the Sheriff-Substitute, and found the pursuer entitled to additional expenses, to be paid out of the trust estate.

Counsel for the Pursuer—Asher—Maclaren. Agents—Macpherson & Mackay, W.S.

Counsel for the Defenders—Pearson—Shaw. Agent—James Drummond, W.S.

Friday, October 24.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

HORSBRUGH (ROBERTSON'S TRUSTEE) *v.* ROYAL BANK OF SCOTLAND.

Retention—Bonds Lodged with Bank—Presumption—Terms of Receipt.

The customer of a bank, whose account was overdrawn, lodged with the bank certain annuity bonds transmissible by delivery and payable to bearer, receiving from the bank agent receipts bearing that the bonds were held "for safe keeping on your account and subject to your order." The customer died leaving his account largely overdrawn and a large amount of bonds in the bank's hands. His estates were sequestrated after his death. In an action by the trustee against the bank for delivery of the bonds, the Court *assoilzied* the defenders, holding (1) that as the defenders had the custody of the bonds there was a presumption in favour of their having a right of retention over them; (2) that this presumption was not rebutted by the terms of the receipts, which did not fully express the terms of the deposit, and were consistent with the bank having a right of retention; and (3) that the rest of the evidence in the case supported the presumption in the bank's favour.

On 25th November 1887 Mr David Souter Robertson deposited with the Royal Bank of Scotland at Brechin an Edinburgh City Annuity bond for £3500 with interest coupons attached, receiving from the bank a receipt in the following terms—"We hold for safe keeping on your account and subject to your order, City of Edinburgh Annuity bond, No. 3937, for the payment annually of £105 with coupons attached, £52, 10s. each, payable half-yearly on 1st February and 1st August." On 12th April 1888 Mr Robertson deposited with the bank two Edinburgh City Debt bonds for £500 each with coupons attached, receiving a receipt in substantially similar terms, and on 27th April 1888 he deposited further Edinburgh City Debt bonds and coupons attached with the bank, and again received a similar receipt. All these bonds were payable to bearer, and in terms of 1 and 2 Vict. cap. 55, sec. 45, were transmissible by simple delivery and without intimation of any kind. Mr Robertson died on 10th November 1888, at which date the bonds above mentioned still remained in the bank's hands, and his account with the bank was overdrawn to the extent of £5651. Mr Robertson's estates were sequestrated after his death, and Henry Moncreiff Horsbrugh, C.A., was appointed trustee thereon.

The present action was raised by Mr Horsbrugh against the bank for delivery of the said bonds.

The pursuers founded on the receipts above quoted, and pleaded—"(1) The bonds and coupons referred to being part of the sequestrated estates of Mr David Souter Robertson, the pursuer is entitled to delivery thereof. (2) In respect of the acknowledgments quoted, the pursuer is entitled to decree as concluded for. (3) The defenders' statements are irrelevant; *et separatim*, they can only be proved *scripto*."

The defenders claimed a right of retention over the bonds in respect of Mr Robertson's debt to the bank, and averred that there had been all along an understanding and agreement between him and them that they were to hold the bonds as a security against any advances by them to Mr Robertson; the advances to Mr Robertson had been made on the faith of this agreement. The bank collected the coupons and annuity warrants as they fell due, and the parties otherwise acted inconsistently with the bond being held by the bank merely for safe keeping.

The defenders pleaded—"(1) The pursuers' statements are irrelevant and insufficient to support the conclusions of his summons. (2) The defenders being entitled to retain the bonds sued for until payment of the debt due to them, should be assoilzied, with expenses. (3) In respect of the understanding and agreement libelled, and of the course of dealing following thereon, the defenders are entitled to the retention claimed."

On 5th November 1889 the Lord Ordinary (KYLLACHY) before answer allowed the defenders a proof *habili modo* of their averments, and to the pursuer a conjunct probation, and the pursuer having reclaimed, the Court on 7th December adhered.

Proof was led on 6th February 1890.

The evidence for the defenders consisted of the parole evidence of Mr Guthrie, the bank agent at Brechin, and of Mr T. R. Chaplin, a son of Mr Robertson, of the correspondence passing between the bank and members of Mr Robertson's family, and of the bank account.

