any objections on the score of expense may be obviated in the way your Lordship has stated, if the parties desire to minimise expense, but I am very far from thinking that proceedings in this Court would be as expensive as procedure in the Court of Admiralty, which is the only other place where this matter could be determined. Accordingly I have no difficulty in concurring with the views your Lordship has expressed in holding that these answers must be repelled.

LORD GUTHRIE—I agree. Mr Lippe has given up the objection to competency, and therefore the only question that remains is one of convenience. It is not necessary to decide whether a case of this kind might not arise in which the objection of *forum non conveniens* would apply, but in this case the objection is a very weak one on the face of it. The only objection is taken by the owners of the cargo; the owners of the vessel have been served, and they have not appeared to support the views presented by the owners of the cargo. It is not even said there is going to be any competition whatever; it is merely said that in the event of a competition, then certain difficulties, according to the respondents, will arise; and when one looks at the question of expense, in view of the locality of the collision and the residences of the parties and of the witnesses, it would rather appear that costs would be less, certainly not greater, if the case were tried here in Edinburgh instead of in London. Therefore, without deciding that an objection of this kind could in no case be sustained, I concur in thinking that the plea of *forum non conveniens* cannot be sustained in this case.

The LORD JUSTICE-CLERK and LORD ARDWALL were absent.

The Court pronounced an interlocutor limiting the liability as craved in respect of the consignation, making the order staying all suits or actions permanent, repelling the answers, and appointing claims to be lodged within twenty-one days.

Counsel for the Petitioners—Constable, K.C.—J. Stevenson. Agent—Campbell Faill, S.S.C.

Counsel for Respondents—Lippe. Agents—Boyd, Jameson, & Young, W.S.

HOUSE OF LORDS.

Monday, June 26.

(Before the Lord Chancellor (Loreburn), Lords Kinnear, Atkinson, and Shaw.)

GLENDINNING *v.* HOPE & COMPANY.

(In the Court of Session, December 9, 1910, 48 S.L.R. 111, and 1911 S.C. 209.)

Stock Exchange—Retention—Lien—Stockbroker's Right to Retain Scrip against Open Accounts.

A stockbroker has a general lien on documents such as transfers coming into his hands in the course of his business and lawfully in his custody, and that even in respect of debts due by a customer to him not arising out of the transaction to which the transfer relates.

This case is reported *ante ut supra.*

The defenders Hope & Company appealed to the House of Lords.

At delivering judgment—

LORD ATKINSON—It is not disputed in this case that on the 1st of September 1909 the appellants, on behalf of the respondent and as his brokers, purchased 200 Globe and Phœnix mining shares for a sum, including brokerage and contract stamp and transfer and registration fee, of £865. Neither is it disputed that the respondent, by letter of the 15th of September 1909, repudiated that transaction and refused to carry it out. It is conceded that if the respondent was not entitled thus to put an end to the contract, the appellants were entitled to sell those shares against him and recover any loss they sustained on the re-sale. The plaintiff resold the shares, and in my opinion the whole trial proceeded on the assumption that on that re-sale and by means of it the appellants had lost £50, 2s. That is absolutely plain, and is, I think, found as a fact by the Lord Ordinary. The respondent justified his repudiation of his contract on the ground that he had not merely instructed the appellants, on the 9th of September 1909, to sell these 200 shares for cash and settlement on the 10th of September, the day following, which is undoubted, but that the appellants contracted to do this, *i.e.*, bound themselves to do that which they had, in a letter written on the very same day before the absolute contract to sell is alleged to have been entered into, stated could not be done.

In my opinion there is no proof whatever, of a character to be safely acted upon, that the appellants ever entered into this absolute contract to sell these shares.

The respondent's repudiation of his contract to purchase these 200 shares was consequently unjustifiable, and he is therefore liable to pay to the appellants the amount of the loss so found to have been sustained.

This is not, however, the real or important point arising in the case.

The appellants in the course of an earlier transaction—a purchase on behalf of the respondent of 100 shares of the same company—got into their possession, in the course of their business as stockbrokers and as agents of the respondent in that behalf, a transfer of those 100 shares. They claim to have a lien upon this transfer in respect of this sum of £50, 2s. This claim is resisted by the respondent, as I understood, on two grounds. First, on the ground that a stockbroker has in the law of Scotland no general lien on documents such as transfers of this kind coming into his hands in the course of his business and lawfully in his custody, in respect, at all events, of debts due by a customer to him not arising out of the transaction to which the transfer relates. And second, on the ground that this transfer should have been delivered up to the respondents some days before he gave the order to buy the 200 shares ultimately resold, and that the transfer was not therefore in the appellants' lawful custody either at the time the 200 shares were bought or at the time when the respondent repudiated his contract to purchase them.

