[*27th August* 1833.]

No. 40. The Honourable RAMSAY MAULE of Panmure, Appellant.—*Lord Advocate* (*Jeffrey*)—*Murray.*

WILLIAM MAULE, Esq., Respondent.—*Dr. Lushington* —*Robertson.*

Res Judicata—Entail.—Circumstances in which (reversing the judgment of the Court of Session) a decree pronounced in 1782, in a question with an heir of entail, was held res judicata as to part of the subject matter thereof, in a question with a subsequent heir of entail.

1ST DIVISION.
Lord Newton.

JAMES MAULE, fourth Earl of Panmure, having engaged in the rebellion 1715, was attainted, and his honours and estates of Panmure, Brechin, and Ballumbie were forfeited to the crown. His Countess, Lady Margaret Hamilton, was allowed to retain her life-rent of the family seat of Brechin, and also an annuity over the estate of Panmure, which had been secured to her by her contract of marriage.

James, the attainted Earl, died without issue, and was succeeded by his immediate younger brother, Mr. Harry Maule, proprietor of the estate of Kelly, who entered a claim to the estate of Ballumbie (which alone had been entailed), and it was sustained. In the year 1719, the estates of Panmure and Brechin were purchased by the York Buildings Company.

On the 23d of April 1724 the York Buildings Company granted a tack, in favour of Harry Maule and his

assignees, of the mansion house of Brechin and other subjects, at the rent of 50*l.*, for ninety-nine years from the first term after the expiry of the life-rent of the Countess of Panmure.

On the same day, they granted a lease to the Countess and her assignees of the mansion house of Panmure, and other subjects, at the rent of 100*l.*, also for ninety-nine years from the term of entry, which was declared to begin on the 15th of May 1724.

On the 5th of June of the same year the Countess granted an assignation of the lease of the mansion house of Panmure (reserving her own life-rent) to Harry Maule and the heirs male of his body; which failing, his other heirs and assignees whatsoever, the eldest heir female succeeding without division.

Harry Maule had four sons, George, James, William, and John. George and James predeceased their father without issue. William was afterwards created an Irish peer, by the title of Earl of Panmure. John was an advocate at the Scotch bar, and afterwards one of the barons of exchequer. Harry Maule had also two daughters, Henrietta and Jean; the former of whom died unmarried, and the latter married Lord Ramsay, son of the third Earl of Dalhousie, who was the grandfather of the appellant, the Hon. Ramsay Maule.

In the year 1730 Harry Maule, his two sons William and John, and the Countess, executed five separate entails of the property respectively belonging to them, in favour of the same series of heirs; viz., 1st, An entail of the estate of Kelly by Harry Maule, with consent of his two sons; 2d, An entail of a bond to the extent of 9,000*l.* granted by his son William

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Maule; 3d, An entail of the estate of Ballumbie, executed by the sons, William and John; 4th, An entail of the lease of Brechin, executed by Harry Maule; and 5th, An entail of the lease of Panmure, executed by the Countess and Harry Maule. Under these entails the respondent alleged that his father and he were substitutes.

The Countess of Panmure died on the 6th of December 1731, and Harry Maule on the 23d of June 1734, upon which last event William Maule, afterwards Earl of Panmure, took possession of the taillied estates.

On the 12th of October 1745 he executed a general disposition of all his lands and estates, including the leases of Brechin and Panmure, in favour of himself and the heirs male lawfully to be procreated of his body; whom failing, to John Maule (Baron Maule), and the heirs male lawfully to be procreated of his body; whom failing, to his own nearest heirs and assignees whatsoever, the eldest heir female always succeeding without division.

On the 10th of May 1758 he executed another disposition in favour of himself and the heirs male of his body; whom failing, to his brother John, and the heirs male of his body; whom failing, to his own nearest lawful heirs and assignees whatsoever, of all his heritable estates, with power of revocation.

In the year 1765 a large portion of the forfeited estate, comprehending the mansion house and demesne of Brechin, was exposed to sale, and was purchased by the Earl. On completing the purchase his Lordship expede a crown charter, in which he included the estates of Kelly and Ballumbie; and, failing himself and the

heirs male of his body, he substituted his brother Baron Maule, and the heirs male of his body, without any limitation whatever. On the 30th of August 1775, he executed a strict entail of his whole estates, calling his brother, and the heirs male of his body; whom failing, George Earl of Dalhousie in life-rent, and the appellant, his second son, in fee. On the 12th of July 1779, he executed a disposition and settlement in favour of himself and the heirs male of his body; whom failing, his brother Baron Maule, and the heirs male of his body; whom failing, his own nearest heirs and assignees whomsoever, of the mansion house, gardens, and parks of Panmure, and other subjects contained in the lease granted to the Countess by the York Buildings Company. On the 18th of September of the same year, he executed another disposition and settlement of these subjects, in favour of the heirs mentioned in the deed of entail of August 1755.

In the year 1781 Baron Maule died unmarried, and in his repositories there were found two separate parcels containing the deeds of entail executed in 1730, and which had been deposited with him; and also a deed, bequeathing the parcels to the respondent's father, as the heir called by these deeds. On this being made known, the Earl of Panmure executed in duplicate, on the 18th of August and 8th of September 1781, a deed of declaration, translation, and revocation, ratifying the settlements which he had made in 1775 and 1779, and revoking the deeds which had been found in Baron Maule's repositories; and on the 6th of October of the same year, he executed a disposition in favour of the Earl of Dalhousie, and the heirs therein mentioned, of all his property, both heritable and moveable, under certain

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exceptions; and on the same day he executed a settlement of the property so excepted. On the 12th he made an entail of all his estates, in favour of himself and the heirs male of his body; whom failing, the Earl of Dalhousie in life-rent, and the appellant in fee.

The Earl died on the 4th of January 1782, at the age of 82, without issue; whereupon a competition of brieves ensued between the respondent's father, the late Thomas Maule, Esq., and the present appellant, each claiming right to the estates and leases comprehended under the various entails. Previous to this an action of reduction and declarator had been raised by the late Earl, and on his death was insisted in by Lord Dalhousie, on his own behalf as life-renter, and as administrator in law for his son the appellant, as fiar, against the respondent's father, for setting aside the deeds of entail of 1730. The latter, on the other hand, raised a counter action of reduction improbation, for having all deeds done in contravention of these entails of 1730 reduced. The respondent was called as a party in these proceedings,—an execution against him personally having been returned, and also against his tutors and curators, if he any had, edictally, at the market-cross of Dumfries. The Court of Session, on the 5th of March 1782, pronounced the following judgment:—"On report of Lord "Gardenston, senior Lord Assessor, who, along with "Lord Kennet, attended the Macers in the above-men- "tioned competition of brieves, and having advised the "mutual informations given in by both parties, with the "several processes which are now conjoined, writs pro- "duced and proof adduced, and having heard parties "procurators in their own presence, the Lords find,

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" that the deed of taillie executed by the deceast
" Mr. Harrie Maule of Kelly, with consent therein
" mentioned, in the year 1730, of his lands and estate
" of Kelly, and also the deed of taillie executed by the
" late William Earl Panmure, in the aforesaid year, of
" his lands and estate of Ballumbie, are cut off both by
" the positive and negative prescription; and that the
" obligation for employing 9,000*l.* sterling, executed by
" the said William Earl of Panmure in the aforesaid
" year, is cut off by the negative prescription; and
" therefore sustain the reasons of reduction of these
" three deeds, and reduce, decern, and declare accord-
" ingly: Find that the said William Earl of Panmure
" had full power to make the deed of taillie executed
" by him in favour of the said Mr. William Ramsay
" Maule and his administrator at law; repel the reasons
" of reduction of that deed of taillie, and assoilzie the
" said Mr. William Ramsay Maule and his administra-
" tor at law from the process of reduction 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 Kelly and Ballumbie, and
" also from the process against them for implement and
" performance of the prestations contained in the ob-
" ligation for the 9,000*l.*: Find that the said Mr. Wil-
" liam Ramsay Maule is entitled to be served heir of
" taillie and provision to the said deceast William Earl
" Panmure, his grand uncle, in virtue of the foresaid
" deed of taillie in his favour; and remit to the Macers
" to proceed in his service accordingly in the brieve
" brought before them by him and his administrator in
" law: Find that the said Lieutenant Thomas Maule

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"has right to take up the leases of the house and parks "of Panmure, and house and parks of Brechin, and "decern against the said Mr. William Ramsay Maule, "and his said administrator in law, in the conclusions "of declarator and removing in the foresaid action at "the instance of Lieutenant Thomas Maule, so far as "the same respects these leases, and remit to the Macers "to proceed in his service in so far as regards these two "leases; but find that he is not entitled to be served "heir male of taillie and provision to the said William "Earl Panmure, in virtue of the deed of taillie of the "estate of Kelly executed by the said Mr. Harrie "Maule, nor in virtue of the deed of taillie of the estate "of Ballumbie executed by the said William Earl of "Panmure, and that his service on the brieve taken out "by him cannot proceed with regard to the said estates "of Kelly and Ballumbie; and remit to the Macers to "dismiss the same accordingly, in so far as concerns "these two estates, and decern." An appeal was immediately entered by Lord Dalhousie and the appellant against this judgment, so far as it was unfavourable to them; but it was afterwards withdrawn. No appeal, so far as it related to the estates of Kelly and Ballumbie and the bond, was entered by the respondent's father.

Thereupon a deed in the form of a submission, comprehending all the proceedings under the actions, was, on the 30th March 1782, entered into betwixt Lord Dalhousie, for himself, and as administrator in law for the appellant, on the one part, and Thomas Maule, for himself, and as administrator in law for his son the respondent, on the other part.

Two days after the date of the submission, (2d of

April 1782,) a decree arbitral was issued by the arbiters, by which they affirmed the judgment of the Court of Session, in so far as respected the estates of Kelly and Ballumbie and bond for 9,000*l.*, but reversed the same in so far as regarded the leases of Panmure and Brechin, and found the respondent's father entitled to the sum of 3,500*l.*, to be paid in a particular way, and under the condition that if he or his son should attempt to make any claim on pretence of not being bound by the submission, or any other ground, it should then be competent for Lord Dalhousie, or any other heir to the estate of Panmure, to insist for repetition of the money. The money was paid in terms of the decree.

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The respondent's father died in the month of November 1789; and in the year 1809, the respondent, alleging that he had been in the meanwhile ignorant of the nature of his rights, raised an action against the appellant, before the Court of Session, concluding for reduction of the submission and decreet arbitral, and claiming the benefit of the judgment of 1782, in favour of his father, in respect to the leases of Brechin and Panmure.

On the 9th of March 1813 the Second Division of the Court pronounced an interlocutor in these terms:—

" The Lords, having resumed consideration of this " process, and advised the mutual informations and " additional informations for the parties, writs produced, " and former proceedings, repel the reasons of reduc- " tion, sustain the defences, assoilzie and decern: Find " the defender entitled to expenses, allow an account " thereof to be given in, and remit to the auditor to " examine the same, and report; superseding extract " till the first box day in the ensuing vacation; and, if

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" a petition shall then be given in, supersede extract " farther till the petition shall be disposed of."

Against this interlocutor the respondent appealed; and upon the 10th of May 1816, the House of Lords pronounced this judgment:—" The Lords spiritual and " temporal, in Parliament assembled, Find that in " this action and proceeding between the present appel- " lant and respondent, the alleged submission and " alleged decree arbitral, of the respective dates of the " 30th of March 1782 and 2d of April 1782, ought not " to be considered as being or having in law the effect " of a submission or decree 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 submis- " sion, was concluded; and, with this finding, it is " ordered that the said cause be remitted back to the " Court of Session in Scotland, to review the interlocu- " tor complained of in the said appeal, and upon such " review to do therein as is just and consistent with this " finding."

On the case returning to the Court of Session, their Lordships, on the 2d of December 1817, pronounced this interlocutor:—" The Lords, having resumed con- " sideration of the mutual informations for the parties, " with the additional informations, and whole circum- " stances of the case, sustain the defences pleaded for " the defender, assoilzie him, and decern."

Upon a second appeal by the respondent, the House of Lords, on the 10th of July 1819, pronounced a judgment in these terms:—" 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 interlocutor of 9th March 1813 complained " of in the former appeal, and so far as it sustains " generally the defences pleaded for the defender, and " except as herein-after expressed: And it is farther " 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 appellant: And it is de- " clared, that, under the circumstances of this case, the " interlocutor of 1st March 1782 is not to be considered " 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 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 taillie in the pleadings mentioned."

