1712. *February* 5. LORD and LADY ORMISTON *against* HAMILTON.

No 315.
A reason of reduction of a decree *in foro*, being, that diverse articles were brought into the account and decerned for, which were not libelled on; the Lords repelled the nullity, without prejudice to the party (a minor) to insist on any material ground of lesion.

IN the cause betwixt the Lady Ormiston and Hamilton of Bangour, mentioned 11th January 1711, No 5. p. 5334.; Bangour being allowed to repeat a reduction of my Lady's decreet of constitution *incidenter* as to all such reasons as were instantly verified, or resulted from perusal of the decreet itself, the first reason insisted on was, Bangour a minor was exceedingly lesed, in so far as the Lady's summons was only raised for three articles, viz. the L. 7000 Sterling, the family's aliment to the term, and her life-rent annuity; and yet there were five other articles brought into the count and decerniture, which were not in the libel, viz. George Robertson's debt, the bond to my Lord Whitlaw's first Lady's friends, and three accounts owing to Miln, Monteith and Macdougal, and so the decreet being *ultra petita* is null; and to show the minor's prejudice, he had sundry objection's against them, and also was lesed, by deducting them off the executry, though they were not paid by the Lady at that time; and the right of them not being then in her person, the whole executry should have been imputed to extinguish the L. 7000 bond, seeing the compensation operates *ipso jure*; and that moment she got an assignation to the executry from the Lady Househill, it compensed *ipso facto*, and ought not to have been ascribed to any other debt not libelled upon; all which being omitted, at least not distinctly proponed for the minor, it is yet entire for him to be heard thereon, bygone annualrents being accumulated into a principal sum, and made to bear annualrents to his evident lesion; and to support this erroneous calcul, they ingrafted into the decreet an exotic process, at the Lady Ormiston's instance, against the Lady Househill, the executrix, by which they unwarrantably drew in these extraneous articles; and though nullities now, since the regulations 1695, do not open the decreet *in toto*; yet it repones him to get redress *quoad* the point complained on. *Answered*, She oppones her decreet, which is *res judicata in foro contentiosissimo*, where all this was fully debated, and no article escaped without some objection; and though our law affords many privileges to minority, yet judicial sentences cannot be rescinded in their favours, where the matter has been fairly stated and determined, without any omission or negligence; but all that is now alleged is materially proponed and repelled in the decreet; and though the eloquence of a barrister may brighten and illuminate a cause by various illustrations and parallels, yet if the defence or allegeance has been plainly laid before the Judge, without varnish or disguise, a minor cannot resume the same thought in other terms, so as to bring it under a new review; but the truth is, the informality here insisted on is so thin and subtle, that it borders on the confines of nothing, and is a pure non-entity; for is there any thing more ordinary than to bring in articles of deduction by compensation or recompensation in replies and duplies, which never entered into the libel? and must all these decreets be therefore defective, informal and null? And all here quar-

No 315. relled is the method of counting, which, stated any of the ways, makes very little alteration or lesion to the minor; and a small difference ought not to lay solemn decreets open, unless the lesion were somewhat gross and enormous. But in the restitution of minors, lawyers observe it is much more easily conceded in extrajudicial cases, than in judicial; for which Mascardus gives this reason, conclus. 1063, num. 4. quia restitutio contra sententiam est magni præjudicii, especially if sentences of supreme courts, where the favour of sopiting pleas is of a more general consequence than the interest of minors, whose privilege leans on these two grounds, ubi ex sua facilitate lapsi sunt vel per dolum alterius; and therefore, *quoad* points *in jure*, they are not restored, but in such *utuntur jure communi* with majors, but are relieved where they have either erred *in facto*, or have omitted defences. This makes the accurate Perezius, ad tit. C. Si adversus rem. jud. restitutio. pet. say, the minor must found upon *novas allegationes* formerly omitted, which quadrates to L. 18. § 1. D. De minor. The prince rarely repones minors, nisi ea quæ pro causa faciunt non dicta fuisse alleget, vel ab advocatis se proditum esse queratur. It is true, that text has another reading, but Cujacius amends it in this manner ex l. 36. eod. and Faber approves it, adding, it were a reflection and derogation to the honour, knowledge, and integrity of a supreme court, that any defences could arise from facts proponed before them for a minor, that did not occur to them, so as to supply their defects. But we need not foreign authorities; our own are ample and full. Dirleton, in his doubts and questions, page 149, asks if interlocutors *in jure* against minors can be reduced *ex capite minoris ætatis et læsionis*, and answers *negative*, and that there must be either *captio ex facto alterius*, or his own facility in omitting defences. See also 25th February 1683, and two late cases, Cochran of Kilmaronock and the Marquis of Montrose, and the Lady Kincairdin against Purves of Purveshall. (See APPENDIX). The vote being stated, sustain this reason of reduction as relevant, that five articles were brought into the accout which were not libelled on, or repel it? THE LORDS by plurality found it not relevant, without prejudice to Bangour to insist on any material grounds of lesion; but they repelled this nullity, and thought she might retain for these articles.

1712. *February* 16.—IN Hamilton of Bangour's case against the Lady Ormiston, Bangour's lawyers having discovered some scorings, interlinings, and vitiations in my Lady's process against the Lady Househill, the executrix, which they thought might be useful to cast that process before the House of Peers, where the matter was tabled by an appeal, he applied to the Lords for a warrant to get up the principal libel, on his leaving a transumpt compared, and an obligement to reproduce it after the trial. This was obtained after some struggle, which put Ormiston to inspect Bangour's summons of reduction, and finding some scorings, interlinings, and margins there, as well as in his own, he craved it up, to be transmitted, that it may appear to be no such unusual prac-

tice to alter and amend libels, et quod quisque juris in alium statuerit ut ipse eodem utatur. Bangour could not complain, whatever sentiment the English may have when they see such incorrect libels. THE LORDS, by plurality, allowed Bangour's summons to be transmitted as well as the other. No 315.

Fountainhall, *v.* 2. *p.* 717. & 726.

SECT. XVI.

Res Judicata. Reclaiming Days.

1731. *January.* BUNTEIN *against* BUCHANAN.

A CRIMINAL libel for theft having been brought before the Court of Justiciary, wherein there was also a conclusion of damages, and the Judges having found the same relevant to infer the pains of law, and after the facts were found proved by the jury, having pronounced a sentence *condemnator*, but without pronouncing any sentence upon the damages; the LORDS of Session found this not to be a *res judicata* to bar a civil action for damages upon the same fact. See APPENDIX. No 316.

Fol. Dic. v. 2. *p.* 203.

1782. *November* 15.

ALEXANDER-JAMES GRANT, and his TUTOR, *against* The CREDITORS of SKELBO.

No 317.
The reclaiming days do not run against a pupil whose tutor is dead.

IN the ranking of the Creditors of Skelbo, Alexander-James Grant, then an infant, and his tutor, presented a claim, which was rejected by the Lord Ordinary; and, before the days appointed for representing had elapsed, the tutor died.

More than two years afterwards, Mr Grant and a new tutor having for the first time offered a representation, the LORD Ordinary found, "That he was barred from insisting in his present claim, by a final interlocutor."

Upon advising a reclaiming petition for Mr Grant, with answers for the Creditors,

THE LORDS found, "That there was no *res judicata*; and remitted to the Lord Ordinary to proceed accordingly."

Lord Ordinary, *Kames.* For Mr Grant, *James Grant.* For the Creditors, *Geo. Ferguson.*
Clerk, *Hume.*

Fac. Col. No 65. *p.* 103.

C.