

*N.B.* If the commission had been given to do any thing for the behoof of the Bailie, I think it might have been proved by witnesses as a proper mandate; but as it was singly for the behoof of the young man at London, and was a pure gratuity, I think it was the same thing as if the Bailie had directly promised the L.10 to the young man, which certainly could not have been proved by witnesses; for it is the same thing to me whether it be attempted to be proven by witnesses that I promised L.10 to A, or that I ordered B to pay him L.10 sterling. It is true such a mandate as the Bailie gave would have been a proper mandate, according to the rules of the civil law, and, as such, might have been proved by witnesses, but so might a direct promise of the L.10 sterling to the young man; and the doctrine of the Roman law concerning mandates must not be carried so far as to impinge upon that principle of our law, that no donation, even of the smallest sum, can be proved by witnesses, unless it be a legacy to the extent of L.100 Scots. To this it may be added, that it is established, by many decisions, that a cautionary obligation cannot be proved by witnesses. Suppose that in this case the Bailie had given commission to Scott to be caution for the young man to the merchant for the value of the clothes, Could that commission have been proved by witnesses?

In this case the Lords did not advocate the cause, though it came before them by a bill of advocation, as it was under L.12 sterling, but remitted it to the Sheriff with instructions to decern for the L.10 sterling, with full expenses of suit.

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1765. July 9.

MOSMAN *against* ———.

THE Lords, in this case, were all of opinion, that though a man renounced to be heir when he was sued for a debt of his predecessor's, that did not hinder him afterwards to serve himself heir to that predecessor.

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1765. July 9.

SHIAN *against* KILLIEHUNTLY.

IN this case the Lords found, unanimously, that an interlocutor of the Inner-House, having been pronounced in favour of Shian, the pursuer, and Killiehuntly having reclaimed, and during the dependance of the reclaiming bill Shian having died abroad, the second interlocutor of the Lords, affirming the first, was void and null, and the heir of Shian must take up the cause as it stood upon the first interlocutor.

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