COURT OF SESSION.

Tuesday, July 5.

OUTER HOUSE.

[Lord Mackenzie.

BUCHANAN *v.* BALLANTINE.

Process—Expenses—Caution for Expenses—Pursuer Ordained to Find Caution for Expenses—Action Unsuitable for Trial in Court of Session.

A pursuer having raised an action of damages, applied for the benefit of the poor's roll. The reporters found that there was a *probabilis causa*, but on consideration of their report the Second Division refused admission to the roll on the ground that the cause was unsuitable for trial in the Court of Session. The pursuer thereupon proposed to proceed with the action in the Court of Session in ordinary form.

The Court (*per* Lord Mackenzie) *ordained* the pursuer to find caution for expenses within fourteen days.

This was an action of damages for slander at the instance of Effingham D. Buchanan, Strathaven, against Andrew Ballantine, farmer, Glassford, Hamilton, in which proceedings were sisted in order to allow the pursuer an opportunity to apply for the benefit of the poor's roll.

The matter came before the reporters on *probabilis causa litigandi*, who reported that there was a *probabilis causa*, but thereafter, on the consideration of the report by the Second Division, the Court refused to admit the pursuer to the poor's roll, on the ground that the cause was unsuitable for trial in the Court of Session.

The pursuer then enrolled the case before Lord Mackenzie (Ordinary), and intimated that he desired to proceed with the action in the Court of Session in common form, and on 14th June 1910 the Lord Ordinary, on the pursuer's motion, recalled the sist.

On 5th July 1910 counsel for the defender moved the Court to ordain the pursuer to find caution for expenses, and cited *Ritchie* v. *Mackintosh*, June 2, 1881, 8 R. 747, 18 S.L.R. 528; and *Robertson* v. *Meikle*, July 15, 1890, 28 S.L.R. 18.

The Lord Ordinary (MACKENZIE) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel, in respect of the interlocutor of the Second Division of 8th June 1910 finding that this action is not a suitable one to be raised in the Court of Session, ordains the pursuer to find caution for expenses in common form, and that within fourteen days."

Counsel for the Pursuer—Dykes. Agent—Robert Gray, S.S.C.

Counsel for the Defender — Fenton. Agents—Simpson & Marwick, W.S.

Friday, December 9.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

GLENDINNING *v.* J. D. HOPE & COMPANY.

Stock Exchange — Retention — Custom — Proof—Local Custom—Stockbroker's Lien—Custom of Edinburgh Stock Exchange—Right to Retain Scrip against Open Accounts.

In an action against a firm of stockbrokers, who were members of the Edinburgh Stock Exchange, for delivery of a transfer of shares, the defenders averred that it was the custom of the Exchange for stockbrokers to retain scrip (including transfers) belonging to their constituents as security against open accounts. The sole partner of the defenders' firm and one other member of the Exchange deponed that the custom existed, but they did not speak to any individual case in which they had enforced it. Another member of the Exchange deponed that he had exercised the right on one occasion. For the pursuer an experienced member of the Exchange deponed that he had never heard of any case in which the alleged custom had been enforced, although he knew that some members of the Exchange maintained that it existed. It appeared that the alleged custom was in force on the London Stock Exchange.

Held (*rev.* judgment of Lord Mackenzie) that the alleged custom had not been proved, and that the stockbrokers were therefore not entitled to retain the transfer against a balance said to be due on a subsequent transaction.

James P. Glendinning, Nethershiell, Mid-Calder, brought an action against John D. Hope & Company, stockbrokers, Edinburgh, and against John D. Hope, the sole partner of that firm, in which he concluded for delivery of a transfer of 100 fully-paid ordinary shares of the Globe and Phœnix Gold Mining Company, Limited.

The pursuer averred that on 19th August 1909 he instructed the defenders to purchase on his account 100 shares of the Globe and Phœnix Gold Mining Company, Limited; that on the same day the defenders sent him a contract note advising the purchase of 100 shares for settlement on 26th August 1909; and that on 26th August he duly paid the amount required to settle the transaction.

