[HEARD 26*th February*—JUDGMENT 29*th July*, 1850.]

ARCHIBALD THOMAS F. FRASER, ESQ., of Abertarff, *Appellant.*

THE RIGHT HON. ALEXANDER LORD LOVAT, *Respondent.*

Arbitration.—Res Judicata.—Terms of Reference by mutual memorial of parties and of opinion expressed upon it by the referee held to be sufficient, whereon to support a plea of *Res judicata*, in respect of matters made the subject of a subsequent action.

BY the 43 Geo. III., c. 80, which was passed for the purpose of raising money towards the construction of roads and bridges in the Highlands of Scotland, it was enacted that it should be lawful "for any corporation, or the tutor or curator of any infant "or lunatic, or other person under any disability or incapacity "possessed or entitled to a real estate, or any heir of entail in "possession of any entailed estate in any county of Scotland "through which any such road shall pass, or in which any such "bridge shall be situated, his or her tutor or tutors, curator or "curators, with the consent of the said Commissioners, to con-"tribute towards the making of such roads, or erecting of such "bridges, respectively, any sum not exceeding one year's free "rent of such estate; and, for that purpose, it shall and may be "lawful for such corporation, tutor or curator, or heir of entail, "or his or her tutor or curator, to charge such estate with any "sum not exceeding one year's free rent thereof, to be borrowed "for the purpose of contributing towards the expense of making "any road, or erecting any bridge in said counties respectively, "under the provisions of this Act, which sum, so contributed

" or borrowed shall be paid as herein before directed, to be " placed to account of the said respective roads or bridges."

By another section of the same statute it was enacted that every heir of entail contributing should be bound to keep down the interest of the sum borrowed, and that so soon as the road or bridge should be completed, he should be obliged every year to pay the Commissioners appointed by the Act, a sum equal to 3*l.* per centum of the sum borrowed as a sinking fund to pay off the loan.

By the 44 Geo. III., c. 75, which was passed for assessing proprietors of lands in the county of Inverness towards the expense of making and supporting the roads and bridges authorized by the previous statute, the heritors of the county were authorized to bind themselves to the Commissioners of the Roads and Bridges for payment of one-half the expense of constructing any road or bridge which they, the heritors, might approve of, and to require the Commissioners of Supply of the county to assess every proprietor for payment of his proportion of the sum assessed. Heirs of entail were allowed to charge their lands with the amount of the sum assessed upon them under the same obligation upon them as in the previous statute, in regard to keeping down the interest upon the sum to be so charged, and to provide, during their possession, a sinking fund for its ultimate liquidation; and " where any person or persons " have already paid, or found security to pay, or shall hereafter " pay, or find security to pay, the sums necessary towards " making any road, or erecting any bridge in the said county in " the manner directed by the said recited Act" (being 33 Geo. III., cap. 80, above noticed) " such person or persons shall not be " liable to pay his, her, or their proportion of any assessment to " be made pursuant to this Act, unless or until such proportion " shall amount to a sum equal to one-half of the estimated " expense of such road or bridge which they have paid, or found " security to pay, in the manner directed by the said recited

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" Act, or until they are repaid one-half of such estimated expense " in manner herein directed."

In January, 1806, the Honourable Archibald Fraser, heir in possession of the entailed lands of Lovat, in the county of Inverness, granted a bond over those lands in favour of the Road Commissioners for payment of 357*l.* 10*s.* towards the construction of the Fort Augustus road—that sum being one-half of the whole estimated expense. This bond recited the Act 43 Geo. III., bore to be "in terms of the said Act," and conveyed the lands of Lovat in security, but contained a declaration " that, although the granter's heirs whatsoever were bound in " payment, yet, as the money was to be expended in ameliorating " the entailed estate, the heirs of entail succeeding thereto should " be bound and obliged to free and relieve his other heirs of " and from payment of the same, and all the consequences " thereof."

This road was completed by the year 1810;. and during the period between 1806 and that year, Fraser was allowed to retain the assessments which were made upon his lands under the 44 Geo. III., in relief of the obligation he had come under by his bond.

