

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.