The defenders admitted these averments, but they averred that the pursuer was due to them the sum of £50, 2s. in respect of a subsequent transaction. They further averred—"Explained that it is a custom of the Edinburgh Stock Exchange, as well as of the London Stock Exchange, for stockbrokers to retain scrip, including transfers, belonging to their constituents, and which has come into their possession

in the course of their constituents' business, as security against accounts open with them by such constituents at the time."

The pursuer pleaded—"(2) The defenders being bound to make delivery to the pursuer of the transfer of the 100 shares referred to in their contract note of 19th August 1909, the pursuer is entitled to decree of delivery as concluded for."

The defenders pleaded — "(2) The defenders being entitled to retain the scrip for said shares until payment of the debt due to them, should be assoilzied."

In the course of the proceedings the transfer was delivered to the pursuer on consignation of the sum of £55.

Proof was allowed and led.

The following *narrative* is taken from the judgment of Lord Salvesen:—"On 19th August 1909 the pursuer instructed the defenders as his stockbrokers to purchase for him 100 shares in the Globe and Phœnix Gold Mining Company. The order was duly executed, and a contract note for the purchase of the shares in question was on the same day sent to the pursuer. The note bears that the purchase had been made subject to the rules of the Edinburgh Stock Exchange, and that the transaction was to be settled on 26th August. On that day the pursuer remitted the price and became entitled to receive a transfer of the shares. Had the transaction taken the ordinary course the transfer should have been sent to the pursuer for signature within a few days after the 26th August; and indeed as the delivery of the shares fell to be made from a lot standing in the defenders' name and subject to their control, there is no reason why the transfer should not have been sent on the same day that the money was received. On receiving it back signed it would then have been the duty of the defenders to forward the transfer, with a certificate of the shares sold, to the company, and on receiving in exchange a certificate in name of the pursuer to forward the same to him. On 1st September the pursuer instructed the defenders to purchase a further lot of 200 shares of the same company, and he received a contract note informing him that the purchase had been effected on the usual terms, and that the transaction fell to be settled on 10th September. Through some overlook or neglect on the part of the defenders' staff, the transfer of the 100 shares for which the pursuer had paid on 26th August was not sent to him for signature in due course, and had not reached him by the 8th September. This circumstance created a feeling of dissatisfaction and distrust in the pursuer's mind, and he resolved to take his business out of the defenders' hands. With this object he arranged with another firm of stockbrokers, Messrs Lawrie & Ker, to buy in the 200 shares in question when they were offered for sale by the defenders on his instructions. Having made this arrangement he wrote to the defenders instructing them to sell the shares 'for cash and settlement 10th September.' Had his instructions been carried out he would have become the purchaser of his own shares through Lawrie & Ker, and would only have required to settle any difference in the price between that at which he bought and that at which the shares were sold to him by the defenders. In point of fact, the shares were not offered for sale by the defenders, and the pursuer intimated that he declined to have any responsibility for the price on the ground that his instructions had not been carried out. The defenders thereupon on 15th September sold the shares against him for settlement on the 28th at a loss of £50, 2s., and to the extent of this sum they maintained that the pursuer was indebted to them. They declined to deliver the transfer of the 100 shares already paid for on the ground that they were entitled to retain it until the pursuer settled his indebtedness to them under the second transaction. The pursuer thereupon brought the present action for delivery of the transfer."

