Saturday, March 16.

FIRST DIVISION.

GULLAND (HENDERSON'S FACTOR), PETITIONER *v.* HENDERSON.

Parent and Child—Custody of Pupil where Father dead and Mother guilty of Misconduct.

Where the factor *loco tutoris* of a child whose father was dead presented a petition to the Court praying that the child should be removed from the custody of the mother, who had had two illegitimate children since the death of her husband, the Court *ordained* the mother to give up the child to the petitioner, and appointed him to submit to the Court a scheme for the maintenance and residence of the child.

Mr Charles Gulland, factor *loco tutoris* to Robina Henderson, the child of the deceased Robert Henderson, presented this petition to have her removed from the custody of her mother Margaret Henderson, and to have her given into his custody. Mr Henderson had died about five years previously, he having at that time been married about six months. He left property to the value of about £700. The child Robina Henderson was born after his death. The mother continued to live where she had resided previously to her husband's death, since which date she had given birth to two illegitimate children.

Mrs Henderson in her answers to the petition admitted that she had given birth to the illegitimate children, but stated that she was desirous to conduct herself for the future in an exemplary manner, and she accordingly craved the Court to refuse the petition. It was further mentioned at the bar that she had not lived, and did not now live, with the paramour.

Petitioner's authorities—Fraser's Parent and Child (2d ed.) 214; *Walker*, March 10, 1824, 2 S. 651; *A B* v. *C*, June 30, 1837, 9 Jur. 536; *Paul*, March 8, 1838, 16 S. 822; *Denny* v. *M'Nish*, January 16, 1863, 1 Macph. 268; *Muir* v. *Wylie*, July 13, 1868, 6 Macph. 1125.

Respondent's authority—*Kennedy* v. *Steel*, Nov. 16, 1841, 4 D. 12.

At advising—

LORD PRESIDENT—Undoubtedly the question in this petition is one for the discretion of the Court, but in exercising that discretion we must have regard to precedent, and it is impossible to resist the cases cited by the petitioner. The factor has only done his duty in bringing the question before the Court, and I am of opinion that we must pronounce an order for the delivery of the child. But that order must he accompanied, as in the case of *M'Nish*, 1 Macph. 268, by an order on the factor to submit a scheme to the Court for the residence and maintenance of the child.

LORD DEAS concurred and remarked—There are funds here, and if the child is to be left with the mother, she must have the funds too, and they will very likely be spent for the benefit of the bastards.

LORDS MURE and SHAND concurred.

When the proposals for the board and place of residence of the child were submitted by the factor to the Court—

LORD PRESIDENT—In the event of a change of circumstances, such as the girl going to school, the factor will understand that he will have to come back again to the Court for authority, but he may do that by motion so as to avoid additional expense.

Counsel for Petitioner—Gebbie. Agents—Adamson & Gulland, W.S.

Counsel for Respondent — Moody Stuart. Agents—Boyd, Macdonald, & Co., S.S.C.

Saturday, March 16.

SECOND DIVISION.

[Sheriff of Lanarkshire.

STRONG (LECK, COWAN, & CO.'S TRUSTEE) *v.* PHILIPS & CO. (M'MURRAY & CO.'S ASSIGNEES).

Retention—Packers' Lien—Proof of Usage.

A firm of dyers were in the habit of sending goods to calenderers or packers in Glasgow for the purpose of being packed. The dyers failed, and in a question with the trustee upon their sequestrated estate, *held* that the packers had a right of retention over goods in their hands in security of a running account which had been previously incurred for packing, a usage to this effect in Glasgow having been established by proof.

Observations per Lord Justice-Clerk upon the law relating to packers' lien.

This was an appeal from the Sheriff Court of Lanark. John Roxburgh Strong, the petitioner and appellant, was trustee on the sequestrated estate of Leck, Cowan, & Co., Turkey-red dyers, Strathclyde Works, near Glasgow; the respondents were William Philips & Co., yarn merchants in Paisley and Glasgow, as assignees of John M'Murray & Co., calenderers and packers in Glasgow.