As to the first point, it is difficult to see for what reason the principle of the common law as to general lien should not apply to the case of a stockbroker.

In the case of *Fisher* v. *Smith*, 4 A.C., p. 1, the plaintiff, on the instruction of the agent of the owners of a ship, effected policies of insurance on her cargo. He paid the premiums, and claimed to retain the possession of the policies till the amount of those premiums and sums due for brokerage were repaid to him. There were subsidiary points raised which need not be referred to; but at page 5 of the report Lord Cairns, in giving judgment, said—"As to the question whether this is a case in which lien originally would arise in the respondent, I think there is no doubt. He is the person who effected the policies of insurance. He either paid the premiums or became liable for the premiums, and his was the labour and the care through which the insurances were effected. According to the well-known rule of law he would be entitled, by common law, for his labour and care and his money expended, to a lien, in the nature of holding possession of the policies, and he would be entitled to that lien as against every person—against the owner of the goods for whose benefit the policies were effected, and against any intermediaries who might have intervened between the owner of the goods and himself. That appears to me to be the ordinary and well-known rule of law, and I do not think it was seriously disputed at your Lordships' Bar." Every line of that extract from the judgment of Lord Cairns applies, I think, to the case of a stockbroker who buys stock for a client, and the cases of *Jones* v. *Peppercorn*, Johnson 430, and in *re London and Globe Finance Corporation*, [1902] 2 Ch. 416, establish that in England as part of the law merchant, which apparently must be judicially noticed (*Brandon* v. *Barwell*, 12 C. & F. 805), bankers and brokers have a general lien on securities in their hands as between themselves and their customers for the balance due from those customers on account between them.

It will be observed that Lord Cairns says "paid the premiums or became liable for the premiums." It is therefore enough if the agent or broker has assumed liability though not discharged it. It is urged that this rule does not apply where, as here, an agent contracts for an undisclosed principal, and his liability is in effect though not in form only contingent on the principal's making default. It is difficult to see on what principle this distinction rests. It would appear to me to be unsound. In such a case the agent remains primarily liable on the contract to the other contracting party. He has put himself in that position in discharge of the business of his principal, and as against that principal is, I think, entitled to his lien, certainly over documents connected with the transaction out of which the liability arose, until the principal has relieved him from the obligation under which he has put himself.

Again it is contended that documents connected with a transaction which is closed cannot be retained in respect of a liability arising out of a subsequent transaction, even though those documents happen to be in the lawful custody of the person claiming the lien at the time the subsequent transaction was entered upon and liability of the agent incurred in respect of it. No authority was cited for that proposition. In the case of a solicitor there is admittedly no such distinction, nor, as would appear to me from the judgment of Lord Eldon in *Cowell* v. *Simpson*, 16 Ves. 275, does it exist in the case of a tradesman or of a factor.

In the passages cited from Bell's Commentaries and Bell's Principles, principles quite in harmony with these decisions are laid down as part of the law of Scotland. I think sufficient evidence was given to show that this general custom of the law merchant applied to transactions on the Edinburgh Stock Exchange. The last and the most serious point on which the respondent relied is that the transfer was not in the lawful custody of the appellants when on the 1st of September the order was given to purchase the lot of 200 shares, inasmuch as they should have delivered it on the 26th or 27th of August though the respondent had not demanded it, and further, that even if this were not so, the transfer was not in the lawful custody of the appellants after the 10th September, three days before the repudiation, when the respondent asked for the delivery of it.

The appellants did not, in answer to this demand of the 10th of September, refuse to deliver the transfer; on the contrary, they wrote on the 11th of September a letter containing the following passage—"We shall be glad to see you such time you are in town, when you will get the transfer for signature."

