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

life, is not to be reckoned. *De minimis non curat prætor.* The case of Boswell is the straitest that can be. The aliment was L.200, and the interest of her own money supposed L.100. I propose that she should have L.200 for the half year. I would give as high a sum for mournings as was ever given. As to the jointure-house, it has as much *tractum futuri temporis* as lands or bonds heritable by destination. Besides, the executry must be summed up at the term after the defunct's death, which is incompatible with a *tractus futuri temporis.* The case of an obligation to pay a certain sum, is different from an obligation to pay an annual sum; the first is pure and clear, the second is casual and of unknown extent.

The Lords found the executor liable in the aliment to the term, and the mournings; the heir liable in an annual sum in lieu of a jointure-house. They afterwards adhered to the Lord Justice-Clerk's interlocutor, modifying L.300 for mourning, and L.50 *per annum* for a jointure-house; and of consent modified L.200 for aliment to the term.

Act. J. Boswel. *Alt.* D. Rae, R. M'Queen. *Reporter,* Justice-Clerk.

1767. *March 5.* WILLIAM ELLIOT and OTHERS, *against* GEORGE MALCOLM.

ANNUALRENT.

If due on sums arrested.

[*Faculty Collection, IV.* p. 383; *Dictionary,* 550.]

KAIMES. As the price of land bears interest, Why should not the price of stocking?

PITFOUR. The question as to interest has varied much of late years: formerly, a demand for interest was *strictissimi juris*; but now, when one is *lucratus,* he is thought liable for interest in equity. I do not know any case where the rule as to interest on the price of lands has been extended to moveables.

PRESIDENT. No practice has carried the demand of interest so far as is claimed in this case. Interest is due on a merchant's account because of a *mora*; but here the money was locked up, and Malcolm had it not in his power to pay it.

COALSTON. There is great equity that, where one retains my money, he should pay interest for it; but with us, in law, interest is not due unless *ex lege pacto vel mora*: nothing of this kind here.

AUCHINLECK. The money was to have been paid at the Martinmas after finishing the bargain. So there was a term fixed: had a bill been granted, there would have been a legal claim for interest. Interest would have been due had there not been a compearance for the creditors: *dies interpellit pro homine.* Why not so now when Malcolm reaped a benefit by the interpellation of the creditors.