The petition stated that upon 26th April 1875 Leck, Cowan, and Co. had placed in the hands of M'Murray & Co., for future order and disposal, 2040 lbs. of Turkey-red yarn. On the same date Leck, Cowan, & Co. suspended payment, and sequestration was awarded on the 12th of May following. The petitioner had applied for delivery of the yarn, as forming part of the bankrupt estate, but delivery had been refused except upon payment of an account due by the bankrupts to M'Murray & Co. for former packing work done. Hence the petition to the Sheriff to grant warrant of delivery. M'Murray & Co., in answer, claimed a right of retention or lien over the goods in their hands in security of the general balance which they said was due to them.

From the proof allowed by the Sheriff-Substitute (GALBRAITH) it appeared that Leck, Cowan, & Co. were in the habit of sending goods to M'Murray & Co. for the purpose of being packed. They also used M'Murray's premises as a "house of call," and to a certain extent as a store. Evidence was led that when goods were sent to

M'Murray & Co. by the bankrupt they were to be packed unless orders to the contrary were received. In February 1875 Leck, Cowan, & Co. stated to M'Murray & Co. that they were to send them goods to be packed into 200 bales, which were to be sent in from time to time. M'Murray & Co. packed and sent away part of the 200 bales. On 26th of April the goods in question—2040 lbs. of Turkey-red yarn—were sent to them, which they said they considered a part of the 200 bales which were to be packed. The receive-note sent along with them was in the ordinary terms. Mr Leck stated that the goods in question were sent to M'Murray & Co. to be stored, and that the reason of their being sent was as security for an advance of £1000 given by a Mr Cotton. Mr Leck further stated that when the goods were sent he had no idea they would stop payment so soon, but that Mr Cotton had made the advance in question, for which he must have security, and that he was to sell their goods, acting as an agent. Mr Leck further admitted that no instructions were sent to M'Murray & Co. regarding these goods, or about the object they had of securing Mr Cotton; they were sent just in the same way as the other goods were, so far as M'Murray & Co. knew. For M'Murray & Co. a number of witnesses (who were all calenderers and packers in Glasgow) proved that it was the custom in Glasgow for packers to retain the goods in their hands in security of a general balance. The account—£89, 6s. 6d.—claimed by M'Murray & Co. was admitted to be a good claim against Leck, Cowan, & Co.

The Sheriff-Substitute (GALBRAITH) on 24th April 1876 decerned against M'Murray & Co., finding that they had no right of retention over the goods in question.

On appeal the Sheriff (W. G. DICKSON) on 31st July 1876 recalled this interlocutor, and found that M'Murray & Co. had "a lien over the goods in question for their general balance against Leck, Cowan, & Co. He added the following note:—

"*Note.*—There is a good deal of evidence to show that packers or calenderers like the pursuers have a lien for their general balance, and that evidence is uncontradicted. It is unnecessary for the Sheriff to say whether he thinks it is insufficient (as the Sheriff-Substitute does) on account of proceeding only from calenderers, and therefore being one-sided. He considers that under the recent case of *Witt* v. *Shubrook* (6th April 1876–7, Law Reports, Chancery, 489) such a general lien must be held as settled in England, and that the only evidence as to usage being decidedly in favour of the existence of a similar lien in this country, such a lien must be recognised here also.

"It is understood that Mr Strong does not dispute M'Murray & Co.'s account. The case has been continued in order that the goods in question may be delivered to him if he is prepared to pay that account, and for further procedure if he is not."

The goods were afterwards sold by order of the Sheriff, and on 7th November 1877 the Sheriff (CLARK), after sisting W. Philips & Co. as defenders in room of M'Murray & Co., found them entitled to £89, 6s. 6d., being the amount of the general balance for packing work done by M'Murray & Co. for the bankrupt.

The petitioner appealed, and argued—There could be no lien unless there was either a general usage of trade or a special contract between the parties. There was no proof here of a usage of trade except the evidence of some Glasgow packers, which was unsatisfactory, and even if satisfactory was not of a sufficiently general usage. There was certainly no special contract between the parties, and if they were to hold that a course of dealing was sufficient to establish a usage, it must amount to an implied agreement. There was no doubt a right of lien in England, but that was no reason why there should be one here; the circumstances of the two countries were different.

