

No 54

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.

“ 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.