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.