Authorities—*In re Witt ex p. Shubrook*, April 6, 1876, L.R. 2 (Chan.) 489; *Harper* v. *Faulds*, Bell's Oct. Cases, 440, and M. 2,666; *Lawrie* v. *Anderson*, Feb. 17, 1853, 15 D. 404; *Smith* v. *Aikmans*, Dec. 24, 1859, 22 D. 344, Bell's Comm. (M'L.) ii. 106.

Argued for respondent—The goods came into M'Murray's hands in their character of packers, and they could know nothing of Leck & Co.'s secret purpose in sending them. It was clearly proved that it was the custom in Glasgow for packers to have a right of retention, and there was no evidence to the contrary. Besides, such was undoubtedly the law in England, and it would produce a most anomalous result if it were found that the law of the two countries on a mercantile question of importance was different.

Authorities — *Brandao* v. *Barnett and Others*, 1846, 12 Clark and Fin. (H.L.) 787, 809, 6 Man. and Granger, 630; *Bock* v. *Gorrissen*, Nov. 1860, 30 L.J. (Chan.) 39; Smith's Merc. Law, 563; Cross on Lien 34; Douglas Walker, Bankers' Law, 139.

At advising—

LORD JUSTICE-CLERK—The present case raises some questions of importance. The account claimed by M'Murray & Company is before us; it commences on 9th July, and bears to be for packing done for Leck, Cowan, & Company at different times down to 5th April, shortly before the date of their sequestration. It is alleged by M'Murray & Company that goods were constantly in use to be sent to them by Leck, Cowan, & Company, which they were in the habit of packing. Goods were also sent to them for the purpose of being stored, Leck & Company having the use of M'Murray's premises for that purpose, and it was contended for the appellant that it was for this purpose that the goods in dispute were sent. But it was said by M'Murray & Company that the understanding when goods were sent was that they were to be packed unless other orders were received. The 2040 lbs. of goods in question were sent to M'Murray & Company on 26th April. The same day Leck, Cowan, & Company failed, and the question is, Are M'Murray & Company or their assignees entitled to retain these goods as security for their claims against Leck, Cowan, & Company as stated in the account?

I have had a difficulty in this case, not so much in regard to the legal grounds upon which it is to be decided as on the facts. On the whole, I think the goods must be held to have been sent in the ordinary way to M'Murray & Company.

They were both warehousemen and packers, and it seems that a considerable quantity of goods were sent to them in the former capacity; but, on the whole, I think the proof bears out that the goods were sent in the ordinary manner, and also that when goods were so sent the agreement between the parties was that they were to be packed, unless orders to the contrary were received. It may not have been the intention of the senders that the goods were to be packed, but M'Murray & Company could not know what was in the mind of the senders, and I think they were entitled to assume that the goods were sent to be packed. As to the question whether the goods were sent in order to create a preference in favour of Mr Cotton, in my opinion that is proved; indeed it was not denied that that was the object for which the goods were sent. But then it appeared that M'Murray & Company knew nothing about this, they simply receiving the goods in the ordinary course of trade.

Having so far cleared the case upon the facts, the question now remains, Is there or is there not a right on the part of packers to retain goods in their hands for any general balance due to them?

Now, the doctrine of lien, as it is called in English law—or retention, as we call it—has not been very accurately defined hitherto. On the one hand, it has been held that when goods are put into the hands of an artificer for the purpose of having something done to them, they must be restored when the work is performed upon them, and that therefore there is no lien over them; but, on the other hand, it has been held that there may be a course of dealing which implies that the work done on particular goods is not the only transaction between the parties, and that such a course of dealing may imply a contract that the goods in the artificer's hands may go to secure him for his work—that is, that he may retain the goods in his hands in security of any general balance due to him. This may be inferred in two ways—First, from a continuous course of credit between the parties, each parcel coming in to supply the place of the one before it in securing the artificer; second, from a general usage of trade giving the artificer a right to retain.