This judgment was applied by the interlocutors of Lord Cringletie, Ordinary, the one dated the 26th of November 1819, in these terms:—" The Lord Ordi- " nary, having considered the petition and remit from " the Court, assoilzies the defender from the conclusions " of the libel of declarator, and decerns." And the other dated the 7th of March 1820, in these terms:— " The Lord Ordinary, having advised this petition for " the Honourable William Maule, with the interlocu-

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" tor of the House of Lords, therein recited, the " interlocutor of the Lords of the Second Division " applying the same and remitting the cause to the " Lord Ordinary, and mutual minutes for the parties, " observes, that in the said interlocutor of the House of " Lords there is a clerical mistake in terming the action " a declarator, which it is not, the same being a reduc- " tion of the decreet arbitral therein mentioned, also a " removing of the said Honourable William Maule from " certain subjects therein described, and of count and " reckoning for the rents thereof; and therefore the " Lord Ordinary, in application of the said judgment " of the House of Lords, and remit by the Lords of the " Second Division to him, reduces the said decreet " arbitral, and decerns and declares accordingly; but " assoilzies the said honourable defender from the conclu- " sions of removing and of count and reckoning contained " in the said summons, and decerns, ' without prejudice " ' as to any question between the parties in any other " ' action touching any property comprised in the deeds " ' of taillie in the pleadings mentioned,' viz. in this " action; and, of consent of parties, alters the interlocu- " tor of date the 26th November last to the above " extent."*

In the year 1821 the respondent raised a new action against the appellant, in which he claimed right, under the entails of 1730, both to the estate of Kelly and Ballumbie, and to the sum of 9,000*l.*, and also to the leases of Brechin and Panmure as heir of entail. In defence

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* In the meantime the appellant raised an action against the respondent for repayment of 2,500*l.*, being the sum that remained due out of the 3,500*l.* ordered to be paid by the award; and decree was, upon the 22d of November and 7th December 1822, pronounced.

the appellant pleaded res judicata; and Lord Alloway, on the 5th of June 1823, pronounced this interlocutor:— "The Lord Ordinary, having considered the memorials "for the parties, and whole process, Finds that by the "extracted decree of the Court of Session of 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 "Session, 21st May 1816 and the 4th of 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 rights "and interest which the pursuer claims under the pre-"sent summons of reduction and declarator are totally "excluded, and the subject matter of this action is res "judicata by the judgments above referred to; there-"fore assoilzies the defender from this action, and "decerns." To this judgment the First Division of the Court adhered on the 1st June 1824.

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The appellant having appealed, the House of Lords, (26th May 1826,) pronounced this judgment:—"After "hearing counsel on Friday the 5th day of this instant "May, upon the petition and appeal of William Maule, "Esq., residing in Edinburgh, son and heir of the late "Lieutenant Thomas Maule, complaining of three in-"terlocutors of the Lord Ordinary in Scotland, of the "5th and 26th of June and 12th November 1823, and "also of an interlocutor of the Lords of Session there, "of the First Division, of the 1st of June 1824, and "praying that the same might be reversed, varied, or "altered, so far as complained of, or that the appellant "might have such relief in the premises as to this "House, in their Lordships great wisdom, should seem

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" meet; as also upon the joint and several answers for " the Honourable William Ramsay Maule of Panmure, " and the Right Honourable the Earl of Dalhousie, " put in to the said appeal, and due consideration had " this day of what was offered on either side in this " cause;—It is ordered and adjudged by the Lords " spiritual and temporal, in Parliament assembled, " That the interlocutors complained of in the said " appeal be and the same are hereby affirmed, with " respect to the estates of Kellie and Ballumbie, and " the bond for 9,000*l.* in the said interlocutors men- " tioned, 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 reduc- " tion and declarator in the said interlocutors men- " tioned, 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, in- " asmuch 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 pro- " ceeding 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
" declarator 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 inter-
" locutor by this House was without prejudice to any
" question between the parties in any other action
" touching any property comprised in the deeds of taillie
" 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 taillie
" therein mentioned, open to be discussed in such

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" 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 de- " clarator then before the said Court, according to the " reservation contained in the judgment of this House " of the 10th July 1819, and the true intent and mean- " ing 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 judg- " ment and with the former judgments of this House, " and as shall be just."*

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* Before this judgment was pronounced, the respondent had entered a petition of appeal against the interlocutor of 1782, on which this deliverance was issued on report from the Appeal Committee :—" The Earl " of Shaftesbury reported from the Lords Committee appointed to con- " sider of the causes in which prints of the appellants and respondents " cases, now depending in this House, in matters of appeals and writs of " error, have not been delivered pursuant to the standing orders of this " House, and to report to the House; and to whom was referred a peti- " tion of William Maule, Esq., praying their Lordships to receive his " petition of appeal against an interlocutor of the 1st March 1782, pro-

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In the month of August thereafter the respondent instituted an action of reduction improbation and declarator against the appellant and the other heirs of entail, setting forth the proceedings, and particularly the last judgment of the House of Lords; and that "a proper "and suitable mode of impeaching the said judgment "of our said Lords of 5th March 1782, so far as "regards the lands and baronies, and sum of 9,000*l.* "aforesaid, and of obtaining redress against the ante-"cedent and posterior acts and deeds of the defen-"ders and their authors, being by the process of re-"duction, declarator, and other conclusions after "written." Therefore he called for exhibition and reduction of the decree pronounced upon the 5th day of March 1782, with the grounds and warrants on which the said decree proceeded; and also the whole of the respondent's titles from 1734 to the lands of Kelly and Ballumbie, and the bond for 9,000*l.* His main reason for reduction of the decree of 1782 was, that during the whole period of the proceedings he was in

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"nounced by the Court of Session, in a competition between Thomas "Maule on the one part, and the late Earl of Dalhousie and the "Honourable William Ramsay Maule on the other part; that the Com-"mittee had met and considered the petition of William Maule, Esq., "praying their Lordships to receive, under the circumstances stated in "the said petition, his petition of appeal against an interlocutor of the "Court of Session, dated the 1st March 1782, pronounced in a competi-"tion between Thomas Maule, the petitioner's father, on the one part, "and the late George Earl of Dalhousie and the Honourable William "Ramsay Maule, on the other part, and thereby permit the petitioner to "obtain a discussion of his claims, which were locked up by a compromise "to which he was made a party when a minor, and which he has now "reduced; and the said petitioner being in attendance, did not insist upon "the prayer of his said petition, but prayed their Lordships leave to with-"draw the same; and the Committee are of opinion, that the said peti-"tioner should be allowed to withdraw his said petition as desired; which "report, being read by the clerk, was agreed to by the House, and ordered "accordingly."

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pupilarity, and had no tutors or curators, and no tutor ad litem; and, in so far as he was concerned, the decree passed in absence of him, and while he was non valens agere cum effectu, and was to his lesion, and the right of appeal had been foreclosed by the collusive agreement made by means of the submission and decreet arbitral; and as that decree had been set aside it was now competent for him to impeach the decree of 1782 in any way by law competent, and a process of reduction improbation was competent for that purpose.

In defence the appellant produced the extracted decree of 1782 as sufficient to establish a plea in defence of res judicata, and to exclude the respondent's title to reduce the other deeds called for; and he maintained that, until the defence of res judicata was overruled, he was not bound to make any further production.

Lord Newton pronounced this interlocutor on the 23d December 1826:—"Having considered the summons and defences, and heard parties procurators, "Finds that, in order to satisfy the production, it is "not sufficient for the defender to produce the decree "of the Court of Session of 1st March 1782, as excluding, while unreduced, the pursuer's title to call for "the other writs under reduction; therefore repels "the preliminary defence to the production of the said "writs, and decerns.

"*Note.*—The Lord Ordinary is quite aware that the "pursuer must succeed in reducing the decree before "he can be heard to challenge the other deeds called "for; but the necessity of following this order does "not appear to justify the defender's refusal to satisfy "the production by producing the whole. In actions "of this nature, where a series of titles are challenged,

" the validity of the later ones generally depends upon " that of the earlier; but the defender is not, on this " account, allowed to content himself at first with pro- " ducing a part. The case of Irvine of Drum against " the Earl of Aberdeen, as decided in the House of " Lords 2d April 1770, founded on by the pursuer, " seems very much in point. Besides, the form of " proceeding contended for by the defender seems in- " consistent with that required by the Act of 6 Geo. 4. " cap. 120., as it would be necessary to receive peremp- " tory defences, and to make up and close the record, " in order to dispose of the decree 1782, while, in the " event of this being reduced, a further set of defences " would need to be given in, and a second record to " be made up in reference to the other deeds. Now, " although, from the peculiar nature of actions of re- " duction, dilatory defences may be lodged and con- " sidered separately, there is no reason why the whole " peremptory defences should not be stated at once, " in terms of the 2d section of the act."

The respondent having reclaimed, the First Division of the Court, on the 31st January 1827, pronounced this interlocutor:—" The Lords having resumed the " consideration of this note, and heard the counsel for " the parties thereon, they alter the interlocutor of the " Lord Ordinary complained of, and remit to his Lord- " ship to hear parties upon the reasons of reduction, " and the defences arising out of the production of the " decree of the 5th March 1782, and to proceed further " as to his Lordship shall seem proper; but sist pro- " cess in the meantime relative to the production of " the writings called for other than the said decree " already produced, and until the reduction of the

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" same; and further find the defender not entitled to " the expenses of the present discussion."

A record having been closed, and the case having come before Lord Moncrieff, he ordered the question to be argued in cases, which he reported to the Court, accompanied by this note:—" It is impossible for the " Lord Ordinary not to feel that a considerable pro- " portion of the case given in for the pursuer is " occupied with matter which, in a correct view of " the state of the cause, is irrelevant to the proper " question at issue. The pursuer undisguisedly avows, " that he is discussing precisely the question, whether " the decree of 1782 was right upon its merits or not? " After the deliberate judgment of the Court, of 31st " January 1827, sisting process in regard to the validity " of the title deeds by which the defender holds the " estates, the Lord Ordinary cannot think that this is " a correct proceeding; for the merits of the question " as to the validity of those title deeds are in a great " measure, if not absolutely, the same with the merits " of the questions involved in the decree 1782; and, " therefore, all discussion of that question seems to be " excluded, until the decrees as res judicata shall be " taken out of the way.

" The pursuer maintains indeed, that, in insisting for " reduction of the decree on the ground that it was a de- " cree in his absence, and on minority and lesion, he is " entitled and bound to show that it was erroneous in " itself, and that he suffered lesion by it. But there is " manifest fallacy in this reasoning. The question is, " whether the decree is to stand as res judicata of the " matters determined by it or not? Unless relevant " grounds be made out for showing that it does not con-

" stitute res judicata, it is incompetent to discuss the ques-
" tion which under it is finally and irreversibly determined.
" But if good grounds be shown for finding that it is not
" res judicata, the decree may be reduced to this effect;
" and then, but then only, the pursuer will be entitled to
" try the question anew, in the same manner as if that
" decree had not been pronounced. It is true that a
" party who brings a reduction of a decree pronounced
" in absence may be called upon, after he has established
" that it is a decree in absence against which he is
" entitled to be reponed, to show that the decree is
" erroneous on its merits, before he can obtain either
" absolvitor or decree in his own favour; because all
" that he is entitled to is, to be placed in the same
" situation in which he was before the decree was pro-
" nounced. But the point which the pursuer has here
" to prove is the preliminary point, that this decree is
" liable to reduction at his instance as a decree in
" absence. Until he establishes this, any discussion of
" the merits of it is incompetent. If he establishes it,
" the whole merits will be open to him, because the
" plea of res judicata will then be repelled. In the
" same manner, when the pursuer pleads minority and
" lesion, he is entitled to assume the lesion by the
" facts of his being deprived of the estate; and, though
" he may also assume in argument that he is deprived
" of it by an erroneous judgment, his opponent is not
" bound to discuss with him the question, whether it
" was erroneous, or pronounced according to a just
" view of the law, until it be first determined that there
" is a competent and relevant plea of minority, which
" shall have the effect of preventing that decree itself

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" from standing as a final determination of the ques-
" tion.

" The Lord Ordinary is therefore humbly of opinion,
" that the manner in which the pursuer has treated the
" case in the present state of the process is very in-
" correct, and may very possibly produce confusion in
" the proceedings.

" On the merits of the only question really at issue,
" the Lord Ordinary shall only make a few remarks.

" 1. He is of opinion that the decree of 1782 cannot
" be considered as a decree in absence. The pursuer
" seems to grant that the question which was there
" tried might have been effectually tried in the com-
" petition with Lieutenant Thomas Maule, the imme-
" diate heir of entail, alone, and that a judgment against
" him (laying aside the question as to the effect of the
" decree arbitral) would have been effectual against the
" pursuer. But the question was tried in foro conten-
" tioso with Lieutenant Thomas Maule, and as to him
" it was no decree in absence. The pursuer was also
" called in the action of reduction, and it is said to
" be a decree in absence against him, because no tutor
" ad litem was appointed. But, whether his being so
" called can alter the effect in foro with the proper
" party or not, (and the Lord Ordinary does not think
" it can alter it,) there is no doubt that appearance
" was made for the pursuer and his administrator in
" law; and as there was then at least no adverse interest
" between him and his father, there was no room for
" the appointment of a tutor ad litem; and such an
" appointment, it is thought, would have been altogether
" incompetent. A decree which was obtained on full

" discussion by the first counsel at the bar appearing
" for both these parties, can never be a decree in
" absence with regard to either of them, whatever other
" objections it may be liable to as forming res judicata.
" There is no room in the present case for the principle
" adopted in the case of Sheuchan; and to apply it,
" indeed, to such a case, would be to hold that the
" father can in no case act effectually as the tutor of
" his son.