Mr Guthrie, the bank agent at Brechin, gave evidence to the following effect:—Mr Robertson began to bank with the Royal Bank at Brechin in 1880. In November 1882 his account was overdrawn, and the witness asked him to lodge securities against the overdraft, which he did; the bank gave a receipt bearing that they were lodged for safe keeping and held to your order. In November 1887 Mr Robertson's account was overdrawn to the extent of £3210, and the bank held bonds belonging to him for £3000. Mr Guthrie then intimated to Mr Robertson, both by letter (dated November 4th) and verbally, that he

could not get further advances without lodging securities to cover them. On 25th November Mr Robertson accordingly got up the bonds in the bank's hands and lodged the bond for £3500 sued for. The receipt was expressed in the terms above quoted, Mr Robertson having assured the witness that these terms were quite consistent with the bank having a lien. In the spring of 1888 Mr Robertson intimated that he would require further advances, and bonds to the value of £1200 and £800 were lodged with the bank on 12th and 27th April respectively. In each case the deposit was followed by extended credits made on the faith of the increased security obtained by the bank. On 1st June the overdraft having risen beyond the amount of the bonds in the bank's hands, the witness wrote to Mr Robertson's son asking for additional security. On September a cheque for £410 drawn by Mr Robertson was returned unpaid because securities to a sufficient amount had not been lodged. On two occasions, in 1885 and in 1888, the bank sold securities lodged with them by Mr Robertson, with his consent, and placed the proceeds to his credit in order to reduce the overdraft.

The most material parts of the correspondence were as follows:—Mr Guthrie on 4th November 1887, as already mentioned, wrote to Mr G. Robertson Chaplin, a son of Mr Robertson, in these terms:—"I think you might suggest to your father whether he would not return to us, for safe keeping, the City of Edinburgh bond which you have in the safe at Murlingden. I fancy our strong room is fully better than yours. Think of the fire at Colonel Sandeman's at Stanley House the other day. Besides, if we have bonds in that way of considerably greater value than the obligations at the branch here, we would be enabled to charge a lower rate of interest all round on the advances."

The following postscript was appended to a letter from Mr Robertson to Mr Guthrie of date 19th November:—"The bonds are here if wanted."

On 1st June 1888 Mr Guthrie wrote to Mr T. Robertson Chaplin in these terms:—"I think I told you that the bank was finding fault with us for making such large advances to your family without having the same arranged for beforehand and covered by securities approved by our head office. I think your father has some spare Edinburgh City Debt bonds at the Commercial Bank, has he not? Perhaps he could send us a bond for £500 or £1000 without any trouble. It would enable us to say that we held additional security to warrant these recent additional advances."

On 11th June Mr T. Robertson Chaplin replied:—"I duly received your note, and will endeavour to get my father to send you part of the bonds he has brought here with him to be held as security by your bank. I do not see the policy of his retaining these bonds at all; it would surely be better were he to sell them and apply the proceeds towards placing his a/c current on the credit side, but for some reason he does not fall in with my views on the matter. I will likely be north shortly for a day or two, and will call for you."

Mr Guthrie wrote again on 12th June—"We shall be glad to see you when you come; and the safe and simple way would be to bring one or two of these bonds with you, to be lodged on your father's account, and to be drawn against at any time or held in security. We will give a formal acknowledgment for the same. The holding of these would enable us to charge interest at a lower rate."

From acknowledgments granted by the bank agents it appeared that the bank collected the coupons attached to the bonds held by them, and placed the interest to the credit of Mr Robertson's account with the bank. The bank account showed that the overdraft on Mr Robertson's account amounted to £3210 on November 25th when the bond for £3500 was deposited, to £3478 on 12th April when the further deposit was made, and to £4251 on 27th April when the third deposit of bonds was made. On 12th April the bank cashed a check drawn by Mr Robertson for £750, and on 28th April a cheque drawn by him for £500.

