

No 52.

Replied to the first ; An exception by an agent against exhibition does not prescribe, so long as the writs are in his custody. And to the *second*, it was *answered*, That a right of property, and that of an hypothec, are, in their nature, quite different ; the proprietor suffers nothing by exhibiting the writs, if he gets them safely returned ; but a writer, who has the custody thereof for security of his accounts, would be precluded from any benefit arising from his hypothec, if he were obliged to exhibit them even *ad modum probationis* ; more especially, that, if the pursuer prevail in the process of recognition, there will no subject remain for payment of any of Lord Duffus's creditors.

THE LORDS found, that the Earl had a title to have the writs exhibited to him, without being obliged to pay Mr Coupar's account.

Fol. Dic. v. 1. p. 419. C. Home, No 82. p. 135.

1742. *January 29.* SIR ROBERT STEWART, and Others, Petitioners.

No 53.

If a writer or agent be obliged to allow inspection of writings, on which he has a hypothec ?

It was reasoned among the Lords, whether or not an agent or writer, who had an hypothec on writs in his hands, was obliged to allow inspection till his account was paid ? It was on the one hand said, that all the party wanted, was inspection, whereby the hypothec would be eluded ; on the other hand, should a writer be allowed to say, ' I have papers, but I will not shew them till I am paid ;' he might draw his account for shewing papers that might be no better than a pack of cards. *2do*, Why should a writer, on account of his hypothec, have a stronger right than a proprietor has in his own papers, who yet is obliged to exhibit *ad modum probationis* ?

The point did not in this case receive a direct determination ; but it seemed to be the opinion of the majority, that inspection was to be allowed.

N. B. It is remembered, that in a declarator of recognition, the writs of the lands being called for by a diligence, to shew that they held ward of the pursuer, the defender's writer, in whose hands they were, was found obliged to exhibit them, notwithstanding his hypothec, which could not bar the third party's interest, to have them produced *ad modum probationis*, January 31. 1738, Earl of Sutherland *contra* Mr David Coupar, No 52. p. 6427.

Kilkerran, (HYPOTHEC.) No 2. p. 272.

No 54.

A writer may detain his client's papers for his account, but not for money advanced for him.

1749. *July 5.* THE CREDITORS of LIDDERDALE *against* NASMYTH.

IN the ranking of the Creditors of James Lidderdale of Torrs, James Nasmyth writer, called upon a diligence at the instance of the Creditors to exhibit the common debtor's rights to his estate, produced an inventory of the writs called for ; but insisted that he was not bound to deliver them till he was paid of an

account due to him by the common debtor ; which the Ordinary ' having sustained,' the Creditors reclaimed, and the Lords were of different opinions.

Some thought that the right competent to agents was improperly called a hypothec, as it is no pledge or real right, but only a personal right of retention of the writs while they are in his hands ; and if so, only competent against his employèr, but not against singular successors or real creditors, who *eo ipso*, that they acquire the real right in the estate, must of consequence have right to the title-deeds as accessory thereto : And to this purpose a case was remembered to have occurred in the year 1735, between Neil M'Vicar writer, and the Relict of Campbell of Kirnan, (See APPENDIX.) ; where Neil M'Vicar, who had got from Kirnan his charter, which contained also an annuity to the Lady of 600 merks, having refused, at the suit of the Lady, to exhibit the charter till he was paid an account due to him by Kirnan, the Lords, after altering the Ordinary's interlocutor, repelling the hypothec, upon advising a bill for the Lady, returned to the Ordinary's interlocutor, and found the hypothec only competent to M'Vicar against his employer.

Notwithstanding which, the LORDS in this case " adhered to the Ordinary's interlocutor, sustaining the hypothec."

As that case of M'Vicar and Lady Kirnan was upon no record, it was uncertain what circumstances may have attended it ; and the Lords generally attested, that in their practice in rankings, the agent's right to retain, till paid of his account, was always admitted ; and as it was a creature of the Court introduced for the agent's security, who otherways would not undertake the affairs of a person of doubted circumstances, which sometimes might be a loss even to his creditors, so, if it was only good against his employer, it would in most cases be good for nothing.

A special objection was then made for the Creditors to an article in the agent's account of L. 160, paid to the Stewart-Depute of Kirkcudbright, as the non-entry and relief due to the Crown, which he had promised to pay when he obtained the Stewart's precept for infesting the common debtor on his service and retour, in compliance with the clause in the precept *capiendo securitatem*.

Which objection the LORDS ' sustained,' as the payment of such money did not properly fall within the agent's province ; for that by the same rule, that the agent should be entitled to a hypothec for this, it might be pleaded, that the hypothec extended to the case of an agent's becoming cautioner in a suspension.

Fol. Dic. v. 3. p. 294. Kilkerran, (HYPOTHEC.) No 7. p. 275.

. D. Falconer reports the same case :

1749. July 6.—THE Creditors of James Lidderdale of Torrs having adjudged his estate, and being about to bring it to a voluntary sale, executed a diligence

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against James Nasmyth writer to the signet, for recovering out of his hand the title-deeds thereof; who *alleged*, That he being employed by the common debtor as a writer, was not obliged to give up the writs till he obtained payment of his account, consisting partly of L. 160 Scots of bygone feu duties, paid in order to obtain his client infest.

THE LORD ORDINARY, 19th July 1748, " found that James Nasmyth had a right of hypothec upon the writs, and to retain them, until he should be paid of the whole of his account."

Pleaded in a reclaiming bill, The writer's right is not properly a hypothec, though called so; for if it were, he would have right to recover the papers when out of his possession, which he has not; but it is only a retention competent against his employer; and he cannot, on being employed by one man, retain from another his papers, consequently not from the Creditors, whose the papers now are, as the estate is, which they have carried off by their diligence.

The article of money paid of arrears of feu-duties, is a common debt, and no article of a writer's account.

Answered, A writer has the papers pledged to him for his employment, and can retain them against all persons, though not recover them, if he lose the possession; and being employed to infest his client, which was his proper business, he was obliged to give security for the bygone feu-duties, which he afterwards paid.

" THE LORDS adhered, in finding he had right to retain the writs, till paid of his account due to him as a writer; but found that the money laid out by him for payment of the bygone feu-duties, was of the nature of a common debt, and he had no right of retention therefor."

Act. H. Home.

Alt. A. Macdougall.

Clerk, Murray.

D. Falconer, v. 2. No 78. p. 83.

1773. January 23. JOHN FINLAY *against* ROBERT SYME Clerk to the Signet.

No 55.

Writer's hypothec on his client's writings, found to be even a demand of exhibition *in modum probationis*, at the client's instance.

SYME, cited as a haver in virtue of a diligence at the instance of Finlay, the purpose whereof was, to recover writings, in order to instruct Finlay's claim against a third party, acknowledged upon oath, that he had sundry writings in his custody, which he had got possession of in consequence of their being transmitted to him, in order to be used in different processes whereof he had the management for behoof of Finlay; but insisted, that, as Finlay was indebted to him for money disbursed in the foresaid processes, and other articles, he had a hypothec upon the writings in his custody, which he therefore could not be obliged to deliver up till the account was paid. He, at the same time, exhibited an inventory of the papers in his custody, and a copy of the account due to him by Finlay.