

found the trust not proven, mainly on this ground, that they would not take away heritable rights by presumptions and conjectures.

But the next day, on a bill given in by Balcomy, representing that he offered to prove by witnesses present, who heard Lesmore say, when he was paying the compositions, and transacting with some feuars, that it was not his interest but Balcomy's; the LORDS, before answer, allowed these persons *ex officio* to be examined thereanent.

This cause being heard again on the 26th of January, it was contended by Sir William Gordon, that his right could not be taken away by extraneous witnesses, especially women. THE LORDS refused to admit women-witnesses, though one of them was the Lady Lesmore, Mr William's own mother; but she was Balcomy's sister, and the LORDS allowed any other habile witnesses to be examined on the qualifications of the trust.

Fol. Dic. v. 2. p. 139. Fountainhall, v. 1. p. 391.

1700. June 28. M'GOWAN and BOYD *against* MONTGOMERY.

RANKEILOR reported Provost M'Gowan and Boyd of Pincross against Montgomery of Skelmuirly. Sir Robert Montgomery of Skelmuirly grants a bond of 7000 merks as a provision to Antonia his daughter. Sir James, his son, gives a corroboration of it and his other brothers and sisters portions. Antonia marrying Pincross, he and Thomas M'Gowan, his creditor, pursue this Skelmuirly for payment, who *alleges* absolutor, because the principal bond corroborated was retired, and in Skelmuirly's hand, and so presumed paid, being *chirographum apud debitorem repertum*; so that the bond of corroboration *per se* can be no probation of the debt, unless the first and principal bond were produced, seeing *non creditur referenti nisi constet de relato*. *Answered*, That the bond of corroboration alone is a sufficient instruction of the debt, seeing by the very style it is *accumulando jura jurius*, and but hurt or derogation thereto in any sort; and the having the principal bond can infer no rational presumption of its being paid, unless they had either taken a discharge, or retired it; likewise the bond of corroboration, seeing no man of sense would pay without one of these two: And it does not alter the case that the second bond contained the rest of the childrens' bonds as well as her's, and was registrated for their security, and so could not be retired and given up, for then no man could have relied upon the getting up of the principal bond without a discharge of both. And this question being stated by the Doctors, is inserted by Vinnius, *lib. 1. cap. 70. quæst. select. et illust.* and in his *tractate de pactis, cap. 12.* where there are *plura chirographa unius debiti, an redditione unius censeatur tota obligatio remissa?* and he determines in the negative, and answers all the arguments adduced by Bartolus and Bachovius in the contrary. THE LORDS found, this being but a presumptive payment, it could not take place here, where the bond of corro-

No 75.

No 76.

Where a bond of provision had been granted to a daughter by a father, and a bond of corroboration by his son; found, that where the second was not retired as well as the first, there was no presumption of payment.

No 76.

boration was not likewise retired; and that in such cases, either retiring of both, or at least a discharge was necessary, seeing *actus non debent operari ultra agentium intentionem*; but if the creditor's actual re-delivery and back-giving of the original bond could be proved, it would make the debtor's defence of payment, or at least the *pactum de non petendo*, and renouncing the debt, more clear; for the producing the first bond, now retired and in the debtor's custody, is not so strong a presumption, seeing he might have, *viis et modis*, come by it without the creditor's knowledge or consent, as has sundry times fallen out.

Fol. Dic. v. 2. p. 138. Fountainhall, v. 2. p. 99.

1703. *January 21.*BROWN *against* HENDERSON.

No 77.
Found in conformity to
M^cGowan
against Skel-
morly, *supra*.

HELEN BROWN, daughter to George Brown litster in Edinburgh, pursues a reduction against Mr William Henderson, late bibliothecarius of the college of Edinburgh, of some bonds whereupon he had led an adjudication of her father's lands. The reason against one of the bonds was, that the sum therein contained was paid, in so far as the pursuer produced the bond now in her own hands, et instrumentum apud debitorem repertum præsumitur solutum; and, though Mr William had a bond of corroboration thereof, yet that was not probative without the original bond corroborated, and that being given back, the debt is extinct, as wanting a foundation to lean on. *Answered*, If there were a discharge of the first bond, something might be alledged, but their having it in their hands while the bond of corroboration is unretired signifies nothing; for though the first bond were not extant, and could not be shown, yet the corroboration is *per se* a sufficient instruction of the debt; and though it be now in the debtor's hands, yet it might come there many ways without actual payment, upon mistake, as thinking they had no more to do with it, after they got the corroborative security, which cannot be taken away unless it be offered to be proved by William Henderson's oath that the bond corroborated is truly paid. THE LORDS found the presumption of having the first bond not sufficient to infer payment, where the creditor produced the bond of corroboration, unless they offered to prove by his oath that it was given back upon payment.

Fol. Dic. v. 2. p. 138. Fountainhall, v. 2. p. 140.

1703. *February 5.*

MR WILLIAM GORDON *against* the Heirs and Daughters of JOHN JOHNSTON of Polton, and JAMES WILKIE Husband to one of them.

No 78.
A bond granted to a defunct was a-

BRUCE of Newton as principal, and John Johnston of Polton as cautioner, grant bond to Mr William Gordon, written to the signet, for 5000 merks. Mr