by a wife is presumed to have been made with the husband's money, unless the contrary is proved, so the purchase itself does accresce to the husband; nor can the wife, or her heir, dispose of it without the consent of the husband; and if it shall be supposed that the pursuer consented to the right conceived in favour of his wife, then it is plainly a *donatio inter virum et uxorem*, which is at all times revocable, even against a singular successor, from the wife or from her heirs. 3*dly*, There is no resemblance between this case and that of a latent unrecorded back-bond. Such latent back-bond cannot qualify or limit an infeftment upon record, and thereby prejudice a purchaser. But, here, the pursuer's plea is founded on a quality inherent in the nature of the right, which bears to be granted to a wife *stante matrimonio*: the records give security against burdens and incumbrances not recorded, but they give no security against objections to the validity of the author's title.

"The Lords repelled the reasons of reduction; found the letters orderly proceeded, and found expenses due."

Act. R. M'Queen. *Alt.* Alex. Murray. *Reporter.* Barjarg.

OPINIONS.

AUCHINLECK. Here there is a trick committed by Dodds: he suffers the subject to be considered as belonging to his wife till after the sale, and then he claims it as belonging to himself.

PITFOUR. The presumption that a purchase made by a wife, *stante matrimonio*, is made with the husband's money, is not an invincible presumption. Here, as the husband pleads upon the wife's right, he must hold by the narrative of the right, namely, that she had paid the money.

KAIMES. If the wife had got the money from the husband, the money might have been recalled by the husband; but it does not from thence follow that the subject purchased with such money might also have been recalled by the husband; much less can the subject be recalled from a singular successor acquiring for a price.

PRESIDENT. After the husband's repeated acknowledgments that the subject belonged to the wife and her heirs, there is no place left for repetition.

1766. *June* 13. ALEXANDER MUDIE *against* JOHN OUCHTERLONY and the OTHER CHILDREN of the deceased Alexander Ouchterlony, Provost of Aberbrothock.

PROOF.

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 shew that the order had been given.

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

PATRICK Spink was proprietor of certain tenements in the burgh of Aber-

brothock. On the 13th August 1761, being about to leave Scotland and settle in Jamaica, he granted a factory to Provost John Wallace, merchant in Aberbrothock, with special powers to sell the tenements aforesaid.

On the 1st April 1762, Wallace exposed the tenement to sale by way of public roup: One of the tenements was advertised to be put up to roup at the price of L.50 sterling. For it, Alexander Mudie, writer in Aberbrothock, offered L.65, and was preferred as the highest offerer. The price was made payable at Whitsunday 1762, the term of his entry. It had been conditioned, by the articles of roup, that Spink, the proprietor, should himself grant the disposition to the purchaser, and that Wallace should be bound to procure such disposition properly executed, between and a limited time. Wallace accordingly had the disposition made out in favour of Provost Ouchterlony, as if the purchase had been made for his behoof, and transmitted it to Spink, that he might execute it. But the ship, in which it was sent to Jamaica, having been lost on the voyage, the disposition never came into the hands of Spink. Wallace transmitted a second disposition, also in favour of Provost Ouchterlony; and it was, in January 1764, duly executed by Spink. Provost Ouchterlony, however, refused to have any concern in the bargain, to accept of the disposition, or to pay the price. Upon this, Wallace insisted, in an action before the Sheriff of Forfar, against Mudie, the purchaser, and against Ouchterlony, for whose behoof it was supposed that the tenement had been purchased. The libel, after reciting that the tenements had been exposed to sale by public roup, set forth, "That one of these tenements and yards was, by Alexander Mudie, writer in Aberbrothock, purchased for and on account of Alexander Ouchterlony, present Provost of Aberbrothock, at the sum of L.65 sterling: That, by the conditions of roup, the purchaser's entry was at Whitsunday 1762, and they had right to the rents after that term: That, accordingly, the said Alexander Ouchterlony took possession of the tenement purchased by Alexander Mudie for him,—uplifted the rents,—repaired and set the tenements to new tenants; but now absolutely refused to accept of the right to the said tenement and yard, and pay the price." The libel concluded for payment both against Mudie and Ouchterlony. Both the defenders were personally cited. Mudie made no defence; and, on the 29th March 1764, judgment was pronounced against him. Two procurators appeared for Ouchterlony: The defences bore, that he was no party in the roup; that his name is not mentioned as an offerer, nor did any person pretend to have had a commission from him for purchasing the tenement: "What Mr Mudie may say in this matter, as to a commission given him by Provost Ouchterlony to purchase the tenement for him at the roup, it is nothing to the pursuer; he may make the best he can of Mr Mudie; for the process is ineptly brought against Provost Ouchterlony, at this pursuer's instance. If Mr Mudie should think proper to bring an action against Provost Ouchterlony for his relief, as making the purchase by commission, that commission ought to be libelled on and produced; and even in that case Ouchterlony has very relevant defences to propone; such as that the conditions of roup were not strictly fulfilled on the part of Wallace." The defences then proceed to specify the particulars wherein Wallace had failed to fulfil the articles, and they conclude with an absolute denial that Ouchterlony had taken possession of the tenement, repaired it, or set it to new tenants. During the dependence of the action against Ouch-

