

1770. *August 2.* DAVID GLEN *against* THOMAS YOUNG.

WRIT.

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

[*Faculty Collection, V. 109; Dictionary, 16,905.*]

COALSTON. There is a difficulty from the terms of the Act of Parliament. If witnesses to a recent deed were positive as to this fact, That they did not see the party subscribe,—the deed would be null: but, after some years, it would be dangerous to interpret the Act so strictly. The law requires knowledge—nevertheless in practice the witnesses do not know the party.

MONBODDO. The law is express: decisions on the law are strong: How can we depart from the law and the decisions?

HAILES. This is too strict: the one witness remembers every thing,—the other does not remember—but he says nothing which leads to the belief that he did not see the party subscribe. When he says that he does not know the party—he explains himself so as to show that, by knowledge, he meant personal acquaintance.

AUCHINLECK. Were there a recent challenge, the strict words of the statute might have some efficacy; but here the challenge is after several years.

PITFOUR. To yield to this objection would be to accuse our nature, which cannot long retain the memory of uninteresting facts.

On the 2d August 1770, the Lords assoilyied; adhering to Lord Auchinleck's interlocutor.

Act. A. Crosbie. *Alt.* J. M'Claurin.

1770. *August 3.* DAVID OGILVIE *against* ROBERT GRUAR.

TACK—SERVICES PERSONAL.

A Tenant found not liable for certain perquisites or fees to the ground-officer of the Barony, they not being mentioned in the Tack; although it appeared that, by the immemorial usage of the Barony, the Tenants had been in use to pay such fees.

A FARM on the estate of Dunsinnan being let by public roup, the defender, as the highest bidder, became tenant thereof. By the written tack entered into

between him and the landlord, he became bound to pay a certain rent to him, &c. Some time after the defender's entering, a demand was made upon him by the pursuer, the ground-officer of the barony, for payment of certain small perquisites or fees, which, although not mentioned in the tack, had been in use, it was alleged, for time immemorial, to be paid by the tenants on the estate. The defender having resisted this demand, an action was raised for the amount. And, after a proof of the custom, the Lord Ordinary pronounced this interlocutor: "Finds it proved that it has been the immemorial practice of the barony of Dunsinnan for the tenants to pay certain fees to the baron-officer, though not specified in these tacks: Finds, that the fees in use to be paid out of the defender's possession, was a firloft of oats, and a peck of meal yearly; and, therefore, finds the defender liable in payment of the said dues," &c.

In a petition against this interlocutor, the defender, besides maintaining that the alleged custom of the barony could not be binding on him, who was a stranger, and took the lands at a public roup; also founded on the Act of the 20th Geo. II. prohibiting indefinite services of tenants.

The following opinions were delivered:—

ALEMORE. The Act 20th Geo. II. is salutary. I would not depart from it even in trifles.

COALSTON. The tack is the rule between master and tenant. It is dangerous to introduce any prestation not in the tack.

AUCHINLECK. When a proprietor sets his lands, he ought to speak up all that is to be paid. Prestations not depending upon the master will be implied though not expressed. A fee to a baron-officer is not of that nature.

GARDENSTON. This question, mean itself, is great in its consequences. By the statute 20th Geo. II. a tenant is liable for nothing but what is in his tack. The baron-officer is the servant of the master: why should the tenant pay him?

PRESIDENT. A stranger to the barony takes his tack by public roup upon conditions. Prestations to the baron-officer are none of them. After the tack is granted, the baron-officer comes and claims fees. It is of great moment to hold fast by the statute.

On the 3d August 1770, "The Lords assoilyied;" altering Lord Barjarg's interlocutor.

Act. W. Nairne. *Alt.* Ch. Boswell.