

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<sup>c</sup>Gowan  
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