In October, 1810, Fraser applied the amount of these assessments towards payment of the sum in his bond; and in order, as was alleged, to keep the amount as a charge upon his lands, he took an assignation of the bond, in favour of Dundas as his trustee.

In March, 1811, Fraser likewise granted an heritable bond over his entailed lands in favour of the Road Commissioners for payment of the sum of 5,237*l.* 10*s.*, being half the estimated expense of building the Beauly Bridge. This bond also recited the Act 43 Geo. III., and bore to proceed in terms of it. During the time that the bridge was in course of construction, Fraser was, as in the other instance, allowed to retain the assessments made upon his lands in respect of the bridge in

relief of his obligation under this bond. By the year 1815, the amount so retained had come to the sum of 2,382*l.* 5*s.* 2*d.*, and in that year he was likewise paid out of the general assessments of the county, in further relief of his liability, the sum of 869*l.* 13*s.* 9*d.*, these two sums making an aggregate of 3,251*l.* 18*s.* 11*d.*

In October, 1815, Fraser paid this sum of 3,251*l.* 18*s.* 11*d.* to the Road Commissioners in liquidation of his bond of 1811, and some correspondence took place between him and his agent with a view to a conveyance being taken of the bond, as had been done in the case of the bond for the Fort Augustus Road, but before this was accomplished, Fraser died on 8th December, 1815.

In 1818 the Respondent, who had succeeded Fraser as heir of entail of the lands of Lovat, paid the Road Commissioners the balance owing upon Fraser's bond of 1811, after deducting his payment of 3,251*l.* 18*s.* 11*d.*, and took from them a discharge and renunciation of the bond, so as thereby to extinguish it as a charge upon the lands against him and the succeeding heirs of entail.

The Appellant, who was the general disponee and executor of Fraser, disputed the right of the Respondent to take this discharge and renunciation, and with a view of settling this dispute and other claims which the two parties had upon each other they agreed in signing a "joint memorial" addressed to Mr. James Keay, Advocate.

This memorial recited the clauses of the two statutes which have been noticed, and then proceeded thus :—

"1. The late Honourable Archibald Fraser became a con-
"tributor to several roads under the statutes referred to, and
"he granted bond over the entailed estate of Lovat, as autho-
"rized by the former of these statutes, for a moiety of the esti-
"mated expense of the Beauly or Lovat Bridge, amounting to
"4,734*l.* 4*s.* 5*d.* The roads to which he contributed were the

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" Fort-Augustus, Inverfarigaig, and Beauly roads, and he " charged the said estate with his contributions to these roads " by granting bonds to the Commissioners. He granted two " bonds on account of the expense of the Beauly road, one for " 1239*l.* 11*s.* 2*d.*, and another for 638*l.* 10*s.* 2*d.* He made " payment of 3,251*l.* 18*s.* 11*d.* in October, 1815, to account of " the bond granted for the moiety of the estimated expense of " the Lovat Bridge, and the present Lovat paid up to the Com- " missioners the balance of that bond, as well as the amount of " the other two bonds in February, 1818. Abertarff has since " settled accounts with the county for the other roads, to which " the deceased contributed, under reservation of his claim of " relief against the county and Lovat. He has, however, " retained the Parliamentary Road Assessments affecting the " lands of Abertarff, &c., to which he succeeded since the late " Lovat's death, on the following grounds,—(1.) That some of " his author's engagements for roads may still remain undis- " charged, and that, at any rate, he has claims for the expense of " securities granted by the late Lovat for his contributions " towards roads and bridges: and (2.) That he has a claim " against Lovat (which, however, is not admitted by the other " memorialist) for a large proportion of the assessment exigible " from the Lovat estate during the late Lovat's lifetime, in " virtue of the above quoted clauses of the said Acts autho- " rizing heirs of entail to charge their estates with their " contributions to roads and bridges, and also with their " assessments.

