

got a bond from the nephew for securing him of the half of the liferent of that sum, with a clause adjected, that he, James, might alter and innovate the same; which faculty he exercised in favours of another nephew, after the first's decease without children, and raised a declarator thereof against a person to whom the said first nephew had assigned the bond, particularly upon this ground, that the bond was never delivered;—Alleged for the defender, That the cedent having paid to the pursuer the half of the annual-rent for several years, upon his discharges thereof, that imported delivery, and that the pursuer had but the naked custody of his nephew's bond; and many times creditors will make assignations, and intimate them, for the assignee's behoof, and yet keep all in their own possession. The Lords recommended to the parties to settle, which they did by dividing the sum.

*Page 44, No. 198.*

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1684. *December.* GEORGE PARK *against* INGLIS of CRAMOND.

FOUND, that if an author, called after raising of process of improbation, die before pronouncing of decret, his apparent heir must be called, or rather the process must be transferred against him.

*Page 154, No. 553.*

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1684. *December 2.* SIR PATRICK HEPBURN *against* MARY BRUCE.

IN a competition of adjudgers within year and day, the Lords found, That Sir Patrick Hepburn having paid only 10,000 merks to Margaret Scrimsour, for her adjudication of the lands of Ahinethy, he could only share of the price of the lands effeiring thereto, though the ground of Scrimsour's adjudication was 15,000 merks. This was a trysting interlocutor, by which Sir Patrick had so much advantage in another point as hindered him to reclaim.

*Page 76, No. 309.*

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1684. *December 4.* ROBERT STUART *against* WILLIAM BLACKWOOD.

JAMES Denholm and William Blackwood having, by their letter of commission, ordered Robert Stuart, factor, to send them home fifteen tuns of wine, and draw bills on them for the value; the wine accordingly was sent home, and bills drawn on both of them, but only presented to and accepted by Denholm, who intromitted with the whole wine. Six years after, these bills were protested for non-payment, against Denholm, without any intimation to Blackwood: Mr Stuart pursued Blackwood as Denholm's copartner. Alleged for the defender, That he must be free, no diligence being done against him, nor the bills or protest so much as intimated to him all this time, till now that the other copartner is bank-

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.

Page 36, No. 161.

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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*.

Page 62, No. 261.

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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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