

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.*

A&S. *Robertson.*
Agent, *D. Lister.*

Agent, *Jo. Tausc.*
Clerk, *Pringle.*

Fac. Col. No 6. p. 12.

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.

1802. *March 5.*

LENNOX, Petitioner.

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

filled up with a particular sum. When the process came before the Lord Ordinary, in the course of the regulation-roll, it was taken out to see, and an order was given to lodge defences. But this order was never complied with; and some months afterwards, (June 24. 1801,) the pursuer obtained an interlocutor in absence, in terms of the libel.

Against this, the defender presented a short representation, praying the Lord Ordinary to alter his interlocutor; "to ordain the pursuer to produce the accounts libelled on, and thereafter to allow the representer to give in and be heard upon his defences." The representation was refused, (Jan. 12. 1802.)

This interlocutor was allowed to become final, owing, as it was afterwards alleged, to the defender's agent having been indisposed; and an account of expenses was given in by the pursuer, which was modified; but before ten sederunt-days after this modification, a representation was presented by the defender, upon the competency of reviewing the interlocutor of the 12th January, which the Lord Ordinary (11th March 1802) appointed to be answered.

The pursuer did not lodge answers; but having afterwards (January 21. 1803) enrolled the cause, "the LORD ORDINARY having heard the pursuer's procurator, in respect the representation was given in after the cause was final, refuses the representation as incompetent."

Upon this, Mitchell presented a petition to the Court, and

Pleaded; To constitute the exception of *res judicata*, defences upon the merits must have been proponed; and in this case, even although the decree had been extracted, the dilatory defence stated to the Lord Ordinary would not have precluded his interlocutor from being reviewed, either in the form of reduction or suspension, because the terms competent and omitted, as understood in the regulations 1672, were not applicable to such a case. But, at any rate, a party is entitled, even after the *induciae* in the acts of sederunt (July 9. 1709 and 15th February 1723) have elapsed, to bring an interlocutor under review, upon grounds not previously before the Judge, if he can assign a sufficient cause for the omission; and in this case, the agent for the defender was prevented, by indisposition, from the exercise of professional duty at the time when this interlocutor appeared in the minute-book.

The Court, without requiring any answer to the petition, conceiving that the circumstance stated did not authorise the plea of *res judicata*, remitted the cause to the Lord Ordinary, in the usual form, to hear the parties upon its merits.

Lord Ordinary, *Armadale*.

For Petitioner, *Corbet*,
Clerk, *Menzies*.

Agent, *A. Ferris*.

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Fac. Col. No 82. p. 183.

No 320.
though allowed to become final, does not authorise the exception of *res judicata*, when the cause has never been argued on its merits.