

1664. February 13. CHEYNE against KEITH.

THERE was a decret obtained before the Commissary of Aberdeen, at the instance of Mr Thomas Cheyne, as executor to Mr John Cheyne, his father, against James Keith of Kinnady, as representing his father, for payment of 100 merks, as the price of a horse, promised by the defender's father to the pursuer's father, in regard of an agreement profitably made in an action of spuilzie pursued by the said Mr John Cheyne against Kinnady's father, which promise was proved by witnesses. This decret was craved to be reduced upon this reason, that the promise was not probable by witnesses, especially after 17 or 18 years time, both parties being now dead, and they having lived together above 10 years; and repeated a practise out of Durie, 25th March 1629, betwixt Russel and Paterson, No 185. p. 12383. where the Lords refused to sustain a promise of L. 99, to be proved but by writ or oath of party. It was *answered*, This promise being for an onerous cause, and for a thing of a little moment, which prescribed not, was probable by witnesses, and *quocunque tempore* might be craved.

THE LORDS reduced the decret.

Fol. Dic. v. 2. p. 227. Gilmour, No 95. p. 73.

1668. July 3. JAMES DONALDSON against HARROWER.

JAMES DONALDSON pursues John Harrower, as representing his father, for whom the pursuer became cautioner to the Lord Rollo for L. 100, for relief of the defunct's goods that were then a poiding; for which the defunct promised payment, and did pay the Lord Rollo, and produces a testificate of the Lord Rollo's thereof, and craves payment, and offers to prove the libel by witnesses, the libel not being above L. 100. It was *alleged* for the defender, That this being a cautionry, and a promise, it was not probable by witnesses, especially after so long a time, the promiser being dead, who might either qualify the promise, or instruct payment, there being nothing more ordinary, than to transact such affairs without any writ.

THE LORDS found the libel not probable by witnesses.

Fol. Dic. v. 2. p. 227. Stair, v. 1. p. 548.

* * Gosford reports this case :

JAMES DONALDSON *alleging*, That he was cautioner for Alexander Harrower to the Lord Rollo, *in anno* 1644, for the sum of L. 100, which he had paid, did pursue the said Alexander's son for relief. This action was not sustained, there being no bond adduced; to prove that he was cautioner; albeit it was *alleged*,

No 189.

A promise to pay 100 merks not relevant to be proved by witnesses; but this was after 17 or 18 years.

No 190.

Promise to relieve a cautioner not probable by witnesses, though within L. 100 Scots, where the promiser was dead.

No 190. That being for the sum of L. 100, it was probable by witnesses ; and a discharge, granted by the Lord Rollo, bearing payment, the defender's father having lived long after the alleged cautionry, and no pursuit intended against him during his lifetime, and the sum libelled being but L. 100 ; the LORDS would not sustain a promise for relief to be proved but *scripto vel juramento*.

Gosford, MS. No 17. p. 7.

No 191.

A promise of marriage, the granter being dead, found probable only *scripto*.

1670. July 19.

MARGARET COCKBURN *against* ALLAN LOGAN.

IN a pursuit for aliment, pursued at the said Margaret's instance against the nearest of kin of William Logan, to whom she alleged she had born a child, under promise of marriage, which was proved by several witnesses, in a process before the Commissaries ; it was *alleged* for the defender, That the said William, granter of the promise, being dead seven years ago, and never any action intended against him for completing of the marriage, any such alleged promise was not probable but *scripto* ; and, as to any probation led before the Commissaries, it was *res inter alios acta*. The defenders not being called, and the LORDS having advised this cause, found it to be of a dangerous consequence to sustain the probation of a promise of marriage, after the death of the granter, otherwise than by writ ; and found the case far different, where a promise might be proved by witnesses against the party, being alive, for solemnization, seeing he might object against the witnesses, or propone interrogatories, for clearing of himself, or allege relevant defences, which his nearest of kin could not know. And the case being of itself most unfavourable, the Lords would not sustain any other manner of probation but *scripto*.

Fol. Dic. v. 2. p. 228. Gosford, MS. No 308. p. 135.

1672. January 19.

DEUCHAR *against* BROWN.

No 192.

Found in conformity with Auchinleck against Gordon, No 181. p. 12382. that a promise of one person to pay a sum for another, is not probable by witnesses.

WILLIAM CATO having bought a web of plaiding from John Deuchar for L. 47 Scots, for which Thomas Brown became cautioner, whereupon Deuchar obtained decret before the Bailies of Edinburgh against Brown, wherein the promise as cautioner was proved by witnesses ; Brown suspends, and raises reduction on this reason, that the decret was unjust, proceeding upon an unwarrantable probation, admitting witnesses to prove a promise, or the emission of words, where there is no bargain between the parties, which is only probable by writ, or oath of party. It was *answered*, That a promise for whatever cause, is valid and obligatory ; and there is no difference of naked pactions, which were inefficacious by the Roman law, but are approved by the canon law, and common custom of nations ; and as for the manner of probation