

might uplift ; but, when she is interpellated, how can her husband or his creditors be excluded ?

PRESIDENT. The specialties, in this case, are excessively strong in favour of the wife. A tacit consent may be as valid as if there had been an actual allotment of the wife's rent by way of aliment.

On the 24th July 1770, "The Lords, in respect that it is not alleged, on the part of Mary Jamieson, that Captain Houston cohabited with his wife or alimented her, preferred Isobella Houston to the sum *in medio* ;" adhering to Lord Kaimes's interlocutor.

On the 14th November 1770, adhered.

*Act.* Alex. Belches. *Alt.* W. Baillie.

*Diss.* Alemore, Gardenston, Coalston, Hailes. *Non liquet*, Ellick.

[The reason of my differing from the judgment was, that I wished for more light into the fact ; and, as some insinuations had been thrown out against Mrs Houston's character, I thought there was a propriety in inquiring by whose fault the separation happened.]

1770. November 17. JEAN JOHNSTONE *against* HUNTER JAMES FERRIER.

MINOR.

A male, under the years of pupillarity, incapable of contracting a marriage.  
Effect of Inhibition after the years of pupillarity are expired.

[*Faculty Collection*, V. 130 ; *Dictionary*, 8931.]

AUCHINLECK. The maxim *malitia supplet ætatem* is an old maxim : But where is the *malitia* here ? There is a great deal of *stultitia* if you please. This woman gave the child money to buy sweeties, I suppose : she gets herself joined to him in the form of wedlock by a *Buckle-the-Beggars*, and the child returns to the country with a wife and his sweeties. Where was the *malitia* then ? Had there been any, he would have consummated directly. Instead of this, the first time he appears in the character of a husband, is lying in the same bed with Jean Johnstone, his clothes on, and his face turned to her back. Had there been any *malitia* in him, Jean would not have been in that posture : had Nash the dragoon been in bed with her, she would not have turned her back upon his *malitia*.

GARDENSTON. A marriage with Nash may be presumed : there is better evidence of that. In the course of the proof, we have much of low life and low love. Jean is a very fit wife for the dragoon : she has two husbands, one of them indeed a boy, and I suppose that he has had two or three wives since he parted with Jean. The maxim *malitia supplet ætatem*, is adopted by Lord

Bankton. I respect that authority ; but I would require much more than that authority to persuade me, that the unripe vigour of a young lad is to supply the place of years and understanding.

JUSTICE-CLERK. The maxim cannot apply to our law. It is dangerous to suppose that the form of marriage, celebrated under the years of puberty, may become good after the years of puberty, unless there be a solemn consent and cohabitation of parties : Nothing of this kind occurs here.

ELLOCK. A solemn consent and cohabitation would do ; for that is sufficient to constitute a marriage *ab initio*.

On the 17th November 1770, "The Lords remitted to the Commissaries, *simpliciter* ;" [who had found no marriage.]

Act. Andw. Balfour. Alt. G. Clerk. Reporter, Stonefield.

1770. November 21. JOHN and WILLIAM CUNNINGHAMES against ROBERT HAMILTON of Wishaw.

PERSONAL AND TRANSMISSIBLE.

A Tack for 57 years, secluding assignees and sub-tenants, not Adjudgeable.

[*Fac. Coll.*, V. 136 ; *Dictionary*, 10,410.]

MONBODDO. Lord Elchies was against the first judgment in *Elliot's* case, but he altered his opinion upon a second hearing, and the judgment became unanimous. I doubt as to the decision upon Corthen's bond, *ex facie*. Wishaw was as much debtor as M'Gregor ; and I think M'Gregor's declaration, taking the whole debt upon himself, is reducible upon the Act 1621.

PITFOUR. I should not incline to give my vote for altering the decision, *Elliot*. It is single indeed, but it has been acquiesced in by all men of business for a long tract of years : an alteration would make the law vacillant and uncertain, though the consequence of the decision is to establish a subject in the debtor which creditors cannot reach. [They can reach the annual produce of the lease.] I do not, however, think that the decision, *Elliot*, exactly applies to this case. Here there is no absolute exclusion of assignees ;—so adjudgers are not absolutely excluded. Wishaw himself has adjudged : may not others adjudge in imitation of him ; and, if they are within year and day of him, how can he refuse to admit them as to Corthen's bond ? In the case of *Sir William Nairn*; 1725, the Court found that the declaration of a bankrupt did not prove. It has since been found, that the oath of the bankrupt is good against the arrestee.

KAIMES. Although I was lawyer on the losing side of the case of *Elliot*, and was abundantly keen ; yet, afterwards, when I cooled, I thought the