The *evidence relating to the custom* of the Edinburgh Stock Exchange was thus summarised by Lord Salvesen — "The defender Mr J. D. Hope when invited by by his own counsel to state what he knew of the alleged custom could only say in effect that he always understood that he was entitled to exercise the lien which he claimed. Such an opinion — for it is no more—is of course no evidence of a custom. It may only show that the defender has misapprehended his legal position, and that in a hypothetical case, which has never in his experience come to the test of practice. His opinion on the point is shared by Mr Watson, the chairman of the Edinburgh Stock Exchange, who says that he has frequently acted upon it. When he is pressed, however, to give an instance, he can only recollect one where he asserted the right, and when on the claim being asserted, the client paid up the balance due. Even this case is left extremely vague, and we do not know what induced the client to act as he did. It may be that he considered it better to pay up his admitted debt rather than have a contest with his stockbroker, or that he had really no interest to contest the matter. Mr Watson does not state that the client admitted the right of retention claimed, and that cannot be inferred from the mere fact that he paid up his indebtedness. Mr Soutar Sanderson, another Edinburgh stockbroker, while stating that such a custom exists, has never known of any individual case in which it has been put in force. On the other hand, the pursuer put into the box two of the partners of Messrs Lawrie & Ker. The evidence of one of these gentlemen, who had only been a year on tht Stock Exchange, cannot be regarded as weighty on a question of custom; but Mr William Lawrie was quite as much entitled to express an opinion on the point as the defender or his witnesses. Mr Lawrie deponed that he had never heard of any case in which the alleged custom had been enforced. He knew that some members of the Stock Exchange maintained that it existed, and in the event of a client defaulting, who was due a balance to him-

self, he would retain his scrip as security for such balance."

On 17th June 1910 the Lord Ordinary (MACKENZIE) pronounced this interlocutor:—"Sustains the second plea-in-law for the defenders: Assoilzies the defenders from the conclusions of the summons, and decerns: And in respect the transfer of the shares mentioned in the summons has been delivered to the pursuer, grants warrant to the Accountant of Court to deliver the consignation receipt, and to the North of Scotland and Town and County Bank, Limited, to pay the sum contained therein with the interest accrued thereon to the defenders or their agents, and that on a certified copy of this interlocutor."

Opinion.—[*After discussing questions which are not now reported*]—"The next question is whether the defender was entitled to retain the transfer of the 100 Globe & Phœnix shares bought for the settlement on 26th August, and paid for then until Mr Glendinning paid him the £50, 2s. in respect of the subsequent transaction. The right to do so is founded on the lien which stockbrokers have. I think the cases of *Jones* v. *Peppercorn*, 28 L.J. Ch. 158, and *London & Globe Finance Company*, 1902, Ch. 416, show that such a right exists on the London Stock Exchange. The evidence in the present case is, in my opinion, sufficient to establish that there is such a right on the Edinburgh Stock Exchange. I do not think the lien is limited to transactions for the same account. It was said, however, that the transfer was in Mr Hope's hands under circumstances which excluded his lien. His clerk admitted that as the shares were to be transferred out of a parcel standing in Mr Hope's name at the National Bank, the transfer should have been sent on 26th or 27th August. I accept his explanation that it was due to an oversight that this was not done, and do not consider that there is sufficient in the circumstances to prevent Mr Hope exercising his right of lien. There is, I think, no warrant for the suggestion that Mr Hope was holding up the transfer for the purpose of getting the benefit of the additional cover for advances from the bank.

"The result of my opinion is that an interlocutor will be pronounced granting warrant for payment of the consigned money to the defender, and finding it unnecessary to dispose of the conclusion of the summons for delivery of the transfer. The defender is entitled to expenses."

