1766. *June* 13. ALEXANDER MUDIE *against* JOHN OUCHTERLONY.

No 212.
One person having purchased, at a public sale, a house for another by verbal order; a proof was allowed by witnesses of facts tending to show that the order had been given.

PATRICK SPINK, proprietor of some tenements in the burgh of Aberbrothock, having settled in Jamaica, granted a factory to John Wallace, merchant in Aberbrothock, with special powers to him to sell and dispose of the subjects belonging to Spink in said burgh.

Mr Wallace exposed the subjects to sale in different lots by way of public roup; and Mr Ouchterlony having given Alexander Mudie a verbal order or mandate to purchase one of these lots, Mudie accordingly purchased it for behoof of Ouchterlony.

These subjects were sold in April 1762; but, owing to the distance of Spink's residence, and other accidents, no proper disposition or conveyance was obtained from him to the purchasers before January 1764.

In this interval, Ouchterlony repented of the bargain, and refused to accept of the conveyance to the subject, or to pay the price.

Wallace, the exposer, brought an action before the Sheriff against both Mudie and Ouchterlony. Mudie having no defences, allowed decreet to go against him. Ouchterlony appeared by a procurator, and *pleaded*, 'That he was no party in the roup, nor offered at the same.' And, as Wallace had got decreet against Mudie, he appears to have insisted no farther in his action against Ouchterlony.

Mudie afterwards brought a process in his own name against Ouchterlony before the Sheriff, setting forth, that he, Mudie, had been found liable as purchaser, and concluding, that Ouchterlony should be decerned to relieve him of the price. Ouchterlony happening to die soon after this process was brought, Mudie brought another process against Ouchterlony's Representatives

In this action, Ouchterlony's Representatives *pleaded*, That the mandate, or commission, alleged to have been given by their father to Mudie, was only probable *scripto vel juramento* of the mandant, and that a proof by witnesses could not be allowed. The Sheriff found a proof by witnesses not competent, and asoilzied. Mudie advocated the cause, and gave in a condescendence of facts, which he offered to prove, importing, that Ouchterlony had, after the roup, acknowledged the purchase to be made for him; that he had intromitted with the rents, that he had caused repair the tenements purchased, and that he had set them to tenants posterior to the roup.

Ouchterlony's Representatives did not explicitly deny these facts, but contended they could not be admitted to proof. THE LORD ORDINARY refused to allow a proof by witnesses, and Mudie reclaimed to the Court.

Pleaded for Mudie: The statute 1696 does not apply to this case, as he, Mudie, not Ouchterlony, was the trustee in this matter; and, though there might be a doubt, whether Ouchterlony could have proved this trust against Mudie, otherwise than by writ or reference to oath, it will not follow that

No 212. Mudie is not at liberty, by every competent mean of proof, to establish the mandate he received from Ouchterlony, to make the purchase for his behoof; and so was determined in the cases Tweedie *contra* Loch, Skene *contra* Balfour, Ramsay and Rigg *contra* Maxwell, all lately under the consideration of the Court, (See Appendix). And theprinciples of the civil law, under the title *De Mandato*, are perfectly agreeable to these decisions.

Answered for Ouchterlony's Representatives: Mandates or commissions are commonly given in writing: This practice proceeds from the general sense of the law: Mandates are only probable by writ or oath; and it is consistent with reason they should be so, as the terms of a verbal commission, like a verbal promise, may easily be mistaken by witnesses, and proof of mandates has been often limited to writ or oath, long prior to the act 1696, particularly in these cases observed by Durie, 13th Feb. 1638, ——— *contra* ———, No 203. p. 12397.; 28th Nov. 1634. Brown *contra* Hamilton, No 204. p. 12398.; and 15th June 1688, Lague *contra* Vauss, No 212. p. 12402.: That, whether Mudie or Ouchterlony is to be considered as the trustee, makes no distinction in the present case, as the intention of the legislature, by act 25th 1696, could not be to give a benefit to the trustee, which it denied to the truster; and, if writ or oath only could prove the trust against the one, no other mean of proof can be competent against the other.

'The Lords remitted to the Lord Ordinary to allow a proof.'

For Mudie, *Lockhart*. For Ouchterlony, *D. Rae*. Clerk, ———

A. E. *Fol. Dic. v.* 4. *p.* 160, *Fac. Col.* 36. *p.* 60.

1766. *June* 27.

Dr Robert Herriot *against* Alexander Farquharson, Trustee for Adam and Thomas Fairholme's Creditors.

No 213. Accession to a trust-deed was found to be sufficiently proved by letters from the creditors authorising their agent to concur with the acceding creditors, joined to the agent's attendance at their meeting, and concurring in their measures.

Act. *Ilay Campbell*. Alt. *Macqueen*.

G. F. *Fol. Dic. v.* 4. *p.* 160. *Fac. Col. No* 39. *p.* 267.

1791. *May* 7. Trustees of Croll *against* Robertson.

No 214. Accession to a trust was found sufficiently proved, by the creditor having attended a roup of the bankrupt's effects, called by the trustees, bought several