" 2. The learned Counsel will observe that contributors to " roads and bridges were entitled to retain their assessments to " the extent of half the estimated expense of such roads and " bridges. They were also ranked on the general road funds " of the county, levied from non-contributing heritors for a " moiety of these estimates, less their retained assessments. In " some instances, the actual expense of these works fell short

" of the estimated cost, and this happened in the case of the " Lovat Bridge, where the difference was considerable. In the " year 1823, a general state of the Parliamentary Road and Bridge " Accounts was made, in which, in every case, the actual expense " was stated to the debit of the county; and, from this state, " it appeared that the contributor to the Beauly Bridge had, by " the application of retained assessments and payment of divi- " dends, been overpaid (including interest to the 30th April " of that year) no less a sum than 1322*l.* 0*s.* 2¼*d.*, which, with " the interest since accruing, the county now claims from " Lovat, who retained part of the said assessments. He, how- " ever, maintains that Abertarff, as the late Lovat's executor, " is liable for more than one half of the balance claimed, the " overpayment having chiefly arisen prior to his death, and " he refers to the account prepared by the county accountant " in proof of this fact; but Abertarff does not admit his " liability for any part of the said balance, for the reasons " stated above.

" 3. Under the clause of the local Act of 1804 (quoted above), " which authorizes an heir of entail to charge the entailed " estate with the amount of the assessment, in the manner " prescribed by the Act of 1803, in the case of an heir of entail " borrowing money on the security of the entailed estate, on " account of the expense of roads and bridges, Abertarff main- " tains that he has a claim against Lovat, as the heir now in " possession of the Lovat estate, for the whole assessments " affecting that estate, down to the period of the late Lovat's " death, under deduction of three per cent. yearly on the amount " as a sinking fund, and the interest, in consequence of the late " Lovat having granted bonds over the estate for the original " contributions, in terms of the general Act of 1803, and of his " having retained the whole of his assessments in virtue of the " local Act of 1804, down to the period of his death, and no " final settlement having taken place. But Lovat contends

" that his ancestor cannot be held to have availed himself of " the provisions of the local statute of 1804, authorizing the " estate to be charged with the assessments, and that therefore " his executor cannot possibly have any claim against him on " account of these assessments.

" The learned Counsel will be pleased to answer the " following queries :—

" 1. Is Abertarff, in the circumstances stated above, bound " to pay up the whole or any part of the Parliamentary road " assessments retained by him as aforesaid? Or is he entitled " still to retain these assessments on the grounds stated by " him?

" 2. Is Abertarff, as the late Lovat's executor, liable to " Lovat for, or to relieve him of, any sum that shall appear " to have been overpaid the deceased, by retention of assess- " ments or otherwise, on account of his advances for the Lovat " Bridge at the time of his death?

" 3. Has Abertarff a claim against Lovat, for the whole or " any part of the Parliamentary road assessments, which were " payable out of the estate of Lovat during the late pro- " prietor's lifetime, under the clause of the local Act of 1804, " which declares that an heir of entail may charge the entailed " estate with the assessments thereby imposed, or in virtue of " the general Act of 1803?

On the 13th November, 1830, a paper entitled " Notes by " the Arbiter in reference between Lovat *v.* Abertarff," was issued by Mr. Keay; the concluding paragraphs of this paper were in these terms:

" 5. It appears to me that the assessment for the district- " roads not being payable till 25th March, and being an assess- " ment not for the recovery of funds previously expended, but " an assessment for raising money to be afterwards laid out, " Lovat, and not the executor, was bound to have paid it.

"6. If the late Lovat was entitled to retain a certain propor-
" tion of the assessment imposed upon his estate, in relief of
" the engagements which he had undertaken to the Commis-
" sioners for Roads and Bridges; and if, from an exaggerated
" estimate of the expense of the works, he was led to retain a
" larger sum than the half of that which was truly expended,
" and for which alone he was bound, I must consider the
" assessment so retained without authority, as still in arrear,
" and therefore a debt due by the executor.