Mr T. R. Chaplin was examined by the defenders after the case had been taken into the Inner House in the reclaiming-note mentioned below. He deponed to this effect—He was helping his father with his affairs in June and July 1888 in the absence of his brother George, who usually did so. The letters from Mr Guthrie of June 1st and 12th above quoted were seen by his father. He was aware that his father's account was largely overdrawn at that time, and that the bank held bonds of his to a large amount. He sometimes saw Mr Guthrie personally, and knew that at that date he was wishing further security against any further overdraft.

The sole evidence produced by the pursuer was the receipts given for the bonds.

On 28th February 1890 the Lord Ordinary assoilzied the defender from the conclusions of the summons and decerned.

"*Opinion.*—Having considered the proof in this case, I have come to the conclusion that the bank have established the lien which they claim.

"Had it appeared that the receipts which are quoted on record constituted or fully expressed the contract between the parties, and had those receipts required to be construed without any help from outside, I should probably have felt compelled to come to a different conclusion. For I before observed that a deposit for *safe* keeping appeared to me to be *prima facie* a deposit for a special purpose, and a special purpose inconsistent with the general lien which the defenders claim. And I have seen no reason to change that opinion. It is true, as the defenders urge, that the deposit here was of negotiable securities; and it may be that as between a banker and his customer a deposit of negotiable securities has different incidents from, *e.g.*, a deposit of plate. But if the deposit is expressed to be for *safe* keeping, and there is nothing to qualify that expression, I

have not been able to see that a deposit of bonds is in a different position from, *e.g.*, a deposit of plate. And therefore, although there have been *dicta* of some authority to the effect that a banker's lien extends over all paper securities placed for any purpose in the banker's hands, I am not, I confess, prepared in the absence of direct decision to carry the banker's lien so far. Indeed, as regards decision, the leading case on the subject, *Brundao* v. *Barnett*, decided in the House of Lords, 12 Clark and Finelly, p. 787, appears to me to confine the lien within considerable narrower limits. For in that case the lien was held excluded where Exchequer bills (usually deposited in the banker's safe in a box, of which the customer kept the key) were handed to the banker to obtain payment of the interest due and to have the bills renewed, and where the customer failed, while the new bills still remained in the banker's hands waiting for redeposit in the customer's box.

"But the question always is, what were the terms of the contract under which the deposit was made; and here I am not able to accept the pursuer's argument that it is illegitimate to look beyond the terms of the receipts which the bank granted to the deceased. For that argument implies that those receipts must be taken as expressing the final and whole contract between the parties; and as expressing it, moreover, in terms which do not admit of construction even by the subsequent writings or subsequent actings. Now, I do not think that the receipt granted upon a deposit is a document which at all necessarily expresses the terms of the deposit. It may do so; but, on the other hand, it may not. The contract of deposit may lie behind the receipt altogether. It may have been concluded by a formal deed, or by missives, or by correspondence, or even by verbal agreement, and the receipt may in such cases be merely executive of the contract, and of little or no importance even for purposes of construction. Or the receipt may be one of several sources from which the terms of the contract fall to be gathered. For example, it may fall to be read simply as a letter in a correspondence, or as a letter or telegram passing in the course of communications partly written and partly verbal. It is certainly not a document which is at all in the position of a formal deed. And the contract of deposit being always a consensual contract, capable of being constituted verbally and proved by parole, I confess I see no reason why in a case like the present the whole communications between the parties should not be considered, and the true terms of the contract ascertained.

"In this view I think it is quite legitimate to look at the evidence which has been adduced by the bank, which evidence consists partly of the testimony of Mr Guthrie, the bank's agent in Brechin, partly of certain correspondence passing between that gentleman and the late Mr Robertson, and partly of Mr Robertson's bank account, a copy of which taken from the bank's books is produced.

"Mr Guthrie's evidence, if accepted, appears conclusive. I do not suppose that can be disputed. His statement is that Mr Robertson's account being in November 1887 overdrawn, he (Mr Guthrie) suggested a deposit of bonds, or rather a deposit of additional bonds, by way of cover, and that Mr Robertson at once agreed to this; and the deposit first-mentioned on record was arranged and made expressly for the purpose of covering the then overdraft. He says, further, that the deposit having been thus arranged and made, the receipt granted was expressed as for safe keeping, in the same terms as previous receipts, because both he and Mr Robertson considered, rightly or wrongly, that those terms were quite consistent with the bank's lien, which lien it was the expressed object of both of them to bring into force. He says, further, that Mr Robertson was allowed further credit in respect of the increased cover thus obtained, and that the two subsequent deposits mentioned on record—both made in April 1888—were arranged in the same way, and were followed by similar extended credits. In short, if Mr Guthrie's evidence is to be accepted, there was in the case of each deposit an express agreement that the bank should have a lien over the bonds deposited for their general balance.