terlony, Mudie insisted in an action before the Sheriff against Ouchterlony, concluding to be relieved of the purchase, and craving to be allowed a proof of the *res gesta*. This action was raised in April, but not called in court till June, on the very day on which Ouchterlony died. Mudie insisted before the Sheriff in a new action against the representatives of Ouchterlony. The representatives pleaded, that the supposed transaction could only be proved *scripto vel juramento*. On the 18th December 1764, and 25th January 1765, the Sheriff "found the proof, as craved by Mudie, not competent, and therefore assoilyied the defenders." Mudie obtained advocation, and, by appointment of the Lord Auchinleck, Ordinary, lodged a condescendence of the facts which he offered to prove. This condescendence bore, in substance, That Ouchterlony, immediately after the roup was over, acknowledged to third parties that the tenement was purchased for him,—mentioned a token which he had given to Mudie how to proceed in bidding; and also spoke of the use which he proposed to make of the tenement: That, at Martinmas 1762, he took payment of the rents from the tenants: That he employed workmen to make repairs upon the stone-work of the house, caused a carpenter to make a new roof to it, and a slater prepare 22 bolls lime for the repairs: That he let the house to two tenants, to be entered to at Whitsunday 1763: That they entered accordingly, possessed it, and paid rent to Ouchterlony during his life, and continue still to possess: and that Ouchterlony offered L.5 sterling to John Miln, to be freed of the purchase.

The defenders ANSWERED,—That the articles of the condescendence were either not relevant, or not probable by witnesses. Mudie endeavoured, by a diligence, to recover receipts for rents granted by Ouchterlony, but without success; so that the question fell to be determined upon the relevancy of the proof sought and its competency by witnesses.

On the 24th January 1766, "The Lord Ordinary,—having considered the report of the act and commission, with the condescendence and answers, and other proceedings in this cause, and specially that the purchase was made by the pursuer upon the 1st of April 1762, and that the pursuer did not commence his action, or even take out his libel, till the 4th day of July 1764, when Provost Ouchterlony was dead,—finds, That the allegation set forth by the pursuer, which he offers to prove by witnesses, now that he has failed in recovering the written documents founded upon by him, cannot be allowed to go to proof by witnesses; and assoilyies the defenders, and decerns."

Upon advising a representation for the pursuer, the Lord Ordinary, on the 4th February 1766, pronounced the following interlocutor:—"Having considered this representation, finds the circumstances in this case offered to be proved, though strong, are not sufficient, in law, to subject the defenders; and as there is not sufficient set furth to vary the Lord Ordinary's interlocutor, except in so far as concerns the time when the process was brought, which appears now to have been in April 1764, when Provost Ouchterlony was alive, which does not appear to be of great weight, adheres to the former interlocutor, and refuses the desire of this representation."

The pursuer reclaimed. Answers were put in to his petition.

