

1749. February 10. EARL of MORTON *against* MUIRHEAD.

THE late Earl of Morton lent 5000 merks to Alexander Muirhead of Linhouse, grandfather and tutor in law to Alexander Muirhead, now of Linhouse, for which he got his bond, bearing that the sum was borrowed for paying a part of the price of the lands of Welheads purchased by the tutor at a public roup from the trustees of the Lord Torphichen, for the use and behoof of his pupil and grandchild.

In the process at the instance of the present Earl, against the then pupil, Alexander Muirhead, now of Linhouse, it was for him *alleged*, That as there was no evidence of the money being applied by the tutor towards the price of that purchase, so *zdo, Esto* it had been so employed, he could not be liable, as the money had been unprofitably borrowed, the tutor having at the time other money in his hand sufficient for that purpose; and a diligence was craved for instructing, that the tutor had before the purchase intromitted with funds sufficient to pay the price of the lands purchased by him.

But the LORDS were of opinion, That it is not necessary for the lender to maintain that the tutor had no other money to answer the purpose for which it was lent; that is what the creditor has nothing to do with, for whom it is enough to say, that the money lent was so applied; and the following circumstances were found sufficient to shew that the money was so applied, viz. The narrative of the bond, the sale tallying in point of time with the bond, the parties' admission that the price was paid, and the tutor's character for frugality; and therefore "they repelled the defence."

Fol. Dic. v. 4. p. 6. Kilkerran, (MINOR.) No 8. p. 350.

1770. November 17.

JEAN JOHNSTON *against* HUNTER JAMES FERRIER, SON of JAMES FERRIER,
Tacksman of Gorton Coal.

JAMES FERRIER HUNTER, a minor, with concurrence of his father as curator, raised a process of scandal and putting to silence against Jean Johnston; who, on the other hand, brought a declaration of marriage against him.

The Commissaries having allowed a proof to both parties, it was established, that the pursuer, who was a servant in the defender's father's house, and the defender had, in the month of June 1769, gone to Edinburgh together; and after meeting with some obstacles which both endeavoured to remove, had been married by a person who was said to be a minister, in presence of witnesses, and by interchanging marriage lines, which were produced and dated 15th June 1769. The parties were also seen in bed together towards

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A tutor purchased land for his pupil, and borrowed money to pay it, although he had sufficient funds in his hands belonging to the pupil. The pupil notwithstanding liable to the creditor.

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A male under the years of pupillarity, incapable of contracting marriage.

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the end of July following; and it was affirmed by the pursuer, though denied by the defender, that they had frequently had carnal knowledge of one another subsequent to the marriage. The defender was born on the 15th August 1755; and hence, at the time of the marriage, wanted two months, and at the time the parties were found in bed together, wanted two weeks at least of being fourteen years of age. The pursuer was then about twenty. There was also a good deal of evidence, that the pursuer, three years before her connection with the defender, had been in extremely familiar habits with one Nash a dragoon; though it did not, on that head, amount to sufficient proof of a marriage.

The Commissaries pronounced an interlocutor, finding "the facts, circumstances, and qualifications proved, not relevant to infer marriage between her (Jean Johnston) and the said Hunter James Ferrier; and therefore assoilzie the said Hunter James Ferrier from the whole conclusions of the said Jean Johnston's libel; and of consequence find and declare, in terms of the libel at the instance of the said Hunter James Ferrier, so far as respects the putting the said Jean Johnston to silence."

Jean Johnston brought an advocacy of the cause; and the Lord Ordinary having ordered memorials, it was

Pleaded for the pursuer,

Though it now turned out that the defender, at the time of the celebration of the marriage, was somewhat under fourteen years of age, yet he had, upon that occasion, affirmed to the clergyman who married them, that he was between sixteen and seventeen. The pursuer believed this to be the fact, and was authorised to do so, as well from his own positive affirmation, as from his manly appearance. In this case, accordingly, the exception from the general rule, as to the nullity of the marriage, when the male was under fourteen, "*nisi malitia suppleat aetatem*," pointedly applied; that too, in the strongest sense, as well on account of the defender's bodily powers, as of his mental qualifications. The last was sufficiently evident from his whole conduct, in particular the deceit he had put upon the clergyman, and even upon the pursuer herself; and the former fell to be presumed, from the situation in which they were found in bed together at night, as man and wife; so that, notwithstanding the defender's denial, no doubt could remain but that the marriage had been actually consummated. Lord Bankton, B. 1. T. 5. § 26.

The defender's plea, that he was entitled, as a minor, to the benefit of restitution, was not applicable. The circumstances had gone farther than a mere civil contract; for, by the consummation *res non sunt integræ*, and by the Roman law, the benefit of restitution was denied to a minor, "*qui se majorem dolose dixerit*." Kennedy against Weir, 23d Feb. 1665, *voce* PRESUMPTION.

Pleaded for the defender,

It was an established point in the law of Scotland, that marriage could not be entered into before the complete years of pupillarity; 29th June 1756, Cameron against Malcolm, *voce* PROOF. The exception introduced by the canon law, viz. "*nisi malitia suppleat aetatem*," was in this country of very difficult application. The *malitia* was applicable to the mind only, and was frequently explained by the word *prudencia*. It was, according to the canonists, to be presumed from the ability of the party to consummate; but as the decency of our practice confined the proof of this presumption of *malitia* to a view merely of the person, there could seldom, upon this point, be an accurate conclusion formed. It would add much to the dangerous situation of youth, were an exception of this anomolous nature to be sustained; and as no instance could be pointed out where this exception had legitimated a marriage solemnised within the years of pupillarity, it did not appear, that it was at all applicable to the law of this country.

As to the effect of cohabitation to ratify a marriage entered into in pupillarity, there was a distinction to be taken betwixt cohabitation after, and cohabitation prior, to attaining the years of majority. The one might be effectual, the other could not; but as to both, it was certainly fair, that this ratification should not be presumed from every species of cohabitation or unpremeditated rencounter, but from an open, regular, and avowed cohabitation as man and wife. In the present instance, there had been no cohabitation after pupillarity; and even that consummation which was alleged to have taken place, was not of that open and avowed nature as was required by the law to validate the marriage; but, on the contrary, appeared from the proof never truly to have taken place at all, or at least was not from the circumstances to be presumed. As no consummation again after pupillarity was either proved or was to be presumed, he was entitled, on the head of minority, to be restored against the injury he would otherwise sustain.

The Judges, in very strong terms, reprobated the action. The maxim of the canon law *nisi malitia, &c.* was not received in the law of Scotland; and it was observed, that though a marriage contracted under pupillarity might, without any new ceremony, be validated after pupillarity, when done solemnly and *ex animo*, yet it would be highly dangerous if this could be accomplished merely by lying with the woman, as that was done not *ex animo*, but *ex libidine*, and from enticement.

They therefore unanimously approved of the Commissaries' judgment, and remitted the cause *simpliciter*.

Lord Ordinary, Stonefield.
R. H.

For Johnston, A. Balfour.

For Ferrier, Geo. Clerk.

Fac. Col. No 45. p. 130.