" 2. The Lord Ordinary is of opinion, that the plea
" of minority and lesion is equally inadmissible; for, 1,
" The pursuer brought no reduction within the quadri-
" ennium utile, to which the law has expressly con-
" fined the rights of a minor to complain on this
" ground of acts done in his minority. But, 2, The
" thing which he has to set aside is a decree of this
" Court, on trial of a question of law; and the Lord
" Ordinary is not aware that such a decree in foro is
" liable to reduction on minority and lesion, without
" some other ground of objection to it than merely
" that the party says that he will now show that it
" ought to have been different, the facts and the law
" remaining exactly as they were, and where it is not
" stated that the proper allegations in fact and law
" were not made. See Ersk. 1. 7. 38.

" 3. The pursuer, however, has another view of his
" case. The judgment of the Court in 1782 was sub-
" ject to appeal; but no appeal was entered. The
" pursuer says that his father, Thomas Maule, aban-
" doned his right of appeal by a collusive compromise
" for a sum of money; and he infers that therefore
" the judgment of the Court ought not to operate as
" res judicata against the other heirs of entail. This

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" plea is to the point, whether relevant or well founded " or not; but it ought not to be mixed with questions " about the pursuer's personal connexion with the " decree arbitral, or its effects against him as a decree " or agreement. Supposing it not to affect him in any " way, the point which he has to make out is, that, " supposing that the judgment of the Court in foro " would have been res judicata if Lieutenant Maule " had simply acquiesced in it without appealing, the " effect of it in this respect is destroyed by the com- " promise of the suit. And it will be necessary for " him to satisfy the Court, both that it prevented the " judgment from becoming final at the time, and that " he is not barred from now complaining of it by not " having taken his remedy in due time; for the point " stated by the defender is certainly material, that the " pursuer brought no action for reducing the decree, " not only till many years after he was of age, but till " long after he raised his action for reducing the decree " arbitral, and even more than five years after that " decree was finally reduced.

" This part of the case appears to involve considera- " tions of very great importance to the law. The Lord " Ordinary doubts whether, from the very singular " course which the pleadings have taken in these papers, " the arguments of the parties sufficiently meet one " another with regard to it. But perhaps it may " appear to the Court that there is enough for the " decision of the question. The Lord Ordinary has " thought it his duty to frame these notes, merely in " order to show where, in his humble opinion, the " merits of the case hinge. The Court will have at the " same time to consider the effect of the judgment of

" the House of Lords of 26th May 1826, in regard to " this question of res judicata."

The Court, after allowing the parties to lodge additional cases, remitted them for the consideration of the other Judges, who delivered the following opinions :—

Lords Justice Clerk, Glenlee, Cringletie, and Moncreiff.—" The pursuer, by his summons raised on the " 18th of August 1826, insists for reduction of a decree " of this Court, pronounced, upon full discussion of the " merits of the cause between the parties proper for try- " ing the questions at issue, on the 1st March 1782; " and he further demands reduction of the titles, by " which the defender and his father have possessed the " estates mentioned in the summons before and since " the date of that decree, and which were thereby found " and determined to be valid rights.

" The present question is, whether the decree thus " challenged does or does not constitute res judicata, to " the effect of excluding all consideration of the ques- " tions which were decided by it? or, whether any " relevant grounds have been shown for reducing it " after so long a period, so as to lay open the whole " merits of those questions regarding the validity of the " defender's title deeds.

" We are clearly of opinion, that, in this state of the " question, it is altogether incompetent to enter at all " into the merits of the judgment pronounced by the " Court in 1782; and that the question, whether the " decree is res judicata or not, is a preliminary question, " which must depend on other matters of fact and law. " For unless relevant grounds have been shown for " setting aside that decree as a decree legally pronounced, " or for opening it up as not final, it must be considered

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" as having irreversibly adjudged and determined the " questions involved in it.

" The facts on which the question, whether this decree " constitutes res judicata or not, depends, are not very " numerous, and are not involved in any perplexity.

" The pursuer founds his title in the present action " on certain deeds of entail executed in 1730, under " which he says his father, Lieutenant Thomas Maule, " was the immediate heir in the estates of Kelly and " Ballumbie on the death of the Earl of Panmure in " 1781. Some proceedings had been taken before the " death of Lord Panmure; and, in particular, Lord " Panmure had brought a declarator against Lieutenant " Thomas Maule, to have it found that he had an un- " limited right to the estates, and that the entails were " not binding on him; and separately, a reduction for " setting aside those deeds, in which the present pursuer, " as well as his father, was called as a party. After " Lord Panmure's death, the question as to the rights " to these estates was further raised; first, by a reduction " at Lieutenant Maule's instance against Lord Dal- " housie and the present defender; and, secondly, by a " competition of brieves between Lieutenant Maule on " the one part, and Lord Dalhousie as the defender's " administrator in law on the other. These various " processes having been conjoined, appearance was " made for all the parties under them; and there is no " doubt that the entire question as to the validity and " subsistence of the entails, and as to the validity of the " defender's titles as opposed to them, was fully dis- " cussed by the first counsel then at the bar, and was in " all respects aptly and legally brought to issue, and " decided by the Court in favour of the defender.

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" The same interlocutor found, that Lieutenant " Maule had right to certain leases of the parks of " Panmure and Brechin in virtue of separate entails " applicable to them. And against this judgment Lord " Dalhousie entered an appeal to the House of Lords.

" A transaction was then entered into in the form of " a submission and decree arbitral, by which Lieutenant " Maule, for himself and his son, surrendered his right " by this judgment as to the leases, and became bound " not to enter a cross appeal against the judgment " regarding the estates; and Lord Dalhousie, for him- " self and the defender, became bound to pay a sum of " 3,500*l.* to be settled in a particular way. That " money was paid or invested as agreed upon.

" The pursuer was served heir to his father, came of " full age, and, for many years after that event, received " the interest of the money invested, without challenging " the decree arbitral or raising any doubt concerning " the conclusiveness of the decree in 1782 as to the " estates.

" In 1810 he brought a reduction of the decree " arbitral on various grounds, to which it is unnecessary " to advert. As far as we have seen, the single ground " on which the House of Lords ultimately proceeded " was, that from the terms of the deed itself it appeared " that it was not a decree arbitral, but merely a form " by which Lord Dalhousie and Lieutenant Maule " made an agreement between themselves. This first " action, concluding for reduction of the decree arbitral, " related to the leases alone; and the summons con- " tained further conclusions, to have it found that the " pursuer had right to these leases, and for removing " against the defender.

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" The Court by a majority assoilzied the defender.

" But it is believed, that even those who differed from " that judgment were then of opinion, that, though the " decreet arbitral were set aside at his instance, the " effect could only be to place the defender in the " same situation in which he stood before it was pro- " nounced.

" On appeal the House of Lords found, that the " submission and decree arbitral was only a form " adopted by which an agreement between Thomas " Maule and Lord Dalhousie was concluded, and re- " mitted the cause.

" The Court afterwards pronounced a judgment in " general terms sustaining the defences, though there is " no doubt that the whole merits of the cause had been " pleaded, and were intended to be decided, on the " footing of the previous judgment of the House of " Lords.

" On a second appeal the House of Lords reversed " the interlocutor (1819), so far as was thought incon- " sistent with that judgment, and sustained the defences " generally; and ordered, that the decree arbitral should " be reduced ' as a decree arbitral affecting any rights " ' of the appellant.' It declared, that the judgment of " the 1st March 1782 was not to be considered as final " and conclusive against the respondent with respect to " the leases; and therefore, as to so much of the pur- " suer's action as sought a declaration of his rights to " the leases, affirmed the judgment, without prejudice " to any question between parties in any other action " as to any other property comprised in the deeds of " taillie mentioned.

" The pursuer holds this judgment to have been a

" decree reducing the transaction called a decree arbitral " to all intents and purposes, so far as 'affecting any " 'rights of him the appellant.' It probably was so " intended; and we think it may now be assumed to " have this effect. But it is to be observed, that up to " this time the pursuer had brought no regular action, " either for claiming the estates of Kelly and Ballumbie, " or for setting aside the decree of the Court in 1782 " regarding them, though he had unsuccessfully at- " tempted to repeat a summons as to these estates in " the action regarding the leases; but it is very evident " to us, that, if the views now maintained by him had at " all occurred at an earlier period, he must have laid " claim to the estates in his very first proceeding.

" But, apparently in consequence of the finding of " the House of Lords, that the decree 1782 was not " conclusive against the defender as to the leases, the " pursuer now took up the idea that it could not be " conclusive as to him with regard to the estates. We " are of opinion, that there is no correct analogy " between the two things; but, if there were a correct " analogy, the pursuer does not appear to have availed " himself of it in a competent manner.

" He did not attempt to enter any appeal to the " House of Lords at this time against the judgment in " 1782, neither did he bring any reduction of it; but " he brought before the First Division of the Court " simply an action founding on the old entails, and de- " manding reduction of those title deeds which had " been solemnly adjudged to be valid by that decree. " The defence stated was res judicata, which was sus- " tained by the Court.

" On a third appeal the House of Lords pronounced

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" the important judgment of 26th May 1826, ordering " that the interlocutors be affirmed with respect to the " estates of Kelly and Ballumbie, and the bond for " 9,000*l.* in the 'said interlocutors mentioned, so far as " '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 March 1782, in the said " 'interlocutors mentioned; inasmuch as it appears " 'to their Lordships that it was not competent for the " 'appellant, by the summons of reduction and de- " 'clarator in the said interlocutors mentioned, to " 'impeach such decreet of 5th March 1782, so far as " 'the same respected such estates and bond, and such " 'decreet has not been impeached by reclaiming peti- " 'tion or appeal, or any other proceeding competent " 'to impeach the same.'

" This appears to us to have been a conclusive judg- " ment on the case as it stood before the House of " Lords. Neither do we find any reservation in it. It " seems just to determine the point thus: that the " pursuer, not having taken any competent form of " impeaching the decree 1782, the House then held " that decree to be res judicata to exclude the claim " made by him in the action to the estates of Kelly and " Ballumbie.

" The pursuer, however, now raised the present ac- " tion for reducing the decree 1782, at the distance of " forty-four years from its date. The nature of the

" action, and the proceedings in it, are fully detailed in " the papers of the parties.

" In this state of the case, we are humbly of opinion " that the decree 1782 does constitute res judicata " against the pursuer in the present action.

" It is evident that the decree 1782 must be con- " sidered as res judicata, unless the pursuer has shown " legal grounds for impeaching it as such. It was pro- " nounced in a regular process, competent for the " decision of the question, fairly conducted, upon full " argument, and by the competent tribunal. It was " not impeached by reclaiming petition nor by appeal; " and forty-four years went over it before this reduction " was brought. All these points are clear. But the " pursuer maintains various grounds of reduction.

" 1. He says that it was a decree in absence as to him. " We are of opinion, that it was not a decree in " absence; and that, though it had been so, the plea is " irrelevant. The pursuer was a party to the suit by " his administrator in law having been called in one of " the actions which was conjoined with the rest; the " merits of the case were fully pleaded in his behalf, the " interest of his father and himself precisely coinciding; " and we are of opinion, that, in such circumstances, " there was no necessity for the appointment of a tutor " ad litem, and there would have been no competency " in such a measure. But, at any rate, we are clearly " of opinion, that the plea is irrelevant. The question " was, whether the entails were subsisting? Thomas " Maule was the immediate heir of entail. He un- " doubtedly discussed the question in foro contentioso; " and we are of opinion, that such a judgment pro- " nounced causa cognita against the immediate heir of

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" entail, who would have been the verus dominus if the " entail subsisted, does constitute res judicata against " all other heirs claiming under the same entail.

" 2. He pleads minority and lesion. We are of " opinion that this plea is not well founded. The " privilege of a minor to bring such a reduction must " be exercised within the quadriennium utile, which has " not been done in this case. Even if this rule could " be changed by the pursuer's allegation of his ignorance " of the nature of the decree arbitral, (of which, how- " ever, we have seen no evidence,) he must at least have " been bound to bring the action as soon as he knew " the facts. But neither was this done. We further " entertain great doubt whether this ground of reduc- " tion could be applied to the effect of reducing a decree " of this Court in foro contentioso, even if the pursuer " had been the primary or the only party to it. But " we think it very clear that it is altogether inadmissi- " ble as a ground for reducing a decree which was " competently pronounced against another party who " was the first heir of entail fully in titulo to try the " question with effect, and who was of full age.