"The question, however, is, whether Mr Guthrie's evidence is sufficiently corroborated. For entirely as I believe his statement, he is certainly in the position of a party, and perhaps a deeply interested party, and I should have at least hesitated to accept his unsupported testimony as against the *prima facie* import of the three receipts. But I am glad to be relieved from considering that question, because I am of opinion that Mr Guthrie is amply corroborated not only by the bank account, which so far as it goes supports his statement, but also by the correspondence which passed between him and Mr Robertson and Mr Robertson's son—Mr Robertson-Chaplin.

"I incline to think that the terms of the contract in which the first deposit (that of November 1887) was made are sufficiently ascertained, apart from the parole evidence altogether, by Mr Guthrie's letter to Mr Robertsou-Chaplin of 4th November 1887, and Mr Robertson's postscript to his letter of 19th November 1887, and I think that the bank's view of the several transactions is also borne out and illustrated by *inter alia* Mr Guthrie's letter of 1st June 1888, Mr Robertson's letter (no date), and Mr Guthrie's letters to Mr Robertson-Chaplin of 12th June 1888 and 31st July 1888. These letters I think show pretty conclusively that throughout the communications Mr Guthrie, Mr Robertson, and his son Mr Robertson-Chaplin (who lived with and acted for him), recognised that the bonds held by the bank were subject to the bank's general lien, and that when additional credit was required further bonds required to be lodged.

"I therefore hold that Mr Guthrie's account of the matter is sufficiently corroborated; and in these circumstances it is not necessary to consider how far, if the contract

had been constituted by the receipts and the receipts alone, the subsequent correspondence and subsequent actings of parties would have sufficed to construe the receipts in a manner favourable to the bank. It is not, however, to be overlooked that the actings of parties make it at least plain that the deposits in question were in no view deposits for keeping merely. That is to say, it is clear upon the proof, that although not expressed in the receipts, it was a part of the arrangement between the parties that the bank should undertake to collect the coupon interest as it fell due and to put it to the credit of Mr Robertson's account. That at least goes to shew that the receipts did not express the full contract between the parties.

"On the whole, therefore, I conclude, as I said at the outset, that the bank have established their lien, and that they are entitled to absolvitor with expenses."

The pursuer reclaimed, and argued—(1) The defenders had no lien over the bonds The terms of deposit were expressed in the receipts, and external evidence of the agreement between the parties was therefore inadmissible to contradict the terms of a contract which had been reduced to writing. If the receipts had been mere acknowledgments of having received, external evidence would have been admissible to explain the contract, but from the terms of the receipts it clearly appeared that the bonds were lodged for safe keeping only, as they were held subject to the depositor's order, *i.e.*, were returnable on demand. The contract was accordingly one of deposit merely, and the depositary could not claim a right to retain the articles deposited save in respect of expenses incurred in connection with the deposit. The bank therefore had no right of retention or lien over the bonds, which did not come to them in the course of business, but were lodged for a special purpose. The general lien of bankers was not a right which the Courts were inclined to construe liberally—Bell's Prin., secs. 212, 1414; Bell's Comm. (7th ed.), ii., 89, 113-4, 122; *Brundao* v. *Barnett*, 12 Clark and Finelly, 787. The fact that the bank collected the interest coupons did not prove that the contract under which the bonds were lodged was not one of deposit. They also collected the coupons of bonds not in their possession. The evidence in favour of the defender's claim was mainly that of Mr Guthrie, who was an interested party. It would be unsafe to proceed on his evidence unless it were sufficiently corroborated, which it was not. (2) If the defenders could not succeed by pleading a right of general lien, they could not succeed by resting their claim on the principle of retention in bankruptcy. This latter principle did not rest in the balancing of accounts, but was based on the right of general lien, the question in every case being whether the person claiming the right of retention belonged to a class which had a right of general lien—*Meikle and Wilson* v. *Pollard*, November 6, 1880, 8 R. 69; *Robertson* v. *Ross*, November 17, 1887, 15 R. 67; *Distillers Company* v. *Rupell's Trustee*, February 9, 1889, 16 R. 479; *Strong* v. *Philips & Company*, March 16, 1878, 5 R. 770; *Anderson's Trustees* v. *Fleming*, March 17, 1871, 9 Macph. 718.

