JUSTICE-CLERK. The warehouseman was a public custodiar, who receives a hire, and is bound *præstare diligentiam.*

AFFLECK. I was formerly of the same opinion; but Lord Coalston's argument now seems unanswerable. Why should the custodiar take the burden of seeking out the person whose goods are put into his hands?

BARJARG. It is the duty of the custodiar *præstare summam diligentiam;* but then it is the diligence of custody. If he keeps books whereby every one may discover his own, nothing more is required.

PRESIDENT. I was for the interlocutor; but now I see cause to alter.

ELLIOCK. I pronounced the original interlocutor; but now I am convinced that it was erroneous.

On the 7th March 1771, "The Lords assoilyied;" altering the interlocutor of the Inner House, and that of Lord Elliock.

*Act.* P. Murray. *Alt.* J. Boswell.

*Diss.* Justice-Clerk, Pitfour. Kaimes did not vote.

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1771. *January* 25. ALEXANDER GREIG *against* WILLIAM GREEN.

## PROMISSORY-NOTE.

**Action of Recourse not competent against the indorser of a Promissory-Note.**

[*Fac. Coll. V.* 209; *Dict.* 12,259.]

GARDENSTON. The Court has long ago got over what I considered the great difficulty, the finding promissory-notes valid, though informal; and yet it has persisted uniformly in giving them no farther privileges.

MONBODDO. A great lawyer in a neighbouring country, (Lord Mansfield,) observes, that the practice of merchants may become part of the common law. I see no reason for stopping. Since we have gone so far already in granting privileges to promissory-notes, I cannot draw the line here.

AUCHINLECK. Merchants found it convenient to introduce promissory-notes: one reason was, because many of their creditors could not write, and consequently could not draw bills; another, that promissory-notes are made to bear interest, which bills cannot regularly do. Promissory-notes are found valid, that men may not be suffered to counteract their own obligations; but it would be going much further to give them extraordinary privileges: This would be not only creating obligations contrary to decisions, but also creating obligations in which the indorser did not consider himself as originally bound.

ELLIOCK. I think it is not in the power of the Court to communicate the privileges of bills to promissory-notes.

JUSTICE-CLERK. There is no higher privilege belonging to bills of exchange

than this of a certain form in negotiating them: it is adverse to the common law to extend such privileges.

KAIMES. Promissory-notes were current in England long before the statute authorising them. This is a proof of the integrity of that nation: the same practice may hereafter prevail in Scotland, but hitherto there is no evidence of its so prevailing as to require our decision in support of it.

COALSTON. Promissory-notes are more used than bills of exchange, and they are generally considered as implying recourse as much as bills. I do not comprehend why the Court stopt short, after it allowed promissory-notes to be indorsed; the doing so much, and doing no more, is apt to ensnare the lieges. I am deeply sensible of the many decisions of the Court against the privileges of promissory-notes; but I do not know that this precise case, as to recourse, has ever been determined.

PITFOUR. In England we see the source of the practice in statutes: not so with us.

PRESIDENT. Although a statute should be obtained, equalling promissory-notes to bills of exchange, yet many questions will remain to be determined as to the operation of those notes in time past: it is dangerous to determine that, as to such questions, the law of England must be the rule all our decisions notwithstanding.

On the 25th January, 1771, the Lords sustained the defence.

*Act.* A. Gordon, junior. *Alt.* T. Ferguson. *Reporter,* Coalston.

*Diss.* Monboddo, Coalston. [He was for inquiring into practice.]

1771. *March* 7.—AUCHINLECK. The certificates from merchants are highly improper: they might just as well have certified that a charge of horning could pass on a promissory-note.

COALSTON. The practice of merchants makes law in mercantile matters: had we evidence of a long and general practice, it would go far. From practice, promissory-notes of banking companies are held good though wanting legal solemnities. By practice also, indorsations of promissory-notes have been sustained. Would take trial of practice as to recourse on promissory-notes.

PITFOUR. If this had happened in 1696, there would have been no occasion for the statute: the merchants would have made law. I do not know *who* are the members of this parliament of merchants, or *how* we are to collect their voices. It has been found that, *in re mercatoria,* the solemnities of the Act 1681 are not necessary: the older Judges, Newhall and Dun, scrupled at first to come into this opinion: it may be fit to go further, and to establish recourse by statute on promissory-notes. This the Legislature may do: we cannot.

MONBODDO. Practice may introduce rules in promissory-notes as well as in bills. It is now a general practice to grant promissory-notes instead of bills. The practice of merchants will make law.

KAIMES. No practice is proved. We have only an opinion indecently given

to influence this Court. Bills of exchange were circulated in England, while there was no law for them. At that time they passed among merchants, and yet courts of justice could not regard them.

ELLIOCK. The interlocutor is right. The privileges of bills of exchange are known; they are adopted all over the world. Promissory-notes are not universally received in practice, particularly not in Holland. With us, very lately, they were not so much as considered to be documents of debt. In England the authority is given them by degrees. The first statute to that effect was temporary. The opinion of merchants will not make law. If I give a bank-note out of my hand, and the bank does not pay, will there lie recourse against me?

JUSTICE-CLERK. In a matter of law, I must judge according to my own opinion of law. This decision may affect the interest of many individuals, but I do not see the necessity of promissory-notes. A decision of the Court, checking that practice, would be of public utility. Why allow merchants to grant promissory-notes instead of bills? In England the case is very different, because promissory-notes and bills are upon the same footing. If merchants, for their own conveniency, will grant promissory-notes, they may add *with recourse*, and then they will be bound with their own covenant.

PRESIDENT. If this had been a universal practice, we should have had another sort of opinion.

On the 7th March 1771, "the Lords advocated the cause, sustained the defence, and assoilyied;" adhering to their interlocutor of 25th January 1771.

*Act.* A. Gordon, jun. *Alt.* G. Fergusson.

*Reporter*, Coalston.

*Diss.* Monboddo, Coalston, (who was for inquiring further into practice.)

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1771. *June* 13. DAVID GRAY *against* ROBERT REID.

## JURISDICTION.

**Jurisdiction, Act 20th Geo. II., c. 43. Burgh of Barony of Kilmarnock, If independent of the Baron?**

[*Fac. Coll. V.* 266; *Dict.* 7685.]

MONBODDO. As to the jurisdiction of a burgh, it matters not *who* is the superior, providing the jurisdiction is independent.

KAIMES. I am of the same opinion, and am glad to be so, as it is of great moment that large societies of men have the means of action within the place of their residence.

PRESIDENT. At first I doubted, because of the words of a statute, which I greatly esteem. The words of the statute are strong, but I think they relate