to exclude the pursuer's "title, and assoilzie and decerns."

Feb. 9, 1761.

On reclaiming petition, the Court thereafter pronounced this interlocutor:—"Having advised this petition, with the "answers, and heard parties' procurators upon the point "mentioned in the former interlocutor, sustain the defence "founded on the transaction with Elizabeth Middleton in "the year 1713; and of absolvitor pronounced thereon in "favour of the defender in the year 1753; and adhered to "the points in the former interlocutor reclaimed against."

Against these interlocutors the present appeal was brought to the House of Lords, in so far as these interlocutors sustained the defence of *res judicata*, founded on the decree of absolvitor; and the defence that the appellant, John Gordon, represents his father Charles Gordon, and is thereby, as well as by the transaction referred to, barred from challenging the deed of renunciation of the estate of Balbegno, executed by Mrs. Elizabeth Middleton or Gordon, his mother.

Pleaded for the Appellants:—Elizabeth Gordon died without having made up a proper title to the estate of Balbegno. The adjudication led upon her trust bond was no more than a title to bring a process for trying her right to the estate. It was never conveyed to her by her trustee, but her action being cast upon an objection, personal to herself, the adjudication fell to the ground, and never became a title in Elizabeth to the lands. Such a title without possession is not sufficient to fix a representation upon the apparent heir, nor to divest the predecessor, and therefore the next heir may pass over without representing, which the appellant in

this case having done, is not bound by the deeds of his mother. As her adjudication was abortive, the fee of the estate remained in *hereditate jacente* of Robert, her brother, last infeft. The appellant, therefore, does in no shape represent his mother, Elizabeth Middleton; and this being the case by the law of Scotland, no deed of the ancestor can affect an heir who has not made up titles to him—at least Elizabeth Middleton's adjudication can be no title to this estate further than to the amount of £7000, the sum in the trust bond, but quoad the surplus, the *res judicata* against Elizabeth can not strike against the appellant. There being no sufficient title, there could be no prescription, and no proof adduced of uninterrupted possession. The appellant further never represented his father, nor ever took any benefit from his father's inheritance, and ought, therefore, to be entitled to set aside the deeds which affect his rights to the estate of Balbegno.

Pleaded for the Respondent:—The transaction entered into with Charles Gordon and his wife Elizabeth Middleton, the appellant's father and mother, in 1713, and the decree absolving the respondent from Elizabeth, his mother's suit, whereby the matter became *res judicata*, are sufficient bars to the present reduction, and the defence, on these grounds, ought to be sustained, and the action of reduction dismissed. It is no answer to him to say, that he, as heir, ought not to be excluded from challenging a transaction which deprives him of his rights, he having been no party to the transaction, because, as he claims upon the same right, and the very same grounds, as his mother, and as deriving that right from her, it must descend from her to him, with all the exceptions pleadable against it, and affectable by her obligations. And the mere fact that he claims and sues for a right descendable to him, from her or his father, is a sufficient representation to subject him in the passive title, so far as he claims the right sued for. Besides, the appellant was further barred, by the positive prescription, because there had been continued possession of the estate by the respondent's father and his heirs upon charter and sasine, for more than 40 years, before this action was brought.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are, hereby affirmed.

For Appellants, *Tho. Miller*, *Al. Forrester*.

For Respondents, *C. Yorke*, *Ja. Montgomery*.

1762.

FRAZER
v.
HIS MAJESTY'S ADVOCATE.

Note.—Lord Kames says, Dec. p. 239, "This process was spun out to a great length by a multitude of points and circumstances which deserve not to be recorded. The cause, purified of its dross, resolved at last into the following point:—What should be the effect of Elizabeth's ratification? It is effectual to exclude Elizabeth herself; but is it also effectual to exclude Andrew's other heirs insisting in a reduction of the settlement after Elizabeth's death, though they do not represent her? It occurred at advising that if the reduction had been brought before Ogilvie was infeft, the pursuer could have no title without being served heir in special to the land remaining still *in hæreditate jacente* of Robert. But that Ogilvie's infeftment which *funditus* denuded Robert of the property made the case very different. The ratification (renunciation) was accordingly sustained as a bar to the action."

[M. 15,196, Fac. Col. ii. p. 256.]

Captain JAMES FRAZER of Belladrum, - *Appellant;*
HIS MAJESTY'S ADVOCATE, - - *Respondent.*

House of Lords, 30*th March* 1762.

LEASE—DURATION—POWERS.—A lease was granted for 1140 years for a valuable consideration given, besides a yearly tack-duty. Sasine and possession followed: Held, on the forfeiture of the estate, that the lease was good against the granter, and also against the crown, reversing the judgment of the Court of Session.

June 8, 1770.

OF this date, *Hugh* Lord Lovat granted a lease of the lands of Fingask to Simon Frazer for the period of twenty times nineteen years, or 1140 years, in which he was duly infeft. This lease was afterwards acquired by and assigned to the appellant.

Simon Lord Lovat succeeded to the title and estates of Lovat; and in 1747 was attainted for high treason, and his estates forfeited to the crown.

The appellant then, in right of the lease, made a claim against the crown, to be allowed the possession under the lease, on payment of the stipulated rent. But his Majesty's Advocate objected to the lease, on the ground, 1*st*, That a lease of lands, for so long a term as 1140 years, was an anomalous right, unknown in the law of Scotland, and therefore invalid; 2*d*, Besides, even supposing it good, Hugh Lord