" 3. The pursuer maintains, that Thomas Maule " having by the decree arbitral bound himself and the " pursuer not to enter a cross appeal to the House of " Lords against the judgment regarding the estates, the " effect of this must be to take away the operation of " the judgment as res judicata, and to entitle him even " now to reduce it.

" This is the only point in which we think that there " is any difficulty in the case. But we are of opinion " that the plea is not solid.

" The decree arbitral has been found to have been

" merely the form of an agreement, and it has been
" reduced as a decree arbitral affecting the rights of the
" pursuer. Under this decision he claimed the leases.
" But the Court and the House of Lords held, on the
" plainest principles of law and justice, that the effect
" of his challenging the decree arbitral successfully in
" that point could only be to oblige the defender to
" take the place, as to these leases, which he would
" have held if no such transaction had been made—
" that is, with an appeal actually entered against the
" judgment; or, in other words, to discuss the merits
" of the judgment as still open. It appears to us that
" the law and equity of this proceeding are manifest.
" What did the pursuer complain of? Of nothing
" but that by the decree arbitral Thomas Maule had
" compromised the pursuer's right as an heir of entail
" to the leases, which had been found by the interlocu-
" tor to belong to Thomas Maule and the heirs of entail
" in their order. But if he was reponed against this
" effect of the decree arbitral, there could be neither
" law nor equity for holding that the defender should
" not be also reponed against the abandonment of his
" appeal by Lord Dalhousie on the faith of the com-
" promise. We think that it was the inevitable
" consequence; and so the House of Lords conclusively
" determined by the judgment of 1819.

" But the position of the parties with regard to the
" estates was and is totally different. As to them the
" defender held the judgment of the Court. If Thomas
" Maule chose to acquiesce in the judgment he had a
" right to do so. If he had appealed, and abandoned
" the appeal, he had a right to do so. Neither could
" he have challenged any agreement for himself, en-

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" gaging not to appeal; and indeed the decree arbitral " has not been reduced so far as it affected his rights, " the judgment of 1819 being expressly applied to it " only as 'affecting any rights of the appellant.' Now, " the defender never challenged the decree arbitral. He " is asking nothing of the pursuer. He is not impeach- " ing any part of the agreement which was made for " him. It is impossible therefore to apply to him the " ground of equity which the House of Lords sustained " against the pursuer in the case of leases. The pur- " suer was challenging the decree arbitral, and yet " holding the defender bound by the judgment of the " Court, which stood appealed at the time, and only " became final by the force of the same decree arbitral. " The defender is in no such position. He was and is " willing to stand by the decree-arbitral in all points. " And the plea of the pursuer seems really to be, that, " because he himself has reduced the decree arbitral, " with a different view, the defender must lose the " benefit of the judgment of this Court, which he pre- " viously held.

" This view of the dissimilarity of the two cases is " not removed by the circumstance that, by the decree " arbitral, Thomas Maule renounced, for himself and " the pursuer, the right to enter a cross appeal. If " this had been thought to make the cases parallel, the " pursuer must have been admitted at once to impeach " the original merits of the decree in 1782. But, " beyond all doubt, the House of Lords have expressly " decided the reverse; and as that House has definitively " determined that the cases are not parallel, we humbly " think that it is now incompetent for the pursuer to " maintain, and would be incompetent for us to hold,

" that the decree of 1782 is not res judicata, on any " supposition that they are alike, or that the House of " Lords should have determined otherwise than they " have done. We think, however, that the difference " is still very plain in principle. The defender is not " challenging the decree; and though the pursuer, who " challenges it as heir of entail, may overcome that " which was incompetently done by his ancestor in the " surrender of the leases, it does by no means follow, in " our apprehension, that the defender is to be compelled " to open up the lawful decree which he holds in his " favour, merely because the party in the immediate " right at the time had consented to let it stand with- " out an appeal.

" In the case of Porterfield, lately before the Court, " the question was fully tried by the late Sir Michael " Shaw Stewart; and after several judgments had been " pronounced, and the case was final in this Court, he " intimated in writing to his opponent, Mr. Corbet " Porterfield, that he was satisfied with the trial of the " case, and did not intend to appeal, and gave up the " benefit of an agreement by which the expenses of both " parties were to be paid from the rents till a final " judgment in House of Lords. This did not interfere " with the right of any other heir of entail to appeal; " and the next heir has done so. But if no appeal had " been entered within the period of five years there " can be no doubt, we apprehend, that the judgment of " this Court would have been res judicata against all " parties whatever.

" The question here is, whether the case is made " different by the circumstance of the pursuer having been " made a party to the submission. And we can very

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" well see, that if the pursuer had proposed to appeal " the case in due time, and had been met by the clause " in the decree arbitral as a bar to such a proceeding, " he must have been reponed against that as soon as " the decreet arbitral was found not binding on him. " But laying aside that case, it is not easy to see that, " in the actual circumstances of his proceedings, he was " placed in any worse situation than he would have " been if he had not been a party either to the actions " or to the decreet arbitral. He says, indeed, that for " a long time he thought himself bound by the decreet " arbitral; and it has been suggested, that thereby he " was prevented from appealing in proper time. We " are much afraid that this view receives very little " support from the facts of the case, more especially " as the idea of either appealing against the judgment, " or attempting to reduce it, or even claiming the " estates at all, did not occur to him for so very many " years after he brought his reduction of the decreet " arbitral as to the leases. But giving the utmost " weight to the consideration, and granting also the " principle, however doubtful, that in equity he might " still be permitted to challenge the judgment, final " though it was against Thomas Maule, we can see no " ground for holding that this right could be altogether " without limits, and that, after he knew all that he " yet knows, he should still be allowed to let the decree " stand unchallenged, and at last bring his reduction " after sixteen years of further acquiescence. His first " action was brought in 1810. He did not even claim " the estates till 1821; and he did not bring the reduc- " tion of the decree 1782 till 1829. It would be a " very great stretch of equity, but surely it would be

" the utmost latitude which could be given to it, on the " ground of his thinking himself bound by the decree " arbitral, that he should be allowed still five years " more to challenge the judgment, after he saw cause " to object to the validity of the decree arbitral. But " granting even this, he lost the opportunity.

" The pursuer, however, says further, that he waited " till the decree arbitral should be reduced. It may " well be doubted whether any party can be entitled to " allege such a thing as an excuse for not exercising a " right claimed as matter of equity as soon as he him- " self believed that no legal obstacle could stand against " him. But supposing even this to be overcome, the " decree arbitral was reduced in 1819. Still there was " no attempt to challenge the judgment of 1782. The " pursuer, indeed, brought an action claiming the " estates. He was met by the plea of res judicata, " which gave him fair warning. The Court found it to " be res judicata, which should still more have put him " upon his guard. The House of Lords, in 1826, " affirmed the judgment; and it was only after this that " the present action was raised.

" By that judgment the decree 1782 stands clearly " found to be res judicata, excluding the pursuer's " claim to these estates. On what ground then is it to " be overcome, in regard particularly to the last period " from 1819 to 1826? The pursuer has nothing to " state but this, that he acted under the impression, " that because when he challenged the decree arbitral " as to the leases the pursuer was admitted to defend " his titles by trying the merits of the judgment regard- " ing them, without bringing any reduction, the pur- " suer should be equally entitled to challenge the judg- " ment as to the estates without a reduction; and that

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" he only discovered his mistake when the judgment of " 1826 was pronounced. We do not think that this " can be received even as a matter of fact, considering " that this Court had sustained the plea of res judicata. " But, supposing it were true, is it relevant? Sup- " posing it granted that even in 1819 the pursuer " might have challenged the decree 1782, if he did so " immediately, or even within five years, what does the " plea for the delay amount to, but that the pursuer " took a false view of the law, and has, even in this last " stage of a forty years delay to impeach the judgment " of this Court, lost his opportunity by an error in " law? We apprehend that the pursuer had no good " ground to make the assumption which he says he " did. He was told by the interlocutor of the Court that " he had not. But if he chose to act upon his own advice " or any other, we apprehend that that can furnish no " reason for now relieving him of the consequence of " his not having taken his appeal or brought his reduc- " tion in due time.

" The case of the pursuer, therefore, against the " plea of res judicata appears to us to consist in a " series of excuses for not having done that which he " was bound by law to do in order to preserve his " right to complain of the judgment. The case is no " doubt special; but we cannot avoid looking at the " very long period which has elapsed between the date " of the decree and the action for reducing it. We " know of no similar case in which a decree solemnly " pronounced in foro has been allowed to be opened up " at so great a distance of time. And as it certainly " cannot be held that, under any of the peculiar features " of this case, the pursuer's right to challenge became " absolutely indefinite as to time, we are humbly of

" opinion that, after the utmost possible effect is given
" to each of his successive apologies for the delay, he must
" be considered as at last foreclosed by the course of pro-
" ceeding which he chose, with his eyes open, to adopt."

" *Lords Meadowbank, Mackenzie, Medwyn, Core-*
" *house, and Newton.*—In 1782 certain actions rela-
" tive to the succession of Earl Panmure depended in
" this Court, in which the late Thomas Maule, the
" pursuer's father, on the one side, and the defender,
" and the Earl of Dalhousie as his administrator in law,
" on the other side, were parties. These actions related
" to the estates of Kelly and Ballumbie, to a bond for
" 9,000*l.*, and to two long leases of parts of the estates
" of Brechin and Panmure, all of which Thomas Maule
" claimed as heir of entail and provision under certain
" destinations executed in 1730 by Harry Maule, father
" of Lord Panmure, and others. It seems unnecessary
" at present to specify the nature of those actions, farther
" than to mention, that in some of them Thomas Maule
" appeared for his own behoof as the heir entitled to
" possession of the subject, and in others not only for
" his own behoof, but also as administrator in law for
" the pursuer, and his other children then in infancy,
" the nearest substitutes.

" All those actions were conjoined, and on the 5th
" of March 1782 the Court of Session pronounced an
" interlocutor, by which they decided in favour of the
" defender as to the estates of Kellie and Ballumbie
" and the bond for 9,000*l.*, and in favour of Thomas
" Maule as to the leases. Before that interlocutor
" became final the defender and his administrator in
" law entered an appeal to the House of Lords, in so
" far as regarded the leases; and it appears that
" the counsel for Thomas Maule were preparing to

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" enter a cross appeal as to the estates of Kelly and " Ballumbie and the bond. In these circumstances an " agreement was concluded between the defender and " his administrator in law on the one part, and Thomas " Maule, acting for himself, for the pursuer, and the " remaining substitutes, on the other part, by which " Thomas Maule for the sum of 3,500*l.* surrendered " his and their right to the leases, part of which sum " was to be paid to himself, and the remainder vested " in trustees for behoof of himself and the substitutes " in their order. Farther it was stipulated, that the " defender's appeal should be withdrawn, that Thomas " Maule should not enter a cross appeal, and that the " interlocutor of 1782, so far as concerned Kelly and " Ballumbie and the bond, should be allowed to become " final. As the parties entertained doubts whether this " agreement was legal and effectual, it was made to " assume the form of a decree arbitral pronounced on " a pretended deed of submission; and in virtue of that " decree the defender was afterwards served heir of " entail and provision to the estates and the bond.

" The pursuer having survived his father, and " attained the age of majority, received for several " years the interest of the trust funds in the belief " that the submission was regular, and the decree " arbitral effectual. But having come to the knowledge " of the previous agreement, he brought an action " concluding for reduction of the decree arbitral, for " declaring his right to the leases, and for removing " the defender from the subjects held under them.

" The Court of Session (9th March 1813) assoilzied " the defender. The House of Lords (10th May 1816), " on appeal, remitted for reconsideration, with a finding, " that the submission and decree arbitral were not

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" valid as such, being only a form which the agreement " had been made to assume. The Court of Session " (2d December 1817) again assoilzied; but, on a " second appeal, the House of Lords (10th July 1819) " reversed the judgment in part, reduced the decree " arbitral, found that the interlocutor 1782 was not " final against the defender with respect to the leases, " and affirmed as to the declaratory conclusions of the " pursuer's action; reserving any question between the " parties in any other action touching the property " contained in the deeds of tailzie.

" The cause came back to the Court of Session, and " the pursuer (5th April 1821) raised a new action, " in which he claimed not only the leases, but also the " estates of Kelly and Ballumbie and the bond. It was " pleaded in defence, first, that although the transac- " tion in 1782 had been reduced as a decree arbitral, " it was valid, notwithstanding, as an agreement. " Second, that as the interlocutor of the Court of " Session in 1782, not having been brought under " review either by reclaiming petition or appeal, had " become final, and as it never had been challenged by " reduction, it formed a res judicata against the pur- " suer as to the estates and the bond. Both these " pleas were sustained, as appears from the report of " the case (1st of June 1824), and the defender was " again assoilzied.

