

1773. *January 23.* JOHN FINLAY *against* ROBERT SYM.

HYPOTHEC.

Writer's hypothec on his client's writings bars even demand of exhibition *in modum probationis* at the client's instance.

[*Faculty Collection, VI. 13 ; Dict. 6,250.*]

GARDENSTON. If this interlocutor were adhered to, the credit of the lieges would be hurt; writers would not trust their clients. The answer, that the writings are only called for as in an exhibition, is not sufficient: this would be to make the writer merely a custodier of the papers. It is true, as the Ordinary expresses it, that this incidental question embarrasses the cause: but that is Finlay's fault; he should have brought an action at first for his papers, and then the defence of hypothec would have occurred. His delay in bringing this action cannot alter the nature of Sym's defence.

KAIMES. Here the writer stands out against his own interest; his payment depends on Finlay's success, and Finlay's success depends on the exhibition.

HAILES. I was so much prepossessed with the notion that Sym argued against his own interest, that I did not give sufficient attention to the *legal* defence, which I apprehend my interlocutor wounds. It is certain that Sym's only chance of payment depends on his waving his right of hypothec, and that, by gaining his cause, he will lose his money.

On the 23d January 1773, the Lords found that Sym has a right of hypothec for payment of his account, and that he is not obliged to exhibit the papers called for; altering Lord Hailes's interlocutor.

*Act.* A. Crosbie. *Alt.* Cosmo Gordon.

1773. *February 2.* JOHN FINLAYSON *against* JOHN EWEN.

BILL.

To preserve recourse against an onerous indorsee on a bill passed by him in course of trade, the bill must be duly negotiated, whether the drawer was creditor or not to the person drawn on.

[*Faculty Collection, VI. 136 ; Dictionary, 1,597.*]

COALSTON. Had the question been with the drawer of the bill, the objection of undue negotiations would not have been good. The case is different when the question is with the indorsee.