" The late Lovat having, in terms of the Act 43, Geo. III,
" come under certain obligations for the expense of making
" county roads, rendered (as I understand) those engagements
" burdens on his entailed estate, in terms of that statute. By
" the Statute 1804, he was entitled to retain a certain portion
" of the assessment imposed on his estate, in relief or extinction
" of those engagements. He did so,—and thus the burden upon
" the succeeding heirs of entail was so far diminished. I can-
" not see any ground for maintaining that the full amount of
" the bonds (under the deduction only of three per cent.
" annually) is to be held as still due by the heir of entail, while
" the executor is to have right to the whole assessments, which,
" during the late Lovat's life, were actually applied towards
" reduction of those bonds."

These notes were afterwards copied over into a paper entitled " Award by Mr. Keay in said Reference," and duly signed by him in November, 1830.

In the year 1842 the Appellant brought an action against the Respondent, the summons in which set forth the matters which have been detailed, and after averring that the Appellant, as the general disponee and executor of Fraser, had right to the sums which Fraser had advanced for the construction of the two roads, and that the Respondent was liable in payment of the interest upon the said sums and of three per cent annually of

their amount after the death of Fraser until the whole amount should be liquidated, concluded against him for payment of the sums in the bond, with interest from the time of Fraser's death (the sinking fund being now equal to their full amount), under deduction of interest and of the annual payment to the sinking fund up to the time of Fraser's death.

The Respondent pleaded *inter alia* in defence of this action, that the subject-matter "is *res judicata* in the submission "entered into by the present parties to Mr. James Keay, by "his final award thereon in 1831; and the Pursuer is barred "thereby from insisting in the present action."

The Lord Ordinary (*Cuninghame,*) sustained the action by finding that the pleas urged by the Respondent in defence, were not well founded, and he accompanied his interlocutor by a note which, as to the defence of *res judicata,* was in these terms: "(3.) The third and last plea of the Defender, against entering "into any accounting for the claims libelled on, was founded on "an opinion given by the late Mr. James Keay, advocate, to "whom it is said the question was referred, and decided in "favour of the Defender.

"On attending, however, to the opinion of Mr. Keay, it is "plain that he gave no decision against the claim of the Pursuer, "although he laboured under some misconception as to the "state of the case, which would doubtless have been removed "if he had been required to adjust the claims of the parties "precisely in a decree-arbitral, which he never was. The "opinion, called an award, by Mr. Keay, is dated 28th January "1831, and it is manifest, from its terms, that he by no means "declared the whole amount of the bonds, or of the corres-"ponding assessments included therein, as extinguished. If "that had been his meaning, he would at once, and in explicit "terms, have declared that all claim of Abertarff under the "bonds or statutes was irrelevant or discharged. But the

"opinion is very differently expressed. Mr. Keay, in his "answer to the memorial, alluded to the statutes, and then "concluded his response with the following sentences:—"'By "'the statute 1804, he was entitled to retain a certain portion "'of the assessments imposed on his estate, in relief or "'extinction of those engagements. He did so,—and thus the "'burden upon the succeeding heirs of entail was so far dimi-"'nished. I cannot see any ground for maintaining that the full "'amount of the bonds (under the deduction only of three per "'cent. annually), is to be held as still due by the heir of entail, "'while the executor is to have right to the whole assessments "'which, during the late Lovat's life, were actually applied "'towards the reduction of these bonds.'

"There was here a mistake, of the nature of an *error calculi*, "as to the amount of the claim of the executor, which is quite 'palpable. Mr. Keay seems to have supposed (perhaps from "some indistinct explanation, written or verbal, of the country "agents), that the executor claimed right both to a part of the "bonds, and to the whole assessments, unpaid during the late "Lovat's life. That would, indeed, have been a glaring *pluris* "*petitio*; and it was that plea only that Mr. Keay repelled. "*Quoad ultra*, the Lord Ordinary infers, from Mr. Keay's "words, that if Lovat had not retained his assessments, but "paid them up, that then his executor was entitled to claim "such part thereof from the heir of entail as the statutes autho-"rized to be laid on the entailed estates. What that was "required an accounting between Lovat and the subsequent "heir, which Mr. Keay evidently supposed was to take place in "conformity with the statutes. It is apprehended, therefore, "that the accounting now directed to be made by Mr. Lindsay "is in accordance with the probable views and meaning of Mr. "Keay, as indicated in his opinion."