The pursuer reclaimed, and argued—The custom alleged by the defenders had not been proved. The only evidence in support of it was that one witness had enforced it on one occasion. That was not sufficient to prove the existence of a custom of trade—*Hogarth & Sons* v. *Leith Cotton Seed Oil Company*, 1909 S.C. 955, 46 S.L.R. 593. *Jones* v. *Peppercorn*, 1858, 28 L.J. Ch. 158; and *in re London and Globe Finance Corporation*, [1902], 2 Ch. 416, did not apply to the present case. They turned on the custom of the London Stock Exchange, and that was irrelevant when the question was as to the custom of the Edinburgh Stock Exchange. If the custom was not proved the defenders must fail, for a stockbroker had no lien at common law—Bell's Prin., secs. 1434, 1438, 1445, 1451, and 1452. Further, the transfer in the present case was not the proper subject of a lien. The only documents which could be the subject of a lien were documents of title and negotiable securities—*Hamilton* v. *Western Bank*, December 13, 1856, 19 D. 152; *National Bank of Scotland* v. *Dickie's Trustees*, June 20, 1895, 22 R. 740, 32 S.L.R. 562 (*per* Lord Kyllachy). Even if the right of lien existed, the defenders were not in a position to plead such a right as against the pursuer. Under their contract it was their duty to deliver the transfer to the pursuer at a time before the question under the subsequent transaction had arisen. Their possession was thus due to their own negligence and breach of contract, and therefore they had not that lawful possession which was necessary to make a right of lien effectual—Bell's Prin. secs. 1412-14; Gloag & Irvine on Rights in Security, p. 346; *Fisher* v. *Smith*, 1878, 4 A.C. 1. A custom which gave a lien under such circumstances would be void as being unreasonable and contrary to law. [Lord Dundas referred to *Bruce* v. *Smith*, June 20, 1890, 17 R. 1000, 21 S.L.R. 785.] *Meikle & Wilson* v. *Pollard*, November 6, 1880, 8 R. 69, 18 S.L.R. 56; and *Robertson* v. *Ross*, November 17, 1887, 15 R. 67, 25 S.L.R. 62, were distinguishable. In these cases a right to retain was held to be an implied term of the contract under which possession was had. Here the contract was inconsistent with a right of retention.

Argued for the defenders—It was proved that by the custom of the Edinburgh Stock Exchange a stockbroker was entitled to retain his client's documents in security of an open account. A similar custom obtained in London, and was recognised as matter of law in the English Courts—*Jones* v. *Peppercorn* (*cit.*); *in re London and Globe Finance Corporation* (*cit.*)—and that being so slight evidence was sufficient to prove that the custom was in force in Scotland—*Strong* v. *Phillips & Company*, March 16, 1878, 5 R. 770, 15 S.L.R. 443 (*per* Lord Gifford). *Hogarth & Sons* v. *Leith Cotton Seed Oil Company* (*cit.*) was distinguishable, because there the merchants who were to be bound by the custom deponed that they had never heard of it. If the custom existed, it was binding on the pursuer—*Scott and Horton* v. *Godfrey* [1901], 2 K.B. 726; *Robinson* v. *Mollett*, 1875, L.R., 7 H.L. 802; *Mitchell* v. *Newhall*, 1846, 15 L.J., Ex. 292—whether he knew of it or not—*Fargett* v. *Baxter*, [1900] A.C. 467, at p. 479. Further, a stockbroker was a mercantile agent, and as such had a right of retention for a general balance at common law—Bell's Comm. (M'Laren's ed.), ii, 114, 115; Gloag and Irvine on Rights in Security, p. 396; *Sibbald* v. *Gibson & Clark*, December 11, 1852, 15 D. 217. Retention might be pleaded in respect of a future or contingent debt—Bell's Prin., section 1410; *Ross* v. *Ross*, March 9, 1895, 22 R.

461, 32 S.L.R. 337 (*per* Lord M'Laren). The defenders' possession was sufficient to support their right of lien. In its origin it was perfectly legal possession, because the transfer had come into the defenders' hands in the ordinary course of business. Once the defenders had legal possession, the lien subsisted until the possession *de facto* came to an end — Bell's Comm. (M'Laren's ed.), ii, 107.

At advising, the judgment of the Court (the LORD JUSTICE-CLERK, LORD ARDWALL, LORD DUNDAS, and LORD SALVESEN) was delivered by

LORD SALVESEN— . . . [*After the narrative quoted above*]—The Lord Ordinary has decided that a stockbroker is entitled to retain any transfers that he has in his hands belonging to his client in security of any general balance, actual or contingent, which may be owing by the client to the stockbroker. He has based his decision on an alleged custom of stockbrokers which he finds has been established in England, and which, on the evidence led before him, he considered himself justified in applying to Scotland. I am unable to reach the same conclusion.