Argued for the defenders and respondents—(1) The defenders had a right of retention over the bonds in question. A banker had a general lien over all unappropriated paper securities in their hands, and there was therefore a presumption in the present case that the defenders had a lien over these bonds—Bell's Comm. (7th ed.), ii. 89; *Brundao* v. *Barnett, supra* (*per* Lord Campbell). The *onus* accordingly lay on the pusuer to show that the banker's general lien was excluded. This *onus* was not discharged by merely pointing to the terms of the receipts, for these documents did not necessarily express the whole agreement between the parties, and did not exclude the bank's lien. An agreement for "safe keeping" was quite consistent with the bank's having a right of lien—*United Service Company*, 6 Ch. App. 212. The ground of the decision in *Brundao's* case was the agreement that the securities should be locked up in the safe of which the customer had the key after the particular business for which they had been entrusted to the bank had been concluded. There was no such agreement here, but the bonds came to the bank in the usual course of business, as it was part of a banker's business to keep bonds and collect the interest which accrued on them. There was ample evidence that these bonds were lodged by Mr Robertson as securities against the overdraft on his account. Mr Guthrie's evidence was sufficiently corroborated by the correspondence and the real evidence of the bank account. (2) An alternative view was that the principle of retention in bankruptcy was applicable to the case in consequence of the bank having possession of the bonds. The delivery of the bonds to the bank and the receipts granted by the bank were equivalent to an *ex facie* absolute title in the bank's favour, coupled with a back-letter declaring that they held in trust or for security—Bell's Comm. (7th ed.), ii. 122; *Murray's Creditors* v. *Chalmers*, 1744, M. 2626; *Hamilton* v. *Western Bank*, December 13, 1856 19 D. 152; *National Bank* v. *Forbes*, December 3, 1858, 21 D. 86.

At advising—

LORD PRESIDENT — This action is at the instance of the trustee on the sequestrated estate of the late David Souter Robertson for the purpose of compelling the Royal Bank of Scotland to make delivery to him of certain Edinburgh City Annuity bonds specially identified in the summons. The defence to the action is embodied in the 2nd plea-in-law for the defenders, which is in these terms—"(2) The defenders, being entitled to retain the bonds sued for until payment of the debt due to them, should be assoilzied with expenses."

The Lord Ordinary has in effect sustained that plea, and has assoilzied the defenders. Now, the plea is one of retention, and it appears to me that the ordinary rule and doctrine of retention is directly applicable to

the settlement of accounts between brokers and their customers whether the customers are bankrupt or still solvent. This rule I see is generally spoken of, and I refer particularly to Mr Bell's Commentaries, as banker's lien, but it seems to me to be simply the doctrine of retention known in the common law, and which is directly applicable to cases like the present, and the point we have to consider is whether it is applicable to the circumstances of the present case.

This right of retention may fairly be defined as a general right to retain all unappropriated negotiable instruments belonging to the customer in the hands of the banker for securing his balance on general account. In the present case it is certain that there is a large balance due to the defenders, and also that the four bonds in question are in the possession of the bank. But it is maintained by the pursuer that these bonds were lodged with the bank for a specific purpose, and not in the usual course of business, so as to constitute a security to the bank for a general balance, and of course the rule of retention is subject to this exception—that if a negotiable instrument is lodged with a banker for the purpose of securing a particular debt or for any specific purpose, the general rule does not apply, but, on the other hand, the specific purpose must be clearly ascertained, or otherwise the general rule holds good.