The Respondent reclaimed to the inner house, which recalled the interlocutor of the Lord Ordinary, and found "that the

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"subject-matter of the present action is *res judicata* in the "submission entered into by the present parties to the late Mr. "James Keay, by his final award thereon in 1831, and that the "Pursuer is barred thereby from insisting in the present action: "Therefore, dismiss the present action, and assoilzie the Defender "from the conclusions thereof."

This interlocutor was the subject of the appeal.

Mr. Bethell and *Mr. Robertson* for the Appellant: The paper entitled Award does not amount to a positive finding so as to form a decree-arbitral, but is a mere *obiter* explanation of what the referee had previously stated in his notes. At all events, the whole facts had not been presented to the referee by the memorial, as it was silent in regard to the fact that Fraser had granted heritable bonds over his lands for payment of the sums in question, by deeds professing in terms to be made under the power given for that purpose by the Act 43 Geo. III., and so had actually made the sums in question a charge upon the lands, which the Appellant, as the next heir of entail, was by the statute bound to liquidate.

The memorial did not contain a general reference of all questions, but of certain specific ones. No question was put by it to the arbiter in regard to the effect of the bonds under the 43 Geo. III.; accordingly his mind was directed entirely to their effect under the Act of 44 Geo. III. But even if the first of these questions had been put, it was not answered—the award is silent upon the subject—the arbiter merely says that the Respondent is entitled to have from the Appellant, the sum which Fraser had put into his own pocket out of the assessments, and that the Appellant could not set off against that claim, a sum which he was entitled to insist should be made a charge upon the Respondent's estate.—In truth, nothing as to the nature or effect of the bonds was either submitted to the arbiter or answered by him.

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Mr. Andrews and *Mr. Anderson* for the Respondent.

LORD BROUGHAM.—My Lords, in this case of Fraser *v.* Lovat I agree entirely with Lord Cottenham, the late Lord Chancellor, in his opinion upon it. His Lordship has favoured me with a note of his opinion, which I shall read as the ground of the judgment I am about to advise that your Lordships should give.

His Lordship says, "The Court of Session decided this "case upon the ground that the matter of this suit having been "submitted to the judgment of Mr. Keay, and he having given "two opinions against the claim of the Appellant, the matter "was to be considered as *res judicata*, and not subject to be "re-opened in this suit. Upon this point the Judges of the "Court were unanimous, and the Lord Ordinary, Lord Cuning-"hame, admitting the principle, thought that Mr. Keay had "been under some misapprehension as to the facts or the claim, "and that the principle therefore did not apply. That is, that "the opinion of the referee was not correct. It is obvious that "if it were competent for a party to question the correctness of "the opinion of the referee, the whole matter would be open. "I consider, therefore, the whole question to be, Was the "claim, as insisted upon by this summons, submitted to the "judgment of Mr. Keay, and decided upon by him? Three "points are to be considered,—First, What is the claim between "the parties? Second, Was it submitted to and decided by "Mr. Keay? Third, Is it the subject of the present summons? "The claim arises from the provisions of the Acts of 1803 and "1804. By the Act, 1803, owners in possession of entailed "estates were authorized to borrow upon and to charge the "entailed estates with sums not exceeding one year's income, "to be advanced to the Commissioners for making Roads and "Bridges in the Highlands, of which they were to keep down the "interest and to pay 3*l.* per cent. towards replacing the sum so "borrowed and charged. By the Act, 1804, the heritors of the

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" county of Inverness were authorized to charge the whole of " the lands with the sums necessary to be advanced, which were " to be repaid by assessment upon the lands. Heirs of entail " had the same power of charging their entailed estates with " the amount of the assessment made upon such estates as was " given by the former Act. Heritors were authorized to advance " the sums required for the security of the assessments out of " which, when collected, they were to be repaid, but were to " deduct the amount of their own assessments.

