

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.

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 ;

and if it did, Mr Ross has acknowledged his subscription, which would, at any rate, take the case out of the statute. [This part of his opinion was reprobated in general by the Court, as inconsistent with the principles of the noted decision, *M'Kenzie* against *Park*.]

PRESIDENT. Goodlet's case, in 1739, is just like this. A thousand letters are written every day in mercantile transactions, of a form similar to that of the letter in controversy : and there is no doubt of their being obligatory.

On the 19th January 1779, "The Lords found that the letter was obligatory on Mr Ross ;" adhering to Lord Covington's interlocutor.

Act. W. Stewart. *Alt.* W. Law.

1779. January 19. JAMES and ANDREW MORRISON *against* JAMES STEWART and OTHERS.

INSURANCE.

Case of a concealment on the part of the insured.

[*Fac. Coll. VIII.* 102 ; *Dict.* 7080.]

HAILES. There may be a difference in considering the two policies : the one does not conceal the state of the ship ; the other, from the very same intelligence, does.

BRAXFIELD. There is a difference ; and the one case is not so clear as the other. But we ought to consider that the insured may easily practise frauds against the insurer which the insurer cannot against the insured ; therefore, the real state of the ship ought always to be intimated, and every material circumstance capable of varying the risk. Here the insured, in both policies, intentionally concealed material circumstances.

JUSTICE-CLERK. The one policy *concealed*, and the other *misrepresented* circumstances. *Both* intended to deceive : the ship was a *missing* ship, before any insurance was made.

COVINGTON. It matters not whether the concealment was unintentional or purposely made. But *here* the fraud is gross.

PRESIDENT. There was much concealment and strong circumstances of fraud in this case.

On the 19th January 1779, "The Lords assoilyied the insurers ;" adhering to Lord Gardenston's interlocutor.

Act. A. Crosbie. *Alt.* Ilay Campbell.