House of Lords, the verdict would have been held good as unimpeached. It was competent to try the question of the invention before a jury, for the patent is *periculo petentis*—it is meant to hurt nobody, and in law it hurts nobody. I am hurt when I see a foreigner forced into a litigation in this Court.

The Lords adhered to Lord Kennet's interlocutor, and found expenses due. No vote as to the principal point. As to expenses,

Diss. Strichen, Pitfour, Coalston. *Non liquet*,—Kaimes.

Act. J. Dalrymple. *Alt.* A. Lockhart.

1767. *July* 23. ROBERT BLACKLOCK *against* The TUTORS of ALEXANDER GOLDIE.

SALE.

Where the buyer's faith is followed, the Sale is good, although the price has not been paid.

[*Faculty Collection, IV.* p. 290 ; *Dictionary,* 14,157.]

COALSTON. Here is a strong plea in equity. Had there been a mutual contract, there would have been no difficulty. But this is not precisely a mutual contract. On one side, there is a disposition: on the other, a bond to pay the price. The question is not between a seller and the singular successor of the purchaser, but between a seller and the original purchaser.

The same rule ought to hold in this case as in mutual contracts. The question is of *causa data causa non secuta.* The Court has found that, though a wife assigned a bond of provision to her husband, yet that it was not effectual till the wife was secured in the provisions which were the cause of that assignation.

MONBODDO. If it be true that, in contracts of sale, whenever the price is not paid, I can take back the lands, great innovations in law would arise: the seller must make *this* a part of the bargain, by the *lex commissoria*: if he does not, then *fides habita est de pretio,* and he has no recourse. If Blacklock has been overreached, he may reduce the sale; but till then it remains good.

JUSTICE-CLERK. If this covenant had rested upon a minute of sale, there could have been no doubt as to the declaratory conclusions of the libel: the only question is as to the *species facti.* I am moved with Lord Coalston's argument, but I rest my opinion upon this:—The case here is between an agent and his client; Goldie, a man of knowledge, trusted by an ignorant rustic. Goldie conceived an early inclination to have this man's bargain off his hands, and did, by his letter, now printed, convey an idea that the bargain was a bad one: he was intrusted with a letter from Blacklock to the original seller: he suppresses it, which desired either to have back the money or to get a clear right to the lands: he strikes a bargain with Blacklock.

The bargain ought to have been executed by a minute of sale, and Goldie

knew that it ought to have been so executed: But the contrary was done; Goldie took a right to the land, and left Blacklock nothing but a personal ground of action. The same construction, in these circumstances, ought to be put upon the transaction, as if Goldie had done what he ought to have done.

ALEMORE. If your Lordships can preserve the law, and at the same time give back the land to Blacklock, I have no objection: the last opinion, indeed, preserves the law, but then it goes upon fraud, which is not proved. There is no hypothec upon the land for the price. How long is this supposed right in the seller to last? If for one year, why not for twenty? The contract of sale is completed as soon as the price is paid, or, which is the same thing, as soon as *fides habita est de pretio*. If there is such a hypothec, then it must be good against third parties as well as against the purchaser. If bonds for the price of lands are good against the lands, then all other creditors contracting personally with the purchaser, will be cut out. Equity is nothing, if by *equity* we mean relief against a hard case: equity can only prevail upon certain principles, as certain as law.

GARDENSTON. In this case the seller is no more than a creditor. Where is the equity here, more than in the case of any other creditor, who followed the faith of Goldie, and lent his money upon Goldie's personal security? I am ready to listen to any plea of fraud. If this demand were to be sustained as to heritage, why not also as to moveables? This would overturn many a principle of law.

PITFOUR. Here no fraud is qualified; but there is a conclusion, from the nature of the contract, that the contract should be implemented. This is not a rule of equity, but of plain common sense. A purchaser cannot say, I will not tell you whether I will pay the price or not. It is true that no irritancy is to be implied,—it must be expressed; but it is still competent to say to the purchaser, You must determine whether you will implement the bargain or not. This is laid down in the decisions quoted for the pursuer, *Maitland of Pitrichie* against *The Laird of Gight*. Were there a minute of sale, there could be no doubt.—Here there is a disposition; but, as there is no infeftment, this is equivalent to a disposition contained in the minute itself, and it is no more. The alternative action of declarator is competent while third parties have no interest. There is no hypothec here, for that is a right which affects the subjects in whatever hands they may be found.

ELLIOCK. This question, in itself, may be of little moment, but it is of great moment whether a simple obligation to pay the price of lands sold, shall be a real burden upon the lands, as much as if payment of the price had been made the condition of the sale.

MONBODDO. The decision of *Pitrichie* related to a mutual contract. Even in a minute of sale the one party cannot be obliged, by means of a declarator, either to give up the sale or to pay the price.

ALEMORE. Here is no hanging up or uncertainty left, for the seller has the purchaser's bond, and he may do diligence upon it. We must not confound a mutual contract with the present case.

KAIMES. Here there is no mutual contract, but a disposition for a price paid; the bond for the price is a common debt,—there are no *termini habiles*

for a mutual contract. If a mutual contract, as alleged, then even Goldie's infeftment would be ineffectual.

AUCHINLECK. The security of a seller in a minute of sale is, that the obligation to pay is the counterpart of the obligation to sell, and that the one is not effectual without the other. When a disposition absolute is granted, and a separate obligation for the price, the buyer has nothing to ask from the seller: the seller has nothing to ask but the price: there is no longer any connexion between the price and the lands. It may be right in a seller to take the precaution of making payment of the price a condition of the sale; but, if he does not, how can we do it for him? Could we bring this case under fraud on the part of Goldie, it would be of less moment.

JUSTICE-CLERK. As a judge, I am not bound to give an abstract opinion; I must determine according to the circumstances of the parties.

COALSTON. Had infeftment been taken, it would have been impossible to set aside the sale. But here there are only personal rights: it is still competent for the seller to hold the lands till the price is paid: this was determined in *Selkirk's* case, Dec. 1721.

The Lords assoilyied, and altered Lord Barjarg's interlocutor.

Act. R. M'Queen. *Alt.* A. Crosbie.

Diss. Justice-Clerk, Barjarg, Coalston, Pitfour, Hailes, (the last upon the circumstances of the case as stated by Lord Justice-Clerk.)

1767. *July* 29. JAMES MACHARG, *against* MAJOR COLIN CAMPBELL.

FOREIGN.

A judgment of a court-martial abroad, finding a Scotsman guilty of murder, is evidence for awarding an assythment in Scotland.

[*Fac. Coll. IV.* p. 282; Kaimes's *Sel. Dec.* p. 326; *Dict.* 12,541.]

AUCHINLECK. The defender was guilty of assassination, but there were not numbers enough in the court-martial to condemn him to die. If Major Campbell had been brought before the Court of Justiciary to be tried again for the murder, he would have thought it hard, had the defence of *res hactenus judicata* been repelled. It is ascertained that Major Campbell was guilty of the crime charged: the question is, how far is assythment due? Here it is said, that a crime committed in one country cannot be tried in another.—Will any man pretend, that, if a person commit treason in a foreign country, he may plead, when he is tried at home, that the crime cannot be punished as having been committed abroad? If the defender had been brought before the Justiciary Court, he might have been tried, convicted, and executed.—He has been convicted, but not executed: the question is as to assythment being due or not due. Had the defender been punished with death, there would have