

which the triennial prescription may be objected. They are in the case of a person having a pledge, and are entitled, in virtue of the right of hypothec, to retain the papers till payment of the account; as was decided, Mitchel *contra* M'Adam, 18th January 1712, *voce* PRESCRIPTION, and has ever since been held to be law.

THE LORDS found, that a writer, holding possession of his client's papers, does not stop or interrupt the triennial prescription of his account; and remit to the Ordinary to proceed accordingly.

Act. J. Boswell.

Alt. G. Fergusson.

Clerk, Tait.

Fol. Dic. v. 3. p. 295. Fac. Col. No 12. p. 22.

1781. August 9. Ranking of HAMILTON of Provenhall's Creditors.

IN the ranking of Provenhall's Creditors, William Wilson, writer to the signet, produced an interest founded on an account of business done for the common debtor, and craved a *primo loco* preference, in virtue of his right of hypothec, on the papers which were still in his hands.

It was at first *objected*, That Mr Wilson had passed from his right of hypothec, by taking a bill for the sum in his account. But this objection being over-ruled by the Lord Hailes Ordinary, William Jamieson, an heritable creditor, reclaimed upon a different ground, viz. that his debt was completed by infestment, prior to every article in Mr Wilson's account of business.

Pleaded for Mr Jamieson; That, by an heritable bond, not only the lands of the debtor, but the title-deeds of those lands, are conveyed to the creditor, and both become equally his property to the effect of securing him against every new contraction of the proprietor. Though, therefore, an agent is entitled to retain papers in his hands till paid his account, in a question with either the proprietor himself, or even a personal creditor, yet he cannot be preferred, or even come in *pari passu*, in ranking with an heritable creditor, who had previously a real *lien* upon the papers. Besides, Mr Wilson's claim is inconsistent with the security of real creditors, who always understand, that no right, which does not appear on record, can interfere with them.

Answered for Mr Wilson; That, by the law of Scotland, title-deeds or other writings in the custody of an agent, are held to be pledged in security of his account; nor can an agent be obliged to give up his hypothec without payment, any more than a wadsetter can be obliged to renounce his wadset, without payment of the redemption money. Both are redeemable rights, and both are equally inviolable till payment. As to the conveyance of writs and evidents in an heritable bond, it constitutes no real *lien* whatsoever, but merely a personal right to make them furthcoming from the debtor. Possession of the *ipsa corpora* is the only *lien* upon the title-deeds; and when it is observed that lands,

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A writer's hypothec on the papers of a bankrupt, found preferable to another creditor's infestment on his lands, though prior in date to the writer's account.

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and the title-deeds of lands, are really two different subjects, it will be evident that the custodier of the deeds has, by possession, as complete and distinct a right in that subject, as the creditor has in the lands by his infestment. With regard to creditors trusting only to the faith of the records, it is by no means the fact as to matters of this kind; nor can it be, for the record does not inform a creditor where his debtor's papers are to be found, or how much of his agent's account is unpaid. A creditor need never be long at a loss in these matters; and a very little degree of attention may secure him against any danger; but, on the other hand, if an agent were always to make searches before could safely proceed to business, it would either oblige every man to be his own agent, or put an end to business altogether.

Cases quoted by Mr Wilson, Nasmyth *contra* Creditors of Lidderdale of Torrs, No 54. p. 6248.; Patrick M'Dougal *contra* Creditors of Castleswine, January 1780, See APPENDIX. Mr Wilson himself *contra* Creditors of Lainshaw, July 1780, See APPENDIX.

THE LORDS preferred Mr Wilson.

Lord Ordinary, *Hailes.* Act. *H. Erskine.* Alt. *Mortbland.* Clerk, *Orme.*
D. *Fol. Dic. v. 3. p. 295. Fac. Col. No 82. p. 137.*

1793. February 9.

THE CREDITORS OF JOHN NEWLANDS *against* ANDREW MACKENZIE.

No 59.

An agent ordained to make exhibition to his client's creditors, of his title-deeds, on getting a decree of preference for his account, on the produce of the subjects, and a warrant for payment out of the first and readiest of the funds *in medio.*

JOHN NEWLANDS owed Andrew Mackenzie, writer to the signet, an account for business performed. His creditors demanded exhibition or inspection of certain title-deeds belonging to him, in Mr Mackenzie's possession, which he refused till he got payment of his account.

The creditors had no objection that Mr Mackenzie's preference on the funds of the debtor should be ascertained by a decree of the Court, but insisted, that they should have inspection of the title deeds.

Mr Mackenzie *objected*; A third party may no doubt call for exhibition of writings *in modum probationis*, although subject to the writer's hypothec, without paying his account; Aiton, No 51. p. 6247. But this is not competent to the employer, or to creditors standing merely in his right; Creditors of Lidderdale, No 54. p. 6248.; 23d January 1773, Finlay *against* Syme, No 54. p. 6250.; 9th August 1781, Ranking of Provenhall, No 57. p. 6253.

From the peculiar situation of the property of Mr Newlands, there is reason to believe, that the creditors will not find it their interest to sell it, so that the hypothec will thus be completely disappointed.

Answered; The decisions above quoted proceeded on specialties. If the title-deeds are not produced, the subjects must remain unsold, and the account