

## S E C T. VII.

## Hypothec competent to Writers and Agents.

1705. November 23. *AYTON against COLVILLE.*

No 51.

A WRITER has hypothec over his constituent's papers, for security of his claim for pains and debursments; nor does the hypothec fall upon getting a written obligation for his payment.

*Fol. Dic. v. 1. p. 419. Fountainhall. Forbes.*

\* \* \* See this case, *voce* IMPROBATION.

1738. January 31.

*THE EARL OF SUTHERLAND against MR DAVID COUPAR Writer in Edinburgh.*

In the process of recognition at the Earl's instance, as superior of the lands of Skelbo, belonging to the Lord Duffus, Mr Coupar being charged, in virtue of letters of diligence, to exhibit several writs that were in his custody, which, it was *alleged*, might be probative of the points admitted to the pursuer's probation, did, in order to stop executing the second diligence, petition the Lords, setting forth, that he having been employed by Lord Duffus the defender, had debursed some money in his affairs; and therefore, having a right of hypothec in these writs, he was not bound to produce them, as the production thereof would be evidence of the facts the Earl was allowed to prove, which, being all that was wanted, would tend to frustrate Mr Coupar's payment.

*Answered* for the Earl; That the account due to Mr Coupar is prescribed; of course, the right of hypothec, which is only accessory, cannot subsist after the debt, for which it is a security, is extinguished.

*2do*, Supposing it were not, the right of retention, in virtue of the hypothec, cannot take place here, as the Earl is not insisting for delivery, but only for exhibition in the clerk's hands, *ad modum probationis*; which is a piece of justice he is entitled to demand from every person in whose custody these papers may happen to be lodged; nay, Lord Duffus himself, if he had had the possession thereof, could not have detained them upon any pretence whatsoever; consequently Mr Coupar's title cannot be stronger than his author's right of property.

No 52.

A superior, in a process of recognition, is entitled to have the writs relative thereto exhibited to him, without paying the agent's account who has the custody thereof.