" A third appeal was entered; and it is material to " consider the effect of the judgment (26th May 1826) " pronounced upon it. First, the interlocutor of the " Court of Session was affirmed as to the estates and " the bond, on the ground that it was not compe- " tent to impeach the interlocutor of 1782 under the " summons of reduction and declarator then before the

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" House. Secondly, it was found that all questions " relative to the leases were open to both parties, and " in express terms that the pursuer had a title to insist " in his claim for them, which necessarily inferred " that the transaction in 1782 was ineffectual, not only " as a decree arbitral, but as an agreement or com- " promise. Thirdly, the judgment reserved all ques- " tions between the parties respecting the property, " exclusive of the leases, to be discussed in a competent " manner; or, what was the same thing, it found that " the reservation in the preceding judgment of the " House of Lords had that effect, the intent and mean- " ing of which previous judgment it declared and " affirmed. And, lastly, it remitted to the Court of " Session to try the rights of the parties as to the " leases.

" The pursuer raised a new action (18th August " 1826), concluding for the first time for reduction of " the decree of the Court in 1782, by virtue of the " reservation; and also for reduction of the deeds exe- " cuted by Lord Panmure, relative to the estates and " the bond which had been the subject of the former " reduction raised in 1821. The Lord Ordinary ap- " pointed the production to be satisfied as to both; but " the Court (31st January 1827) recalled that inter- " locutor, and limited the production to the extracted " decree 1782. The only question, therefore, at present " is, Whether that interlocutor can be set aside, to the " effect of allowing parties to try the merits of the " question as to the validity of the entails? or whether, " on the contrary, it forms a res judicata between the " parties, unimpeachable on any of the grounds stated " in the pleadings?

" We agree with the Lord Ordinary that a great

" deal of matter irrelevant at this stage of the cause " has been introduced into the pursuer's argument, as " it relates not to the effect of the interlocutor 1782, " but to that of the deeds executed by Lord Panmure. " The first point which properly falls under considera- " tion is, Whether the interlocutor ought to be held " as pronounced in absence, because the pursuer, though " cited in one or more of the conjoined actions, was in " pupilarity, and no tutor ad litem was appointed to " him? We are of opinion that this reason of reduc- " tion is ill-founded. There was no need of such ap- " pointment, as the pursuer's father was his admini- " strator in law, and acted for him expressly in that " capacity. If there had been an opposition of interest " between his father and himself, the case might have " been different; but there was no such opposition " while the action depended in the Court of Session. " Nay, if the pursuer had not been cited at all, we con- " ceive that the decree obtained against his father, as " the heir of entail entitled to possession, would have " been effectual against him; for whenever the interests " of the heir and the substitutes coincide, he represents " them in every law suit respecting the subjects of the " entail; and a decree pronounced against him, causa " cognita, and without collusion, is effectual against " them. If this were not the law, whenever the rights " of third parties are implicated with those of heirs and " substitutes of entail the matter might become inextri- " cable, and every judicial proceeding regarding them " be rendered insecure.

" Secondly. Before the interlocutor 1782 became " final the defender had appealed against it to the " House of Lords, and the pursuer's father was pre-

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" paring a cross-appeal. But the pursuer's father " entered into a transaction with the defender which " was ultra vires, if not fraudulent; and, in terms of " that transaction, all legal proceedings were departed " from, the appeal was withdrawn, the cross appeal was " not entered, and the interlocutor became final, sub- " ject to the alteration made upon it by the decree " arbitral. But the whole transaction has been reduced, " both as an agreement and a decree arbitral; and " the next point is, What is the effect of that reduc- " tion, first in law, and then in equity? It is evident " in law, that by the reduction the surrender of the " leases in reference to the pursuer became ineffectual— " the interlocutor 1782, in so far as they were con- " cerned, not having been reclaimed against, and the " appeal being withdrawn, took effect and stood as a " final interlocutor; and the pursuer, therefore, was " entitled to extract it as a decree, and by virtue of it " to obtain possession of the subjects. But in equity, " other considerations are let in. If the agreement " had been held altogether fraudulent, and the defender " as participant of that fraud, it does not appear how " he could have obtained redress. But as it might " have been entered into in bonâ fide, though not valid " against substitute heirs, whose interest was opposed " to that of Thomas Maule, and compromised by his act, " —and even if fraudulent, as the defender was a pupil " at the time,—it seems fair and reasonable that instead " of holding the interlocutor a res judicata against him, " he should be reponed against it, and be allowed to try " the question anew. In point of form, that could not " be done in the shape of a reclaiming petition, the " reclaiming days being elapsed; indeed, that mode of

" procedure had been abolished by the Judicature Act " before the point was stirred in 1826. Neither could " it be reviewed by appeal, for the original appeal had " been withdrawn, and the time for appealing again " had long before expired. The most correct form of " proceeding, it is thought, would have been by an " action of reduction at the instance of the defender, " on the ground that the interlocutor had become final " in consequence of the misconduct of his administrator " in law, and concluding that he should be restored in " integrum, to the effect of retrying his right to the " leases. But that form was dispensed with by the " House of Lords, and parties sent back to try the " right to the leases de plano in the pursuer's declarator. " The reason of this may have been, that the defender " was in possession of the leases, and the pursuer in " petitorio; although that scarcely appears a satisfac- " tory reason, a res judicata being no less effectual " as a ground of pursuit than it is as a ground of " defence. But the point is immaterial, since in equity " it was thought right to let parties into the question, " to which of them the leases belonged. That question, " accordingly, has been tried under the pursuer's decla- " rator and removing; and the result has been, that the " interlocutor of 1782 was altered in part, and in part " affirmed, the pursuer being found entitled to the " lease of Panmure, and the defender to the lease of " Brechin.

" On the other hand, it is equally manifest, that " though the transaction was reduced, both as a decree " arbitral and an agreement, the interlocutor of the " Court remained a rés judicata against the pursuer as " to the entails and the bond. The time for reclaiming,

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" had reclaiming petitions been still in use, was expired, " and for the same reason an appeal was incompetent. " But in equity, on the same principle that the de- " fender, having a final interlocutor standing against " him, was allowed to retry the question as to the " leases, the pursuer, in the like predicament, was " entitled to retry the question as to the entails and the " bond. Perhaps it ought rather to be said, that the " pursuer's right to be reponed against the interlocutor " was still more unquestionable. If there was a fraud " in the transaction between Thomas Maule and the " defender, it was a fraud for his behoof, while it was a " fraud to the prejudice of the pursuer. Farther, the " defender's administrator in law had no personal " interest in the matter opposed to that of his pupil; " while Thomas Maule compromised his son's interest " with a view to promote his own. There would have " been no inconsistency, therefore, in holding that the " pursuer was entitled to a restitutio in integrum, while " the defender was not; but it would plainly be iniqui- " tous to bestow that privilege on the defender if it was " withheld from the pursuer.

" For these reasons we are of opinion that the right " of restitution against the interlocutor of the Court in " 1782 is mutual; and as it formed no res judicata in " favour of the pursuer, neither can it form a res " judicata against him.

" It remains to be considered, whether this opinion be " in conformity with the judgments of the House of " Lords already pronounced, and obligatory upon the " parties. And here it is manifest that the judgment pro- " nounced in 1819, when Lord Eldon presided, pro- " ceeds on the principle of mutual restitution. While

" it affirms the interlocutor appealed from as to the " leases, it contains an express reservation of 'any " 'question between the parties in any other action " 'touching any property comprised in the deed of " 'taillie in the pleadings mentioned;' and his Lordship " observed on that occasion, as appears from an excerpt " from his speech, 'that the opening of the interlocutor " '1782, considering it as not res judicata, must be " 'considered as opening it altogether.'[1]

" The judgment pronounced in 1826, when Lord " Gifford presided, is equally decisive. It is true that " the House of Lords, on the motion of his Lordship, " affirmed the interlocutor of the Court below, as to " the estates and the bond in the action then before " him, on the ground that the decree 1782 could not " be impeached in that action in which it had not been " brought under reduction, and that it had not been " impeached by reclaiming petition, appeal, or any " other competent proceeding; but the affirmance is " expressly qualified with a declaration that the effect " of the preceding judgment in 1819 was to leave open " all questions, not only as to the leases, but as to the " other property comprehended in the taillie,—that is, " the estates and the bond,—to be discussed in such " manner as the same might be properly discussed in " any future proceeding raised for that purpose. Now, " since reclaiming petition and appeal are incompetent, " the only proceeding in which the question as to the " estates and bond can be properly discussed is a " reduction; the action which accordingly has been " brought.

[1] Speech of Lord Eldon, 28th June 1819.

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" It is said that the pursuer is barred from insisting " in this action by his delay, as he challenged the " decree arbitral in the year 1810, and allowed seven- " teen years to elapse afterwards before the present " summons was executed. We do not think that the " pursuer is to blame for this delay, and far less that it " can operate as a bar to his action. On the same " ground that the defender was allowed without a " reduction to discuss his right to the leases, notwith- " standing the interlocutor of 1782, in point of form, " was final, the pursuer had reason to believe that he " would be allowed, without a reduction, to discuss his " right to the estates and the bond, the same inter- " locutor 1782 having been declared to be equally open " as to both parties, and in reference to all the property " contained in the entails. It was not until the date " of the judgment 1826 that he learned that this form, " dispensed with in the case of the defender, was " deemed requisite in his case; and, however well " founded the distinction may be, it certainly was not " so obvious that the fault of overlooking it should be " visited with a penalty so severe.

" The last point for consideration is the plea of " minority and lesion, on which the interlocutor 1782 " is challenged. It is possible that both that inter- " locutor and the decree arbitral or agreement might " at one time have been brought under reduction on " that ground; but the quadriennium utile having long " since elapsed, minority and lesion per se can no " longer be competently pleaded to that effect either " against the one or the other. The only plausible way " of putting the argument is, that the pursuer, being " deceived by the collusive decree arbitral, refrained

" from bringing his reduction ex capite minoritatis, " and that the defender, being participant in the fraud, " is barred by a personal exception from pleading the " lapse of the tempus utile. But we think the argu- " ment, even in that shape, untenable; for the decree " arbitral was at least as hurtful to the pursuer as the " judgment of the Court which preceded it, and the " one was just as liable to reduction on this ground as " the other. No reason can be assigned why the decree " arbitral, whether fair or fraudulent, should have pre- " vented the pursuer from having recourse to this " remedy if he had suffered lesion in proceedings. " But, in truth, the consideration of the question is " superseded by the reduction of the decree arbitral, " which at once opens the way for retrying the question, " whether the pursuer was lesed or not; and, in the " circumstances of this case, a restitutio in integrum is " a much more effectual remedy than an action of " reduction ex capite minoritatis.

" It is said that a distinction exists between the case " of the defender and the pursuer in reference to the " interlocutor 1782, because the defender had actually " entered his appeal againt it, while Thomas Maule " had not entered a cross appeal, either on his own " part, or on that of his son, that it is not presumable " he would have done so, and if he had not, the inter- " locutor would have been final, independently of the " agreement. We think it a sufficient answer to this " remark, that Thomas Maule, having the power to " appeal, became bound by the agreement not to appeal. " In hoc statu, there is just as much reason to presume " that the defender would have withdrawn his appeal " after it was entered, as that Thomas Maule would

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" have refrained from entering a cross appeal, because " at this stage of the proceedings we have no means of " forming an opinion whether the interlocutor 1782 " was better founded with regard to the estates and the " bond than it was with regard to the leases; the same " equity which interposed to restore the defender against " a final interlocutor, because his appeal had been with- " drawn in consequence of an invalid agreement, must " confer the like privilege on the pursuer, who was tied " up by it from entering a cross appeal.

" We come to the conclusion, therefore, that the " interlocutor 1782 ought not to be held as a res judi- " cata against the pursuer; and, there being no title " therefore to exclude, that the defender should be or- " dained to satisfy the whole production, with a view to " the merits being discussed."

Lord Fullerton.—" The determination of the question " now before the Court depends, in a great measure, " on the legal effect and import of the procedure which " has taken place, and the judgments which have been " pronounced in the former actions between the parties.

" But those actions have been so complicated, and " those judgments, both in this Court and in the House " of Lords, have been so various, that it is a matter of " some difficulty to ascertain, separately, what points " were fixed by each successive judgment, and of still " greater to seize their combined effect; so that it is " with some diffidence I give this opinion, founded as " it is on a view of the previous procedure, in taking " which it is not impossible that particulars materially " affecting the result may have escaped my attention.

" The decree now sought to be reduced formed part " of a judgment pronounced by the Court of Session on

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" the 5th March 1782 in certain conjoined actions " depending between Lieutenant Maule, the father of " the pursuer, and the defender and his administrator " in law, Lord Dalhousie.