ARGUMENT FOR THE PURSUER:—

In a question as to relevancy, what is offered to be proved, must be

held as proved. From the circumstances of the case, there is legal evidence that the purchase was made by mandate from Ouchterlony, or for his behoof. This appears from the conduct, 1st, of Wallace, who sold the subjects; 2d, Of the pursuer, who bought them; 3d, Of Ouchterlony, for whose behoof they were bought. *First*, As to the conduct of Wallace, who sold the subjects, he ceded possession to Ouchterlony: he made out first one disposition, and then another, in favour of Ouchterlony, to be executed by Spink the proprietor; he laid his action for performance against Ouchterlony as well as Mudie,—against the one as actual purchaser, against the other as the person for whose behoof the purchase was made. *Secondly*, As to the conduct of the pursuer; he never took nor demanded possession of the subjects, although the entry to the purchase was declared to be Whitsunday 1762. He suffered Ouchterlony to take possession of the subjects, and to use them at his pleasure. *Thirdly*, As to the conduct of Ouchterlony himself; he assumed possession, repaired the houses, levied the rents, removed tenants, and placed others in their room. From the moment of the public roup he was universally held to be the purchaser; repeatedly in conversation declared, that it was on his account that the pursuer made the purchase; and he even offered a valuable consideration in order to be relieved of the purchase. When pursued by Wallace for implement, he did not, by his two procurators, deny the fact, but pleaded defences implying an acknowledgment of the fact. This case does not fall within the statute 1696, which provides, "That no action or declarator of trust shall be sustained, as to any deed of trust made for hereafter, except upon a declaration or backbond of trust, lawfully subscribed by the person alleged to be the trustee, and against whom, and his heirs or assignees, the declarator shall be intented; or unless the same be referred to the oaths of parties *simpliciter*." For it will be observed, that, in this case, if there were any trust, the pursuer, Mudie, and not Ouchterlony, was the trustee; and thus, from the words of the statute, it might be pleaded, that Ouchterlony could not have proved the trust against Mudie, otherwise than *scripto vel juramento*; but it does not follow that Mudie could not have proved the mandate against Ouchterlony otherwise than *scripto vel juramento*. The Court has allowed witnesses to be received for proving a mandate to purchase lands. This was allowed in the late cases, *Tweedie* against *Loch*, and *Colonel Skene* against *Balfour of Balbirnie*; and still more recently in the case, *Maxwell of Leckiebank* against *Mrs Rigg*.

ARGUMENT FOR THE DEFENDERS:—

Ouchterlony was no bidder at the roup; Mudie was, and became purchaser in his own name; and, therefore, unless he can prove, in a habile manner, that Ouchterlony gave him a commission, the representatives of Ouchterlony must be assoilyied. Commissions like that which is here asserted to have been given, are generally given in writing. This proceeds from the general opinion of men, that such commissions are only probable by writing. And the reason of this opinion is obvious: verbal commissions may be easily misunderstood by witnesses; and the Court expressly found, "16*th June* 1688, *Laing* against *Vanse*, That a command, mandate, or order, is not relevant to be proven unless *scripto vel juramento*." When one party holds a right in

trust for another, there is a species of the contract *mandati*. Formerly, a proof of such trust, by facts and circumstances, was admitted; but the statute 1696 corrected this deviation from the general rule, a deviation particularly dangerous in matters of land-rights. Neither could the statute 1696 mean to give a greater privilege to the trustee than to the truster. If only writ or oath can prove against the one, only writ or oath can prove against the other. With respect to the cases quoted, in them the question was with the persons alleged to be trustees, who denied the trust, in prejudice of their supposed employers: And, in Loch's case, the supposed mandatory expressly consented to the proof by witnesses. Further, the facts condescended on are in themselves irrelevant. They consist of allegations as to words uttered *ex post facto*, which witnesses may have misunderstood. Had rents been received by Ouchterlony, the receipts granted to the tenants would have been recovered. The tenants themselves cannot be admitted to swear to their having paid rents within the years of prescription; for this would be to admit them to operate their own liberation by their own oaths, before the lapse of the prescription. As to Ouchterlony having repaired the subjects in controversy, and having granted leases; these things might have happened in consequence of a lease or of a commission from Mudie, concerning which the representatives of Ouchterlony can have no knowledge; and although Ouchterlony had offered a consideration to get free of the purchase, this would have implied no more than a desire, on his part, to avoid the trouble and the expense of a lawsuit with the pursuer.

"The Lords allowed the proof before answer, and remitted to the Lord Ordinary to proceed accordingly."

Act. A Lockhart. *Alt.* D. Rae.

OPINIONS.

PITFOUR. Things have been done by the parties; and *rei interventus* bars the *locus pœnitentiæ*. No danger in allowing the proof, for there is already some real evidence.

GARDENSTON. Of the same opinion; on the authority of the cases, *Tweedie* and *Skene*, where the Court admitted witnesses to prove a mandate for purchasing land.

PRESIDENT. I would doubt of allowing such a proof by witnesses solely; but, in a question of this kind, written evidence may be supported by witnesses: here there is already some written evidence, namely, the defences made by Ouchterlony. As his procurators denied *in fact*, they must be held to have corresponded with Ouchterlony, and their assertions will be held as his assertions.