I do not think anything, in reality, turns upon this demand, since the appellant's liability for the price of this parcel of 200 shares had then accrued. But with reference to the non-delivery of the transfer, either on the 26th of August or 10th of September, it is necessary to consider what was the nature of the contract entered into between the appellants and respondent—what the former had bound himself to do and was paid to do. He was not employed merely to purchase these 100 shares and obtain a transfer of them. On the facts and documents given in evidence it is plain he was employed and paid to have in addition the transfer registered. To do that it should be executed by the respondent and brought or sent to the office of the company by the appellants and registered in the books of the company. It is to this execution of the transfer by the respondent that the appellants in their letter of the 11th of September refer.

Now what was the nature of the default the appellants are alleged to have committed before the 1st of September, which it is urged rendered their custody of this transfer on that day unlawful? The transfer could no doubt have been delivered or tendered for signature on the 26th or 27th of August. The reason why this was not done is stated by the witness Chas. Terras Morrison in the following passage of his evidence—"In ordinary course, if the shares were coming out of our own banker's name, they should have been delivered to pursuer on the 26th or 27th. The reason why they were not was that I was working night and day, and I omitted to send the transfer to the bank for signature. I left on the 28th for a holiday, and did not get back till about the 7th of September. . . . Until the letter of the 10th of September from the pursuer, he did not intimate to us any desire to have his transfer. If he had told me before, he could have got the shares at any time if I had been reminded of the fact that I had overlooked the matter." That evidence was uncontradicted. It is, I think, clear that the mere omission to deliver this transfer to or tender it for signature does not, under such circumstances, make the custody of it by the broker thenceforward wrongful or unlawful as against his client, so as to deprive the broker of any lien upon it, which he otherwise might have had. For these reasons I think the decision appealed from was erroneous and should be reversed, and this appeal allowed with costs.

LORD KINNEAR—I agree entirely with the opinion which has just been delivered, and I should have been content to express my concurrence without adding anything to what has been said by my noble and learned friend, were it not that we are differing from the judgment of the Second Division, and I think it is only respectful to the opinions from which we dissent to examine in some detail the grounds of fact upon which the judgment rests.

The action is brought by the respondent Mr Glendinning against Messrs Hope & Company, who are stock and shareholders in Edinburgh, for delivery of a transfer of 100 shares of the Globe and Phœnix Gold Mining Company purchased by the defenders on his behalf. The averment is that he instructed this firm of stockbrokers to buy 100 shares for him, that they did so, and that they now refuse to deliver the transfer in his favour, which is or was when the action was brought still in their hands. Failing delivery, he demands payment of a sum of £750; but this alternative conclusion does not call for consideration, since it is not disputed that the shares in question were bought for the respondent upon his order, and must be delivered to him subject only to a right of retention maintained by the defenders for payment of a debt of £50, 2s. By a very reasonable arrangement in the course of the proceedings the transfer was in fact delivered to the respondent, under reservation of all pleas, on his making a consignation of a sum of £55 to cover the debt. The actual stake for which the parties are contending was thus converted into money, but their rights must be determined on exactly the same considerations as if the scrip were still in the defenders' hands and the appellant were still demanding that it should be made over to him unconditionally and without his being required to make payment of a debt which he disputes.

The first question, then, is whether there was a debt due by the respondent to the appellants when the action was raised, because if not it would be unnecessary to consider the more important question of law which is raised by the defenders' plea of right to retain. On this first question I agree with the Lord Ordinary. The respondent had instructed the appellants to buy for him a second parcel of 200 Globe and Phœnix shares, and the point in dispute is whether in consequence of his refusal to carry out the purchase of this second parcel the appellants were entitled to sell out against him and recover from him the loss which they incurred on the re-sale, or whether, on the other hand, he was not justified in putting an end to the transaction by their previous failure to do their duty as brokers.

The shares were bought in accordance with the respondent's instructions, and on the 8th September, which was the ticket day, the appellants passed the respondent's name to the vendors' broker for insertion in the transfer as purchaser. On the 9th September they received a letter from the respondent intimating that he had resolved to re-sell the shares and instructing them to sell for cash and settlement on the 10th September; but it was impossible for them to obey these instructions and sell for cash, because when a sale is made for cash it is proved that the selling broker is required to deliver the transfer with certificate attached within twenty-four hours. This the appellants could not undertake to do, because the respondent's name had been passed to the vendors' broker and by him

transmitted to Glasgow and thence to London. The appellants were therefore unable to recover the transfer in order that the name of the transferee might be altered in time for a sale for cash and settlement on the 10th September, and they therefore did not sell. This is supposed to justify the respondent in rescinding the contract of employment and refusing to take the shares which had been bought for him.

