

“ THE LORD ORDINARY having considered the objection, is of opinion, that Mr Syme must exhibit the writings in question.”

No 55.

Syme reclaimed; and, in point of fact, observed, that his case is certainly as favourable as any in which the question can come to be tried. The articles which compose his account consist, in a great measure, of disbursements in 1761 and 1762, still wholly owing. And the diligence is at the instance of the person to whom the papers belong, for whose behoof the articles were expended, and who, in order to get restitution of papers so material for him, ought to make a voluntary payment of the account.

With respect to the question itself, he cited the authority of Bankton, B. 1. T. 17. Par. 15. and Mr Erskine, B. 3. T. 4. § 21; and a decision, November 1705, Ayton *contra* Colvil, No 51. p. 6246.

Finlay stated some objections to the justness of the account on which the hypothec was claimed; and further contended, that, supposing it were a true account, and justly due, Syme has no title to insist on the demand he makes. A writer indeed has a hypothec upon the papers of his client, which may entitle him to say, that he will not deliver up these papers until he has paid his account; but he had no title to say, that he will suppress the evidence which they may afford, in a disputed question of fact, any more than he has a title to say, that he would not depone as a witness, when cited by a person who owed him money on account, till his account was paid. The present question is about exhibition of papers *in modum probationis*, and by no means about the delivery of them; for, if they are produced in the way of evidence, Mr Finlay has no objection that they be returned to Mr Syme afterwards.

“ THE LORDS find, that Mr Syme has a right of hypothec on the papers, and is not obliged to produce them till satisfied of his debt.”

Act. Cosmo Gordon.

Alt. Crosbie.

Clerk, Ross.

Fol. Dic. v. 3. p. 295. Fac. Col. No 49. p. 130.

1778. November 18.

ALEXANDER ORME *against* ANDREW BARCLAY, and Others.

ALEXANDER ORME, writer to the signet, was employed by the tutors of Robert Wright to make up the titles of their pupil to his father, Wright of Freuchie, as heir, *cum beneficio*, and to bring an action of ranking and sale of the estate at the instance of the heir. For these purposes, the title-deeds of the estate were put into his hands. The process of sale was carried on, and the expense of it debursed by Mr Orme until the ranking was finished; after which it was allowed to lie over. Upon the majority of the heir, a new process of ranking and sale was brought at the instance of his father's Creditors, in which Orme appeared, and

No 56.

An agent who carried on the ranking and sale of an estate, for a minor, as heir *cum beneficio*, was found to have no preference for his account to the creditors of the defunct.

No 56.

Pleaded; That he was entitled to be ranked for the expense of the former process as a preferable creditor, from his right of hypothec on the title-deeds of the estate still remaining in his hands.

Answered for the Creditors; The claimant is not a creditor to the deceased Wright of Freuchie in this account. He is only creditor to the heir and his tutors and curators, who were his employers. But the heir of a bankrupt has no more right to withdraw the title-deeds of the bankrupt, than any part of his estate from the creditors, and cannot hypothecate them for payment of what is advanced and furnished to himself.

The COURT repelled the claim founded on the right of hypothec, reserving action to the pursuer against the minor and his tutors and curators.

Lord Ordinary, *Alva*.For Orme, *Ferguson*.Alt. *Scott*.Clerk, *Gibson*.

Fol. Dic. v. 3. p. 295. Fac. Col. No 45. p. 79.

1780. December 22.

JAMES FOGGO, and Others, Executors of JOHN FOGGO, writer in Glasgow, against JOHN M'ADAM of Craigengillan, and Others, Creditors of JOHN ALSTON.

No 57.
Found, that although a writer hold possession of his client's papers, this does not interrupt the triennial prescription of his account.

IN a process of ranking and sale of the bankrupt estate of John Alston, the title-deeds of said estate were produced by the Executors of John Foggo, writer in Glasgow, under condition, that producing these papers should not hurt any claim of preference, or right of hypothec, Mr Foggo's executors had, for payment of an account for business done by Mr Foggo for Alston.

After the process of ranking and sale was concluded, the papers were delivered back to Mr Foggo's executors, who, in the divisions of the rice, claimed payment of the account due to Mr Foggo.

Objected by the other creditors; The account on which Mr Foggo's executors found their claim, begins in 1774, and the last article stated is in 1762. John Alston died in 1768; and it is to be presumed this account was settled before his death. It is cut off by the triennial prescription. For, however reasonable it may be, that a writer should have a hypothec on his client's papers, for an account of business, this right cannot be understood as giving a privilege, *præter communes juris regulas*, so as to keep up such a claim against the client and his representatives for ever; and so it was determined, Mason against Earl of Aberdeen 26th November 1709, *voce* PRESCRIPTION.

Answered for the executors; Although they consented to produce the papers, rather than interrupt the sale, they did so, under condition that it should not hurt their right of hypothec; and, after the decret of ranking was extracted, the papers were given back, and are now in their possession; so they are not to be considered as claimants bringing an action for payment of an account, to