

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

judgment right. The adjudication deduced by the master does not vary the case. The master might have been assignee; and why may not the adjudger? His departing from his privilege, in so far, will not imply that he consented to admit every adjudger. It is pretty arbitrary, whether we believe the bankrupt or not, as to Corthen's bond. Had his testimony been given to the prejudice of the person in whose favour the partial disposition *omnium bonorum* was granted, I should have given more credit to him.

KENNET. The exclusion of assignees is a reasonable stipulation. If, in such case, the tack could be adjudged, the stipulation would be constantly eluded. It is impossible to exclude *heirs*, because, without a clause to heirs, it would be difficult to find tenants. Adjudgers, who now generally come in *pari passu*, ruin both the land and the master. The adjudication deduced by the master is nothing; for at that time he imagined there was a new bargain with M'Gregor. Besides, the master, by adjudging, returns to his own right. If the subject was not adjudgeable, how can posterior adjudgers come in? As to Corthen's debt, the declaration and disposition were long before M'Gregor became notour bankrupt.

ALEMORE. I never heard the decision, *Elliot*, contradicted by men of business. The argument (by Lord Pitfour,) for Wishaw's giving up his privilege, rather pleased than convinced me. The adjudication contains an express protest, that it should not infer a consent to assign. If Wishaw has passed from his adjudication, the other adjudgers must come in upon their own diligence. Now, that diligence is ineffectual, according to the decision, *Elliot*. As to Corthen's debt, if the creditors say the acknowledgment is false, they must prove it.

HAILES. As to Corthen's debt, you have an express declaration of M'Gregor, importing what is probable; for it is improbable that Corthen, a stranger, would have lent L.500 to M'Gregor,—but very probable that he would have lent a thousand pounds to Wishaw. The creditors, at this moment, do not say that M'Gregor's acknowledgment is improbable, or that the contrary supposition is probable.

PRESIDENT. As to the case of *Elliot*, Elchies was brought over by this argument, That, as the law stood in the last century, when masters were liable for many delicts of their tenants, it was of consequence for masters to exclude assignees.

COALSTON. As to Corthen's debt,—It is not sufficient, to cut down the evidence of a fact, that the person acknowledging is a bankrupt.

On the 21st November 1770, "The Lords found that the seclusion in the tack is effectual against legal assignees, by adjudication, and that the creditors of M'Gregor, the tenant, by their adjudication of the tack of Easter Park and Birkenhill, can take nothing, and have no title to compete with Mr Hamilton the proprietor: found the adjudication on the debt due to Corthen is effectual;" adhering to Lord Auchinleck's interlocutor: but "Found that the adjudication of the lands, concerning which there was a power of subsetting not exercised, is null;" altering Lord Auchinleck's interlocutor.

*Act.* A. Lockhart. *Alt.* R. M'Queen.

*Diss.* As to Corthen's debt,—Kaimes, Monboddo. *Non liquet*,—Gardenston.