I am of opinion, with the Lord Ordinary, that the appellants are not chargeable with any failure or breach of the duty imposed upon them by their employment as brokers, and that the respondent's attempt to determine the contract was altogether without foundation. Their duty as brokers was to buy 200 shares for their customer and to take the transfer in his name. They had given no guarantee that before the transfer could be delivered the shares would at any moment be saleable for cash, and they certainly were not bound to undertake an obligation to any person who might offer to buy for cash that they would within twenty-four hours deliver to him a transfer which they knew to be at the time beyond their reach. If Mr Glendinning had desired to sell his shares, he might reasonably have instructed his brokers to sell for him in the ordinary course of business; but they could not be required to make a contract as brokers under conditions which it was not possible for them to carry out.

But then it is said that although it might be beyond the scope of their original employment as brokers to purchase, they made a new agreement with Mr Glendinning to sell according to his instructions; and the learned Judges have held this agreement to be proved, and that it involved an undertaking to sell for cash so absolute that if the appellants were unable to recover the transfer of the shares they had bought for the respondent in time to carry out this new transaction, they were bound to find other shares that could be sold and delivered in accordance with Mr Glendinning's instructions. They accordingly considered that Mr Hope, the defender, was in fault, because it appears that he himself had shares of his own at the time; and they held that he was bound under this new agreement to sell his own shares for cash and settlement on the 10th September to make the money forthcoming for his customer.

I must confess, with great respect for the opinions from which I differ, that I am unable to find any evidence whatever to support this theory of a new agreement. The learned Judges say, and no doubt very justly, that Mr Glendinning is a credible witness and that his evidence is sufficiently corroborated. But Mr Glendinning does not allege that he made any new agreement whatever. He simply gave instructions which he erroneously supposed to be the ordinary course for carrying out the transaction which his brokers had already undertaken, and although it was distinctly explained to him that this could not be done in the way he desired, it did not occur to him, so far as his evidence shows, to make any proposal for a new and different transaction. His own statement, indeed, shows that it would have been altogether inconsistent with his main design and object to do anything of the kind. He had no real desire to sell his shares, but he wanted (so he explains) to change his stockbrokers. He was dissatisfied with Messrs Hope & Company, because he thought that their completion of his first purchase had been unduly delayed, and accordingly he resolved to put his business into the hands of different brokers; but, no doubt from an amiable motive, he explains that he did not wish to disclose his feeling of distrust to Mr Hope, and he thought that the best way of carrying out his purpose was to give an order to Messrs Hope to sell for cash and settlement on the 10th September, and at the same time to give an order to another firm, Messrs Lawrie & Ker, to attend the next day on the Exchange and buy the shares which Mr Hope was to sell. He proposed to carry out a fictitious sale in which he should be both buyer and purchaser, for the sole purpose of getting his business out of Mr Hope's hands. It appears to me, therefore, that to propose a new transaction to Mr Hope with different incidents and different consequences from that which he desired to determine in so summary a way was the last thing that would have entered into his mind. He certainly, according to his own evidence, made no such proposition. He never proposed to Mr Hope that he should sell his own shares or that he should do anything but sell the shares which he had bought for himself.

The learned Judges express some doubt as to whether Mr Hope had really explained or sufficiently explained to Mr Glendinning that his instructions could not in fact be carried out, but I think that difficulty is quite conclusively removed by Mr Glendinning's statement in evidence. It is said that there is some difference between the accounts which are given of an interview between the two parties, and the learned Judges think Mr Glendinning's account of the interview is preferable to the other. I confess I have no doubt that both witnesses were speaking exactly what they believed to be true. The differences are no more than are to be expected in every case where two people undertake to give an account of a conversation between them after the lapse of a considerable period; but they are both agreed upon the one point which is material to the question, namely, whether there was or whether there was not a new agreement between them, whether it was or was not explained to Mr Glendinning that the thing he proposed could not be done, and whether he thereupon made a new agreement to have something else done. The conclusion on the whole evidence upon this point is brought out, I think, very clearly in an answer to a question put by the Court, which Mr Glendinning was asked—"At

