

tion, which might not have been equally pleaded had the bargain been made to get a footman married to the lady of the highest rank in the kingdom.

KAIMES. M'Kaill ratified the marriage. This might have been sufficient, had the question been solely with respect to implementing the condition ; but the obligation itself is *contra bonos mores* ; for the implementing could not be without dissimulation and guile. Janet Thompson could not say to the young woman, " I am to have nine guineas if I can conclude a match between you and Walter M'Kaill." She was therefore bribed to act falsely, and falsely she acted.

On the 13th February 1770, " The Lords found that the office undertaken by the pursuer, in terms of the missive, was *contra bonos mores* ; refused action, and found expenses due."

*Act.* R. Sinclair. *Alt.* G. Ferguson.  
*Reporter,* Kaimes.

1770. February 14. ALEXANDER MUIR *against* JAMES WALLACE.

WRIT—LOCUS PŒNITENTIÆ.

A Writing, neither in terms of the Act 1681, c. 5, nor holograph, insufficient to constitute a bargain as to heritage, though the subscription was acknowledged.

[*Faculty Collection*, V. p. 60 ; *Dictionary*, 8457.]

COALSTON. I doubt how far the acknowledgment of the subscription is not sufficient to remove the objection of a statutory nullity. Solemnities were required for preventing forgery, and, when the subscription is acknowledged, that reason of the statute ceases.

PRESIDENT. The contrary was found in the case of *M'Kenzie* and *Park*, very deliberately determined. When land is to be conveyed, it is expedient to adhere to our feudal rules.

HAILES. I have good reason to remember the case of *M'Kenzie* against *Park*. I was lawyer in it on the losing side. I observe some commendations bestowed on a paper signed by me in that cause. I do not deserve it ; for the paper was not composed by me, but by a person whom I am not at liberty to name, (Lord Kaimes). At the time, I own I did not digest the decision ; but it has been uniformly followed, and I consider it as a safe rule.

MONBODDO. If it is once admitted that an heritable subject may be conveyed by the form of missives, I cannot distinguish between a missive holograph and one where subscription is acknowledged. This was a solemn transaction, and it is no modest or ingenuous plea which the defender urges. As to this point, there are decisions, old and new, which run contrary. I therefore find myself at liberty to determine according to principles.

PITFOUR. If we allow the solemnities of writ to be given up, we defeat the security of the law. The frequency of disputes like the present leads me to be more studious to support the law, otherwise we should sap the foundations of legal securities. Our ancestors, when writing was less common, subsisted well with all legal solemnities; why may not we, when writing is become more common, and instrumentary witnesses may always be had? There are only two cases where this solemnity is dispensed with,—where fraud can be alleged, or where there is *rei interventus*.

KENNET. The law admits *locus pœnitentiæ* till a written obligation is completed. So, the acknowledging a subscription is not sufficient, but leaves matters just where they were.

KAIMES. I am tired with opposing a number of decisions which I think totally wrong. Were those decisions limited to land-rights, it would be less matter: if they are extended to every case, they will destroy the morals of the nation. It is an infamous plea for a man to urge the force of a statute *contra bonos mores*: How can a Court of Justice, established by the public, ever give sanction to so unjust a defence?

PITFOUR. If, by the law, a bargain cannot be established without a writ, there is no reason for disappointing the law, in order to establish a bargain. In some cases the law allows a *locus pœnitentiæ*, that a man may be freed from a rash obligation, but which still may be an obligation in conscience.

JUSTICE-CLERK. Were we to consider this case without reference to statutes and decisions, we would certainly determine according to the rules of good faith. We have often the mortification to be obliged to give decree where the plea or the defence is ungracious and against good faith. This decision will not affect moveables: it relates only to the conveyance of heritable subjects, or to an obligation to convey, which is equivalent. A long tack of lands is an heritable right. An adjudication of it is an heritable title. I cannot distinguish between a large subject and a small one; between recent adjudication and one whereof the legal is near expired.

AUCHINLECK. Were the question concerning a moveable subject, I should have no difficulty in determining the letter to be binding. Here a man comes against his own agreement; but, suppose there were a formal verbal agreement, this is as binding in the conscience of an honest man;—and yet we would not hesitate to say there is *locus pœnitentiæ*, although this is equally against conscience. Here the defender takes advantage of the law of the country. This is not more revolting against conscience than the other, which is equally founded on the law of the country.

COALSTON. Put a case.—A deed signed before witnesses is not good unless duly tested. A man grants a disposition of his lands,—it bears payment of a price,—I pursue for delivery: The party says,—The deed is null, for one of the witnesses did not see me sign. Would this defence be sustained?

PRESIDENT. In that case there might be a *rei interventus*; besides, it may be urged, *non deficit jus sed probatio*. The case which has occurred, will occur seldomer if we hold by the decisions.

ELLOCK. When this case was before me, I did not consider it as relating to

a subject of much importance; being as I imagined, the adjudication of a tack which might expire to-morrow.

On the 15th February 1770, "In respect that the missive relates to an heritable subject, the Lords found it not probative;" altering Lord Elliock's interlocutor.

*Act.* J. Boswell. *Alt.* A. Lockhart.

*Diss.* Kaimes, Coalston, Monboddo.

1770. February 15. ANDREW STEWART *against* JAMES BISSET.

#### COMPENSATION—RETENTION.

A Creditor, when a sum of money was sent by his Debtor, and received, in order to be applied to a particular purpose, not allowed, upon the Bankruptcy of that Debtor, to plead retention of the money, or to apply it in compensation of his own Debt.

(*Faculty Collection, V. p. 58; Dictionary, App. I. Compensation, No. 2.*)

HAILES. The only difficulty seems to be that Bisset, not finding the bill in the hands of Coutts, notified to M'Donald, 3d November 1763, that he had placed the L.18 to the credit of M'Donald, and that M'Donald seems to have acquiesced in this transfer.

MONBODDO. M'Donald had no occasion to write any answer. As he had given the order to pay, and Bisset agreed,—from that time the holder of the bill became proprietor of the L.18. Bisset, therefore, was *in mala fide* to apply it to his own use.

JUSTICE-CLERK. It is a particular thing to put money into the hands of a man not to be applied to A or B, but to the holder of a bill in general. Bisset followed the faith of M'Donald, and went to Coutts to pay the money. Coutts could not take it, not being possessed of the bill. Bisset writes to M'Donald,—states the fact,—and adds,—I state it to your account. M'Donald makes no answer to this. This seems an acquiescence on the part of M'Donald.

KAIMES. The question is—To whom did the property belong? The money was M'Donald's till Bisset paid it; but afterwards M'Donald said he had ordered it to be paid to Stewart. This was a transference. Bisset may have wrote, or may not have wrote the letter to M'Donald—or the letter may have miscarried. [It was wrote; it did not miscarry.] Suppose Stewart out of the question, any creditor of M'Donald's might still arrest it.

PITFOUR. I think Stewart had a *jus qucesitum*.

COALSTON. Bisset undertook a trust. As soon as that was intimated, Macdonald could not recal it.

PRESIDENT. This was a trust in favour of the porteur.

On the 15th February 1770, "the Lords found Bisset liable to Stewart in the money;" altering the interlocutor of Lord Elliock.

*Act.* Cosmo Gordon. *Alt.* J. M'Claurin.