

No 60. and other documents properly belonging to his client ; and therefore refuses to recall the caption, so far as it applies to the recovery of the steps of process, either before the Commissary-court or this Court.'

Mr Bell presented a petition, reclaiming against this judgment ; in which he founded on the case, 28th January 1784, Scott against Lothian \*.

*Observed* on the Bench ; An agent, so far from having an hypothec over the steps of a process, is not even entitled to retain title-deeds or other writings of his client, of which he has got possession merely in consequence of their having been produced in it. But if they were in his hands prior to their production, as in the case of Scott against Lothian, he will not on that account lose his hypothec over them. In the case of Forsyth against Sym †, 18th February 1791, the claim of hypothec was repelled in circumstances similar to the present.

The petition was unanimously refused without answers.

Lord Ordinary, *Estgroue*. For the Petitioner, *W. Stewart*. Clerk, *Menzies*.  
*R. D.* *Fol. Dic. v. 3. p. 295. Fac. Col. No 78. p. 172.*

1794. January 16.

The INTERIM FACTOR on the sequestrated Estate of Bertram, Gardner, and Company, against DAVID THOMSON.

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An agent, whose client's estate was sequestrated, ordained to deliver the bankrupt's papers to his creditors, on receiving a warrant for payment of his account out of the funds *in medio*, as soon as it should be adjusted.

DAVID THOMSON, writer to the signet, was agent for Messrs Bertram, Gardner, and Company, and in that character had many of their papers in his possession. On their bankruptcy, he acted as clerk to the general meeting of creditors, at which Richard Hotchkis was appointed interim factor. The grounds of debt produced for the creditors were immediately returned to them, but their oaths of verity and mandates were left with Mr Thomson.

The interim factor having demanded from Mr Thomson the whole papers he held in his possession, whether as agent for the bankrupts, or clerk to the general meeting of creditors, under reservation of his right of hypothec, Mr Thomson, though willing to allow inspection of them in his own hands, refused to quit possession of the former, until an account due to him by the bankrupts was paid, or at least an obligation granted for payment of it ; and contended, that Mr Hotchkis was not entitled to possession of the latter, as they belonged to the creditors, and not to the bankrupts, of whose effects only he was appointed to take charge ; 33d Geo. III. c. 74. § 15.

Upon this Mr Hotchkis presented a petition to the Lord Ordinary on the bills, to which his Lordship ordered answers to be lodged, and both to be presented to the Court.

\* Not reported.

† Not reported.

THE LORDS 'authorised the said Richard Hotchkis, as interim factor on the sequestrated estate of Bertram, Gardner, and Company, and of John Gardner, Adam Keir, and Robert Forrester, individual partners of the said Company, and the trustee acting for the time upon the said estate, to make payment to the said David Thomson out of the funds in his hands, of the amount of his accounts, as soon as the same are finally liquidated and adjusted; and in the mean time ordained the said David Thomson instantly to deliver to the said Richard Hotchkis, the whole writings, vouchers, documents, books, and papers of every kind, both of the creditors and of the bankrupts, or connected with their affairs.'

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Lord Ordinary, *Ankerville*.Clerk, *Pringle*.

D. D.

*Fol. Dic. v. 3. p. 296. Fac. Col. No 91. p. 203.*

1802. July 9.

SMYTH *against* GEMMILL and HERBERTSON

IN the action which was maintained by William Robertson against Andrew Gemmill and Arthur Herbertson, in which he was successful, his agent, James Smyth, writer to the signet, obtained the decree for the expenses of process to be extracted in his name. This was objected to on their part, principally because a claim of compensation against Robertson would thus be cut off, if a third party were entitled to sue for them.

The Lord Ordinary appointed the parties to state the claim and objections in minutes, to be reported to the Court.

James Smyth

*Pleaded*; The Court have, by very long practice, allowed a decree for expenses to go out in name of the agent in the cause, for this just and solid reason, that the agent who has disbursed the expenses is in fact the real and proper creditor; and wherever these are found due, though they are nominally given to the contesting party, yet they are just the recompense of the labour of the agent, and the reimbursement of his own money. In a question between the agent and his client, there can be no doubt but the claim of the agent, by whose money the client's subject was preserved, or his right made effectual, would be preferred; as the subject belongs to the client only after deducting the sum expended in recovering it. Nor can the creditors of the client be in a better situation than he is. For though this sum be usually paid first to the client, who reimburses his agent, yet it may be paid at once to the agent, whose it substantially is; and the creditors of the client can have no claim upon what neither really, nor even in point of form, is in the hands of their debtor. Compensation cannot operate, there being no *concursum debiti et crediti*, except on the sum recovered, after the expense of recovering it is deducted. This right of the agent was found effectual in Wright's Trustee against

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The claim of the agent to the expenses of process from the unsuccessful party, preferred to a claim of compensation made by that unsuccessful party against the party in whose favour they were awarded.