your interview with Mr Hope did he say that he could arrange" (that is, could arrange a sale) "or that he would try to arrange a sale?" The answer is—"It was not he who said that. He said, 'Your name is passed for transfer,' and indicated that the transaction could not be carried through. I said 'That can easily be arranged,' and he did not say anything after that on that point." Therefore it appears to me to be clear that the true cause of Mr Glendinning's somewhat precipitate action in putting an end to the contract was not that the impossibility of what he desired had not been explained to him, but that he did not understand it. He was not acquainted with the course of business on the Stock Exchange, and he did not appreciate the difficulty, which according to his own admission, had been quite clearly explained to him. I think that throughout the whole conversation the two parties were at cross-purposes just because Mr Glendinning had not thought fit, for however excellent reasons, to explain distinctly to Mr Hope what it was that he wanted. Mr Hope thought he wanted to sell, because he said he wanted to sell for cash and immediate settlement on the 10th September. Mr Hope thought that was a very inexpedient course to take, and advised his client against it, telling him at the same time that it could not be done. The result upon my mind of the whole evidence is that Mr Glendinning left expecting his order to be carried out, because he did not appreciate the impossibility of so doing, and that Mr Hope was left with no instructions except to sell for cash, which he knew he could not do.

The misapprehension under which Mr Glendinning was labouring is brought out still more clearly by his evidence as to what took place when the brokers into whose hands he wanted to transfer his business attempted to buy for cash according to his instructions. They called for shares for cash on the Edinburgh Stock Exchange on the next day. Mr Hope made no answer to the call. Mr Glendinning was very angry, because he said "they knew that I wanted to sell. They said they could not find buyers, and when a buyer offers they take no notice of his call." Accordingly he says "they have wilfully disobeyed my instructions." But the reason why Mr Hope took no notice, and could take no notice, of an offer to buy for cash was that he could not comply with the conditions imposed upon him if he had accepted it. His difficulty from the first was, not that there were no buyers, but that he had not the transfer.

I am therefore very clearly of opinion that Mr Glendinning had no justification for the course he actually took, which was at once to intimate to Mr Hope that there was an end of the transaction between them, that he would not take the 200 shares which Mr Hope had bought for him, and that he would have nothing more to do with them. Mr Hope accordingly sold out, as I think he was plainly entitled to do, according to the admitted rules of the Stock Exchange. He sustained a loss upon the sale, and he has a good right against his customer to recover payment of the difference. Mr Glendinning, in the letter in which he refuses to have anything to do with the 200 shares, demands delivery of the transfer for the first 100. In answer Mr Hope refuses to accept his determination of the second contract, and intimates that the transfer will not be delivered until the loss which he had incurred should be repaid.

The next question is whether the appellants were entitled to retain the transfer of the first parcel of the Globe and Phœnix shares which was still in their hands until Mr Glendinning should pay his debt of £50, 2s. I think with the Lord Ordinary that they were so entitled.

It has been held by the learned Judges of the Second Division that the evidence adduced is insufficient to establish a custom amongst stockbrokers to retain a client's uncompleted transfer in security of a general balance. I venture to think with great deference that the evidence is sufficient. But the right claimed for the appellants does not in my opinion rest upon any local custom which requires to be proved by evidence in a particular case; it rests upon the common law rule and doctrine of retention which is part of the law of mutual contract. This is defined to be a right to resist a demand for the payment of money or the performance of an obligation until some counter obligation is paid or performed. In its simplest application the rule depends on the fundamental principle that one party to a mutual contract cannot enforce performance of its obligations in his own favour without giving or tendering performance of the obligations incumbent upon himself. Accordingly if the appellants' counterclaim against the respondent had arisen out of the same transaction as that which brought the transfer into their hands, I apprehend that there would have been no question at all as to their right to retain. The difficulty is that the respondent's debt arose out of a subsequent contract, and it is said that there is no authority for holding that the law of Scotland recognises a stockbroker's right of retention or lien for a general balance. It is true that there is no Scotch decision directly in point, but if the question has arisen for the first time as regards a stockbroker it must be determined by the settled principles which have been held to govern the general class of contracts to which that between a stockbroker and his client belongs. The principle, which I take to be very well settled in the law of Scotland, is that every agent who is required to undertake liabilities or make payments for his principal, and who in the course of his employment comes into possession of property belonging to his principal over which he has a power of control and disposal, is entitled in the first place to be indemnified for the moneys he has expended or the loss he has incurred, and in the second place to retain such properties as come into his hands in his

character of agent until his claim for indemnity has been satisfied.