" In 1806, a road, called the Fort Augustus road, being " projected, Lovat, the then owner of the entailed estate in " question, instead of borrowing or paying the money, was " permitted by the Commissioners to give security for the sum " to be advanced, and he accordingly, by bond and disposition " in security, dated 12th January, 1806, bound himself to the " Commissioners to make the advance required; and professing " to proceed under the powers of the Act of 1803, charged the " entailed estates with the amount, and at the end of this instru- " ment, after reciting that such road would be beneficial to his " entailed estate, Lovat declared that his heir of entail should " free, relieve, and indemnify his heirs general from the pay- " ment of such sums of money, and all the consequences " thereof. The sums so secured to the Commissioners having " been paid to them, they, in 1810, assigned this security to " Dundas in trust for Lovat.

" In 1811 a bridge, called the Beauly Bridge, being pro- " jected, Lovat was permitted to give security to the Commis- " sioners for 5,287*l.*, the sum required to be advanced, by a bond " and disposition in security, in every respect similar to the " former. This instrument professed to be founded upon the " Act of 1803, but it reserved to himself the right of relief " against the other heritors of so much of the sum contributed " as should exceed his proportion, which could only be done " under the Act of 1804, and by pursuing its provisions. Lovat " died in 1815. The Respondent is his heir of entail, and the

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" Appellant his representative and general disponee. It is " obvious that these two Acts, and the mode in which these " provisions had been dealt with, were calculated to raise ques- " tions between the executor and the heir of entail; and " accordingly these parties agreed to take the opinion of the late " Mr. Keay, and to be bound by his opinion, as is expressed in " the case submitted to him. The case stated those two Acts, " and the bonds, and that the Appellant claimed against Lovat, " the heir of entail, the whole assessments affecting this estate, " down to Lovat's death, subject to the deduction of the 3*l.* per " cent., in consequence of the granting of the bonds, and his " having retained the whole of the assessments up to the time " of his death; and the third question was, whether he had a " claim against the Respondent for any part of the road assess- " ments payable out of the estate of Lovat dnring the late " proprietor's lifetime, under the clause in the local Act of " 1804, which declares that the heir of entail may charge the " entailed estate with the assessments thereby imposed, or in " virtue of the general Act of 1803?

" The abitrator, having expressed an opinion against the " claim of the Appellant, gave the parties notes of such opinion. " He was over again attended by them, but he adhered to the " opinion before expressed. If the executor had been able to " satisfy the referee that he was entitled to be paid by the heir of " entail any part of the monies so advanced by the late Lovat, on " account of the road and bridge, he would have been entitled " to his opinion and award to that extent, but the referee " entertained an opinion against any such claim. What then " does the summons in this suit seek to obtain? Payment by " the heir of entail of the sums of 440*l.* 5*s.* 3*d.* and 2,918*l.* 18*s.*, " being the principal monies paid by the late Lord Lovat to the " Commissioners, and for which he was liable under his secu- " rities to them, subject to certain deductions, not important to " the present question.

" For this extended claim there could be no pretence; for,

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" of the sum paid by the late Lovat to the Commissioners, a " large proportion has been, or was to be repaid by the other " heritors by the assessment made upon their lands, and the " only question which could arise between the present litigants " would be the assessments for the Beauly Bridge expenditure " upon the entailed estate of the parties; but although the " extra claim is unfounded, it evidently includes the lesser, " which is ' part of the road assessment payable out of the " ' estate of Lovat,' the very terms of the question submitted " to Mr. Keay. It appears to me, therefore, that as to the " bonds on assessments, there is no case made by the Appel- " lant, and that as to the property assessed upon, and the sums " which might have been charged upon the entailed estate, the " opinion or award of Mr. Keay is conclusive against the claim " set up by this summons. I am therefore of opinion that the " interlocutors appealed from are right, and that this appeal " ought to be dismissed with costs." Thus far Lord Cottenham and his argument exhausts the whole matter, leading to a conclusion supporting the judgment of the Court below upon each head, and I entirely coincide with my noble and learned friend.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of, be, and the same is hereby affirmed: And it is further Ordered, That the Appellants do pay or cause to be paid to the said Respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk Assistant: And it is also further Ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord officiating on the Bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be be lawful and necessary.

RICHARDSON, CONNELL & LOCH.—G. & T. W. WEBSTER