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

and every other case where there is a marriage-contract not reduced into writing.

PRESIDENT. Provisions and jointures are not probable by witnesses; but it is a different case where moveables are promised, such as the *jocalia* in the Roman law. Among country people, a cow, a chest, a bedding of clothes, are promised with the bride. Such promises are never committed to writing; would they not be probable by witnesses?

BARJARG. The demand was not made by Miller, the pursuer, *ex incontinenti*, but *ex intervallo*. [This is a mistake in fact.]

PITFOUR. Here is an alleged obligation to furnish a house, and give a share of moveables. Such obligations are frequent in formal marriage-contracts.

MONBODDO. I think that contracts may be proved by witnesses. I do not know that marriage-contracts are an exception. *Here* were *pacta dotalia* concerning moveables of no great value: There are no provisions or jointure sought to be proved.

On the 29th January 1771, "the Lords found a proof not competent by witnesses;" altering Lord Monboddo's interlocutor. 26th February 1771, adhere.

Act. H. Dundas. *Alt.* H. Erskine.

Diss. as to snuff-box, rings, and laces,—Auchinleck, Barjarg, Hailes, Monboddo, President.

1771. *February* 26. COALSTON. The argument for the defender proves too much. That a proof by witnesses is competent, is the general rule; but there are cases excepted. This case of *pactum dotale* is not excepted. The Court seems to have adopted a new exception. The important contract of matrimony itself may be proved by witnesses: why not its accessories also?

PITFOUR. It would be dangerous to alter this interlocutor. I am surprised to see the law of the Romans quoted: they had their solemn stipulations, which they held as sufficient proof. With us a *pactum dotale* is commonly committed to writing. In bargains about moveables witnesses are admitted; because, *there*, there is an obligation *ultra citraq. an contractus nominatus;* but here there is a mere gratuitous promise. If you allow a proof to the extent of L.50, why not to the extent of L.5000. This Court has been always narrowing a proof by witnesses: hence perjury is prevented more with us than in some other countries.

MONBODDO. All bargains concerning moveables may be proved by witnesses. Heritable subjects, by reason of their value, cannot. Even in heritable subjects witnesses may sometimes be admitted,—as in a tack for a year, and in a sale of lands, *ubi res non est integra:* this resembles the present question: *Res non est integra*: marriage has followed. L.50 in presents with a wife is no great matter. Many people have got fifty times as much with a wife and made a bad bargain. If, here, any stipulation for a jointure, &c. were alleged, the case might be different, as respecting matters having *tractum futuri temporis.* Among country people bargains of this nature are usual.

KAIMES. Adhering can do no harm: altering may. Writing is now so common that access may be had to it in every place, unless upon the top of some Highland mountain. It is remarkable that our law has, by degrees, required writing where it did not formerly; and this has been required by the Supreme Courts, while the inferior courts continued to admit of witnesses. Witnesses are allowed in criminal cases, because writing cannot be had.

JUSTICE-CLERK. Miller has not observed the law of the land. If he suffers, no help for it. This is not an exception from the general rule. Mere promises are not probable by witnesses though bargains are. The marriage here was concluded by consent of parties before any mention was made of the promises libelled. By the same arguments which the pursuer uses, why may not a claim be reared up, after many years, by the wife, for one half or for the whole of the moveables.

BARJARG. It is only by a proof that we can know whether the promises were connected with the marriage or not.

HAILES. If you put a *close bed* instead of a *snuff-box*, a pair of *blankets* instead of *laces*, you will find that here is a sort of covenant or promise universally prevalent among country people. We do not hear of actions for the implement of such promises, because they are publicly made; and the parties concerned imagine that they may be fixed down by witnesses. But, if you once find that they are not probable by witnesses, the parents who make such promises will be too apt to draw back. If perjury is excluded one way, a door will be opened for it the other way; and the party will be as apt to swear falsely as witnesses are.

COALSTON. With people of condition the practice is universal to reduce marriage-contracts into writing. Not so among the lower sort. I would limit the proof by witnesses to the *ipsa corpora* of moveables. Anciently such *pactum dotale* might have been proved by witnesses. There is no decision to the contrary. Why extend the law when we know not how deep it may strike?

PITFOUR. I do not imagine that a *pactum dotale* was ever probable by *witnesses* with us, unless when we had no *writing*. "The longest liver bruiks all," is a common rule among country people; and yet no one ever heard that any Court would allow this to be proved by witnesses.

PRESIDENT. I do not see the dangers apprehended by allowing a proof by witnesses. Evidence by witnesses is often admitted *now*, which would not have been admitted *formerly*; for relevancy is left undetermined. Those parts of a contract which are generally committed to writing, and relate to a future period, ought not to be proved by witnesses. *Here* there is no such thing. An alleged promise of a snuff-box, or of a ring,—*that* will not go to solemn prestations. The promises are not gratuitous but *intuitu matrimonii*. In Edinburgh, and on this occasion, there was *copia peritorum*: but the same rule must take place in the country. Must a writer be sent for to authenticate every promise of half a dozen Highland cows, or a score of sheep? The cost would exceed the subject. Forty witnesses are present at the promise, and yet all this must go for nothing. And the father will be allowed to say, "I know nothing of the matter. My promise, which you allege, is not probable by witnesses."

KAIMES. If you can confine the question to the present fact, good; but, if you open a door, how can you shut it?

PRESIDENT. I do confine the question to the *ipsa corpora* of moveables. I do not extend it to matters having *tractum futuri temporis.*

ELLIOCK. We do not hear of any actions for implementing such prestations among country people. This shows the general opinion that such prestations are not probable by witnesses.

AUCHINLECK. This rather shows that there is no such opinion; and that no man disputes the payment of an obligation where witnesses are ready to check him.

On the 26th February 1771, "The Lords found the promises libelled not probable by witnesses;" adhering to their former interlocutor.

Act. J. Boswell, H. Dundas. *Alt.* H. Erskine.

Diss. Coalston, Gardenston, Auchinleck, Barjarg, Hailes, Monboddo, President.

Miller did not reclaim. He told his counsel that he would not give the Court any farther trouble; and, at the same time, declared that he would not put his father-in-law upon oath, lest he should perjure himself.

1771. *February* 26. CHARLES INGLIS *against* SIR ROBERT ANSTRUTHER, &c.

WARRANDICE.

Incurred only by Eviction.

[*Fac. Coll., V.* 243; *Dictionary,* 16,633.]

PRESIDENT. The Extract of the Decree Absolvitor is a valuable book in Mr Inglis's library. I should think that he might have been satisfied to pay the expense of it. His argument goes upon this,—that the decision of this Court was scarcely just; and that the House of Lords affirmed it from the deference due to this Court in matters respecting its own officers. This is a strange plea for Mr Inglis to make, and is not very decent with respect to either Court.

COALSTON. If Waddel had prevailed, damages would have been due; but he did not prevail, and no eviction has happened. The question,—how far expenses due? There was a conditional obligation in case of eviction. But, as there was no eviction, there was nothing exigible. *L.* 18, *Cod. de Evict.* The effect of an instrument, notifying distress, is only to exclude the person warranting from the objection of collusion.

KAIMES. Unless there is eviction, there is no warrandice.

MONBODDO. An obligation to warrant a subject does not imply an obligation to pay every expense incurred in defending the subject.