PRESIDENT. The deed was gratuitous, obviously and avowedly calculated to defeat the widow's claim.

HAILES. I add, proceeding upon a false narrative of an obligation in which the husband was not really bound.

MONBODDO. This deed is, in so far, a testamentary deed, that it does not take place till after the death of the granter; at the same time, it is not a testament because irrevocable: but it is a gratuitous deed, and must come off the dead's part. A man cannot be allowed to make deeds of this kind, to the effect of impairing the legal claims either of wife or of children.

KAIMES. I can conceive many deeds not to take place till after death, and having an obligation of warrandice, and yet good against the wife; *this* is one of the few cases of civil right where intention is to be considered: the intention was not so much to honour the brother as to disappoint the wife. The cloven foot appears throughout.

On the 5th December 1771, "The Lords found that the deed can only affect the dead's part."

Act. D. Græme. *Alt.* D. Smyth. *Rep.* Pitfour.

1771. *December* 10. WILLIAM and HENRY KNOX, &c. *against* WILLIAM LAW of Elvingston.

FIARS.

The mode of striking the Sheriff-fiars of the county of Haddington, and a reduction of them as erroneous, and as not in terms of the Act of Sederunt, 24th December 1723, dismissed.

[*Fac. Coll. V.* 349; *Dict.* 4420.]

KAIMES. Without entering into the merits of the cause, I rest my opinion upon the preliminary point, that the pursuers have no title to reduce the fiars, and that they are barred therefrom *personali exceptione*. Messrs Knox, merchants in Dunbar, could not fail of knowing that the sheriff was wont to strike the fiars by a particular rule, and without the interposition of a jury. Their correspondents in Glasgow could not fail of being informed of this: They also knew that the fiars in East Lothian were higher in 1768 than those in Mid-Lothian,—as 13s. 4d. to 11s. 8d. In such circumstances they bargain by the East-Lothian fiars, which they knew were to be struck without a jury, and which, *they had reason to believe*, would be considerably higher than those of Mid-Lothian. It comes out, that, in fact, the difference between the fiars of the two counties was not so great in 1769 as in 1768, and yet the pursuers, contrary to their express obligation, seek to set aside a rule which they knew would be followed at the time of entering into that obligation.

MONBODDO. Although I were convinced that the rule followed by the sheriff was absurd, I should still hold the pursuers bound, for they must have known the rule.

KENNET. Both buyers and sellers knew the rule, and must have contracted according to it.

KAIMES. Here there is an explicit bargain, according to the fiars, and yet the pursuers will not pay according to the fiars.

PRESIDENT. I doubt as to reduction of fiars at all. There is a strong judgment to that effect, 5th August 1760, in an action against the town of Aberdeen. This case is still stronger; for the purchaser here knew how the fiars were to be struck. When the method prescribed by the Act of Sederunt has not been in observance, I do not think that an established method can be set aside.

AUCHINLECK. Fiars were instituted chiefly for ascertaining the king's duty. In process of time, indifferent persons chose to sell and buy according to the fiars: *here* the agreement was for the *highest fiars*. This shows that the pursuers did then understand that there were *higher* and *lower* fiars, though now they argue the contrary.

PITFOUR. When a jury judges, the evidence must perish in part; for their judgment may be influenced by private knowledge. When a single man judges upon evidence openly taken, that evidence remains. We do not gain so much by the jury's knowledge as we lose by its bias, either for the seller or for the buyer.

COALSTON. The pursuers are barred *personali exceptione* from objecting. I think that the method taken by the sheriff is better than that prescribed in the Act of Sederunt; because a jury may act from private knowledge, and then the Court cannot review its judgment; but I would not determine the general question, as that would run contrary to the Act of Sederunt.

PRESIDENT. I have great respect for Acts of Sederunt; but this has not been established by practice: and, if it is thought erroneous, why enforce it.

On the 10th December 1771, "The Lords found the pursuers barred *personali exceptione;* and separately, upon the merits, repelled the reasons of reduction:" (adhering in substance to Lord Auchinleck's interlocutor.)

Act. A. Lockhart. *Alt.* H. Dundas.

As to the personal exception, unanimous. As to second point—

Diss. Kaimes, Coalston, Barjarg, Stonefield, Hailes.—They declined giving judgment on the sheriff's method of striking the fiars.

Absent, Strichen, Alemore, Gardenston.