The most apt example of the principle is probably the case of mercantile factors and commission agents. It is held both in Scotland and in England that for the balance which may arise on his general account the factor has a right of retention or lien over all the goods and effects of the principal which, coming into his hands in his character of factor, may be in his actual or civil possession at the time when the demand against him is made. It is said that this principle has been established on grounds of justice and expediency, and the conditions upon which the right depends in the case of a mercantile factor are exactly those which govern the relation of a stockbroker and his client. The factor's general right to retention depends upon two considerations — first, that he is required to make payments or undertake liabilities for his principal; and second, that the goods and effects belonging to his principal come into his possession and control in the ordinary course of his employment. But that is exactly the position of the stockbroker who buys with a liability to pay the vendor and receives a transfer for delivery to his client.

Mr Bell in treating of the subject remarks that the general lien or retention arises from the very nature of the contract of factory as a right resulting out of the *actio contraria* of the contract by which the principal engages to indemnify the agent. But that again is of the essence of the contract between the stockbroker and the client. The learned Judges have held that there can be no general right of retention, because the transfer which the defenders refused to part with was in their possession for the special purpose of forwarding it to the pursuer, but this appears to me to be a misconception of the true position of the legal title. If the transfer had been the respondent's property to begin with and he had deposited it with the appellants for a special purpose, it might well have been a question whether the special contract did or did not exclude the general right of retention. But the transfer never was the respondent's. He had no real right in the shares, or in the transfer that represented them, until the transfer was delivered to him in the course of these proceedings. His rights as against the appellants was a right upon a personal contract only, and they had similarly upon a personal contract a counterclaim against him. It appears to me to follow from the principles which have been well established that they are entitled to set up their right to retain until his counter-obligation has been duly performed. The liability was incurred no doubt in a different transaction, but it was one of a series of transactions in the course of which the stockbroker was employed in the same capacity to act as agent for the same purposes for their customer, and their right at the close of the connection between them is to an adjustment of accounts in which they are entitled to plead against the demand which has been made against them their counter right of retention until their demand upon their principal has been satisfied.

I cannot say that I am moved by the consideration which had great weight with the learned Judges below, that the transfer was still in Mr Hope's hands at the time when the demand was made upon him, in consequence of his own delay in delivering it for signature to the pursuer and carrying out the transaction. The reason for the delay is to my mind quite sufficiently explained in the evidence to which my noble and learned friend has referred. But mere delay can never convert the possession which the broker had in the ordinary course of business into an unlawful possession. He was still the lawful holder of the transfer at the time when the demand for delivery was made against him.

It was said that the appellants' demand is a demand to retain for a contingent liability. I entirely agree there could be no right of retention for a contingent liability. The right to retain emerges and becomes available only when a demand is made against the person who is to plead the retention. The right became available to Mr Hope, because when he received Mr Glendinning's demand for an immediate transfer he had already incurred the liability which entitled him to maintain his counterclaim against Mr Glendinning.

There remains to be considered only one very technical point, to which perhaps it is hardly necessary to advert, but since an argument was founded upon it I shall say a single word upon the subject. It is said that the judgment of the Lord Ordinary, to which I think we ought to return, cannot be sustained, because he gives an order for payment of money to the defenders, and, according to the form of the pleadings before the Court, there was no demand for payment of money which could possibly receive effect. It is perfectly true that according to the frame of the action there could be no demand for payment made by the defendants. The action was an action for delivery of a transfer, and their answer was not an answer to a demand for payment which could be made effectual in the course of that action, but a plea of their right to retain until payment should be made. They could make nothing out of that right of retention except through the inconvenience caused to their client by the non-delivery of the transfer. The effect of their right to withhold would of course be that the client must pay, but upon the form of action they had certainly no demand for payment before the Court. But then the whole nature of the proceeding was altered, and altered upon an arrangement between the parties, when Mr Glendinning for his own convenience, with the consent very properly given by the other party, consigned a sum of money in Court to await the orders of the Court. The sum of money so consigned takes the place of the transfer which was in dispute; and I apprehend there can be no question at all that when

money is consigned under the order of the Court it is in the power of the Court, upon mere motion to that effect, and without any new action for the purpose being brought before it, to order the sum so consigned to be paid to one or other of the parties to the consignation according as they determine the rights between them. It might be a logical technical result to hold that in point of technical form the order should not have been for payment to the defenders, but for payment to the pursuer so soon as he had paid this sum to the defenders; but there is absolutely no necessity, and I can see no ground or reason, for following out any circuitous process of this kind when the Court has in the hands of its officers the sum of money which is in dispute, and which by the terms of the consignation upon which it is put into Court is to remain until the order of the Court is pronounced about it.

