

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.

The decision of *M'Kenzie* and *Park* has been frequently repeated. I think it agreeable to the words and spirit of the statutes, and useful in its consequences.

PITFOUR. I do not know that decisions have differed as to this point. I am sure that statutes do not. We cannot repeal statutes. There are but two exceptions, holograph writings and deeds *in re mercatoria*; those exceptions are established in practice. I know no difference between a formal and informal writing, but that the one is valid and the other void. If you miss but a letter in a bond, (servitor for servitors,) the bond is void. Shall we say, that there may be every omission in a missive letter, obliging one to grant a bond?

COALSTON. The deed, as it stands, is not probative: The question is, How far may it be made good by the acknowledgment of the party? Defects in deeds may be supplied by homologation, why not by consent? How can homologation, which is an implied consent, be stronger than direct consent? Since the decision in the case of *M'Kenzie*, many decisions have been pronounced to the same effect; always to my great distress. But, as the Court is now constituted, the prevailing opinion is contrary to mine. I am willing to submit to the majority.

ALEMORE. The obligation is not a written obligation good in law. When one homologates, he acts with his eyes open.

KAIMES. An obligation which is null cannot be supplied by specifying the writer and witnesses. But where is the statute which says, that a man's acknowledgment will not be good, (it is admitted that his oath would be good,) even in a cautionary obligation? If he says, "that is my subscription," what more is there necessary?

PITFOUR. If a man says, "I did promise to become cautioner," it would be nothing, for that still there would be *locus pœnitentiæ*.

PRESIDENT. The statutes are express. We are not to set up loose presumptions against them. Homologation is quite a different thing from acknowledging subscription: it is an implied renewal of the obligation. I was for the decision in the case of *M'Kenzie*, and am pleased to see one judge give up his prejudices against that decision, and another "yield his opinion to that of the majority of the Court."

On the 21st July 1772, "The Lords sustained the defence."

*Act.* Cha. Hay. *Alt.* Alex. Law.

*Reporter,* Justice-Clerk.

*Diss.* Kaimes, Monboddo.