Mr Bell (Comm. p. 105) states it as follows:—"A general usage of trade, when clear and well established, will ground a right to retain generally beyond the debt contracted in the execution of the purpose for which the property was entrusted. In this way several branches of manufacture in England enjoy the benefit of a lien for the balance arising generally on the account of work done. Some of them rest on proof of usage; in others the lien, though originally without any such proof, being once admitted, the decision has served as a ground for usage." And again, (p. 106)—"Lien, in its proper sense, is a right which the law gives as the result of possession and of opposite demands."

He refers in the course of the note, first, to the case of *Harper* v. *Faulds* (27th Jan. 1791, F.C., and Bell's Cases, 440), and then to three cases, *Hunter* v. *Austin* (25th Feb. 1794), *M'Culloch* v. *Pattison* (4th March 1794), and *Aberdeen and Smith* v. *Paterson* (20th Nov. 1812, Hume).

In *Harper* v. *Faulds* it seems to have been decided that although there was a clear case of continuous employment, the bleacher was not entitled to retain the goods in his hands in security of a general balance. There was a close division on the bench—I think 8 to 7—and the minority embraced the names of the Lord Justice-Clerk (Braxfield), Lords Eskgrove, Swinton, and Monboddo. This authority was afterwards very considerably shaken. Lord President Campbell, in the case of *M'Culloch*, said that *Harper* v. *Faulds* did not decide the general question.

And accordingly, in the two cases of *Hunter* and *M'Culloch*, which were pure cases of continuous dealing, the artificer was held entitled to retain; the same was held in *Aberdeen*.

I do not know that the cases since then have been uniform. There is a case of *Smith* which was referred to by the Sheriff-Substitute (*Smith* v. *Aikman*, December 24, 1859) which does not seem altogether in accordance with the older cases. Here it was held that scourers have no right of lien for a general balance, and that a local practice of allowing such a lien not being universal is insufficient to control the common law.

In this case I do not think it necessary that we should solve the difficulties which there are in this branch of the law, because I am quite clear that here there has been a sufficiently distinct usage of trade proved to decide the case, especially when we find that there has been no endeavour to prove the contrary. Besides, when I find that in England it has been the universal practice for a century that packers have the lien claimed in this case, and when we have, as we have here, evidence which is uncontradicted that it is the practice in Glasgow, which is the commercial centre of Scotland, I am satisfied that this is sufficient for the decision of the case.

As regards the English cases, it is in vain to say that they are of no authority here. The circumstances of the two countries are very different from what they were in 1794, when it was said that regard would not be had to the English cases.

In these circumstances, I think the Sheriff-Principal was right, and that M'Murray & Company, or their assignees, are entitled to a lien over the goods referred to in security of their general balance against Leck, Cowan, & Company.

LORD ORMIDALE—I concur. I do not think it necessary to rest the decision of the case upon the law as it stands, for we have here sufficient evidence of usage of trade. The case of *Witt* referred to is quite conclusive upon the state of the law in England, and it is remarkable that in that case the Judges did not go so much upon the general law as upon the proof of usage. The proof there was not nearly so extensive or satisfactory as in this case, where we have a number of most respectable men who all say that it is the usage of trade in Glasgow that packers should have a right of retention.

LORD GIFFORD—The question raised in this case is one of general interest in reference to the rights of packers, as well as in reference to the rights of the manufacturers who employ them, or rather in reference to the rights of the creditors of such manufacturers. It is often a very important matter, both for the packer and for

the creditors of the merchant, whether the packer has a general or continuing lien for his account or not.

It seems to be settled in England under the cases quoted at the bar that a packer in England has a general lien for his account—that is, that he may retain, in the case of the bankruptcy of the merchant, the goods which happen to be in his hands, in security not only of the expense of packing these particular goods, but also of the expense of packing previous goods which he had packed and despatched by the merchant's order. It is needless to inquire into the history of the English decisions, or of the law as so fixed in England. Whether it arose from the circumstance that in former times packers also acted as agents or factors for the merchant, and were in the habit of advancing money on the goods consigned for packing, and so were held entitled to an agent or factor's general lien. However this may be, the rule seems now established in England that a packer has a general or continuing lien.

