

No 378.

him against it, and allowed the Ordinary to try the manner of her alimending, whether she was also kept by them in cloaths, and at schools, or only at bed and board, or if she was used as a servant, and what was her age, to the effect they might have better meiths how much to modify yearly, the time being proved by his oath. Stair, part 4. tit. 40.

Fol. Dic. v. 2. p. 209. Fountainball, v. 2. p. 77.

1706. June 26.

CHARLES ANDERSON, SON to ——— ANDERSON of Midhouse, and JEAN ANDERSON his Sister, *against* JAMES GORDON Merchant in Elgin.

No 379.

JAMES GORDON, merchant in Elgin, being charged by virtue of a decret, obtained before the Commissary of Murray, at the instance of Charles Anderson, factor for Jean Anderson his sister, for the sum of 100 merks, and two bolls of victual, promised by James Gordon to Grant of Arrindully, in name of the said Jean, for her passing from a promise of marriage made by him to her; he suspended upon this reason, that the Commissary committed iniquity by admitting, *imo*, The foresaid promise to be proved by witnesses, although our law doth not allow their testimonies as probative of such a *nuda emissio verborum*, even as to sums below L. 100; March 25. 1629, Russel *contra* Paterson, *voce* PROOF; February 13. 1664, Cheyn *contra* Keith, *IBIDEM*. It imports nothing that nuncupative legacies and bargains of victual under L. 100 are probable by witnesses; for that is indulged *favore ultimæ voluntatis, et commercii*; because the former are generally more listened to than other naked promises; and in bargains of victual, or the like, *interventus rei*, the giving and receiving fixes the minds of witnesses. *2do*, The Commissary committed iniquity by admitting Grant of Arrindully, to whom the promise was made for Jean Anderson's behoof, as a witness for proving thereof, although he was in effect a party; and could not probably purge himself of partial counsel, when the matter could never be brought to a process without his information.

Answered for the charger, *imo*, This was not simply a promise, but a mutual bargain and agreement, which is probable by witnesses; so that the decisions adduced by the suspender, relating to simple promises, do not meet the case. That betwixt Cheyn and Keith proceeds upon a specialty, that the person, to whom the promise was said to have been made, lived ten years with the promiser without requiring implement; and the promise being seventeen or eighteen years old was offered to be proved by the testimony of witnesses, whereas here the agreement was recent. The witnesses, again, in the decret, were received without objection, which *per se* exeems the same from a review upon that ground; February 9. 1672, Wood *contra* Robison, No 370. p. 12225. *2do*, Arrindully was a most habile witness, being in effect a communer, and no

ways interested in that private affair. Besides, he was admitted in common form, without any objection.

No 379.

THE LORDS repelled the reasons of suspension, and found the letters orderly proceeded. See PROOF—WITNESS.

Fol. Dic. v. 2. p. 209. Forbes, p. 110.

* * * Fountainhall reports this case :

JAMES GORDON, merchant in Elgin, having got Jean Anderson with child, under promise of marriage, as was alleged, and he being threatened with a pursuit for adherence, made a verbal transaction, whereby she was to give him a declaration, that he was free to marry where he pleased, and he was to pay to Grant of Ardintully for her behoof 100 merks and two bolls of meal. He having resiled from this stipulation, he is pursued for implement, and it is offered to be proved by the witnesses and comuners. *Alleged*, This is of the nature of a promise, and so can only be proved *scripto vel juramento*. and witnesses are not allowed in such cases, seeing *nuda verborum emissio* may be easily mistaken, the very position of words oft-times altering the sense. And the LORDS have constantly so found; 25th March 1629, Russel *contra* Pater-son, *voce* PROOF; 13th July 1664, Cheyne *contra* Keith, *IBIDEM*; and within these twelvemonths, between Helen Graham and Charles Jack, (See APPENDIX.); and Stair, 3d July 1668, Donaldson *contra* Harrower, *voce* PROOF; and 9th February 1672, Wood *contra* Robertson, No 370. p. 12225. and in page 92 (95) of his Institutions, where it is laid down for a principle, That promises, though for never so small a sum, cannot be proved by witnesses. *Answered*, This is not a promise but a bargain, and had *interventus rei*, viz. her declaration freeing him of his promise; and it is undeniable but nuncupative testaments or legacies, and bargains of victual or other goods, may be proved by witnesses. Some of the LORDS thought this an unlawful paction to dissolve a marriage, and liberate him from his promise, which is *contra jus di-
vinum et bonos mores*. Others said, if it had been a transaction to give the woman so much for doing it before the fact, that had been *turpe pactum*, and reprobated by law; but here it was only a declaration that he was under no promise of marriage to her. THE LORDS found it of the nature of a bargain, and so probable by witnesses. And it being objected against Grant of Ardintully, that he could not be admitted, because he was a party, the promise being made to him, and it being *answered*, That he was only as a comuner, and so the fittest person to declare the terms, the LORDS admitted him as a competent habile witness in this case.

Fountainhall, v. 2. p. 337.