

No 58.

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

unpaid. If they are produced, and the subjects sold, the objector will get payment; if they are not, he can suffer nothing by the production.

No 59.

The Lord Ordinary ordered the writings called for to be produced, reserving to Mr Mackenzie his right of hypothec.

The COURT, upon advising a reclaiming petition and answers, 'remitted to the Lord Abercromby to ascertain the amount of the petitioner's account; and upon the petitioner's lodging in the clerk's hands the papers in question, found him entitled to a warrant upon the factor, for the amount of the account, when so ascertained, out of the funds received or to be received by him out of the subject *in medio*, and remitted to the Lord Abercromby Ordinary to proceed accordingly.'

Lord Ordinary, *Abercromby.*
Alt. *Charles Hope.*

For Mr Mackenzie, *G. Fergusson, Cha. Hay.*
Clerk, *Sinclair.*

D. D.

Fol. Dic. v. 3. p. 295. Fac. Col. No 25. p. 52.

1793. November 28. CHRISTIAN CALLMAN *against* HAMILTON BELL.

CHRISTIAN CALLMAN employed Hamilton Bell writer to the signet to raise a process of declarator of marriage and legitimacy, at the instance of herself and her daughter, against Janet Gourlay, sister, and (as she alleged) representative of the late Robert Gourlay, to whom Mrs Callman said she had been married. She also employed Mr Bell to take out an edict in the name of her child, for serving her executrix, as nearest of kin to her deceased father. The same step was taken by Janet Gourlay, who contended, that she ought to be preferred to that office; and, after some litigation, she prevailed before the Commissaries.

Mr Bell, on the part of his client, brought their judgment under review, by a bill of advocation, which was refused.

At this stage of the action, Christian Callman notified to Mr Bell, that she was to change her man of business; and insisted that he should deliver up to her the bill of advocation, writings produced, and the whole procedure which had taken place upon it in the bill-chamber, and also the process of declarator which was going on in the Commissary-court.

Mr Bell refused to comply with this demand, upon the ground of his having a right of hypothec over the whole papers in his possession, till he should get payment of the account due to him as her agent.

Upon this Christian Callman obtained a caption against him, for not returning the bill of advocation, &c. into the hands of the clerk.

Mr Bell having presented a representation, praying that it should be recalled, the Lord Ordinary on the bills found, 'That an agent is not entitled to stop procedure in a depending process, by withholding the steps of process from his client or the clerk; as his hypothec only extends over title-deeds, securities,

No 60.

An agent's hypothec over the papers of his client, found not to extend to the proceedings in a process which he had been employed to conduct.