Now, the only evidence upon which the pursuer relies as indicating the specific appropriation of the bonds in this case is to be found in the terms of the receipts which were granted by the agent of the bank at Brechin when he received the bonds on November 25th 1887, 12th April 1888, and 27th April 1888, and they are all substantially in the same terms. The first of them is as follows—"To hold for safe-keeping on your account and subject to your order, City of Edinburgh Annuity Bond . . . for the payment annually of £105, with coupons attached, £52, 10s. each, payable half-yearly on 1st February and 1st August." The words particularly relied on by the pursuer are, " for safe-keeping on your account and subject to your order." The expression is not for safe-keeping "only" or "exclusively," but for safe-keeping "on your account and subject to your order." Now, it may fairly be said that when a customer deposits a negotiable security in his banker's hands, one object of the deposit is the safe custody of the document, as a bank is able to keep paper securities much more safely than the customer generally can, and therefore the latter gains the advantage of having his securities in much safer keeping, and therefore it may fairly be assumed that part of the object of the depositor in this case was to have his securities in safer custody than if they were in his own hands. I think also more signification is to be attached to this consideration because of the nature of the documents here in question, which are transmissible by delivery from hand to hand, while the coupons are payable to any person who presents them for payment after they are due. They are therefore securities of a peculiarly negotiable character, and afford the most handy and available security to a banker. So long as the account remained in a healthy condition, I think the receipt fairly expressed the relations between the parties, because if there was no overdraft the object expressed in the receipt, "for safe-keeping on your account and subject to your order," was the only object of the deposit, and it was in the power of Mr Robertson at any time to demand redelivery of the bonds. But if the intention was to appropriate the bonds to a special purpose, we should have expected that to have been more distinctly expressed in the receipt. The presumption in the first instance is that the custody of the bonds gives the bank a right of retention, and that presumption can only be rebutted by something very distinct and express.

The evidence apart from the receipts is all in favour of the defenders—The Lord Ordinary has dealt with the case as if it lay on the defenders to remove a presumption arising from the terms of the receipts, but I cannot go along with him there. I do not think that the terms of the receipts remove the original presumption resulting from the deposit of the bonds. But otherwise I agree with the judgment of the Lord Ordinary upon the evidence. There is one point indeed which appears to me to be conclusive against the pursuer—I refer to what appears on the face of the bank account. On each of the occasions on which these bonds were handed over to the bank, the customer was desirous of making an overdraft, or an additional overdraft on his account, and the overdraft it was quite understood was to amount to a certain definite sum. It appears from the account that when an overdraft was to be made, there was a deposit of Edinburgh City bonds to cover the amount of the overdraft. On all the three occasions on which the bonds here sued for were deposited, the amount of the deposit made, and the additional overdraft allowed correspond closely to one another. These actings of the parties appear to me to be completely subversive of the pursuer's construction of the terms on which the bonds were deposited as shown in the receipts. If the deposit was only for safe keeping, what was the bank's object in allowing an overdraft closely corresponding to the deposited bond? The inference is irresistible that the purpose of the deposit was to cover the overdraft to be made.

The evidence of Mr Guthrie, the bank agent, is also, I think, very important, but no doubt the observation is justly made by the Lord Ordinary that he is an interested party, and the Court could not safely proceed on his testimony alone. But when we take his very clear account of what passed between himself and the late Mr Souter Robertson and his son, and in connection with that testimony take the bank account to which I have referred, we have such corroboration of Mr Guthrie's evidence as is

necessary. The correspondence between the parties also, I think, throws great light upon the question, and so does the evidence of Mr Souter Robertson's son Major Robertson Chaplin, who was examined after the case came into the Inner House. It is sufficient for me, however, to add that I entirely agree with the result at which the Lord Ordinary has arrived, and think the defenders must be assoilzied.

LORD ADAM—This is an action brought by the trustee on Mr Souter Robertson's sequestrated estate, who asks that there shall be handed over to him four City of Edinburgh Annuity bonds of the *cumulo* amount of over £5000. The bonds are all payable to bearer, and they are transmissible by simple delivery. That being the character of the bonds, I think that they are clearly documents of such a nature as that the banker's lien must apply to them. On Mr Souter Robertson's death on 10th November 1888 the four bonds were found in possession of the bank. That being so, it appears to me that there is an *onus* on the pursuer to show that the ordinary rule that a bank has a lien over securities of that kind in their possession for a general balance due to them by the depositor does not apply, and accordingly he has maintained that the bonds in question were deposited with the bank for a special purpose only, and that they do not therefore fall within the general rule to which I have referred.

