

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.

No 52.

Replied to the first; An exception by an agent against exhibition does not prescribe, so long as the writs are in his custody. And to the *second*, it was *answered*, That a right of property, and that of an hypothec, are, in their nature, quite different; the proprietor suffers nothing by exhibiting the writs, if he gets them safely returned; but a writer, who has the custody thereof for security of his accounts, would be precluded from any benefit arising from his hypothec, if he were obliged to exhibit them even *ad modum probationis*; more especially, that, if the pursuer prevail in the process of recognition, there will no subject remain for payment of any of Lord Duffus's creditors.

THE LORDS found, that the Earl had a title to have the writs exhibited to him, without being obliged to pay Mr Coupar's account.

Fol. Dic. v. 1. p. 419. C. Home, No 82. p. 135.

1742. *January 29.* SIR ROBERT STEWART, and Others, Petitioners.

No 53.

If a writer or agent be obliged to allow inspection of writings, on which he has a hypothec?

It was reasoned among the Lords, whether or not an agent or writer, who had an hypothec on writs in his hands, was obliged to allow inspection till his account was paid? It was on the one hand said, that all the party wanted, was inspection, whereby the hypothec would be eluded; on the other hand, should a writer be allowed to say, 'I have papers, but I will not shew them till I am paid;' he might draw his account for shewing papers that might be no better than a pack of cards. *2do*, Why should a writer, on account of his hypothec, have a stronger right than a proprietor has in his own papers, who yet is obliged to exhibit *ad modum probationis*?

The point did not in this case receive a direct determination; but it seemed to be the opinion of the majority, that inspection was to be allowed.

N. B. It is remembered, that in a declarator of recognition, the writs of the lands being called for by a diligence, to shew that they held ward of the pursuer, the defender's writer, in whose hands they were, was found obliged to exhibit them, notwithstanding his hypothec, which could not bar the third party's interest, to have them produced *ad modum probationis*, January 31. 1738, Earl of Sutherland *contra* Mr David Coupar, No 52. p. 6427.

Kilkerran, (HYPOTHEC.) No 2. p. 272.

No 54.

A writer may detain his client's papers for his account, but not for money advanced for him.

1749. *July 5.* THE CREDITORS of LIDDERDALE *against* NASMYTH.

IN the ranking of the Creditors of James Lidderdale of Torrs, James Nasmyth writer, called upon a diligence at the instance of the Creditors to exhibit the common debtor's rights to his estate, produced an inventory of the writs called for; but insisted that he was not bound to deliver them till he was paid of an