" The only one of these actions in which there is any " pretence for considering the present pursuer as directly " a party was that originally raised by Lord Panmure, " and afterwards insisted in by the present defender and " his administrator in law for reducing the entails of " the lands of Kelly and Ballumbie, of the bond for " 9,000*l.*, and of the leases of Brechin and Panmure, " founded on by Lieutenant Maule. But it may be " observed, in the first place, that though that summons " seems to have been served personally on the present " pursuer it does not contain his name. It calls merely " Lieutenant Maule, for himself, and as administrator " for his children. And, secondly, " I understand that in none of the conjoined actions " was there any appearance by Lieutenant Maule, as " administrator for his children. By the judgment " pronounced in these conjoined actions, the Court sus- " tained Lieutenant Maule's claim to the leases of " Brechin and Panmure, but rejected his claim for " Kelly and Ballumbie and the bond for 9,000*l.*

" While it was competent for either party to " reclaim against that judgment, and certainly while " it was competent for either party to appeal, " the litigation was closed by an agreement between " Lieutenant Maule and the defender and his adminis- " trator in law, afterwards embodied in the form of a " submission and decree arbitral, to which the defender, " then a pupil, was made nominatim a party. By that " transaction it was determined, first, that the judgment " of the Court in Lieutenant Maule's favour, respecting

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" the leases, should be held to be reversed, and the de-
" fender's claim to the leases sustained. Secondly, that
" the appeal entered by the defender against that judg-
" ment should be withdrawn. Thirdly, that the judg-
" ment of the Court unfavourable to Lieutenant Maule
" should be adhered to, and ' the cross appeal com-
" ' petent to have been entered by him ' against it,
" departed from. And lastly, that a certain sum of
" money should be paid by the defender, part of it
" instantly to Lieutenant Maule himself, and the re-
" mainder by instalments at particular periods to
" Lieutenant Maule, or the substitutes who might, in
" the event of his death, happen to be in his right under
" the entails at those periods.

" This transaction stood unchallenged till the year
" 1810, when the pursuer having discovered that the
" transaction, though apparently a submission and
" decree arbitral, was substantially an agreement be-
" tween the defender and his father Lieutenant Maule,
" raised an action for setting aside that submission and
" decree arbitral, and the service which he had obtained
" under it while he was in ignorance of the true nature
" of the transaction. That summons called merely for
" production of those documents in order that they
" might be reduced; and upon that reduction founded
" the conclusion, that the defender should remove from
" the houses and parks of Brechin and Panmure,
" being the subjects contained in the entailed leases.
" It contained no conclusion whatever concerning the
" estates of Kelly and Ballumbie, and the 9,000*l.*
" bond. And it is easy to see, from the nature of
" the discussion which afterwards took place, why
" it was so limited. It was evidently founded on
" the assumption, that by the reduction of the

" decree arbitral the decree of the Court of the 5th
" March 1782 revived as a res judicata; and accord-
" ingly, the summons founded the demand of removing
" exclusively on the reduction. In the discussion under
" that summons, various points of great difficulty and
" importance were raised, which it is unnecessary here
" to mention. But with regard to the assumption
" forming the foundation of the summons, two questions
" arose; 1st, whether, on the decree arbitral being set
" aside, the defender was entitled to be heard on the
" merits of his claim to the leases, notwithstanding the
" decree of Court 1782? 2dly, whether he was en-
" titled to be so heard without bringing a reduction of
" that decree? And it is important to observe, that this
" second question, though apparently one of form, was
" substantially decisive of the pursuer's demand of the
" houses and parks of Brechin and Panmure, under the
" only summons then in Court; for it involved the
" inquiry, whether the decree of 1782 in regard to the
" leases was a standing decree, available to the pursuer
" until reduced; and the decision of that point against
" him necessarily led to the result that in the summons
" then in Court, founding merely on the reduction of
" the decree arbitral, and assuming by implication that
" on that reduction the decree of Court revived, he had
" laid no ground whatever for his conclusion for removing.
" Now, it appears to me, that this last was the only
" point which was truly settled by the final judgment of
" the House of Lords, in this action, in the year 1819.
" In the first appeal, in 1816, the House of Lords had
" found, ' that the submission and decree arbitral ought
" ' not to be considered as being or having in law the
" ' effect of such, but as a form adopted, in which an

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" ' agreement previously made between Thomas Maule,
" ' the appellant's father, and George Earl of Dalhousie,
" ' parties to the said submission, was concluded,' and
" with that finding remitted the case to the Court of
" Session. The Court, on 2d December 1817, sus-
" tained the defences in general, and assoilzied the
" defender. There was then a second appeal by the
" pursuer, in the discussion of which the respondent,
" the defender, was materially interested in excluding
" the effect of the decree 1782 as to the leases, as a
" judgment necessarily reviving in favour of the pursuer,
" and requiring a reduction to impeach it. And it is of
" importance to look at the grounds on which that was
" maintained,—grounds which, considered alongst with
" the judgment afterwards pronounced by the House of
" Lords, are quite irreconcileable with the notion that
" the pursuer was properly and directly a party to the
" proceedings in 1782. The respondent, in his appeal
" case on that occasion (page 10), states, that ' in 1781
" ' Lieutenant Maule, the appellant's father, laid claim
" ' to the leases in question in virtue of the entails now
" ' founded on by the appellant. Lieutenant Maule him-
" ' self was the only pursuer in that process, the present
" ' appellant being no party in it.' Again, after men-
" tioning that Lieutenant Maule obtained one interlocu-
" tor in his favour on the 5th March 1782, and afterwards
" closed the proceedings by the transaction of 2d April,
" he proceeds, (page 11.) ' but the interlocutor was not
" ' final and it never did become final, as a judgment in
" ' favour of the appellant, or even of Lieutenant Maule.
" ' Lieutenant Maule, who had alone obtained it, re-
" ' nounced the benefit of it within the reclaiming days,
" ' and it was set aside and given up by a very solemn

" ' transaction.' And again, ' but the finding never
" ' was a judgment in favour of this appellant; it was
" ' an interlocutor in favour of Lieutenant Maule, and
" ' not of the appellant; and surely a judgment not final,
" ' and solemnly discharged by the party for a valuable
" ' consideration, can never afterwards be raised up as
" ' a res judicata.'

" This view, it will be observed, was indispensable to
" support the respondent's case on that occasion; for
" if the pursuer had been properly and distinctly a party
" in the combined actions in which the judgment re-
" specting the leases was pronounced, the agreement of
" Lieutenant Maule to renounce the decree would have
" left it still a good decree available to the pursuer,
" who, according to the preceding judgment of the
" House of Lords, was not affected by the submission.
" On the other hand, if Lieutenant Maule was the only
" proper party, the reduction of the agreement by the
" pursuer could not rear up the decree; because, on
" that supposition, it was a decree passed from by the
" only party in the suit. It appears to me that this
" last was the view taken by the House of Lords. They
" reversed the interlocutor of the Court, ' in so far as
" ' it is inconsistent with the former order of the House
" ' of the 10th of May 1816.' They farther order and
" adjudge, ' that the instrument of the 2d of April
" ' 1782 ought to be reduced as a decree arbitral
" ' affecting any rights of the appellant.' Next, 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

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" ' 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 2d De- " ' cember 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 taillie in the pleadings " ' mentioned.' Here the part of the judgment reject- " ing the pursuer's claim to the leases, erroneously " termed a declarator of right instead of a removing, is " preceded by the word ' therefore,' and is thus made " to depend on the previous finding, that the interlocu- " tor of 1st March 1782 was not to be considered " conclusive against the respondent with respect to the " leases;—a deduction which appears to me to be strictly " correct, because, upon the supposition of the decree " 1782 not being a decree conclusive against the de- " fender, there was truly no ground for the conclusion " of removing laid in the then existing summons, which " rested that conclusion on nothing but the reduction " of the decree arbitral. Accordingly, the judgment " contained an express reservation ' of any questions " ' between the parties in any other action touching " ' the rights contained in the various entails.'

" After this the pursuer raised his action in 1821, in " which he, for the first time, advanced his claims, not " only to the leases, but to the estates of Kelly and " Ballumbie, and the 9,000*l.* bond; and, considering " the view hitherto taken by him, this delay is not to be " wondered at. His claim hitherto advanced was " limited to the leases, because it was bottomed on the " assumption that, by the reduction of the decree " arbitral, the decree 1782 was restored to operation; a

" supposition which, of course, prevented him from
" claiming the estates to which his father's claim had
" been rejected by that very decree. Finding, then,
" that the decree 1782 was to be held open to challenge
" at the instance of the pursuer, he assumed that it was
" equally open to challenge in so far as it was adverse
" to himself; and adopting a particular, and as it has
" turned out, erroneous, construction of the judgment
" of the House of Lords, he assumed not only that it
" was substantially open to challenge, but that it was
" open to challenge by way of exception, and without
" the necessity of any procedure for impeaching it. So
" far he has been found in the wrong by the final judg-
" ment of the House of Lords in 1826, which found
" that the judgment of the Court of Session, of the 5th
" of March 1782, was res judicata in respect to the
" estates and bond, 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 decree
" 'of the 5th of March 1782, so far as the same re-
" 'spected 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.' I cannot hold, that in this judgment the
" term res judicata was used as denoting a judgment
" which it was incompetent in any way to impeach.
" Independently of the expressions employed by the
" noble Lord who moved the judgment, the judgment
" itself seems to be sufficiently explicit. The decreet
" is held res judicata, inasmuch as it was not competent
" to impeach it by the summons of reduction then in
" dependence, and such decreet had not been impeached

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" in any other competent form; the evident meaning of " the House of Lords being, that the judgment must be " held as res judicata under that summons, calling " merely for the reduction of the defender's titles, and " unless impeached by some substantive procedure com- " petent for that purpose, but without determining " whether some other procedure for that purpose might " or might not be competently adopted. And I may be " permitted to observe, that this judgment does not appear " to me to involve any inconsistency with that of 1819, on " the effect of the decree 1782 in relation to the leases. " Holding Lieutenant Maule to be the only party in " the conjoined actions of 1782, the transaction, though " reduced as to the pursuer, truly remained effectually " binding on Lieutenant Maule, and consequently an " effectual waiver in favour of the defender of the de- " creet 1782. In so far as the decree was favourable to " Lieutenant Maule, it was, on the supposition just " made, passed from by the only party at whose instance " it was obtained. But, on the other hand, the decree, " in so far as it was against Lieutenant Maule, remained " in force. Instead of being passed from by the party " who had obtained it, the right to challenge it had " been passed from by the party against whom it had " been obtained. The decree in this last particular, " therefore, remained a decree of Court in favour of " the present defender, which the House of Lords seem " to have held good until it was effectually challenged.

" In the present action, then, the pursuer has at- " tempted that challenge. In the summons he concludes " for the reduction of the decree 1782, as touching the " lands and the 9,000*l.* bond, as well as of the various " titles of the lands founded on by the defender.

" Considering the limitation contained in the inter-
" locutor of Court of the 31st January 1827, I am of
" opinion, that by far the greater part of the discussion
" in the pursuer's pleadings are beyond the limits con-
" templated in that interlocutor. In one sense, no
" doubt, it may be said that the reduction of a decree
" involves the merits of that decree, as those merits
" truly constitute the interest of the party seeking to
" reduce it. But the interlocutor of the Court, by
" limiting the production to the decree itself, and sisting
" process as to the writings, ' until reduction of the said
" ' decree,' seems to me to have intended to confine
" the discussion to the point, whether the decree itself
" formed a title to exclude? In other words, whether
" or not, under all the circumstances of the case, the
" pursuer was entitled competently to impeach the
" decree, so as to reach the merits of the case, of which
" the discussion was necessarily postponed by sisting
" the process in regard to the writings involving those
" merits.

" Considering this to be the only point on which I
" am called upon to give, and have the means of giving,
" an opinion, that opinion is, that the pursuer is entitled
" to reduce the decree 1782 in regard to the lands of
" Kelly and Ballumbie and the 9,000*l.* bond, to the
" effect of being heard on his claims to those subjects.

" In forming this opinion, I do not consider it neces-
" sary to inquire into the effect of the expiry of the
" quadriennium utile, or of those circumstances by which
" that effect may be supposed to have been suspended
" or excluded. There might have been room for some
" such inquiry if the decree 1782 had been directly and
" expressly against the pursuer, called nominatim, and

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" appearing in the combined actions. But it does not " appear to me that he either was properly called or did " appear; the whole of the actions were actions de- " pending with Lieutenant Maule, his father. Even in " the one action in which Lieutenant Maule was called " as administrator for his children, the summons is blank " in regard to the children, and no appearance was ever " made by Lieutenant Maule except in his individual " character. Accordingly, in the discussion under the " original summons raised by the pursuer in 1810, the " defender, as has been seen, pleaded, and pleaded with " effect, that the proceedings in 1782 were proceedings " to which the pursuer was not a party, and the judg- " ments pronounced in which, Lieutenant Maule, as the " only party, had a right to abandon.

" In these circumstances it is impossible to hold the " decree 1782 as a decree directly and nominatim " against the pursuer. Its operations as a res judicata " must rest upon a different ground, namely, that though " not a decree directly against him, it was a decree " effectual against him and the other heirs of entail, in- " asmuch as it was a decree respecting the validity of " entailed rights pronounced in actions maintained by " Lieutenant Maule, the party fully vested at the time " with those rights. That a decree so pronounced will, " in the general case, be held an unchallengeable res " judicata, there seems no reason to doubt; but I think " that this special case does not admit of the application " of that principle.

