1767. *January* 23. ALEXANDER MUDIE, *against* JOHN, &c. AUCHTERLONYS.

PROOF.

A Mandatar being dead, evidence by witnesses was admitted to prove, from his acknowledgment, and from other circumstances, that he had authorised, verbally, the purchase of an heritable subject.

[*Faculty Collection, IV.* p. 60; *Dictionary*, 12,403.]

PITFOUR. It is a rule in law, that mandate cannot be proved by witnesses; but that rule is not to be restricted, as not to allow a proof of circumstances by witnesses. The Act 1696 does not allow trusts to be proved except *scripto vel juramento*; for trusts may be the means of carrying away a whole estate, whereas mandate can only infer damage. This case is not within the act 1696, but within the prohibitive rule of law, which does not exclude the proof of circumstances. I doubt, however, as to finding the defenders liable in expenses; upon the rule of the civil law, *actio rei persecutoria ex delicto non transit in hæredes.*

KAIMES. This is in consequence of the heir being universally liable, but different when the heir is *lucratus;* he must make up the loss occasioned by his father's denial of the trust, in so far as he gains by the succession. The case of *Orbiston* was different; for, there, no action was brought against the father in his own lifetime.

The Lords sustained process,—found the sale binding,—and the heirs of Auchterlony liable for the price, with interest from the time of the sale, and also found expenses due.

1767. *February* 26. JANET GIB and her Husband, *against* ALEXANDER LIVINGSTON.

PROOF.

Parole evidence is competent to prove, that an heritable bond, bearing to be onerous, and adjudged by an onerous creditor, was granted gratuitously, and contrary to the Act 1621.

[*Faculty Collection, IV.* p. 78; *Dictionary*, 909.]

COALSTON. This pursuer is in the same situation with every other onerous creditor. I doubt how far the bond could be disproved by witnesses, but, at any rate, inhabile witnesses ought not to be received.

AUCHINLECK. It is not sufficient to say, as a reason for examining inhabile witnesses, that there was a difficulty in finding habile witnesses.

PITFOUR. Ought not the unexceptionable witnesses to be first examined, and then we may see whether there is a *semiplena probatio*, and whether the proof may not be completed by witnesses more inhabile.

PRESIDENT. Of Pitfour's opinion.

KAIMES. The nature of this process is as to an alleged fraud; and yet it is said, in the condescendence, that Gib, the author of the fraud, signed the deed reluctantly: When such is the supposed *species facti*, we ought to be careful how we admit inhabile witnesses.

The Lords refused, *hoc statu*, to admit the aunts and uncles as witnesses.

Act. W. Nairne. *Alt.* D. Rae. *Reporter*, Barjarg.

1767. *February* 27. MARGARET, Countess-Dowager of Caithness, *against* The EARL of FIFE and SIR JOHN SINCLAIR.

ALIMENT.

The widow of an Earl is entitled to Aliment till the term of payment of her jointure, to mournings, and to a sum of money in lieu of a jointure-house, though she had received a separate aliment in her husband's lifetime, which reached to that term, and though a jointure-house on the estate was offered her.

[*Faculty Collection, IV.* p. 101; *Dictionary*, 431.]

BARJARG. Executor is liable for the interim aliment, and for mourning. The heir is liable for the house.

PRESIDENT. Quoted the case of *Gordon* in 1763, where the conventional aliment was found not to be the rule, but L.8 was raised to L.15.

COALSTON. As to the interim aliment, we are not tied down to follow a proportion according to the conventional provisions during the marriage, or afterwards. The aliment, during the life of the husband, is not the rule, because an aliment was at that period also due to the husband. At the same time, the claims made by Lady Caithness are too high. As to the mournings, the burden of them lies upon the executor, as was established in the case of Tarsappie. In doubtful cases, I am not for departing from decisions. As there is no jointure-house upon the estate, I doubt whether the burden of the house ought to fall ultimately upon the heir.

PITFOUR. The expense of mourning and aliment, to the term, lie upon the executor. A reasonable time must be given for settling the extent of the moveables of the deceased,—the next term is allowed for that,—meantime, the family of the deceased must be kept up. When a lady chances to live separately from her husband, the case is a little different; but still the principle of law is the same. The benefit she got from the aliment during her husband's