The question is, whether the pursuer has proved the specific appropriation. The evidence on which he relies to prove this—and I think the only evidence—are the receipts which were granted by the agent of the bank when the documents in question were handed to him. The receipts are all in the same terms, and the contention is that they "bear that the deposits were made for safe keeping and for safe keeping only." I agree with the Lord Ordinary that the case would have been a difficult one if the receipts had been the only evidence to which we were entitled to look in deciding the legal character of the deposit. I quite concur in the view specified in that part of his Lordship's note, where he says—"Now, I do not think that the receipt granted upon a deposit is a document which at all necessarily expresses the terms of the deposit. It may do so; but, on the other hand, it may not. The contract of deposit may lie behind the receipt altogether. It may have been concluded by a formal deed, or by missives, or by correspondence, or even by verbal agreement, and the receipt may in such cases be merely executive of the contract, and of little or no importance even for purposes of construction. Or the receipt may be one of several sources from which the terms of the contract fall to be gathered. For example, it may fall to be read simply as a letter in a correspondence, or as a letter or telegram passing in the course of communications partly written and partly verbal. It is certainly not a document which is at all in the position of a formal deed. And the contract of deposit being always a consensual contract, capable of being constituted verbally and proved by parole, I confess I see no reason why, in a case like the present, the whole communications between the parties should not be considered, and the true terms of the contract ascertained." I think that is a correct exposition of the law. The true question, however, appears to me to be not the terms of the original deposit, but the terms upon which the bonds were being held at the date of Mr Souter Robertson's death. If that be so, it is obvious that the terms upon which the original deposit was made are only one of the elements of proof to be taken into considera tion along with others. They are all ad missible for the purpose of showing on what footing the bonds were held at the date of Mr Souter Robertson's death. It is obvious that all the correspondence and actings subsequent to the deposits being made must be relevant to establish the defenders' contention.

I do not propose to go over the proof in detail, because it is clear that upon the evidence of Major Chaplin and others that the bonds were being held by the bank in security of the overdraft. I may refer, however, as an example, to a letter dated 1st June from Mr Guthrie, the bank agent, to Major Chaplin, and which is proved to have been shown by him to his father. In that letter Mr Guthrie says—"I think I told you that the bank was finding fault with us for making such large advances to your family without having the same arranged for beforehand and covered by securities approved by our head office. I think your father has some spare Edinburgh City Debt bonds at the Commercial Bank, has he not? Perhaps he could send us a bond for £500 or £1000 without any trouble. It would enable us to say that we held additional security to warrant these recent additional advances." And it seems to me to be capable of only one construction. He asks for "additional" security. Additional to what? To the only security held by the bank for their overdraft, namely, the four bonds.

But further, the actings of the parties show clearly what was the true character of the deposit. Thus I see that prior to 25th November 1887 the state of the bank account was that there was due to the bank a sum of £3210, and they then held bonds to the amount of £3000 only. The bank then applied to Mr Souter Robertson to get additional security, and upon 25th November he lodged a bond for £3500, getting back the bond for £3000. He lodged two bonds for £500 each on 12th April 1888, and upon the same date he passed a cheque for £750. On 27th April following other bonds were lodged to the amount of £800, and next day a cheque was passed for an additional £500. The passing of the cheques immediately followed the delivery of the bonds, and no one can doubt that the bonds were lodged as security for the drafts.

Apart altogether from Mr Guthrie's evidence, I should have been disposed to decide this case in favour of the defenders, but if we are to believe that evidence I can have no doubt whatever. I quite agree with the Lord Ordinary that Mr Guthrie occupied an

interested position, and if his evidence had stood alone there might have been a difficulty in acting upon it. But I think that the written evidence, and the actings of the parties, are entirely corroboratory of that evidence; and upon the whole matter I think the Lord Ordinary's interlocutor ought to be adhered to.

