1801. *November* 27. Millie *against* Millie.

No 318.
How far a decree of court is to be considered as having been pronounced *in foro contentioso*, so as to authorise the exception of *res judicata*?

David Millie, manufacturer in Path-head, died in the year 1795, leaving a son and a daughter. Soon after his death, his daughter, with the concurrence of her husband, raised two actions against her brother, David Millie. The one was a process of reduction of a general disposition and assignation, which had been executed by her father in the year 1791; and she *contended*, 1*mo*, That he was not in a situation to manage his own affairs; 2*do*, That he was barred by the law of legitim from executing such a disposition. The other was an action for the sums to which she was entitled as next of kin to her mother, who had died intestate many years before her father.

These processes came in course before the Lord Ordinary, and the defender was assoilzied 6th June 1797, from the first ground of reduction. With respect to the other, the Lord Ordinary, "before answer, appointed the pursuers to give in a special condescendence of the facts they aver anent the legitim, and the way and manner in which they mean to establish the same." This appointment was never complied with, nor was any appearance made for the pursuer at the next calling of the cause; and the Lord Ordinary "having then heard the procurator for the defender, in respect the pursuer had failed to give in the condescendence appointed by last interlocutor, assoilzied the defender from the whole remaining conclusions of the libel." The only further procedure consisted of three short representations upon the part of the pursuer, not upon the merits of the cause, but for the purpose of obtaining delay. These representations were successively refused by the Lord Ordinary.

Some years afterwards, Elizabeth Millie, the original pursuer, raised two fresh actions against her brother. The one was an ordinary action, concluding for payment of L. 15,000, as her share of their father's moveables. The other was a reduction of the settlement which had been executed in 1791; and also of the two decreets of absolvitor, which had been pronounced in the former actions.

In oppositions to these claims, the plea of *res judicata* was advanced by the defender, who

Pleaded; That these new processes were in fact the same with those from which the defender had been already assoilzied, that the decreets of absolvitor had been pronounced *in foro contradictorio*, had been allowed to become final, and could not now be brought under review. 1*mo*, The pursuer's object has been all along the same in these actions,—to reduce her father's settlement, that his property might be distributed according to the rules of intestate succession; and the *media concludendi* are the same also, the reasons of reduction being almost *verbatim* with those in the former action. They cannot therefore be held to be different processes, Ersk. B. iv. T. 2. § 3. 2*do*, There can be no other distinction between decrees *in foro*, and decrees in absence, than that in

the one case appearance had been made, and defences proponed for both parties; in the other, for one party only. If a proper act of litiscontestation, or an act before answer, were necessary to constitute a decree *in foro*, the greatest number of the decrees of Court must be considered as decrees in absence, which would lead to an endless multiplicity of law-suits. The reduction, so far as it proceeded on the head of imbecility, was argued at great length in the former processes; and, with respect to the legitim, the Lord Ordinary pronounced an interlocutor, ordering a condescendence, with which it was the duty of the pursuer to have complied. This brings the case under the provision of the act 1672, c. 16. § 19., and is a good defence in the present action. Accordingly, the plea of *res judicata* has been sustained in similar cases; December 1780, Macglashan against Stewart; 1799, Black's Trustees against Laing; 23d November 1789, Douglas against Turnbull. * No 318.

Answered; The decree of absolvitor, so far as related to the claim of legitim, passed *sine causa cognita*, and the utmost effect that can reasonably be given to it, is to subject the pursuer to the expenses already incurred. The order for the condescendence shews, that the Lord Ordinary thought the pursuer's claim relevant, and it would have been immediately complied with, but on account of her total inability, from poverty, to carry on the action. She is not debarred, however, from bringing her claim anew; Erskine, B. 4. T. 2. § 17.; for decrees are not to be considered *in foro*, without litiscontestation, and there can be no litiscontestation without extracting an act or warrant, by which a proof of special facts is granted to the parties; Ersk. B. 4. T. 1. § 69.; Stair, B. 4. T. 39. § 1. Accordingly, in many cases, where the process had proceeded farther than in this, it has been found that a pursuer was not precluded from having the merits discussed in a subsequent action; March 1583, Knowles *contra* Irvine, No 235. p. 12125.; 11th February 1541, Town of Selkirk, No 226. p. 12121.; May 20. 1542, Heirs of Innerugie, No 226. p. 12121.; 23d February 1554, Queen *contra* Lord Caprington, No 230. p. 12123.; February 1583, Lady Lundie *contra* Gray, No 234. p. 12124.; 1791, Bald *contra* Simpson, (not reported) Blackstone, B. 3. C. 20. and 21.

THE LORD ORDINARY found, "That the pursuers are not barred from insisting in the present action of reduction, and renewed claim of legitim," and repelled the defence of *res judicata*.

And the Court, upon advising a petition against this interlocutor, with answers, by a considerable majority adhered to the judgment of the Lord Ordinary.

Observed from the Bench; There is no doubt great difficulty in opening up a decree of Court, but there is a supereminent power of equity vested in the Court, which cannot more properly be applied than in a case like this, where the process had been given up through the poverty of the defender. In all such cases, it is the duty of the agent to take measures for having the party

* Not reported. See APPENDIX.

No 318. put upon the poor's roll, to enable them to have the merits of their cause fairly discussed.

Lord Ordinary, *Balmuto.* Alt. *Oswald.* Act. *Robertson.* Agent, *D. Lister.* Agent, *Jo. Tawse,* Clerk, *Pringle.*

Fac. Col. No 6. p. 12.

1802. *March 5.* LENNOX, Petitioner.

No 319. A party is not prevented from again reclaiming, although the Court have already twice given their opinion upon the cause; once on the report of the Lord Ordinary, and again upon a petition against that judgment.

IT was objected to the consideration of the petition of Agnes Lennox, that there were already two concurring and subsequent interlocutors in the cause. The case was this:

The Sheriff of Edinburgh had decerned in favour of the petitioner, in an action against James Black.

Black advocated; and Lord Glenlee, Ordinary on the bills, (14th November 1801,) having advised with the Lords, remitted to the Sheriff, with instructions to alter his interlocutor.

On advising a petition and answers, the LORDS (16th February 1802) "adhered."

The petition reclaiming against this judgment was opposed, because the Court had already twice given their opinions upon the question; and although, according to the forms of process, only the last interlocutor was signed by the Lord President, the other was equally a decision pronounced upon the deliberation of the whole Judges.

But it was found competent to discuss the merits of the petition, as the first judgment was held to be an equivalent only to an interlocutor of the Lord Ordinary.

This question had formerly occurred, and was heard at considerable length, in the case of Ballantine against Waugh, 17th February 1801, (See APPENDIX,) where the first interlocutor was pronounced on the report of the Lord Ordinary in the Outer-House; but the objection was waved. The Court were there much divided upon it.

The petition of Lennox was discussed, and refused on the merits, without answers.

Lord Ordinary, *Glenlee.* For the Petitioner, *Dickson.* Clerk, *Gordon.* Agent. *Geo. Fordyce.*

Fac. Col. No 33. p. 68.

1803. *February 10.* YOUNG *against* MITCHELL.

No 320. An interlocutor pronounced upon a short representation, al-

MICHELL YOUNG, painter in Edinburgh, raised a summons against Andrew Mitchell, his late partner, concluding, "that he was owing to the pursuer the sum of L. Sterling, contained in an account." The blank was afterwards