

and there is no hazard of mistaking here, for these were not *verba jactantia*, but expressed *animo contrahendi et se obligandi*; and Stair, lib. 4. tit. 43. OF PROBATION BY WITNESSES, is clear that all such bargains are so probable. THE LORDS found this of the nature of a bargain, and probable *prout de jure*; but in regard he libelled L. 7 of profit for each boll he wanted, the Lords only considered this as his *lucrum cessans*, and too exorbitant; and therefore remitted it to the bailie, with this direction, that he should not exceed L. 4 *per boll* at most.

*Fol. Dic. v. 2. p. 230. Fountainhall, v. 1. p. 812.*

No 233.

1705. January 20.

CHARLES JACKSON, Merchant in Edinburgh, *against* WIDOW GRAHAM.

CHARLES having set a house and cellar to the said Mrs Graham, he warns her before Whitsunday 1704 to remove, and thereon pursues. She *alleges*, I cannot remove, because I offer to prove, that, subsequent to the warning, there was an express agreement betwixt us, whereby he acquiesced to let her continue in the possession for another year, on her finding caution to pay her rent; and that she had accordingly offered a cautioner, whom he had, without any just reason, refused; and this she offered to prove by witnesses present at the agreement, it being a paction and transaction failing under the sense of witnesses, and not a formal promise, which use not to be proved by witnesses, but *contractus locationis*, a set or tack of lands, which for a year has always been sustained probable *prout de jure*, as Durie remarks, 20th March 1629. Affleck, No 7. p. 5409, that a promise not to remove for a year was allowed to be proved by witnesses, to defend against removing for that year. *Answered*, The defence is relevant if it were true, but the manner of probation could not be allowed, for it resolves into a promise, which being *nuda verbo um emissio* has never been sustained as so probable, nothing being more easily mistaken than the position of words with their true import and meaning; and our law has shunned to rely on the lubric memory of witnesses, unless there be *rei interven-tus* to fix it; and so it was found on the 19th of January 1672, Deuchar *contra* Brown, No 192. p. 12386, that gratuitous promises, though within L. 100, were only probable *scripto vel juramento*, because the party who might interpose writ and did it not seemed wholly to rely on the veracity of the promiser: And the Lords declared they had so decided, after balancing all the former decisions; and so it had been found, 29th January 1630, Laury *contra* Keir, that a promise to set some acres of land, for payment of a certain duty agreed on, was not probable by witnesses. (See APPENDIX.) THE LORDS thought a simple tack or set of lands, either in town or country, for a year, might be proved by witnesses; but this being qualified and conditional on her finding sufficient caution, they refused to find it so probable, and only sustained it *scripto vel juramento* of Jackson, the setter and pursuer of the removing, especially considering the cautioner she offered was already bound to him for the violent profits, and so he had no addition nor accession of farther security more than what he had before.

*Fol. Dic. v. 2. p. 231. Fountainhall, v. 2. p. 259.*

No 234.

Found, that although a set for a year unconditional might be proved by witnesses, it was otherwise where the condition of finding caution was alleged.