LORD M'LAREN—I concur in the judgment proposed, and will merely indicate my view of the principle on which cases of this nature ought to be decided. It is a general principle in our law that every agent has a lien or right of retention against his principal for the balance due to him, and this right of retention is not confined to moneys collected such as rents and dividends, but may extend to securities, the precise extent of the lien being determined by the nature or character of the agency. The so-called banker's lien is an example of this rule of law, and in this case the decisions establish that a banker has a lien over all such negotiable securities of the customer as are lawfully in his possession, and are subject to his control, but this lien may be excluded by agreement, express or implied. If the bill or security is specially appropriated, this is equivalent to an exclusion of the lien, because in the case supposed the banker has received the instrument under instructions which are inconsistent with the supposition that he is to have a lien.

In the present case I hardly think that the question raised is one of special appropriation, but the argument submitted by the trustee for Robertson's creditors is to the effect that the lien which the Royal Bank would under other circumstances have acquired was excluded by agreement.

In considering the meaning of the expressions used in the receipts which were granted by the Royal Bank for these bonds, it is necessary to attend to the distinction between a right in security and a lien. A proper security can only be constituted by the acts of the parties, the debtor and the creditor in the series of transactions, and if a question of construction arises the creditor must establish affirmatively that a right of security was given to him. But a lien is something which the law gives to the creditor, or holds to arise to him from the mere fact of his possession of his debtor's property in the character of an agent, and where the relation of principal and agent or banker and customer exists, it is not necessary that the lien should be set up by proof; the party claiming adversely to the lien must show that by agreement the lien is excluded.

It appears to me that the expressions used in the receipts for these negotiable bonds are insufficient in themselves to exclude the banker's lien. The bonds are said to have been received for "safe keeping," and to be held "to the order" of Mr Robertson. If the Royal Bank had given notice of their intention to sell the bonds with the view of applying the proceeds in reduction of the overdraft, I do not doubt that this would have been a breach of contract, and that the sale might have been interdicted, because the terms of the receipt make it clear that the bank did not receive these instruments under a security-title. But the bank is only claiming a right to detain the bonds until its claims are satisfied, and this lesser right which results from the lien extends to all negotiable instruments which the bank may have received in the ordinary course of business, and not under a special trust exclusive of lien.

Even if the case were more doubtful on the terms of the receipts, the evidence appears to me to place the right of the Royal Bank beyond dispute. Their agent Mr Guthrie, in his letters to Mr Robertson's son, asserted his lien and asked for further deposits of a like nature to cover advances. These letters were communicated to Mr Robertson, who did not dissent from Mr Guthrie's interpretation of the rights of the bank. It is therefore established that Mr Robertson had no intention of excluding the lien, and there being no intention to exclude the lien, it cannot be said that the lien was excluded by agreement. There is also the circumstance that the advances were made concurrently with the deposit of the bonds, and apparently in reliance on the right of lien which would in ordinary course result from such deposit. I am accordingly of opinion that the Lord Ordinary's judgment is well-founded, and that the reclaiming-note should be refused.

The Court adhered.

Counsel for the Pursuer and Reclaimer—C. S. Dickson—W. Campbell. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the Defenders and Respondents—Low—Fleming. Agents—Dundas & Wilson, C.S.

Thursday, October 30.

SECOND DIVISION.

EGLINTON CHEMICAL COMPANY, LIMITED *v.* M'JANNET.

Burgh — Dean of Guild — Jurisdiction — Erection within Burgh — Irvine Burgh Act 1881 (44 *and* 45 *Vict.*)

A duly constituted Dean of Guild Court of a burgh, in terms of its statutory powers, provided that "no building operations of any kind shall be allowed to be erected, added to, or altered within the burgh unless plans thereof have previously been submitted to and approved of by" the said Court. A company, who possessed ground of 100 acres within the burgh, erected a tannery thereon, 65 feet back from the boundary of their property, without the sanction of the Dean of Guild. On a petition of the Procurator-Fiscal of Court the Dean of Guild convicted the company of a contravention of the rules of Court, and fined them £5. This fine not being paid by the com