On the whole matter, therefore, I am of opinion with my noble and learned friend that the interlocutor of the Second Division should be reversed and that of the Lord Ordinary restored.

LORD SHAW—The appellants are stockbrokers in Edinburgh, and in August and September 1909 they acted as such for the respondent, their client. In the middle of August they purchased for him 100 shares of the Globe and Phœnix Gold Mining Company. On the 26th of August, being settling day, they received payment of the price. On the 1st of September they purchased on his order 200 shares more, for settlement on the 10th of September. On the 8th of September Mr Glendinning wrote to Messrs Hope that he had decided to resell the shares, and instructed them to "sell these 200 Globes for cash in settlement on the 10th instant." On the following day he supplemented this by a letter which, *inter alia*, said, "I did not see my way to take up these shares." The parties had an interview, and there are certain differences between them as to what occurred; but on the same day, namely, the 9th of September, Messrs Hope wrote that they had been unable to sell them for cash settlement, and they added this (a passage which I think must have been overlooked by Lord Salvesen in the Court below)—"Over and above this, your name was passed yesterday forenoon for the shares and cannot now be altered." It is clearly proved in the case that this in point of fact was true.

When the 10th, namely, the settling day, arrived, Mr Glendinning did not settle, and he complained that Messrs Hope had never offered the shares. He was at once answered on the 11th by a protesting letter repeating that no dealings could now be done for cash, "as your name had been passed the previous day and could not be altered." Mr Glendinning declined to accept this position, and on the 13th of September repudiated his purchase. Messrs Hope, the brokers, were thus in the position of being responsible for settling the price of these 200 shares, namely, £865, or doing what stockbrokers in such circumstances are entitled to do, namely, sell and charge the customer with the debit balance, if any. They did sell, and the debit balance amounts to £50, 2s. This is the story of the 200 shares.

I desire to say that I see no occasion for doubting the honesty of either of the parties as witnesses, or for suggesting that Messrs Hope's action deviated from the line of duty to their client on account of Mr Hope being also a holder of certain stock in the company in question.

In one of these letters, namely, that of the 10th of September, Mr Glendinning asked for the transfer of the previous lot of 100 shares, and this was obtained from the company by the brokers on the following day. The dispute as to the 200 shares was, however, then pending. Messrs Hope were responsible on the Exchange for their price, and within two days, namely, on the 13th, Mr Glendinning entirely repudiated the transaction, forcing the selling out against him as above described. In those circumstances Messrs Hope declined to part with the transfers until their claims against Mr Glendinning were settled. The question is whether this action was justified.

Certain confusion has come into this case on account of allegations as to custom of trade. I am of opinion that Messrs Hope had a right of retention, and this not on account of a custom of trade but on account of a principle of law. It cannot be justly said, although that point was taken, that Messrs Hope were wrongfully in possession of the transfer. They came into possession of the transfer in the course of business, and I do not see in this case that there was such unreasonable delay as fairly to raise such a point. The conditions as to possession of the document seem accordingly to equate with the dictum of Professor Bell in his Commentaries—"The possession on which retention or lien depends must be actual, legitimate, and subsisting at the time when the security is claimed."

Nor can I agree with the proposition which was so ably argued by the learned counsel for the respondent, that the transfer should have been at once transmitted for completion, for which limited purpose alone it had come into their hands, and that possession should have been parted with by the stockbroker irrespective of any debt due to him by his client. Upon this matter I venture to quote these sentences from the judgment of Lord Justice Buckley in the case of *The London and Globe Finance Corporation*, [1902] 2 Chancery, 420—"As to the law, I do not think that there is any room for doubt. *Jones* v. *Peppercorne* is a decision pronounced in the year 1858, and which has been regarded as well settling the law ever since, to the effect that brokers and bankers have a general lien on securities in their hands as between themselves and the customer for the balance due from the customer to the broker. . . . Here there is nothing at all to exclude the general lien which it is not and cannot be disputed exists. The transactions as

between the customer and the broker resulted in a sum owing by the customer to the broker, and there were in the possession of the broker securities which had come into his hands in the course of his business as broker to the customer. It is a well-established principle that the broker has as against the customer the right to hold those securities for the amount due." I respectfully adopt that language as my own. Further, in my opinion the securities there mentioned include a transfer of stocks still unexecuted or only partially executed, and the principle there set forth is a principle not only of the law of England but of Scotland.

