and he confessed that the rule of law was, that any right taken in favour of infants, absents and ignorants, was presumed to be accepted by them; and in this case, if Lord Royston had died without doing any deed repudiating the entail, he would have been deemed to have accepted of it; but he plainly showed his intention to repudiate it and to accept of his more beneficial right, which his father intended for him,—first, by the transaction in the year 1707; then by the revocation in the year 1714; and lastly, by his continuing to possess the estate after his father's death, upon the more beneficial title, as must be supposed,—that is, upon the infeftment 1707; nor could his after application to Parliament, upon the supposition that there was an entail, be any argument of a contrary intention; because the only design of that application was, in the first place, to secure the purchaser, and, in the second place, to secure himself against incurring any irritancy. And this point, the President said, was precisely determined in the case of *Balnagowan*, in 1744, where it was found that the first institute, Mr Francis Stewart, not having accepted of the settlement, could repudiate it by making, with the consent of the tailyier, a new settlement in favour of my Lord Ross; and, in general, he said, it was absurd to maintain that a settlement made upon a man under certain conditions and limitations, though completed by infeftment, could not be repudiated, or was a valid settlement, until accepted by the party, who, in many cases might have very good reason to reject it; for, suppose that the condition of it was that he should bear the name and arms of a certain family, when he was obliged to bear the name and arms of another family, under penalty of losing a greater estate. This, he said, actually happened in the case of *Sir Hugh Dalrymple*, who was obliged to repudiate solemnly the estate of Bargeny, and by that means made room for his brother, who presently possesses it: nevertheless the contrary opinion prevailed; and it was found, by a narrow majority, that Lord Royston had not repudiated but accepted of the entail 1688. *Non liquet*, Kaimes, Prestongrange, and Justice-Clerk.

This interlocutor adhered to almost unanimously, and the application to Parliament thought an acceptance of the tailyie.

1756. *June 29.* JOHN CAMERON *against* MISS MALCOLM.

[Kaimes, No. 109.]

THE Lords in this case reduced a marriage, on account that the woman was but twelve years and four months old, and that her consent was not so deliberate and determined as the nature of that most solemn contract required.

Prestongrange, in this case, said that he did not think it was a clear point that, by our law, a woman could be married before the age of fourteen; and for this he quoted the authority of Skene, *de Verb. Sig.*, Craig, and Stair; for though several of our authors speak of twelve as the nuptial age, yet they speak so rather as Roman lawyers than as Scotch; at least he thought the age betwixt twelve and fourteen a dubious age, in which it required the fullest proof both of her deliberate and full consent, and of her bodily capacity for

marriage; and he thought that, suppose she had rashly given her consent within that age, yet she might retract it *rebus integris*, before the *copula* followed, which was the case here.

1756. *July* 16. JANET ROBERTSON *against* CLEPHAN.

IN a tack that was granted of a coal, there was a reference made to certain persons to settle some terms of the bargain that were not covenanted at the time of granting the tack, and also to determine any controversy that might arise betwixt the parties. The reference was in the style of a submission, and the referees pronounced a decreet as arbiters: The question, Whether this award of the referees was a decreet-arbitral, falling under the regulations of the statute 1696, or whether it was only *arbitrium boni viri*, that could be corrected by the judge, if it was manifestly iniquous? And the President said, That the referees in this case were not arbiters, but arbitrators, according to the distinction of L. 79, *Pro Socio;* and there was a great difference betwixt a reference of a *lis*, or subject in controversy, and a reference of a bargain not adjusted, though he observed that the writers had not any difference of style to distinguish the one from the other. This distinction, he said, was established, by a solemn and unanimous decision, in the case of my Lord Couper.

With the President the majority of the Lords agreed, and it was remitted to the Ordinary to hear parties upon the equity of the determination of the arbiters.

Some of the Lords observed that the subject of the reference was of a mixed nature, partly to adjust the terms of the bargain, and partly to determine controversies that might arise upon the bargain; for it was a contract about a coal that was not yet discovered, so that, of necessity, many things would remain to be adjusted in the bargain, which could not be foreseen by the parties, and many controversies would arise about the execution of the agreed terms of the bargain. *Dissent.* Minto; Kaimes *non liquet.*

1756. *July* 16. BLAIR *against* HARLE.

IN this case it was unanimously determined that the purchaser of an incomplete right to lands was liable to sustain a challenge of his right, on the head of fraud and circumvention by his author. And accordingly the Lords, in this case, did reduce the right to the lands, on account of the author's having obtained it by fraud and circumvention, though that right was completed in the purchaser, by infeftment, before reduction was raised.
