1773. *January* 23. JOHN FINLAY *against* ROBERT SYM.

HYPOTHEC.

Writer's hypothec on his client's writings bars even demand of exhibition *in modum probationis* at the client's instance.

[*Faculty Collection, VI.* 13; *Dict.* 6,250.]

GARDENSTON. If this interlocutor were adhered to, the credit of the lieges would be hurt; writers would not trust their clients. The answer, that the writings are only called for as in an exhibition, is not sufficient: this would be to make the writer merely a custodier of the papers. It is true, as the Ordinary expresses it, that this incidental question embarasses the cause: but that is Finlay's fault; he should have brought an action at first for his papers, and then the defence of hypothec would have occurred. His delay in bringing this action cannot alter the nature of Sym's defence.

KAIMES. Here the writer stands out against his own interest; his payment depends on Finlay's success, and Finlay's success depends on the exhibition.

HAILES. I was so much prepossessed with the notion that Sym argued against his own interest, that I did not give sufficient attention to the *legal* defence, which I apprehend my interlocutor wounds. It is certain that Sym's only chance of payment depends on his waving his right of hypothec, and that, by gaining his cause, he will lose his money.

On the 23d January 1773, the Lords found that Sym has a right of hypothec for payment of his account, and that he is not obliged to exhibit the papers called for; altering Lord Hailes's interlocutor.

Act. A. Crosbie. *Alt.* Cosmo Gordon.

1773. *February* 2. JOHN FINLAYSON *against* JOHN EWEN.

BILL.

To preserve recourse against an onerous indorsee on a bill passed by him in course of trade, the bill must be duly negotiated, whether the drawer was creditor or not to the person drawn on.

[*Faculty Collection, VI.* 136; *Dictionary,* 1,597.]

COALSTON. Had the question been with the drawer of the bill, the objection of undue negotiations would not have been good. The case is different when the question is with the indorsee.

PITFOUR. The decision in *Falconer, 29th January* 1751, where the contrary was found, is rightly reported by the Collector; but that was the first judgment. The Court altered on a review.

GARDENSTON. The cases quoted in the petition are in point.

MONBODDO. I am glad to hear that it is held to be law, that the objection of undue negotiation is good in a question between the original creditor and the drawer. I do not see the difference between that case and this: every draught is an assignation,—every assignation supposes that *debitum subest.*

PRESIDENT. I lay the case upon the nature of bills, that an indorsee may take the benefit of the objection arising from an undue negotiation, though the drawers cannot.

On the 2d February 1773, the Lords found no recourse due, and therefore suspended the letters; altering Lord Monboddo's interlocutor.

Act. G. B. Hepburn. *Alt.* W. M'Kenzie.

1773. *February* 16. JAMES CATHCART of Carbiestoun *against* JAMES ROCHEID of Inverleith.

HEIRS-PORTIONERS.

There is a distinction between heirs-portioners *ab intestato*, and heirs-portioners provisional, with respect to the *præcipuum*; which, in the case of the latter, is not claimable in right of the eldest of four daughters, who were, failing a son, *nominatim* called to the succession equally amongst them.

[*Fac. Coll. VI.* 143; *Dictionary*, 5,375.]

AUCHINLECK. There is all the difference imaginable between an heir and a disponee. That here they happen to be the same persons, makes no difference: they do not claim as heirs: they must take as disponees.

MONBODDO. The distinction between disponee and heir is as ancient as any in the feudal law. But here the daughters take not as disponees, but as heirs, and make up a title as heirs by service. If they had been strangers, still the eldest heir-portioner would have had a right to the *præcipuum.* The eldest daughter of Sir James the younger would have had a right to a *præcipuum*, so also the daughters of Sir James the elder.

HAILES. It is hard for judges to determine impartially upon a point of law, when, from private knowledge, they are apprised of the sentiments of the parties; which set aside the point of law altogether. The young gentlemen here know nothing of what happened before their own day. The truth is, that there are new buildings at Inverleith made by Colonel Cathcart and Mrs Rochied, exceeding the value of the old capital messuage and its appurtenances. It is impossible to suppose that Colonel Cathcart paid any more than one-fourth of the