" In this first place, I conceive it to be completely " excluded by the option which has been already exer- " cised on the part of the defender in construing the " effect of the proceedings in 1782, in so far as they

" terminated in favour of the heirs of entail. Had the " defender, in the discussion on the reduction of the " decree arbitral and action of removing, confined him- " self to the defence of the decree arbitral, and had " judgment gone against him in the removing, as " necessarily following from the decree 1782, in regard " to the leases reviving on the reduction of the decree " arbitral, it would have been perfectly consistent to " plead now that, in virtue of that self-same decree " 1782, his right to the lands and bond were finally " ascertained. But he did not adopt the option of " standing by the decree 1782 that was held out to him " by the defender. On the contrary, he maintained, as " he was no doubt entitled to do, that on the reduction " of the decree arbitral the decree in regard to the " leases was not only not conclusive, but was not an " available decree at all requiring to be reduced, inas- " much as it had been abandoned by Lieutenant Maule, " the only party who had obtained it.

" Now, though the decree, in so far as it was against " Lieutenant Maule, has been found to stand in a dif- " ferent situation in this particular, that it requires to " be directly impeached by some substantive procedure, " it does appear to me necessarily to follow from the " construction put upon the procedure in those combined " actions by the defender himself, that the pursuer must " be entitled to impeach the decree, so as to be heard " upon the merits of the case. The only ground upon " which that could be denied is, that the decree was ob- " tained in an action regarding entailed rights against " Lieutenant Maule, the heir in whom those rights " vested at the time. But that ground is necessarily " excluded by the course of pleading adopted, and suc-

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" cessfully adopted, by the defender, who obtained a re-
" hearing in the case of the leases, in respect that the
" decree on that point was truly a decree in favour of
" Lieutenant Maule, and not in favour of the heirs of
" entail, and had been passed from by the party who
" had obtained it. In other words, the defender main-
" tained, and successfully maintained, in regard to the
" leases, that the decree was obtained by Lieutenant
" Maule in his individual character, and not in that of
" representative of those interested in the entailed rights.
" But it seems to be impossible for a party to plead,
" that the same decree pronounced in conjoined actions
" can receive a directly different construction in regard
" to its mode of operation; and to maintain, that in so
" far as it was in favour of Lieutenant Maule it was a
" decree in his favour as an individual, of which the
" heirs of entail could take no benefit; but that, in so
" far as it was against him, it affected him in his repre-
" sentative character, and consequently, through him,
" the whole other heirs of entail. These pleas are
" absolutely inconsistent; and, therefore, the opening
" up of the decree in regard to the estates and bond
" seems to me the necessary consequence of the option
" exercised by the defender in refusing to stand by the
" decree on the subject of the leases; and I cannot help
" thinking, that this was the meaning of the expression
" employed by the Noble Lord who moved the judgment
" in 1819, 'that the opening the interlocutor of 1782,
" 'considering it as not res judicata, must be consi-
" 'dered as opening it altogether.' Although, therefore,
" it has been found that the decree in question obtained
" against Lieutenant Maule, and in favour of the de-
" fender, is res judicata available to the defender until

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" impeached, I think that the pursuer is entitled to im-
" peach it, and that the present reduction is competent
" for that purpose.

" But, secondly, and independently of the ground
" above mentioned, I am rather inclined to think that
" the pursuer, an heir of entail, would not have been
" bound by the legal procedure in question, closed as it
" was by a transaction with Lieutenant Maule, which
" has been finally determined not to be effectual against
" the pursuer. It is true that a judgment obtained re-
" specting entailed rights against the party vested with
" them at the time is good against the other heirs of
" entail; but this, of course, involves the assumption
" that the question has been bonâ fide litigated by the
" heir in possession, according to a sound discretion, and
" upon a fair exercise of those privileges to which, by
" the rules of litigation, he is entitled. There seems,
" therefore, no reason to doubt, that if the litigant, in
" the exercise of that sound discretion, declines, upon
" judgment being pronounced against him, to bring the
" case under review by a reclaiming petition or by ap-
" peal, the judgment of a Lord Ordinary is not impaired
" in effect by the failure to bring it under review of the
" Court, still less is the judgment of the Court invalidated
" by the circumstance of the unsuccessful party de-
" clining to appeal. But it is a very different case
" indeed, when the heir of entail in possession, litigating
" in his representative as well as individual character,
" does, during the dependence of his right to reclaim,
" or of his right to appeal, make those rights the subject
" of a transaction with the opposite party, and surrender
" them for a consideration personal to himself. I should
" consider it alike dangerous in practice, and contrary

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" to principle, to hold that a judgment of which the " review was bought off by the opposite party stood, in " a question with the heirs of entail, in the same situa- " tion as a judgment allowed to become final in the fair " exercise of a sound discretion, contemplating the legal " probabilities of continuing the litigation. There is a " manifest distinction between the two cases; and I " rather think that in the former case the heirs of en- " tail would, upon showing that they were not bound " by the transaction, be entitled to impeach the decree, " which had not been bonâ fide acquiesced in by the " original litigant, but of which the right of review, " recognized as a subject of value, had been surrendered " for considerations in which they had no interest. But " this seems to be the case which exists here. At the " time when the compromise was entered into, Lieu- " tenant Maule had a right to reclaim, and certainly " had a right to appeal; and accordingly the abandon- " ment of the cross appeal is expressly set forth in the " submission and decree arbitral as one of the considera- " tions of the transaction.

" I am of opinion, then, upon both of these grounds, " that the pursuer is entitled to be let into the merits of " the case. I have only farther to add, that they appear " to me to be proper grounds of reduction; and that " the competency of the present procedure, therefore, " cannot be affected by the lapse of the period allowed " for appeal. In truth, upon the principle adopted in " the House of Lords in the judgment 1819, the sur- " render of the right to appeal by Lieutenant Maule, " the only party in the suit, would have been an effectual " bar to any other party attempting that mode of review. " The true grounds of challenge here are, that the

" judgment 1782, though obtained against a party who " happened to be vested with the entailed rights at the " time, was obtained or allowed to become final under " circumstances which exposed it to challenge, in so far " as it might be construed to affect the other heirs of " entail; grounds which appear to me to form the apt " and competent subject of an action of reduction like " the present."

On these opinions being laid before their Lordships of the First Division, they gave opinions to the following effect:—

Lord Balgray.—" In this very important question, " and after giving it the most anxious consideration, " and attending particularly to the opinions which have " been given in by the consulted Judges, I have come " to form a very clear opinion. I had not for some " time made up my mind whether there was a res " judicata or not; but after paying all the attention in " my power to the various proceedings and judgments, " the opinion I have now clearly formed is in perfect " accordance with the opinion so well expressed by Lord " Corehouse, and adopted by some of the other Judges. " I also concur in part with the opinion expressed by " Lord Fullerton.

" I cannot look at the proceedings in the House of " Lords, the judgment in the House of Lords, and, " above all, the fatal proceeding on the part of the de- " fender—I say I cannot look upon these, and bring " my mind to any other conclusion than that there " must be a complete restitutio in integrum. I think " it was so understood in the House of Lords, and I " cannot interpret their judgment in any other way. I " look upon it as a debitum justiciæ to this pursuer;

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" and therefore, on the whole, without enlarging on " what has been so well expressed by Lord Corehouse, " I have only to say I concur entirely in the opinion of " his Lordship, and the other Judges who concur in that " opinion."

Lord Craigie.—" I concur entirely in the same " opinion. If the one party was to receive any thing " from that judgment, in common justice I think that " the other party is also entitled to the benefit of it. I " cannot conceive a case where the Court, on the whole " circumstances, can hesitate that the pursuer is entitled " to be restored in integrum."

Lord President.—" I confess the case strikes me in a " very different point of view. I cannot conceive that " the question is now open for us. If you will attend " to the judgment of the House of Lords, it ends with " these words, after affirming the interlocutor of this " Court in regard to the leases: ' But without prejudice " ' to any question between the parties in any other " ' action touching any property comprised in the deed " ' of taillie in the pleadings mentioned.'

" Then comes the important judgment of the 26th of " May 1826, the terms of which it is very particular to " attend to. It is in these words: ' It is ordered and " ' adjudged, that the interlocutors complained of be " ' affirmed with respect to the estates of Kelly and " ' Ballumbie and the bond for 9,000*l.* in the said in- " ' terlocutors 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, are totally excluded, and " ' the subject matter of the action then before the Court

" ' as to such estate and bond was res judicata by the
" ' judgment of the Court of Session of 5th March
" ' 1782, in the said interlocutors mentioned; inas-
" ' much 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 pro-
" ' ceeding 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 of 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.' Now, if it was
" the meaning of the House of Lords to find, notwith-
" standing these separate findings as to the leases
" and the estate, that every question was still open
" between the parties, it appears to be the most extra-
" ordinary judgment ever pronounced by the House of
" Lords. They find expressly, with regard to the
" estates, that there was a res judicata, and they affirm
" the interlocutors of this Court on that point. But,
" says the pursuer, they only meant to find that it was
" a res judicata in so far as it was competent to the ap-
" pellant in that particular action. But in that view
" the judgment should have said nothing about res

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" judicata at all. If the forms of the House had " admitted it, it should have been before answer. More- " over, they should have put in an express reservation; " but so far from that, they say that the said decree has " not been impeached. So that, although the party did " not appeal within the five years, although that time " was allowed to expire, and no appeal is brought and no " reclaiming petition even presented to us, that still within " forty years he is entitled to open up that judgment.

" I cannot conceive what the judgment of the House " of Lords was, if it was not a res judicata. A res " judicata means a thing that cannot be touched at all. " If it is a res judicata, then it is final to all purposes, " and cannot be touched at all. I cannot conceive what " could have been the meaning of the House of Lords " in positively finding that they affirmed the interlocutor " of this Court in so far as we found that the decree in " 1782 was a res judicata, unless they meant that it " really was a res judicata. I cannot imagine, after that, " that it could be the meaning of the House of Lords " that there was no res judicata. If such was the " meaning of the House of Lords, let them find so. I " concur entirely in the opinion expressed by the Lord " Justice Clerk."

Lord Gillies.—" This is a question certainly of very " considerable difficulty, upon which there is a great " difference of opinion among the Judges. I concur " in the opinion of the Lord Justice Clerk; and I go " very much along with the observations which have " been made by your Lordship. It does seem to me " to be a very odd thing, that although there is a judg- " ment of the House of Lords expressly affirming a " judgment of your Lordships, finding that it was a

" res judicata, still that is to be held as no res judicata, " and may therefore be competently challenged. This " does seem odd to me. What he was required to do " in the submission was, that he should not enter an " appeal. What he might have done, no mortal can " say. He had not entered an appeal, and we can not " say whether he would have done so or not. I cannot " reconcile myself to the idea, that because a man is " restrained from entering an appeal within five years, " that therefore he should be entitled to reduce the " judgment within forty. I entirely concur in the " opinion of the Lord Justice Clerk; it would only be " wasting your Lordships' time, were I to go over the " same grounds again."

Lord President.—" The judgment must be according " to the opinion of the majority: there are eight of the " Judges for finding there is no res judicata."

The Court accordingly, on 5th July 1831, pronounced this judgment: — " The Lords having resumed con- " sideration of this cause, and advised the same, with the " opinions of the consulted Judges, and heard the " counsel for the parties, repel the defences of res judi- " cata, and decern; and remit to the Lord Ordinary to " ordain the defender to satisfy the production in " common form: And the Lords, at the request of the " parties, reserve entire the question of expenses; and " of consent remit to the Lord Ordinary to call the " cause without an hour."

On a petition by the appellant, leave was granted to him to appeal from the above judgment, and he accordingly entered an appeal.

The arguments of the parties were to the same effect

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as the reasons assigned by the Judges for the opposite views taken of the question, and need not be resumed.

LORD CHANCELLOR.—My Lords, if in the last case which your Lordships have just disposed of there has been no inconsiderable length of time occupied in litigation, and large sums of money expended, that case sinks into insignificance, compared with the one to which I am now about to draw your Lordships attention. In this there is a remarkable circumstance, a circumstance one may hope, if not unexampled in the history of our jurisprudence, at least of very rare occurrence, namely, that upwards of half a century since a decree was pronounced between the parties, or those whom the parties now represent (the predecessors of the parties), which decree was then intended to be final; nevertheless, instead of its proving so, it has only been the point from which a new departure has been taken; the source from which an apparently interminable and most complicated litigation, or rather series of law suits, has arisen. I firmly hope, however, indeed I am confident, that we are at length approaching to the period of those suits. My Lords, where the Court below is found as nearly divided as fourteen Judges can be, short of equality,—where there are, of either opinion, Judges of the greatest ability, learning, and experience,—and where the greater number being in favour of the judgment, yet the two Chiefs of the Court are found against it,—a very natural anxiety may be supposed to have restrained me from proceeding to advise your Lordships until the fullest opportunity had been afforded of considering the question in all its bearings. Nevertheless the case lies within

a narrow compass, and I have arrived at the conclusion, which I now state without hesitation, that the interlocutor complained of cannot stand.