The averment of custom, which was remitted to proof, is of a very peculiar nature. It is not said to apply to the whole of England or Scotland, but only to the Stock Exchanges of London and Edinburgh. It is admittedly not embodied in the rules of the Edinburgh Stock Exchange, subject to which the contract was made. Neither of these difficulties, perhaps, would preclude the defenders from establishing a local custom so uniform and well recognised as to be binding on all persons contracting with Edinburgh stockbrokers. But it lies upon the defenders to prove by clear and cogent evidence the existence of such a custom, and I shall therefore consider, in the first place, the evidence by which it is said to have been established.

[*His Lordship gave the summary of evidence quoted supra*].

The evidence which I have thus summarised is, in my opinion, entirely insufficient to establish a custom of stockbrokers to retain a client's uncompleted transfer in security of an ascertained balance. Still less does it prove the custom averred of retaining such a document as security against all open accounts. On 10th September, when the demand for the transfer was formally made in writing, although the account for the 200 shares may be regarded as then open, it had not been ascertained that there would be any balance due by the client, and this was not ascertained till 15th September, when the defenders sold the 200 shares. Further, the balance was not payable until the 29th September, so that at best the retention after 15th September was for a debt which was not presently due. In connection with a claim of this nature, Mr Lawrie's evidence is to the effect that it would not warrant the retention by a stockbroker of the client's transfers.

Assuming the alleged custom on the Edinburgh Stock Exchange not to be proved, it is immaterial whether such a custom exists on the London Stock Exchange, or indeed whether such a custom has been allowed by the English law courts as applicable to all stockbrokers in that country. It is no doubt true that where a custom of trade has been well settled in England it requires less evidence to establish a similar custom in Scotland than if the custom be peculiar to the latter country. Whether that principle applies to a local as distinguished from a general custom is open to doubt, but at all events it is perfectly plain that the existence of the custom in Scotland must be proved as matter of fact, and in my opinion there is an entire lack of evidence to this effect. Further, I do not read the two cases relied on by the defenders (*Jones* v. *Peppercorn*, 28 L.J. Ch. 158, and *The London and Globe Co.*, 1902, 2 Ch. 416) as establishing the custom averred in this case even in England.

So far as I understand them they decide no more than this, that where securities had been deposited by a client with a stockbroker to cover a loan made by the stockbroker to the client, these securities were available to cover indebtedness arising upon subsequent Stock Exchange transactions after the original loan had been repaid. If so, they appear to be on precisely the same lines as the decision of the Court of Session in the case of *Hamilton* (19 D. 152). No doubt this Scotch case refers to the right of retention by bankers of documents of title; but I apprehend the same principle would be applied to the case of a stockbroker who was acting as his client's banker. The real point in the case of *The London and Globe Finance Corporation* was whether, as the securities had been deposited for a special purpose—to secure a specific loan—and that purpose having been discharged by payment of the loan, they could thereafter become subject to a general lien. The decisions of the Scotch and English Courts on questions of this kind, so far as I can gather, appear not to conflict but to be in substantial agreement.

The defenders' difficulty in establishing a customary lien of the kind averred is increased by the circumstance that the law of Scotland does not recognise the doctrine of equitable mortgage, now firmly established in England. A deposit of titles, or policies of insurance, or certificates of shares, with a bank, creates no effectual security in its favour by our law. In order to such a security there must be a disposition of the heritable subjects, an assignation of the policy of insurance, or a transfer of the shares. The single exception to this rule that exists in favour of law agents rests upon ancient usage, and has no analogue in the case of other agents or depositaries, and it is impossible to explain it on the principle which was given effect to in *Meikle & Wilson* v. *Pollard* (8 R. 69) and *Robertson* (15 R. 67), where the right of retention claimed was allowed on the

ground of implied contract. These cases appear to me to have no application to the present. The transfer which the defenders refused to part with was in their possession for the special purpose of forwarding it to the pursuer, and of thus completing the transaction which they had already been paid to carry through. It would have been entirely different if documents of title had been transferred to them in security, for they could then have made their claims effective, not by retention of the documents themselves, but by realising the property to which they held an *ex facie* absolute title. Further, the transfer ought to have been delivered long before any question could have arisen with regard to the second transaction. The defenders cannot take benefit from the circumstance that they had failed to perform their duty to their client by delivering the transfer, and so were in possession of a document which they had no right to retain. On all these grounds, therefore, I have come to be of opinion, differing from the Lord Ordinary, that the defenders' claim to retain the documents cannot be sustained, and that the pursuer is entitled to decree in terms of the conclusions of the summons. . . . [*His Lordship dealt with a question which is not reported.*] . . .

