1771. *February* 20. MRS JEAN KERR *against* The EARL of HOME.

FOREIGN.

Triennial Prescription applies to Debts contracted in England.

[*Faculty Collection*, V. 234; *Dictionary*, 4522.]

GARDENSTON. The *locus contractus* limits the constitution and endurance of a debt, if the parties continue to live in the *locus contractus*: the case is different when the debtor transfers his *forum*. A promissory-note, once extinguished in England, cannot be revived by an action in Scotland. The case of *Innes* depended on this, that the debtor came into this country, and hence the creditor was obliged *sequi forum rei*.

PRESIDENT. If you sue *here*, the Court must attend to its own law; but, if a decree is once taken in England, there the Court will interpose *ex comitate*, and make it effectual in Scotland.

PITFOUR. The debt is contracted in England, but we must follow our own law.

KAIMES. The statute of limitations affords an exception against payment. If, afterwards, a man pursues *here*, I will presume payment, because he did not pursue sooner. If the debtor came to Scotland, and lived three years there, I will hold the triennial prescription good, because it was the business of the creditor to follow him.

AUCHINLECK. All questions concerning foreign law are difficult. When a contract is entered into in a foreign country, it is presumed to have been agreeable to the laws of that country, yet it is binding all over the world. When a man contracts a personal debt in England, which is not good against the heir, the creditor may make the best of it wherever he can find the debtor's estate, and thus the heritable estate, situated in Scotland, may be affected. When a creditor pursues in another country, he must subsume that there is a subsisting debt, by the law of the country. We cannot make the Earl of Home liable, as heir, by our law, and yet deprive him of a defence by our law. The pursuer does not instruct, *scripto*, that a rent is due. A tack is proved *scripto*, but nothing more.

MONBODDO. This is a question of the law of nations. The constitution and defeasance of the obligation must be tried by that law. If the obligation is valid by the law of England, the pursuer must have the benefit of the law of England. *It is* subsisting by the law of England. In the case of *Randall* against *Innes*, the principle was, that the creditor had neglected to pursue a debtor who had resided in Scotland more than three years. As to Lord Auchinleck's objection with respect to the heir being bound, *that* relates merely to the *execution* of the contract, and it must be decided according to the place where execution is sued for.

PRESIDENT. The present Lord Home has always resided in Scotland,—*he* is the defender,—*this* assimilates the present case to that of Innes. The action against the Dowager Lady Home can never interrupt the prescription.

JUSTICE-CLERK. I cannot distinguish this case from the case of *Innes*. It is the same thing whether the pursuer, contracting the debt, or his heir, is pursued. *Here* the defender has always resided in Scotland: it was the business of the creditor to look after the debtor. Both the late Earl of Home and the present, had a *forum* for prosecution in this country: Why make the heir liable *here*, though not liable in England, and yet not allow him a defence by the law *here?* Both Sande and Huber are clear as to this question. Both are great authorities: the last, in particular, gives his judgment with much precision.

On the 20th February 1771, the Lords sustained the defence, "and assoilyied."

Act. R. M'Queen. *Alt.* D. Rae.

Reporter, Justice-Clerk.

Diss. Monboddo.

1771. *January* 29. PHILIP MILLER *against* FRANCIS ANGELO TREMAMONDO.

PROOF.

A promise, though alleged to be made *intuitu matrimonii*, not Proveable by Witnesses.

[*Faculty Collection, V.* 211; *Dictionary*, 12,395.]

GARDENSTON. No decision says that the articles of a marriage-contract may be proved by witnesses.

PITFOUR. I do not approve of a proof before answer in this case. It is the relevancy of facts, not the competency of the mean proof, that is left undetermined by a proof before answer. Ever since the Court of Session was established, and juries were disused in civil cases, no promise is probable by witnesses, unless it is part of a common contract. A marriage-contract is no common contract, nor is it probable by witnesses.

AUCHINLECK. It is true that a marriage-contract is not one of the common contracts, such as that of buying and selling, (though that too is often at the bottom.) Yet marriage itself is probable, by witnesses, showing antecedent communings and the like. Why not prove communings as to prestations concerning marriage?

KENNET. It is dangerous to receive witnesses *here;* for, by the same rule, witnesses must be received in every case where marriage is entered into without a contract.

KAIMES. How is it in our power to make a distinction between this case