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The decree of March 1782 must be taken to be a subsisting decree, making the subject matter of this present suit res judicata. "It has not been impeached at the competent "time, either by reclaiming petition or appeal," (I use the language of one of your Lordships judgments,) "or "any other proceeding competent to impeach the same." To which I shall take leave to add, in the words of the learned Lord President, on advising this question, that "if the House of Lords did not thereby mean to treat "it as res judicata, it is difficult to understand what "they meant." Let us shortly consider the course of the proceedings, and the grounds upon which it is contended that the decree of 1782 has not the effect of making the matter res judicata. We shall presume, that as long as the decreet arbitral stood in his way, the respondent, and those to whom he succeeded (that is, his father,) could not take any steps for questioning the judgment of 1782. Then observe when that impediment was removed. In 1809 the reduction was brought, and a narrow majority having assoilzied the defender, (that is, supported the decreet arbitral,) your Lordships, upon appeal, took a different view of the submission and decreet, holding, by your judgment of 10th May 1816, that these instruments were "not to be considered as "having in law the effect of a submission or decreet "arbitral, but only as a form of agreement between the "parties." It is material to observe, that this finding of your Lordships not only seems in itself incapable of any other construction than setting aside the decreet arbitral, but it was so treated by the respondent

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himself; his own statement in the printed case now before the House is, that "he then (on the remit to the "Court of Session) correctly contended, that the de- "creet arbitral was set aside in toto." An observation might here arise upon the state of the respondent's case after the judgment. Had he not now sufficient ground for prosecuting his appeal against the decree of 1782, or bringing it under review of the Court by reclaiming petition? Supposing the reclaiming days not to have expired in 1782 before the submission, the decreet arbitral was, according to his own construction, no longer in his way,—it had been set aside by your Lordships: and although his adversary (the present appellant) no doubt maintained the contrary, putting another construction upon your Lordships judgment, yet that might have been submitted to the Court in the course of any proceeding taken by the respondent; for the question of the subsistence of the decreet arbitral might then have been raised. However, the case does not rest here; for after the remit, and the interlocutors pronounced below in consequence, the case came back to this House, and in 1819 a judgment was pronounced. The interlocutor of 1817 coincided in the respondent's view of your Lordships judgment, and proceeded upon the fact of the decreet arbitral not being in the respondent's way, at least as regards the leases; yet he did nothing then to challenge the judgment of 1782. Next, in 1819, came your Lordships judgment, in terms finding that the instrument purporting to be a decreet arbitral ought to be reduced and set aside as a decreet arbitral affecting any rights of the appellant. This was the 10th July 1819, and from this date, at the very latest, it is plain that the respondent ceased to have any ground whatever for not

challenging the decree of 1782, all obstacles being at any rate now removed; but he took no such proceeding.

It is fit that we now attend to the judgment of your Lordships in 1819. After setting aside the decreet arbitral, it adds a declaration, "that under the circumstances of this case the interlocutor of 1782 is not to "be considered as final with respect to the leases," and therefore affirms as to those leases; "but without prejudice to any question between the parties in any "other action touching any property comprised in the "deed of taillie." As far as this saving clause goes, it rather indicates a leaning against the interlocutor of 1782 being open, excepting in respect of the leases. For if you say a judgment is not final as to one matter, but without prejudice to any question as to another matter, it should seem that you guard yourself against the inference from what you have found respecting the one to what you may be supposed to mean respecting the other, —as if you said, "Mind, when we say the interlocutor "is open as to the leases, it does not follow that we "mean to say it is also open as to the estates." But in 1820, when the case went back with this finding of your Lordships, the decreet arbitral was formally reduced, and, as it were, ceased to exist. Did the respondent then proceed? Not to set aside the interlocutor of 1782 on its merits;—he neither tried to reduce it, nor did he appeal from it, nor reclaim against it; but he sued upon the entails, and proceeded against titles alleged to be inconsistent with them, and which your Lordships had sustained. The defence of res judicata was taken, and prevailed; the Court below, by its interlocutors of 5th June 1823, and 1st June 1824, finding that, by the decrees of 1782, 1813, 1816, 1817, 1819, and 1820, the subject matter of the action was

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res judicata. This finding was submitted to your Lordships by appeal, and the judgment of 26th May 1826 was then pronounced, on which so much reliance has been placed, both in the Court below and in the argument at your Lordships bar. I have very attentively considered this judgment, and I can put but one construction upon it. The decision is, to affirm the interlocutors with respect to the estates and bond, so far as declaring all rights therein claimed by the appellant to be totally excluded, and the subject matter of the action as to such estates and bond to be res judicata by the decreet of 1782; but to reverse, in so far as the interlocutor found the question touching the leases to be also res judicata. I can only read this as a declaration, that the decreet of 1782 was a subsisting judgment quoad the estates, and shut out all question respecting them, though not quoad the leases. But it is followed by a reason which the respondent would represent as a qualification of the finding, and a statement that he may still set the decreet aside, "inasmuch" (says the judgment) "as it was not competent to the appellant, by his summons of reduction "and declarator, to impeach the decreet of 1782, so "far as respected the estates and bond, and such decreet "had not been impeached by reclaiming petition or "appeal, or any other proceeding competent to impeach "the same." It is contended that this judgment only means that the party could not succeed against the decreet of 1782 in that form of action, but that he might have impeached it in another, and might still impeach it in another, viz. by reduction. This appears to be a forced and unreasonable construction, if it goes beyond the legal form, that he might still reduce it on the head of forgery or collusion. The judgment clearly means, that the decreet of 1782 stood in the party's way as to

the estates, though not as to the leases, in respect of the finding to that effect (that is to say, quoad the leases) in the judgment of 1819. It states that the decreet never had been reclaimed against or appealed from, nor in any other way impeached. This can only mean that it had not been appealed from according to the rule which regulates the right of appeal, and directs the manner of appealing, nor reclaimed against in the way appointed for reclaiming; and that therefore it stood unshaken, and presented an obstruction not to be got over. The general expression, "nor any other proceeding com- "petent to impeach the same," refers, no doubt, to reduction, the only other mode of attacking a decreet; but reduction, of course, to be prosecuted according to the rules appointed for that proceeding. It is quite impossible to deduce from this part of the judgment any admission, that if the respondent chose he might set aside the decreet. The very same expressions might have been used if a judgment had stood for one hundred years unquestioned without any such special circumstances as are to be found in this case. The Court might have declared that the party was concluded, by that judgment standing unappealed from and unimpeached in any other way. Would it follow from thence that the Court invited the party to try an appeal or a reclaiming petition, by an implied admission that if he did, his hundred years laches should be no bar, and the lapse and the possession of a century be of no safety to his adversary?

The manner in which the judgment under consideration, that of May 1826, refers to the leases, and to the finding of the judgment of 1819 upon them, greatly aids the construction I have put upon this judgment of your

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Lordships. There is, indeed, in one part of it, an expression which at first sight may seem to favour the contrary view,—and on this the consulted Judges, who support the interlocutor under review, have observed; but upon looking more narrowly at it, we find that it only contains a recital of the words used in the judgment of 1819, and from hence alone wears the appearance of treating the question as open. "The intent and meaning," it goes on, "of the whole of such judgment being, to "leave all questions respecting the leases, as well as "the rest of the property in the deeds of taillie, open "to be discussed in such manner as the same might "properly be discussed in any future proceeding pro- "perly instituted for that purpose." But this, in truth, proves nothing. If the judgment of 1819 leaves the whole question open to be discussed properly by one party, it leaves the plea of res judicata, among other proper defences, open to the other. But it seems quite impossible to get over the very different way in which the judgment of 1826 deals with the leases and the other property, and the different manner in which it applies to the one and the other the findings of the judgment of 1819; whereas the respondent must contend, that the two kinds of property stand upon the same footing in respect of the decreet of 1782, and that the plea of res judicata is altogether and alike applicable to both. I have adverted more than once to the different position in which the question stands as to the leases, and as to the estates, and I have referred generally to the two parts of the subject matter, resting on grounds sufficiently distinct to warrant your Lordships in having held the plea of res judicata good as to the one, while as to the other you declared the question open,—"under the cir-

" cumstances of the case," to use the words of the judgment. It is the less necessary to dwell longer upon this distinction, because the particulars of it are stated with much precision, and in a satisfactory manner, in the opinion of the consulted Judges who do not concur in the interlocutor appealed from. With their Lordships observations, contained in the 9th and 10th paragraphs of page 16 of the appellant's appendix, my mind goes along, for the most part, if not entirely; certainly with all that is material to the statement of the diversity, and the exposition of what it rests on.

The points attempted to be made, of decree in absence, and reduction ex capite minoritatis, need not be considered at all. They are wholly untenable; and, indeed, respecting them, I perceive no difference of opinion amongst the Learned Judges: all agree in rejecting them. I have also purposely abstained from saying any thing upon the remarks delivered by the two Noble and Learned Lords who advised your Lordships, when the case was before you in 1819 and 1826; because, admitting the account we have of what fell from them to be accurate, it is not fit to construe any judgment by reference to the arguments used in recommending or expounding it. But great respect is undoubtedly due to the opinions of those learned persons, upon any points to which they addressed their minds, and therefore, it would be very proper to avail ourselves of such lights as their remarks might shed on any doubtful parts of the present question, if the force of the judgment pronounced by your Lordships, and which cannot be at all affected either way by their arguments, left us at liberty to consider the points raised as still undecided. In Lord Gifford's argument,

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I can see nothing which materially aids the respondent in his present contention, while there is much that makes against him. It is true that his Lordship says, "The House has not now to decide whether the appellant (respondent) can by any manner get rid of the "judgment," on the decreet of 1782; and from hence it is argued, that his Lordship meant to represent the question as still open upon the merits of that decreet; and in one sense, no doubt he did; for who could deny that a reduction might be brought against it, on the grounds of forgery, collusion, vitiation in substantialibus? Does it follow that his Lordship considered the decreet as subject still to be set aside by reclaiming petitions to the Court of Session, or by appeal to your Lordships House? But the short observations of Lord Eldon in 1819 are more relied upon, or rather, an expression is picked out from those observations, and made the ground of inferences, towards which I do not think his Lordship ever pointed. "The opening of the interlocutor of 1782," he says, "considering it as not res judicata, must be "considered as opening it altogether." Both here and in Lord Gifford's argument, it may be remarked, there is some inaccuracy, probably in the report; for their Lordships are made to speak of the decreet of 1782 as being a res judicata. The matter, the subject of the decreet, is res judicata, because of the decreet; but the decreet itself can in no correctness of speech be so called. Passing that, however, and only regarding it as a proof that the report cannot be very correct, it is not fair towards any Judge to catch at a single expression, without reference to the context, and to the matter upon which he is delivering his opinion. Lord Eldon

was here referring to the leases, though he does not name them; but the judgment which he was moving to have altered, clearly shows that he alluded to the leases; and it would be straining his expressions beyond all bounds, and also, I may say, imputing to his Lordship a course of proceeding which he was, more than any Judge I ever knew, averse to—that of giving an opinion, wholly uncalled for, as to the question being open upon every part of the case, when it was only necessary for his purpose to state that it was open as to the leases.

Upon the whole, I am of opinion that the judgment below cannot stand; and in coming to this opinion, I feel much satisfaction from two considerations: 1st, the great opprobrium will no longer rest upon the administration of the law,—that after the lapse of half a century from a decree in the suit, every thing should still be open between the parties, and a new course of litigation be in reality only beginning; 2dly, that when I look into what can be descried of the respondent's case, behind the bar now raised, and alone now under review, there seems little reason to expect, that, if that bar were removed, and the respondent suffered to question the original judgment upon its merits, he could alter the decision. While, therefore, your Lordships may entertain the reflection, that no substantial case is shut out by your resolution, you have the farther satisfaction of feeling that the claimant, were he allowed to proceed, would, in all probability, end where he now is, after much additional expense, and long protracted delay to himself as well as his adversary. My Lords, in this case, I have said nothing about costs,—of course there can be no costs in the case of a reversal. I have

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a very strong opinion of what it might be fitting for the noble appellant to do in this case, and I have privately intimated to those professionally concerned for him my opinion respecting the costs of this appeal.

The House of Lords ordered and adjudged, That the interlocutor complained of in the said appeal be and the same is hereby reversed: And it is declared, That the defence of res judicata ought to have been sustained: And it is further ordered, That the cause be remitted back to the Lords of the said First Division of the Court of Session to proceed therein in such manner as shall be consistent with this judgment: And it is further declared, That this House does not think fit to make any order respecting the costs of this appeal, and that the question of expenses of process in the said Court of Session is left entire for the discretion of that Court.

MONCREIFF, WEBSTER, and THOMSON—RICHARDSON and CONNELL, Solicitors.