

1672. July 19.

FISHER against LITHGOW.

No 273.

If the defender swear not positively, but only *non memini*, the pursuer is at liberty to adduce further proof.

IN an exhibition at Fisher's instance against Lithgow, of a bond, bearing a clause in favour of the pursuer, which was referred to the defender's oath, who having deponed, that he once had the bond, but had given up the same to the party principally concerned; and as to the tenor thereof, and that clause conceived in favour of the pursuer, having deponed that he did not remember that the bond was so conceived; at the advising of the oath, the LORDS did advise, whether in this case the defender deponing *non memini* should be sufficient to absolve; in respect it being *alleged*, that such depositions in matters of fact, which are not the proper deeds of the defender, cannot infer absolutor, where it is offered to be proved by the writer and witnesses, that the bond craved to be exhibited, did truly contain a clause in favour of the pursuer, as is libelled, whereby he had right to the debt. THE LORDS did sustain this allegiance, and admitted of probation, notwithstanding of the deposition, which could only infer absolutor, where the party was to depone *super facto proprio*, which could not otherwise be proved.

*Fol. Dic. v. 2. p. 201. Gosford, MS. No 514. p. 272.*

\* \* \* Stair reports this case :

HELEN FISHER having pursued Isobel Lithgow, her mother, for exhibition and delivery of several bonds provided in favour of the said Helen, by her grandmother, in some of which her grandmother was liferentrix, and the said Isobel having deponed, and acknowledged some of the bonds, and as to others having deponed that they were paid by the debtors, but that she did not remember whether the pursuer's name was in them or not; thereupon it was *alleged*, That the oath proved not for the pursuer, and therefore the defender ought to be assoilzied. The pursuer *answered*, That seeing the defender had not positively deponed, either her name was in the bonds, or not in the bonds, but that she remembered not, the pursuer might yet lawfully prove her libel by the debtors in the bonds, and other witnesses, by which the libel was probable at the first, either as to the making up of the tenor thereof, or the defender having thereof. It was *replied*, That the referring to oath makes an end to all controversy, after which no other probation can be used.

THE LORDS found, That the seeing the defender is not positive, but only that she remembered not, that the pursuer might prove the defenders having of the bonds conceived in favour of the pursuer.