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* Hendeson.

No 77.
Found in conformity to M'Gowan against Skelmorly, *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, writer to the signet, for 5000 merks. Mr

No 78.
missing, and thereafter understood to be in the hand of the cautioner without discharge or assignation. The heirs of the cautioner were assoilzied from payment, there being a memorandum on the back by the cautioner, mentioning that it was paid.

William dying suddenly on a Sabbath day at Leith, his papers were not in order, and particularly Newton's bond was amissing; at last, it was informed, that it was in Polton's hands, whereupon Mr Gordon's son, as executor confirmed, pursues Polton's heirs for exhibition and redelivery of that bond, alleging he had only got a loan of it for framing a bond of relief from Newton. Their defence was absolvitor, because I am precisely in the case of that rule of law, chirographum apud debitorem repertum præsumitur solutum; and the being mine in the debtor's own hands, presumes payment, unless he can instruct any other way how I came by it, there being nothing more usual in personal bonds, where neither infeftment nor any diligence by registration, horning, adjudication, or otherwise has followed thereupon, to rely on the retiring and cancelling them without any further solemnity of a discharge, or other receipt, declaring the payment. *Answered*, That brocard takes place where it is in the hands of the principal debtor; but Polton was only cautioner, and such use not to pay without either a distress, assignation, or discharge. 2*do*, The maxim cannot hold in this case, for Polton, for relief of this and sundry other cautionries wherein he stood engaged for Newton, took an heritable bond of relief, wherein he is expressly obliged to retire the bonds with assignations or discharges, and so he was *in mala fide* to rely upon the naked retiring of this bond due to Gordon, contrary to the faith of his own obligement. *Replied*, There is no difference between a cautioner and a principal in this case, both being *correi debendi*, and bound conjunctly and severally; and the LORDS sustained it where a cautioner had got up his bond without any discharge, or other document of payment, 26th June 1623, Carmichael *contra* Hay, No 73. p. 11404.; and the taking of the bond of relief does not alter the case, for by it he became as it were principal; and it is *jus tertii* to Gordon's heirs to object it, whatever might be competent to Newton. Then Polton's representatives alleged farther, that though they were abundantly secure by the defence of *instrumentum apud debitorem*, yet, to convince the LORDS of the reality of it, he conjoined the following presumptions, viz. a note and memorandum on the back of the bond, wrote by Bailie Johnston's own hand, bearing both the time and manner of the payment, with a fitted account under Sir John Hall's hand, mentioning that Polton had borrowed from him and Bailie Reid 5000 merks to give to Mr William Gordon, who paid it to the Marquis of Athol for a deputation from him to keep the Privy Seal. *Answered*, These resolve into the debtor's own assertion, and the declaration of Sir John Hall, a stranger, who might be made believe that story, and so can never be probative against Mr Gordon's heirs unless they show something under his hand; and the whole seems to be *nimia et affectata diligentia*, and bonds are not to be taken away on such slender presumptions. The LORDS sustained Polton's representatives their defence on having the bond retired and fortified by the above adminicles, and therefore assoilzied from the exhibition and delivery.

Fol. Dic. v. 2. p. 138. Fountainhall, v. 2. p. 178.