As has been seen, the proof in this case, and particularly the terms and dates of the letters, are in my opinion to an effect opposite to that conceived by Lord Salvesen. I agree with the conclusion which Lord Mackenzie arrived at on that subject. And as to the principle of law, I think Lord Mackenzie has correctly applied it; and with much respect to the learned Judges of the Second Division, I think that that principle has not been applied to this case by that Court.

A question was raised at your Lordships' Bar as to what was to happen with regard to the amount of £50, 2s., being the balance due to Messrs Hope as the result of selling out against Mr Glendinning. That sum was deposited with the Accountant of the Court to await the orders of the Court. It is clear that the inquiry in this case covered not only the right to retain but the whole conduct of parties, culminating in the selling out which resulted in the debit balance. Messrs Hope's conduct in that particular appears to me to have been justified, and, speaking for myself, it would be with the greatest reluctance that I could consent to a fresh litigation on a substantially identical issue having to be undertaken in order that Messrs Hope might recover that money. Lord Mackenzie, I think, acted wisely in granting a warrant for payment of the consigned money to Messrs Hope. In my opinion the judgment of the Second Division should be reversed and that of the Lord Ordinary should be affirmed in all points. I should add that I think Lord Mackenzie's selection of the defenders' second plea as a ground for absolvitor was also correct. In the view which I hold, the defenders were entitled to retain the scrip until payment of the debt due to them.

LORD CHANCELLOR—I agree with the conclusion at which your Lordships have arrived.

Their Lordships reversed the judgment appealed against.

Counsel for the Pursuer (Respondent)—Morison, K.C.—W. T. Watson—D. A. Guild. Agents—Sharpe & Young, W.S., Edinburgh—G. R. Thorne Robinson & Company, London.

Counsel for the Defenders (Appellants)—Younger, K.C.—Sandeman, K.C.—Smith Clark. Agents—W. & F. Haldane, W.S., Edinburgh—Neish, Howell, & Haldane, London.

Monday, June 26.

(Before the Lord Chancellor (Loreburn), Lord Kinnear, Lord Atkinson, and Lord Shaw.)

WATSON, LAIDLAW & COMPANY *v.* POTT, CASSELS & WILLIAMSON.

(In the Court of Session, February 5, 1909, 46 S.L.R. 348, and 1909 S.C. 1445.)

Patent—Validity—Specification—Insufficient Description—Ambiguity.

A patent was obtained for "improvements in centrifugal machines." It dealt with a means of supporting while preventing the oscillation of the spindle to which the basket rotated is attached, and the means employed was, in typical form, a hollow indiarubber cone suitably supported, into which fitted a counterpart cone formed upon the spindle. The angle of the cone was not stated, but after a narrative of what had been achieved by previous invention the specification affirmed "the present invention consists in the employment of a cone approaching much more nearly to a cylinder, and whose elements do not pass through the centre of oscillation of the spindle." Previous cones had been as flat as an angle of 53 degrees. It was admitted by the expert witnesses that the most appropriate angle was between 25 degrees and 55 degrees. The patent was challenged on the ground of ambiguity and insufficient description, inasmuch as it covered the whole field from 53 degrees to 1 degree.

Held, allowing the judgment of the Second Division, on an equality of their Lordships—the Lord Chancellor and Lord Atkinson being in favour of *reversing*, and Lords Kinnear and Shaw in favour of *maintaining*—that the patent was not invalid.

This case is reported *ante ut supra*. Following upon the interlocutor of the Second Division of 5th February 1909, the defenders lodged a minute of amendment and the pursuers' answers thereto, and on 28th May 1909 the amendments were allowed, the record was of new closed, and the parties were allowed a proof of their respective averments so far as raised by the amendments.

The important portion of the defenders' amendment, so far as this report is concerned, was—"The pursuers claim to have effected certain improvements in the construction of elastic buffer bearings applied to centrifugal machines by inventing a single buffer bearing, the angle of inclination of whose sides differs from the angle of inclination of the sides of the buffers hitherto in use. They have failed, however, sufficiently to specify or indicate the particular angle or range of angles at or within which the benefits claimed are secured, particularly having regard to the fact that both cylindrical buffers and buffers of conical form, having their sides inclined at