

No 56.

*Pleaded*; That he was entitled to be ranked for the expense of the former process as a preferable creditor, from his right of hypothec on the title-deeds of the estate still remaining in his hands.

*Answered* for the Creditors; The claimant is not a creditor to the deceased Wright of Freuchie in this account. He is only creditor to the heir and his tutors and curators, who were his employers. But the heir of a bankrupt has no more right to withdraw the title-deeds of the bankrupt, than any part of his estate from the creditors, and cannot hypothecate them for payment of what is advanced and furnished to himself.

The COURT repelled the claim founded on the right of hypothec, reserving action to the pursuer against the minor and his tutors and curators.

Lord Ordinary, *Alva.*For Orme, *Ferguson.*Alt. *Scott.*Clerk, *Gibson.*

*Fol. Dic. v. 3. p. 295. Fac. Col. No 45. p. 79.*

1780. December 22.

JAMES FOGGO, and Others, Executors of JOHN FOGGO, writer in Glasgow, against JOHN M'ADAM of Craigengillan, and Others, Creditors of JOHN ALSTON.

No 57.

Found, that although a writer hold possession of his client's papers, this does not interrupt the triennial prescription of his account.

IN a process of ranking and sale of the bankrupt estate of John Alston, the title-deeds of said estate were produced by the Executors of John Foggo, writer in Glasgow, under condition, that producing these papers should not hurt any claim of preference, or right of hypothec, Mr Foggo's executors had, for payment of an account for business done by Mr Foggo for Alston.

After the process of ranking and sale was concluded, the papers were delivered back to Mr Foggo's executors, who, in the divisions of the rice, claimed payment of the account due to Mr Foggo.

*Objected* by the other creditors; The account on which Mr Foggo's executors found their claim, begins in 1774, and the last article stated is in 1762. John Alston died in 1768; and it is to be presumed this account was settled before his death. It is cut off by the triennial prescription. For, however reasonable it may be, that a writer should have a hypothec on his client's papers, for an account of business, this right cannot be understood as giving a privilege, *præter communes juris regulas*, so as to keep up such a claim against the client and his representatives for ever; and so it was determined, Mason against Earl of Aberdeen 26th November 1709, *voce* PRESCRIPTION.

*Answered* for the executors; Although they consented to produce the papers, rather than interrupt the sale, they did so, under condition that it should not hurt their right of hypothec; and, after the decret of ranking was extracted, the papers were given back, and are now in their possession; so they are not to be considered as claimants bringing an action for payment of an account, to

which the triennial prescription may be objected. They are in the case of a person having a pledge, and are entitled, in virtue of the right of hypothec, to retain the papers till payment of the account; as was decided, Mitchel *contra* M'Adam, 18th January 1712, *voce* PRESCRIPTION, and has ever since been held to be law.

THE LORDS found, that a writer, holding possession of his client's papers, does not stop or interrupt the triennial prescription of his account; and remit to the Ordinary to proceed accordingly.

Act. J. Boswell.

Alt. G. Fergusson.

Clerk, Tait.

Fol. Dic. v. 3. p. 295. Fac. Col. No 12. p. 22.

1781. August 9. Ranking of HAMILTON of Provenhall's Creditors.

IN the ranking of Provenhall's Creditors, William Wilson, writer to the signet, produced an interest founded on an account of business done for the common debtor, and craved a *primo loco* preference, in virtue of his right of hypothec, on the papers which were still in his hands.

It was at first *objected*, That Mr Wilson had passed from his right of hypothec, by taking a bill for the sum in his account. But this objection being over-ruled by the Lord Hailes Ordinary, William Jamieson, an heritable creditor, reclaimed upon a different ground, viz. that his debt was completed by infestment, prior to every article in Mr Wilson's account of business.

*Pleaded* for Mr Jamieson; That, by an heritable bond, not only the lands of the debtor, but the title-deeds of those lands, are conveyed to the creditor, and both become equally his property to the effect of securing him against every new contraction of the proprietor. Though, therefore, an agent is entitled to retain papers in his hands till paid his account, in a question with either the proprietor himself, or even a personal creditor, yet he cannot be preferred, or even come in *pari passu*, in ranking with an heritable creditor, who had previously a real *lien* upon the papers. Besides, Mr Wilson's claim is inconsistent with the security of real creditors, who always understand, that no right, which does not appear on record, can interfere with them.

*Answered* for Mr Wilson; That, by the law of Scotland, title-deeds or other writings in the custody of an agent, are held to be pledged in security of his account; nor can an agent be obliged to give up his hypothec without payment, any more than a wadsetter can be obliged to renounce his wadset, without payment of the redemption money. Both are redeemable rights, and both are equally inviolable till payment. As to the conveyance of writs and evidents in an heritable bond, it constitutes no real *lien* whatsoever, but merely a personal right to make them furthcoming from the debtor. Possession of the *ipsa corpora* is the only *lien* upon the title-deeds; and when it is observed that lands,

No 57.

No 58.

A writer's hypothec on the papers of a bankrupt, found preferable to another creditor's infestment on his lands, though prior in date to the writer's account.