

MONBODDO. Every mandatory must observe his mandate, and execute it *in forma specifica*. By the mandate credit was to be given to both the brothers; and a bill to be taken at a certain term from both. This was not done: hence a loss to the mandator, who, if a bill had been taken, might have got it indorsed to him, and made good his relief. But, be this as it will, the mandator is not bound; for his directions were not obeyed.

ELLIOCK. How could Rattray have obtained payment when there was no bill granted.

JUSTICE-CLERK. A letter of credit is of the nature of a cautionary obligation. We cannot extend cautionary beyond the intention of the party. The law says, and common sense says, that in executing human transactions you must take in *bona fides*, and admit of what is done according to the *spirit* of an obligation, although it may not be according to the *letter*. But *here* the mandate was not executed in equipollent terms.

KENNET. The *finis mandati* ought not to be exceeded; but *here* what was done was tantamount; and the granter of the letter can qualify no loss.

BRAXFIELD. The observing of the words of a mandate is of no consequence as long as its spirit is observed. No loss is qualified here.

GARDENSTON. The mandate has not been duly executed. The doctrine of *tantamount* is dangerous, as introducing arbitrary decisions. If you do not what "I order you, I am not bound." Suppose that Pasley, instead of furnishing sugar, had advanced money to the same extent, or delivered wine or tobacco to the same extent, it might be said, that by such advance or delivery no loss could be qualified; yet the cautioner, in such case, would not have been bound.

PRESIDENT. The mandate must be obeyed. In all mercantile transactions matters ought to be exactly conducted.

On the 13th January 1779, "The Lords sustained the reasons of suspension;" altering Lord Stonefield's interlocutor.

*Act.* R. Corbet. *Alt.* A. Bruce, (dead.)

*Diss.* Kennet, Covington, Stonefield, Braxfield.

1778. November 14, and 1779, January 15. JOHN GRANT *against* ROBERT DONALDSON, &c.

#### ABBAY OF HOLYROODHOUSE.

It is necessary for a Messenger, executing a caption within the precincts of the Abbey, to have the concurrence of the Bailie. In order to have the benefit of the Sanctuary beyond twenty-four hours, the Party's name must be entered in the Abbey books.

[*Fac. Coll. VIII. 98; Dict. 5.*]

KAIMES. Sanctuaries may, in some cases, be of use; but I would confine their privileges within narrow bounds. A person may be within the abbey

without meaning to claim the privilege of sanctuary. Custom has determined *who* they are who are understood to claim the privilege : I would not, without custom, extend it.

BRAXFIELD. The Act 1697, and the strong usage condescended on, show that booking was understood to be necessary. To this purpose also there is an interlocutor, although not a decision ; 1741, *Hamilton of Redhouse*. This shows the opinion of the Court at that time. At any rate, in consequence of the general practice, Donaldson and Messenger were *in bona fide*.

JUSTICE-CLERK. If there were no such regulation, there would be a necessity of making it ; but there is no occasion for that. We have immemorial usage.

On the 14th November 1778, "The Lords dismissed the complaint."

*Act. W. Honeyman. Alt. A. Elphinston.*

PRESIDENT. If a messenger can enter the sanctuary, and execute diligence at his own hand, without the concurrence of the bailie, there may frequent and dangerous confusions arise. If a messenger once apprehends a person, no after-booking can relieve him.

JUSTICE-CLERK. When the bailie of the abbey renews the Act 1733, which has been casually lost, he will think it his duty to appoint such concurrence.

MONBODDO. I do not think that the concurrence of the bailie was necessary.

On the 15th January 1779, "The Lords found that the concurrence of the bailie of the abbey was necessary ; but, in respect of the practice to the contrary, found that the defenders acted *bona fide* ; and therefore dismissed the complaint, and found expenses due to neither party ;" varying their interlocutor of ———.

*Act. W. Honeyman. Alt. A. Elphinston.*

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1779. January 19. DUNCAN CLARK *against* DAVID ROSS.

WRIT.

A letter, not holograph, found obligatory, the subscription being acknowledged.

BRAXFIELD. There was no necessity of writing here for constituting the obligation ; it is only used *in modum probationis*.

HAILES. I am sorry that Mr Ross should suffer by an act of good nature and friendship ; but as, on this occasion, he performed the part of a coal merchant, he must be tried by merchant law. I suppose that, by the law of England, and of every other commercial country, an obligation like the one in controversy is good.

JUSTICE-CLERK. Of the same opinion, and for the same reason.

MONBODDO. Mr Ross has engaged in a mercantile transaction ; and he must be bound by mercantile law. This does not fall under the statute 1681 ;