

1667. July 4. CUMMING of Altyr against LUMSDEN.

CUMMING of Altyr having set a salmon fishing to Alexander Lumsden, for payment of L. 60 Scots of tack-duty, he pursues Matthew Lumsden, as intrormitter with the fish taken, for the tack-duty, as having an hypothec upon the profits for the rent.—It was *alleged* for the defender absolvitor, because he intrormitted with these fish as donatar to Alexander Lumsden's escheat ; at least, having now the right of the escheat, he was not liable for that privilege, preferring masters of the ground ; for the rent cannot take place against the King and his donatar, who is more privileged.

THE LORDS repelled the defence, and found the donatar liable for the rent, in so far as ilk year's intrormission would extend to the rent of that year.

Fol. Dic. v. 1. p. 418. Stair, v. 1. p. 469.

No 40.
Fishings
liable to hy-
pothec, See
No. 43.

1676. June 14. CUSHNEY against CHRYSTIE.

THOMAS CUSHNEY having confirmed himself executor-creditor to George Angus, and in the inventory gave up L. 500 as a sum due by Alexander Gordon to George, and having arrested all goods and debts due to the defunct in Alexander's hand, he deponed that he was no other way debtor to the defunct, but that the defunct embarked some goods in Dantzick, in his own name, and with his own mark, to be consigned to Alexander Gordon to his factor, which he had received into his custody, and thereupon was decerned by the Bailies of Aberdeen to deliver the goods. There is now suspension of this decret, and a competition by John Chrystie, *alleging* the goods to be his, or that he is to be preferred, for this reason, *imo*, That certain merchants of Aberdeen having trusted George Angus and John Chrystie to sell a cargo of goods of theirs at Dantzick, they had done the same accordingly, and did jointly buy several parcels of goods there. George Angus having died there, the merchants in Dantzick recovered decret against John Chrystie for the whole, whereof the goods in Alexander Gordon's hands are a part, and must therefore belong to Chrystie, and not to the executors of Angus ; at least Chrystie is preferable for what he paid out for them, as having a hypothec, at least a privilege for the price.—It was *answered*, That supposing the goods had been bought jointly by both, yet they were divided, and each of the two inloaded their share under their mark, and in their name, and on their risk ; and it is clear by Gordon's oath, that this parcel was inloaded in the name of Angus, who thereby was proprietor ; and by our law there is neither hypothec nor privilege for the price of goods, and therefore Chrystie can only pursue for it those that represent Angus.

THE LORDS found the allegiance relevant jointly, that the goods were bought in society or communion, and so received, to give either party an equal share ;

No 41.
Hypothec
on goods for
the price,
found not to
take place
by the law
of Scotland.

No 41. but found the answer of dividing the goods under their several marks relevant to elide the same, and to constitute the property only in Angus, and preferred his executor-creditor thereto; and found, that there was no hypothec or privilege of goods for the price, by our law.

Fol. Dic. v. 1. p. 420. Stair, v. 2. p. 425.

* * * Gosford reports the same case :

1696. *June 16.*

In a multiplepounding, raised at the instance of Alexander Gordon against Chrystie and Cushney, as pretending right to a parcel of goods sent home to Gordon, as factor for the deceased George Angus, it was *alleged* for Chrystie, That he ought to be preferred, because the goods in question were the return of a parcel of goods wherein he and the deceased George Angus were conjunct partners; in contemplation whereof, they having bought a parcel of goods at Dantzick, from a merchant there, without present payment, the said Angus dying upon the place, the merchant who sold to them did arrest, and by a decret founded upon their municipal law, forced Chrystie, as joint in society, and jointly bargaining for the goods, to pay the whole price, so that he had preference to the returns before Angus or any of his representatives or creditors.— It was *answered* and *alleged* for Cushney, That he being executor-creditor to Angus, and having arrested in Gordon his factor's hands, before any real diligence done by Chrystie, he was preferable, because, albeit Angus was in society when the goods were bought, yet the parcel being divided, and the goods sent home to Gordon, as factor for Chrystie, were his proper goods, and belonged to Cushney, his executor-creditor, who had done the first diligence by arrestment.—THE LORDS preferred Chrystie upon that ground, that there was *emptio et venditio* by the division of the goods bought, and that by our law there was no tacit hypothecation; which seems hard, and to which I did not agree, upon the reason that before Cushney did either confirm himself executor, or arrested by the law of Dantzick, which was *locus contractus*, Chrystie was found liable for the whole price, and so was reputed the sole buyer, and had right to the whole property, and upon that principle had been forced to find caution, and pay the whole price; neither Angus, who was joint in security, nor any of his creditors, could have any better right, or could be preferred to the whole goods, without payment of any part of the price; which could not be very destructive to all foreign trade, which must be ruled by the laws of the place where the traffic is to be used, and the goods in society be disposed.

Gosford, MS. No 862. p. 544.