AUCHINLECK. Mr Sime can only be liable in terms of his own declaration; for there is no other evidence of his having received the money.

PRESIDENT. There seems here to be a marriage-contract, rational in order to bar the claim of communion. As to the second point; a small subject belonging to the wife is sold,—the price is received by the husband,—the wife does not desire to have it re-employed. Covenants ensue after this, and no mention is made of that price. In such circumstances, I shall presume every thing to liberate the husband.

GARDENSTON. The wife is barred by the discharge; but there is more difficulty as to the second point. I think that the executor is entitled to recover the price of the heritable subject: The price belonged to the wife; the moment that the sale was made, she became creditor in it. If so, how can she be divested of it by the act of the husband, without her consent? If there was any acquiescence, she revoked it by her act of separating from her husband. The contract of separation has no respect to this subject.

On the 1st July 1772, the Lords found the postnuptial contract valid and not revoked; but found the wife's executrix not barred from the legal claim for the price of the heritable subject.

Act. R. Blair. *Alt.* Cosmo Gordon.

Reporter, Gardenston.

Diss. as to second point, Auchinleck, Pitfour, Kennet, Hailes, President.

1772. *July* 7. JAMES WILSON *against* ROBERT ARMOUR and JANET SMITH.

PASSIVE TITLE.

Intromission to a trifling extent, and without fraud, found not to infer a Passive Title.

[*Faculty Collection, VI.* 21; *Dictionary,* 9,833.]

KENNET. It is impossible that the defender could be liable *gestione pro hærede,* because he was not heir, and because he intromitted with the writings at the desire of the pursuer. The passive title of intromission is not proved, because the intromission was very trifling.

MONBODDO. A general intromission, or with the *animus* of being heir, is sufficient to constitute the passive title. Such was the Roman law, and such our law in Durie's time. That law has been revived by a late decision in the case of *Milmine.*

KAIMES. In disorderly times men were apt to lay to hands; there was a necessity of strictness. Now, in more civilized times, there is no occasion for such strictness, unless when there is evidence of fraud or of intentional concealment.

GARDENSTON. We ought not to think ourselves wiser than our predecessors: we ought not to change the law. I would wish to know what is vicious intromission if this is not?

COALSTON. According to the opinion of Lord Stair, vicious intromission only takes place where the intromission is universal. It is clear, from the authorities of lawyers, that, to constitute this passive title, something like a general intromission, or appearance of fraud, must be shown.

PRESIDENT. I know not what I would have done had I been a judge a hundred years ago; but I have no doubt now.

On the 19th June, and 7th July, 1772, the Lords assoilyied; adhering to Lord Auchinleck's interlocutor.

Act. J. Boswell. *Alt.* W. Wallace.

[*N.B.*—From page 17 of Mr Boswell's second petition Dr Samuel Johnson *dictates.*]

1772. *July* 21. THOMAS CHRICHTON and ANDREW DOW *against* PETER SYME.

WRIT.

I. Act 1681, c. 5, requiring witnesses, applies to all deeds, whether of importance or not; the Act, relative to such distinction, being 1579, c. 80.

II. A cautionary obligation in the form of a Missive, not holograph of the granter, not mentioning the writer's name and designation, and without instrumentary witnesses, not sustained as a formal deed, or actionable, nor the defect suppliable by the granter acknowledging the verity of his subscription.

III. Found competent in the same action, though grounded singly upon the same deed, and also relevant to refer, to the granter's oath, that he came under a verbal obligation to the like effect.

[*Faculty Collection, VI.* 50; *Dictionary*, 17,047.]

AUCHINLECK. I do not think that the obligation is valid in law.

MONBODDO. Any obligation may be constituted, when the party acknowledges his subscription and his knowledge of the contents. There is a distinction between a deed and an obligation in writing: A deed requires solemnities; to that the statutes apply: if solemnities are not adhibited, the deed is null, and it is not enough to prove the subscription. But no statute requires solemnities in an obligation when sufficiently authenticated.

HAILES. I was the single counsel in the case of *M'Kenzie.* One naturally conceives prejudices in such a situation. I confess that it was long before I could digest that decision; but I hope I have now overcome those prejudices.