

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),