

No 50.

1533. December 9. &amp; 1549. February 14. &amp; 17.

The Master of HAILIS *against* Abbot of NEUBOTTIL, and The Laird of KERSE  
*against* GEORGE PANTER.

THE renunciatioun and discharge of all pactiounis, contractis, alienatiounis, and uther dispositiounis quhatsumever, maid in writ, aucht and sould be provin be writ, as ane renunciatioun of ane tak and assedatioun of landis, and uther possessiounis, sould be provin be writ, and not be witnessis.

*Item*, Quairever ane obligatioun or contract is maid in writ, the transactioun thairupon, exoneratioun or discharge thairof, sould be provin be writ, and not be witnessis insert in the said contract or obligatioun, nor be nane utheris.

*Fol. Dic. v. 2. p. 220. Balfour, (OF PROBATION BY WRIT.) No 22. p. 366.*

\* \* \* Sinclair reports these cases :

THE Master of Hailes *alleged* that Andrew, Abbot of Newbottle for the time, had reponed and discharged him for the sums contained in a decree of the Lords, obtained by the said Abbot, and offered to prove the same by witnesses. The Abbot of Newbottle, that now is, said, he should prove by writ and not by witnesses. THE LORDS decerned that this exoneratioun of sums contained in writ ought to be proved by writ, and wherever the obligation or contract is in writ of the practice of Scotland, transaction thereupon, exoneratioun, and discharge thereof, may not be proved but by writ and not by witnesses; and also, in the said cause, in termino dato dicto magistro de Hailes ad probandum exoneratiounem decreti predicti terminus erat peremptorius ut pote supra probatione exceptionis. The Master *alleged*, He had the said old Abbot's discharge in writ under his subscription-manual, and that it was burnt in his place of Bowton, which was burnt and all his gear therein, which was notoriously kend, and offered him to prove tenorem per testes qui legerunt et noverrunt dictam acquittantiam et subscriptionem dicti Abbotis, et ad hoc petiit novum terminum. THE LORDS admitted him to prove his allegiance, but allenarly by witnesses summoned at this term.

The 16th of the said month, the Laird of Kerse called George Panter to deliver to him a nineteen years tack of the parsonage and vicarage of Tillicoultry, which he promised and obliged him to get under the Common Seal and subscription of the Canons of Cambuskenneth, wherefore the said Laird promised to him infestment of six chalders of victual of Alloa of West Kerse, and George to deliver the tack foresaid and the Laird the evidents of the victual within twenty days next after Pasche. Immediately following the date of the contract upon the promise, and long after the said twenty days, by the space of two years, the Laird desired him to be decerned, by decret of the Lords, to obtain and deliver to him the said tack. George *excepted*, He was obliged to

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

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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.