1677. *January* 16. Stewart of Ardvorlich *against* Riddoch.

No 74.
A party disponed his estate to his son, in his son's contract of marriage, which he kept in his own custody. Being a mutual evident, no presumption of extinction took place.

David Riddoch, by contract of marriage betwixt his son Alexander and Janet Ballentyne, did dispone to the said Alexander his estate; and thereafter did dispone the same to his second son David Riddoch, for payment and with the burden of all his debts, who did thereafter dispone the same to Stewart of Ardvorlich for a just price.

The said Stewart of Ardvorlich pursued a reduction of the disposition, contained in the said Alexander his contract of marriage, upon that reason, That the said contract of marriage was not delivered to the said Alexander, at the least there being but only one double subscribed, the same was given back to David Riddoch the father, and was lying by him the time of his decease; and it was evident, that it was never intended that any other use should be made of the said contract, but only in order to get a marriage to the said Alexander, as being provided to the said estate, in so far as the said disposition in favours of the said Alexander was without the burden of the disponer's debts, which were very great, and did not so much as reserve his liferent. Whereunto it was *answered*, That the contract was a mutual evident, subscribed by both parties, and that marriage had followed upon the same, and therefore it could not be taken away up the pretencce of not delivery.

The Lords found, That though the contract had been beside the father the time of his decease, it was not to be considered as *instrumentum penes debitorem*, being a mutual evident: But thereafter it was *replied*, That the pursuer offered to prove, that not only the said contract was lying by the disponer, the time of his decease, but an assignation blank of the said contract, which, being in the disponer's hands, was in effect a retrocession or discharge of the disposition contained in the contract; which reply the Lords found relevant. *In præsentia.*

This reply was found also probable *prout de jure*. See Proof.

Fol. Dic. v. 2. p. 137. Dirleton, No 428. p. 212.

1686. *January* 12. Liermont *against* Gordon.

No 75.
The presumption of *instrumentum penes debitorem*, found not to take place relative to real rights.

The debate between Liermont of Balcomy and Mr William Gordon, advocate, brother to Lesmore, was advised. Lesmore had an apprising on Balcomy; when he pursues for mails and duties, Balcomy raises a declarator that it was in trust, and enforced it from this, that the said apprising, with the charter and sasine, were lying beside the debtor in his charter-chest, and so was in the case of *instrumentum apud debitorem repertum*, which presumes liberation. *Answered*, Whatever presumption of being retired this may infer against personal rights, and principal evidents, yet it had no force in real rights, because they might all be got at the register, and extracted by the debtor, and so the finding them beside him could enforce no transaction nor delivery. The Lords

found the trust not proven, mainly on this ground, that they would not take away heritable rights by presumptions and conjectures. No 75.

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.

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.

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* absolvitor, 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 juribus*, 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-