HAILES. Of the same opinion—but thinks no expenses due—Mr Dingwall, from want of memory, committed many mistakes in his averments before the Ordinary, and thereby threw a sort of obscurity over the cause.

Adhere to Lord Kennet's interlocutor, but found no expenses due.

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

1767. *July 22.* JOHN LAYCOCK *against* THOMAS CLARK.

FOREIGN.

Execution ordered for costs awarded by a foreign decree in terms of a foreign statute.

[*Faculty Collection, IV.* 113; *Dictionary,* 4554.]

HAILES. The opinions of some of the foreign lawyers, quoted in the answers, carry the *comitas* to an extravagant length—but the defender seems to abridge the *comitas* too much. A foreign decree will be held just unless its injustice be shown. The defender is for introducing a sort of *anti-comitas,* and holds that the foreign decree must be held unjust until proof be brought of its justice; and what proof can the pursuer bring? Certainly none but the evidences who were examined at the trial in England. Now the defender, who requires this, has also asserted that the English witnesses cannot be compelled to appear, and that the Scotch witness, M'Bean, is not to be believed—so that his argument not only requires that the pursuer should instruct the justice of the decree, but also tends to show that he has not the means for instructing its justice. Further, the English court was a court chosen by the defender himself—and he must stand to its sentence. Had Laycock been cast, Clark would have received damages. When Clark is cast, it is reasonable that Laycock should receive expenses;—otherwise there would be an inequality and a hardship.

MONBODDO. Clark was the provoker, and chose the *forum.* A contract entered into in a foreign country is effectual in this country. Here, by Clark being the pursuer, there is a tacit contract. The note subjoined to the decision by President Dalrymple is good law.

PITFOUR. If a man is pursued in a foreign country, and a decree is obtained, the question is, how far will this avail in another country? The general solution is, that execution will go upon evidence of the justice of the cause. This is the case of a defender acquitted; and *exceptio rei judicatæ* is certainly binding. But the difficulty is as to the expenses given,—how far are they actionable in another country? I think there is no reasonable ground to doubt that they are. Clark chose the court. Can he object to its sentence? He brought his action before an English court—he knew that it was to be determined by the verdict of a jury, and he knew that that verdict was a sort of blind judgment—because there is no record of the proceedings in such cases. The au-

thority of the statute of Henry VIII. awarding costs where the party is nonsuited, is at least as good as the authority of the judge awarding costs *ex proprio motu*: so Clark cannot complain that the court was obliged to award costs. The statute is a wise one. Even in this country expenses are commonly given on an unsuccessful action for damages; but I doubt as to expenses in this court, on account of the judgment pronounced by this court in the case of *Brunton*.

GARDENSTON. This case clear upon the principle *quodquisque juris*.

AUCHINLECK. For adhering and for expenses. If this case were like that of Brunton, I should be clear against expenses; for the decree of the King's Bench was most iniquitous in that case. Here the decreet is just.

COALSTON. For adhering, 1*st*, Because no iniquity is shown. 2*dly*, Because Clark choose his *forum*. 3*d*, Because we are to presume the decree just—as the defender did not follow the method allowed by the law of England—that of bringing the cause under review by a second trial: But I am clear against expenses. The defender, Clark, has erred in law, by supposing that Laycock was bound to show the equity of the decree. We have no evidence whether the decree was just or not. As to the case of *Brunton*, there was a special verdict, from which the decree appeared unjust. In all the former cases of this kind, either the justice or injustice of the decree appeared *ex facie* of the decree—but here no such justice or injustice appears.

JUSTICE-CLERK. Here, we cannot conjecture whether the decreet is just or unjust: but our *ratio decidendi* is obvious—a suitor must subject himself to the law of the country where he voluntarily brings his action. In every action upon the case in England, when the pursuer is nonsuited, costs are awarded. The pursuer must have known this law, and he was bound, by his suit, to yield obedience to it. We see that the judges of the King's Bench have done nothing but what the law obliged them to do.

KAIMES. The rule of making a man liable where he chose his forum, was a good one while judges continued in the condition of arbiters—but not so now: there is neither contract, nor *quasi* contract, when a man institutes his action: the maxim on which this cause must be determined, is a more simple one. From the time of *Mrs Prescot's* case it is established in this country that, *ex comitate*, there is a presumption in favour of the foreign decree. The case of *Brunton* was different—*there* the decree appeared unjust *ex facie* of the verdict. At the same time I incline for no expenses.

AUCHINLECK. Here the decree just, as upon an Act of Parliament.

ALEMORE. The *comitas* goes so far as to presume justice. He who seeks to get free of the judgment, must prove injustice. The presumption and the verdict of the jury, which is the legal evidence, are in favour of Laycock. The fact is established by the verdict—the consequence is established by an Act of Parliament. Clark has said nothing against the decree, but tells a story—we can get a party to tell a story in every case.

PRESIDENT. I always thought the decree of the King's Bench in *Brunton's* case was a monstrous bad one, though I was employed as a lawyer to support it. A foreign decree must be held just until some proof is offered of its injustice. I see nothing against this decree. Suppose the case had gone to the

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