

rupt. Answered, The pursuer might pursue, or draw upon either of the *socii*, and the defender could not deny but he knew the bills were drawn upon both, and the wine came home, conform to their joint commission; and he may blame himself he did not dispose of his own part, seeing the bills of loading were indorsed to both; and, seeing he did not meddle with the wines, he ought to have seen to the payment of the bills by Denholm the intromittor, and to have secured himself against him as to hazard by the copartnery. The Lords assoilyied the defender; which decision seems hard upon factors.

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1684, *December 16*; and 1685, *March*. MR DAVID SKRYMZOUR *against* The LAIRD of GALDGIRTH.

ONE having prevailed with his debtor by bond, to be cautioner for him, and thereafter assigned the bond; upon which the assignee having pursued, the debtor alleged compensation or retention, till he was freed of his cautionary. Answered for the pursuer, The assignation was intimated before the defender was distressed as cautioner for the cedent; and consequently before his cautionary was a liquid ground of compensation; and the posterior distress is not *inter eosdem*. The Lords sustained the allegiance for the defender, his cautionary being after he was debtor; and it was not alleged, That the cedent was now become insolvent, to relieve the cautioner.—16th *December* 1684. Adhered to, *March* 1685.

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1684. *Dec. 17*. MR CHARLES LINDSAY *against* CUNNINGHAMHEAD.

A SUBSCRIBED account found not probative, and false, upon these indirect articles of improbation, *viz.* the dissimilitude of subscription, and different way of spelling words from the writer's usual subscription and method of spelling; and near forty years' taciturnity and seeking payment; albeit, *comparatione literarum*, as great a difference was observed betwixt the party's true uncontroverted subscriptions as betwixt these and that quarrelled; and the probation by witnesses was directly contrary, and equally pregnant; so that nothing of material objection seemed to remain but the long silence in requiring payment, which was but a light presumption *per se*, seeing law allows forty years to pursue.

This decision seems hard: but here the pursuer not being concerned in the account, but in another debt therein mentioned, which he was like to recover, he did not reclaim.—*Castlehill's Pratt. tit. Improbation, No. 97.*

Page 153, No. 550.

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