The Court pronounced this interlocutor—

"Recal the . . . interlocutor reclaimed against: Find that the defenders had no right, as at the date of the action, to retain the transfer of the 100 fully-paid ordinary shares in the Globe and Phœnix Gold Mining Company, Limited, having its registered office at No. 12 Old Jewry Chambers, London, E.C., purchased by the defenders upon behalf of the pursuer on or about 19th August 1909; but in respect the said transfer has already been delivered to the pursuer, find it unnecessary to give effect to the conclusions of the summons, and dismiss the cause: Authorise the pursuer to uplift the sum of £55 consigned in bank, and grant warrant to the Accountant of Court to deliver the consignation receipt to the pursuer, and to The North of Scotland and Town and County Bank, Limited, to pay the sum therein with all interest thereon to the pursuer or his agents, and that on a certified copy of this interlocutor," &c.

Counsel for Pursuer (Reclaimer)—Solicitor-General (Hunter, K.C.)—Morison, K.C.—W. T. Watson—Guild. Agents—Sharpe & Young, W.S.

Counsel for Defenders (Respondents)—Sandeman, K.C.—Munro, K.C.—C. H. Brown—Smith Clark. Agents—W. & F. Haldane, W.S.

Wednesday, November 30.

FIRST DIVISION.

[Sheriff Court at Oban.

CAMPBELL'S TRUSTEES *v.* O'NEILL.

Process—Sheriff—Appeal—Competency—Removing—Summary Ejection—Application for Warrant—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 37—*The Court of Session Act (Judicature Act)* 1825 (6 *Geo. IV, cap.* 120), *sec.* 44.

The Sheriff Courts (Scotland) Act 1907, sec. 37, enacts—"In all cases where houses, with or without lands attached, not exceeding 2 acres in extent . . . are let for a year or more, notice of termination of tenancy shall be given in writing to the tenant by or on behalf of the proprietor, or to the proprietor by or on behalf of the tenant: Provided always that notice under this section shall not warrant summary ejection from the subjects let to a tenant, but such notice, whether given to or by or on behalf of the tenant, shall entitle the proprietor to apply to the Sheriff for a warrant for summary ejection in common form against the tenant and everyone deriving right from him. . . ."

The Judicature Act, sec. 44, enacts—"When any judgment shall be pronounced by an inferior court, ordaining a tenant to remove from the possession of lands or houses, the tenant shall not be entitled to apply [as previously provided] by bill of advocation to be passed at once, but only by means of suspension. . . ."

In an application for a warrant for summary ejection of a tenant to whom notice of the termination of his tenancy had been duly given, the Sheriff-Substitute, after proof, granted decree as craved, and on appeal the Sheriff adhered. The defenders having appealed, the pursuers objected to the competency of the appeal.

Held that as the Sheriff Courts (Scotland) Act 1907 had left unrepealed section 44 of the Judicature Act 1825, decrees in actions of removing, which this in reality was, could only be reviewed by suspension, and the appeal was therefore incompetent and must be dismissed.

Removing—Notice of Termination of Tenancy—Validity of Notice—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 37, *and First Schedule, Rule* 112, *Form J—Removal Terms (Scotland) Act* 1886 (49 *and* 50 *Vict. cap.* 50), *sec.* 4.

The Sheriff Courts (Scotland) Act 1907, sec. 37, enacts—"In all cases where houses, with or without land attached, not exceeding 2 acres in extent, . . . are let for a year or more, notice of termination of tenancy shall be given in writing to the tenant by or on behalf of the proprietor, or to the proprietor by or on behalf of the tenant, . . .: Provided that the notice provided for