

1629. February 10. KEITH against DICK and GRAY.

No 184.

WILLIAM DICK and Gray having made a bargain with the Earl Marischall, to pay him a certain duty for a five years rent, of a part of his rent, promised to make Robert Keith portioner of the eighth part of the block. He pursues them upon that promise, and refers the same to their oath. They allege this bargain with the Earl was by writ; and if he had been admitted portioner, he behoved to be bound by writ; so long as the writ is unsubscribed *locus est penitentiæ*.—THE LORDS found the promise might be proved by their oaths.

Auchinleck, MS. p. 155.

1629. March 25. RUSSELL against PATERSON.

No 185.

ONE being pursued for payment of L. 99, conform to his promise made to pay the same, it being *contended*, That it was probable by witnesses, as the pursuer desired; the LORDS found it was only probable by the defender's oath, or by writ, and admitted not the same to be proved by witnesses.

Act. Russell.

Alt. Aiton.

Clerk, Gibson.

Fol. Dic. v. 2. p. 227. Durie, p. 441.

1636. February 25. L. ERNOCK against L. PRESTON.

No 186.

LAIRD of Ernock pursuing the young Laird of Preston, for payment to him of L. 100 promised to him by Preston; and it being questioned by the defender, that this promise ought to be proved by writ, or the defender's oath, and no otherwise; the LORDS found, that the same might be proved by witnesses, and admitted the same to probation, to be so proved; seeing it was only the promise of L. 100, and not above that sum; for, if it had been above that sum, they would have found it only probable *scripto vel juramento partis*.

Found the reverse of Russell against Paterson, (*supra*).

Fol. Dic. v. 2. p. 227. Durie, p. 798.

1636. March 4. LILLIE against LAIRD of INNERLEITH.

No 187.

JANET LILLIE, relict of umquhile James Toures, brother to Laird Innerleith, pursuing him to be decerned to pay to her two bolls of wheat yearly, during her lifetime, which the Laird promised to pay to her yearly in presence of diverse famous witnesses, by whom she offered to prove the said promise, and

The promise to pay an annuity, which it was alleged had been paid for two

No 187.
years, was
not allowed
to be proved
by witnesses.

condescended upon their names; and also that the cause of the promise was at the time when her said umquhile husband disposed to the Laird the lands of Pitlochie, whereto she consented; likeas, conform to that promise, the defender made her payment thereof yearly the years 1614 and 1615; which being controverted betwixt the parties, as a matter not probable by witnesses, being to pay a yearly duty, during the pursuer's lifetime; albeit the pursuer *alleged*, That it was probable by witnesses, being a matter of so small importance, and which she should prove by famous and unsuspected witnesses, *et omni exceptione majores*, which she alleged was so admissable; and the rather, the promise having taken effect by two years payment; the LORDS found this promise only probable by writ or oath of party, and not by witnesses, being for a liferent duty, although of never so small a quantity; but declared, that it should be leisome to the pursuer, to have her witnesses present, when the party was to be examined upon his oath, and who might hear him depone, and put him before his deposition in remembrance of any circumstances concerning that matter, and that they might no otherwise contest with him upon his declaration, nor in any sort to impunge the same.

Act. ———.

Alt. *Mowat*.

Fol. Dic. v. 2. p. 227. Durie, p. 801.

1663. *June.*

CRAW against CULBERTSON.

No 188.

A wife's promise to pay her husband's debt, due by bond, found relevant to be proved *prout de jure*, it being under L. 100.

CHRISTIAN CRAW obtains a decret before the Bailies of Edinburgh against Bessie Culbertson, relict to John Denholm, baxter, decerning her to pay 100 merks principal, with some annualrents and penalties, contained in a bond made by her said defunct husband, upon her promise to pay the same proved by witnesses. This decret is craved to be reduced upon this reason, that a promise of this nature is only probable *scripto vel juramento*, as was found in the case betwixt Lillie and Innerleith, (*supra*) seeing such promises falling only under the sense of hearing, the hearer may be mistaken of the words of the promise; likeas, pollicitations of that nature, which are *sine causa*, and not being *pacta vestita*, are not in law obligatory; but so it is, that this relict was noways obliged of herself in any such debt, but her husband only, to whom she was neither heir nor executrix. It was *answered*, That the promise was opposed, which was made *intuitu* of an obligation lying upon her husband, to which she did interpose herself by promise, as *expromissor*, which paction, though *nudum*, yet being *vestitum* with her deceased husband's obligation, is obligatory against her, just as if the apparent heir should promise to pay the father's debts; and this promise being for a debt within L. 100, it is probable by witnesses.

THE LORDS assoilzied the defender.

Fol. Dic. v. 2. p. 227. Gilmour, No 85. p. 66.