

1706. June 26.

ANDERSON *against* GORDON.

No 235.

A MAN having got a woman with child, did, at a communing with her friends, promise to pay a sum of money to one of them for her behoof, she being, on the other hand, to give him a declaration that he was under no promise of marriage; the LORDS found, that this was not a naked promise, but a mutual bargain, and therefore relevant to be proved by witnesses.

Fol. Dic. v. 2. p. 231. Forbes. Fountainball.

. This case is No 379. p. 12234, *voce* PROCESS.

1708. November 27.

FOTHERINGHAM of Pourie *against* The HEIR of HUNTER of Burnside.

No 236.

Promise by a vassal to give his superior a piece of plate, upon his passing from the benefit of an incurred irritancy in the vassal's right, not probable by witnesses.

FOTHERINGHAM of Pourie being superior to Hunter of Burnside, who had a feu-charter, bearing, if two years feu-duty ran in the third unpaid, he should forfeit and amit the feu by the 246th act 1597, and the failzie being incurred, Pourie offered to repone him against the caducity, upon his paying the bygone feu-duties, and paying a piece of silver plate, or L. 20 Sterling as the liquidate value of it, for a new charter and entry, which Hunter accepted in presence of Grahams of Fintray and Duntroon, and several other famous witnesses; but Hunter dying shortly after this bargain, without performance on either side, Pourie pursues Hunter's heir for implement and payment of the peice of silver plate, or its price; and, by an act made in the Outer-house, where the relevancy is not debated, Pourie is allowed, before answer, to prove the agreement by witnesses, whose testimonies coming this day to be advised, the LORDS found the agreement clearly proved by the witnesses present, so that there remained neither doubt nor suspicion of the truth of it; but it was *alleged*, it was before answer to the relevancy, and this being a promise of payment, it was noways probable by witnesses, who may easily mistake the situation of words, but only *scripto vel juramento*, and there being no writ, and the party dead, the probation by either of these ways was altogether lost: For there was scarce any case where there was a more uniform track of decisions than here, that promises are never allowed to be proved by witnesses; Durie, 4th March 1606, Lilly *contra* Tours, No 187. p. 12383; and 25th March 1629, Russel *contra* Paterson, No 185. p. 12383; Gilmour, June 1663, Craw *contra* Cuthbertson, No 188. p. 12384; and February 1664, Cheyn *contra* Keith, No 189. p. 12385; Stair, 19th January 1672, Denham *contra* Brown, No 192. p. 12386; and many other like cases in Dirleton, Sir George M'Kenzie, &c. *Answered*, This was not a promise of payment, but a plain bargain, If you pay me L. 20 Sterling, I'll pass from the caducity, which sort of agreements have ever been sustained probable by witnesses. What stumbled the Lords was, that it had been admitted to probation, and was to conviction proved; though it were to be wished the Lords were more circumspect and wary in admitting points to probation (though before answer),

when they are manifestly irrelevant, as this was ; for it puts the parties to much needless expense, delay, and trouble, which would be prevented by determining obvious relevancies. As also this seemed to be a paction, *causa data, causa non secuta*, for nothing followed on it, neither was there a charter given, nor the price thereof paid ; and *est* the irritancy had been incurred, Pourie the superior, had raised no declarator thereon ; and though there had been a depending process, the Lords would have found it purgeable at the bar by present payment of the feu-duties, *cum omni causa*, such clauses and advantages sought thereon being odious in law. Therefore the LORDS, balancing their predecessors' decisions in this matter, found the agreement could not be proved by witnesses, and therefore assolvied.

No 236.

Fol. Dic. v. 2. p. 232. Fountainhall, v. 2. p. 466.

* * * Forbes reports this case :

In the action at the instance of the Laird of Pourie against Hunter of Burnside his vassal, the LORDS found a promise to give the pursuer a piece of silver plate worth L 20 Sterling, upon his having passed from the benefit of an irritancy in the defender's right, incurred by his father, not probable by witnesses.

Forbes, p. 291.

1744. July 28.

EDMONDSTON against BRYSON.

In a removing, the tenant objecting that he had not been warned, and the master replying, that he offered to prove, by his oath, that he had agreed to remove without warning ; the LORDS seemed to have no doubt, but that the same was relevant by his oath ; but only " Ordained him to depone before answer."

No 237.
Whether it can be proved by a tenant's oath, that he had agreed to remove without warning?

THE LORDS had determined the counter part of this question, 24th January 1734, Carlisle *contra* Lawson, where a tenant having, after expiry of his tack, removed without a renunciation, in a process at the master's instance for the rent, it was found relevant to prove by his oath, that he had verbally agreed the tenant should have leave to remove without renunciation.

Fol. Dic. v. 4. p. 161. Kilkerran, (PROOF.) No 7. p. 443.

1747. January 14.

The EARL of DUNDONALD against ALEXANDER.

By tack between the late Earl of Dundonald and James Alexander, of date the 29th October 1726, the Earl let to him the lands and mailing of Candraas for 19 years, with a break at the end of the first seven years ; and, by a clause in the tack, the Earl was obliged to inclose the said lands, the said James being obliged to uphold the dykes. For which causes, the tenant became bound to pay the yearly rent therein mentioned.

No 238.
Requisition *inter rusticos* allowed to be proved by witnesses.