

deliver the tack, but if the Laird had libelled that he had fulfilled the contract for his part, or offered the same, and that he had no action to pursue him, but first if he had fulfilled it for his part, quia hinc contractus est hinc inde reciprocus, et contractus innominatus facio ut facias, et in contractibus innominatis neuter partium competit, nec nascitur actio de jure, nisi implenti vel offerenti implere. The Laird *replied*, That by the words of the contract foresaid, the said George should first get him the said tack, and fulfil the contract for his part first to him. THE LORDS, by interlocutor, decerned that George ought to fulfil his part of the contract first to the said Laird, and that the said Laird might call him for the same, albeit he had not fulfilled the contract for his part, nor offered thereto within the day contained in the contract, that they should ilk ane fulfil to other the said contract for their own part. But the contract bore that the said George should deliver the tack, and the Laird infest him in six chalders of victual. And also, the LORDS decerned that George was obliged to get that tack, because he promised that he should get to the said Laird a nineteen years tack under the common seal and subscriptions of the abbot and convent; and so he obliged himself ad factum proprium et non alienum; albeit George *alleged*, That promise was supra facto alieno abbatis et conventus, et quod promissio facti alieni de jure non obligat eum. And farther, in the said cause, George *alleged*, That at the making of the contract betwixt the Laird and him, and in the mean time the Laird promised faithfully not to pursue him for that tack nor getting thereof; so he did his diligence therein, and that he had done his utter diligence, and that he could not obtain the said tack, and offered him to prove the same by the notary and witnesses contained in the contract produced by the said Laird. The Laird *alleged*, That should be proved by writ, and not by the notary and witnesses. THE LORDS decerned that the discharge of the contract in writ ought, of the practice, to be proved by writ; and that allegiance was destructive of the contract; sed in hoc casu debet per testes instrumentarios prædicta exceptio probari, et solus fui in opinione mea.

*Sinclair, MS. p. 85.*

1574. October 29.

WAUGHOPÉ against HAMILTON.

WILLIAM WAUGHOPÉ of N. pursued Alison Hamilton, his grandmother, for suspension of letters raised at her instance, charging him to pay to her, as executrix to her husband, his father, the sum of L. 60, contained in an obligation made to his said father by him, registered in the books of council. The pursuer *alleged*, That it was convened betwixt him and his father, that if he obtained a tack of the teinds of N. to his father and his heirs, he should not pay the said sum; and it is of verity, that he obtained the said tack, as said is, and offered him to prove the condition foresaid by the witnesses contained in the obligation, and therefore the letters should be suspended for payment. The

VOL. XXIX.

68 D

1

No 50.

No 51.

A condition not being engrossed in the deed, but only at signing agreed on, was found not relevant to be proved by the witnesses inserted.

No 51.

defender *alleged*, That if such condition was, the same should not be given to the pursuer's probation, without that he would allege that the condition was inserted in the obligation, which was not of verity; which allegiance of the said Alison was admitted by the Lords, and found that the said condition might not be proved by the witnesses, albeit they be inserted in the obligation foresaid; and therefore ordained the defender's letters to be put to farther execution, notwithstanding the allegiance of the said William.

*Fol. Dic. v. 2. p. 219. Colvil, MS. p. 24F.*

1574. November 16.

DALGATIE *against* URY.

No 52.

Found in conformity with the above. The present case respected some verbal promises said to be made by an arbiter at signing a decree arbitral.

THE Lairds of Dalgatie and Ury being referred to the judgment of the Laird of Park, for setting of certain marches, as arbiter and amicable compositor, and what sentence that ever he gave, both the parties should bide thereat; in which matter, the Laird of Park gave sentence, and set the marches betwixt their lands debateable; upon which sentence, Dalgatie summoned Ury to hear letters thereupon, or else to allege a cause why. Ury alleged, at the day of compareance, that no letters should be given conform to the said sentence, because at making of the compromit foresaid, the arbiter promised to him that he should not give sentence, nor yet set marches, but by the advice of certain friends, who were labourers of the said compromit; and also, if he took any lands in any part from Ury, he should give him as meikle by taking off Dalgatie's lands from him in another place, and to give to Ury. Dalgatie *alleged*, That there was a compromit subscribed by the parties, referring and submitting them to the arbiter foresaid, who had decreted in the said matter, and set marches conform thereto betwixt their lands, which was put in writ, authentically subscribed by the judge foresaid, conform to the said compromit; no promise was contained as was alleged; and therefore no witness contained in the said compromit should be received for proving of the said promise, which might take away the effect of the said compromit and sentence passed thereupon, authentically put in writ, unless he would prove the said conditions by an authentic writing, and not by witnesses; which allegiance of Dalgatie was found relevant by the Lords, and no witnesses to prove Ury's allegiance.

*Fol. Dic. v. 2. p. 219. Colvil, MS. p. 24I.*

No 53.

Whatever can take away a decree, can be no otherwise proved than by writ or oath of party.

1583. May.

COUNTESS OF ARGYLE *against* SHERIFF OF MURRAY.

THE Lady Countess of Argyle having obtained decree against the Sheriff of Murray to flit and remove from certain lands, pursued the said Sheriff for the violent profits, who *answered*, That he could not be decerned in any violent profits, because my Lady was content, and agreed, with the consent of my Lord Argyle, her husband, that notwithstanding the said decret obtained