

1770. August 2.

THOMAS YOUNG and WILLIAM DENHOLME, against DAVID GLEN Writer in Dumfries.

The pursuers, as executors to Ann Dalzell, brought a challenge of a bond granted by her in favour of David Glen and his daughter, as not being probative in terms of the act 1681, C. 5. which declares, "That no witness shall subscribe to any party's subscription, unless he then know that party, and saw him subscribe, or saw him give warrant, &c."

The instrumentary witnesses being examined, one of them deponed positively as to his having subscribed the deed; but the other, though he acknowledged the subscription to be his, deponed, "That he cannot remember any thing about her (Ann Dalzell) having subscribed; nor does he remember to have seen the other witness subscribe, or any thing about the affair; nor does he remember ever to have seen Ann Dalzell, and never did know her: That he does not remember even to have been in Ann Dalzell's house; and if ever he was there, he has forgot it: That he did not know till lately where she lived."

In support of their objection, the pursuers referred to the following decisions, November 1682, Stevenson against Stevenson, No. 114. p. 16886. 12th February 1684, Blair against Pedie, No. 27. p. 13942. November 1698, Campbell against Robertson, No. 116. p. 16887.

The defender maintained, That the deposition of the witness amounted only to a *non memini*, which was not sufficient to reprobate a deed; that this might very well be the case, as it was six years since the bond had been granted, 23d Nov. 1708, Syme against Donaldson, No. 132. p. 16713.

The Lord Ordinary found, "That no good exception in law arises from the proof against the validity of the deed." And at advising a petition and answers, it was observed upon the Bench, That if the deed had been recently challenged, and the witnesses were positive in their depositions as to their not knowing the party, the deed would be null, &c. but if it was at a distance of time, and that the deposition amounted to a *non memini*, which was the present case, it would be extremely dangerous, on these grounds, to cut it down.

The Lords accordingly adhered.

Lord Ordinary, *Auchinleck*.
Clerk, *Kirkpatrick*.

For Young and Denholme, *Crosbie*.
For Glen, *Maclaurin*.

Fac. Coll. No. 40. ff. 109.

No. 139.

The deposition of an instrumentary witness, who deponed *non memini* as to his knowing the granter, and having seen him subscribe, not sufficient, in terms of the statute 1681. C. 5. to void the deed.