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 intented 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 intented 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 decreet 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 decreet 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

thereof, the law of nature and nations admits witnesses to be sufficient; and though our custom hath very conveniently restricted probation by witnesses to matters of small moment, not exceeding L. 100, where writ may and uses to be adhibited *in pœnam negligentium*, who if they do not write, must rest solely upon their party's oath, yet there is no restriction in matters of an hundred pounds value, or under; and therefore legacies of an hundred pounds are probable by oath; and if probation were further restricted, it would stop the course of traffic amongst the meaner people, who, by a trade in public market, neither use, nor can make writ in such cases. It was *replied*, That our law and custom hath not only limited the probation by witnesses upon the account of the importance of the matter, but also upon the manner of engaging, which if it be only by emission of words, these being so easily mistaken by the hearers, the same is not probable by witnesses, as in the matters of warrant or command, which is not probable by witnesses, so in verbal promises; in which rule there are very few exceptions, as first, legacies not exceeding an hundred pounds, made by defuncts on their death-bed, are probable by witnesses, *ex favore ultimæ voluntatis*;—next bargains in the way of traffic, wherein there is a mutual onerous cause *in favorem commercii*, are probable by witnesses; but a promise without any cause onerous, or commerce, whereby a party doth either gratuitously promise for himself, or becomes surety for another; such promises, though within an hundred pounds, are not probable by witnesses, which is very necessary for the security of the people, and doth not stop trade, wherein cautioners are not ordinary, and if parties trust to them, they must consider their honesty as well as their ability, and so must refer their promise to their oath. No 192.

THE LORDS having demurred upon this case, and having searched all the decisions that have been thereanent, they found such gratuitous promises, not being in the way of bargain, or commerce, or even in that case, if the party bargained not for himself, but became cautioner for another, were not probable by witnesses, and therefore reduced the decreet.

Fol. Dic. v. 2. p. 227. Stair, v. 2. p. 50.

*** Gosford reports this case:

DEUCHAR pursuing Brown upon an alleged promise of payment of L. 70, as cautioner for one who had bought goods from him; it was *alleged* for the defender, That a promise was not probable, but *scripto vel juramento*. It was *replied*, That by the law and practick of this kingdom, a promise to pay a sum within L. 100 is probable *prout de jure*, for which several practicks were produced. It was *duplied*, That by our law and practick, a debt within L. 100 was probable by witnesses against a person who, by his promise or transaction, became debtor *proprio nomine*; but this action being to constitute a debt

No 192. against an alleged cautioner for another person, there was neither law nor practick for it.

The Lords having considered this case as of general consequence, and to be a practick for the future, did sustain the defence; and found, that the allegeance of one to be cautioner *ex promisso* for another, who was not concerned, and had no benefit by the bargain or transaction betwixt either parties, was not probable, but *scripto vel juramento*; and that it were of a dangerous consequence, where there was only *nuda emissa verborum*, if witnesses' depositions should be taken to constitute a debt against a person not concerned, seeing, by the civil law, *de verborum obligationibus*, where the stipulation is betwixt parties contracting, there are such solemnities required, and *interrogatio et congrua responsio* necessary to make one debtor.

Gosford, MS. No 445. *p.* 233.

No 193. 1687. *June.* Colquhoun *against* M'Rae.

This allegeance, viz. That at the executing of the poinding or caption, the defender promised to pay the debt, was found probable by witnesses; but this interlocutor was stopped.

Harcarse, (Probation.) *No* 799. *p.* 225.

1687. *December* 7. ——— *against* Provost Johnston.

No 194. The Lords found it probable by witnesses, that a person in prison was set at liberty at the defender's desire, and upon his promise to re-produce the other in prison at a certain day; though it was *contended*, That a promise is only probable *scripto* or *juramento*, except where it is accessory to a bargain probable by witnesses.

Fol. Dic. v. 2. *p.* 228. *Harcarse,* (Probation.) *No* 804. *p.* 225.

1732. *February* 19. Katharine Harvie *against* Crawford of Milton.

No 195. In a process of adherence before the Commissaries, the pursuer offered to prove a promise of marriage and subsequent copulation; which the Commissaries sustained, the promise relevant *scripto vel juramento*, and the copulation *prout de jure*. Against this the pursuer applied to the Lords by advocation, insisting, that she should be allowed to prove the promise by witnesses. The Lords refused the desire of the bill. See Appendix.

Fol. Dic. v. 2. *p.* 228.