This precise point does not appear to be determined in Scotland by any decision, or even by any authoritative dictum. But in a question of the merchant law, when any point of practice or any rule of trade is established as the law of England, especially in modern times, and when the reason of the rule is the same in both parts of the island, there is the very strongest presumption that the practice or rule will prevail in Scotland also, unless the contrary be clearly established. At all events—and perhaps this is sufficient for the decision of the present case—comparatively slight proof of the practice of trade in Scotland will be sufficient to establish a rule of trade which is recognised and in full force in England. It is very undesirable in matters of mercantile law and in precisely the same circumstances that different rules should prevail or be fixed for England and for Scotland when no reason whatever can be given for such variance.

In the present case I am satisfied with the evidence relied upon by Messrs M'Murray & Co., the packers and hot pressers, and by their assignees. Indeed, I may say it is all one way, for although Mr Strong, who is the sole witness for himself, explains that the alleged right of lien has often been made the subject of dispute and of compromise, he admits that in general the packers have succeeded in making it good and securing their preference, although he explains that this was not by reason of the law being admitted, but because the packers would otherwise have withheld their consent to composition arrangements. The result is, however, that, so far as we can see in evidence, in Glasgow the packers' right to a general lien has not only always been asserted, but has always or almost always been made good.

I am therefore of opinion that the interlocutor of Sheriff Dickson appealed against is well founded, and that the appeal ought to be dismissed.

The Court dismissed the appeal and found the respondent entitled to expenses.

Counsel for Petitioner (Appellant) — Scott. Agent—A. Kelly Morison, S.S.C.

Counsel for Respondents — Guthrie Smith. Agent—John Gill, S.S.C.

Tuesday, March 19.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

COSTINE'S TRUSTEES *v.* COSTINE AND OTHERS.

Succession—Parent and Child—Power to Revoke— Jus quæsitum tertio.

A father and son entered into a deed of agreement by which the father agreed to pay his son £7000 as the price of his consent to the disentail of an estate. £4000 was to be paid absolutely, the remaining £3000 was to be paid to trustees, "to be held by them in trust for the use and behoof of the son, but under the declaration that it should be lawful for the father to limit the power and control of the son over the said sum to such extent and in such way as he should think proper, and in particular to direct the trustees to hold the sum for behoof of the son in liferent only, and for the issue of his body in fee, whom failing to his nearest heirs and assignees." The father thereafter executed a deed of declaration of trust, which was also signed by the son, who therein expressly declared his concurrence and acquiescence, providing *inter alia* that in the event of the son dying without issue the trustees should hold the £3000 for the father's sister and her heirs.—*Held* (*alt.* Lord Curriehill, Ordinary, and *diss.* Lord Ormidale) that, as the sum in question belonged solely to the son, and his father had merely reserved to himself a power to protect his son against his creditors by limiting his right to a liferent—(1) any destination other than that provided in the deed of agreement was *ultra vires* of the father, and (2) the destination contained in the deed of trust was truly a testamentary destination by the son, and therefore revocable by him, and no *jus quæsitum* arose under it to the father's sister and her heirs.

In the year 1870 the deceased John Costine senior was heir of entail in possession of the entailed estate of Glensone and others, and in consideration of the obligations in favour of John Costine junior, his eldest son, contained in a minute of agreement entered into between them on 20th October 1870, he obtained the consent of his son to the disentail of the estate. By this minute of agreement John Costine senior became bound, in the first place, to pay to John Costine junior the sum of £4000 sterling at the first term of Whitsunday or Martinmas after the completion of the disentail, and, if so required, to execute and deliver to John Costine junior, immediately on the authority to disentail being granted by the Court, a bond and disposition in security over the lands of Glensone for this sum of £4000 payable to John Costine junior, his executors or assignees, at such term of Whitsunday or Martinmas, with interest at the rate of four per cent. per annum; and, in the second place, to pay at such term of Whitsunday or Martinmas to certain parties as trustees, of whom the pursuers are the survivors and acceptors, the further sum of £3000 sterling,