Elgin, incorporated under the Act 28 and 29 Vict. cap. 85 (The Procurators (Scotland) Act 1865), and entitled to sue and be sued in their corporate name. The said Act is repealed by the Act 36 and 37 Vict. cap. 63 (The Law Agents Act of 1873), sec. 25, which, however, provides that "such repeal shall not prevent societies which prior to the passing of this Act were formed under the said Act from continuing to exist as incorporated societies." That the said last-recited Act provides (section 11) that "it shall be the duty of the registrar to keep an alphabetical register of all enrolled law agents; and enrolment in such register shall be deemed to be enrolment under this Act, and he shall strike out the name of any law agent on an order of the Court" (the words "the Court" being declared to mean the Court of Session); section 13—that "a roll of agents practising in any Sheriff Court shall be kept by the Sheriff-Clerk in such form as the Lord President of the Court of Session may direct, and every enrolled law agent who has paid the stamp-duty exigible by law on admission to practise as an agent before a Sheriff Court shall be entitled to subscribe the said roll;" section 14—that "the name of any person shall be struck off the said rolls (1) in obedience to the order of the Court, upon application duly made, and after hearing parties, or giving them an opportunity of being heard;" and section 22—that "every enrolled law agent shall be subject to the jurisdiction of the Court in any complaint which may be made against him for misconduct as a law agent, and it shall be lawful for the Court, in either Division thereof, to deal summarily with any such complaint, and to do therein as shall be just."

Answers were lodged for the respondent, in which he craved the Court to consider the peculiar circumstances of the case, the trifling amount of any possible gain to himself or loss to his client arising from the offence, and the punishment which had already been inflicted on him, and to refuse the prayer of the petition, at least to the extent of allowing his name to remain on the register of enrolled law agents.

The case was disposed of in Single Bills.

The Petitioners' counsel stated that this was the first instance of an application of this kind in Scotland. With regard to English practice he referred to Archbold's Practice (last ed.), 150.

At advising—

Lord President—The Court, though it certainly has discretion in matters like this, can hardly, I think, have much discretion in this particular case. A law agent who has been convicted of forgery and sentenced to twelve months' imprisonment is plainly unfit to remain on the roll of any practitioners in any Court. I am therefore for granting the prayer of this petition.

Lord Mure and Lord Shand concurred.

Lord Deas was absent.

The Court granted the prayer of the petition.

Counsel for Petitioners—Begg. Agents—Rhind, Lindsay, & Wallace, W.S.

Counsel for Respondent—D. J. Mackenzie. Agents—Cumming & Duff, S.S.C.

Wednesday, February 16.

SECOND DIVISION.

[Lord Craighill Ordinary.

MILLER *v.* HUTCHISON & DIXON.

Retention — Lien — Whether an Auctioneer Employed to Sell Goods on Commission is entitled to Factor's Lien for a General Balance.

Course of dealing *held* (*diss.* Lord Craighill) to establish that an auctioneer employed to sell horses on commission was entitled, as a general agent, on the bankruptcy of his customer, to a lien over horses in his hands for a general balance due to him on his transactions with the customer.

The estates of George Neilleay, horse-dealer in Beith, were sequestrated under the Bankruptcy Act on 20th June 1879. This was an action at the instance of Alfred Arthur Miller, his trustee in bankruptcy, against Hutchison & Dixon, auctioneers, Glasgow, concluding for £42, 3s., being the price, deducting expenses of livery and sale, of two geldings which belonged to the bankrupt, and were sold by the defenders at one of their sales by auction on 22d June 1879. The defenders admitted that they had received the geldings in question on 22d May 1879 in order that they might be sold for the bankrupt, they keeping them at livery until sold. They averred, however, that there had existed for some time between themselves and the bankrupt a course of dealing, whereby they from time to time received horses from him for sale on which they made advances, he incurring livery charges to them for the horses, on the mutual understanding that the defenders should have the security of the horses at any time in their hands for the sums due to them from time to time. They alleged that at 22d June, when the horses were sold, reserving all questions between them and the trustee, there was a balance due to them on their transactions with the defenders which exceeded the price which the geldings brought at the sale.

A proof was led, from which it appeared that the defenders were not livery stable-keepers except in so far as they kept at livery horses awaiting sale at their sales by auction. It was also proved that the bankrupt had for a number of years prior to 1879 been in the practice of dealing with the defenders. A partner of the defenders' firm deponed that they had been in the practice of making advances to him against horses in their hands, and that the understanding between the bankrupt and the defenders was that when he took away horses and left others the defenders were to retain possession of those which he left until the money advanced to him was refunded. He also deponed that the stablemen at the defenders' stables were instructed not to allow any horses to go out of the stables without his consent. The bankrupt deponed on this point —"If I were owing him (defenders' managing partner) a good sum of money, I would like to consult with him before I removed horses."

The two horses to which this case related were part of a lot of six horses which the bankrupt had brought over from Ireland for sale.

In evidence of the course of dealing between the bankrupt and themselves, the defenders produced,

inter alia, an acknowledgment in their favour by Neilleay, dated 19th May 1879, of an advance of £20 over "horses and gig placed in their hands for positive sale." They also produced another acknowledgment by Neilleay for £20 as an advance "on two horses to sell," this note being dated 5th June 1879 and referring to the two horses the price of which was in question.

The Lord Ordinary pronounced this interlocutor:—"Finds, as matter of fact—(1) That the horses, the price of which is sued for in the present action, were the property of Neilleay, the bankrupt, and were sold by the defender at the price of £56, 5s. on the 22d July 1879, two days after the sequestration of his estates under The Bankruptcy (Scotland) Act 1856; (2) That these horses were placed in the stables connected with the business premises of the defenders on 22d May last, not for the purpose of positive sale, but that in case they should not be sold by Neilleay himself, they should, upon instructions to this effect from him, be sold either by public roup or private bargain by the defenders, who in the latter case were to receive commission upon the price as well as the cost of the horses' keep, and in the former case were to receive only the cost of their keep; (3) That parties are agreed that the charges connected with the sale and the cost of keep from 22d May to 22d July 1879 amount to the sum of £24, 19s.; (4) That on the 5th June 1879, while said horses remained in the stables of the defenders, they advanced upon the security of these horses the sum of £20; (5) That it has not been proved that there was any course of dealing between the said bankrupt and the defenders, or that there is any general practice of trade, entitling the defenders to bring against the price of said horses any general balance, or any other item of counter claim other than the said sum of £24, 19s. and the said sum of £20; and (6) That the said sums of £24, 19s. and £20, amounting together to £44, 19s., being deducted from £56, 5s., the price of the said horses, there remains a balance of £11, 6s. of the price of said horses still in the hands of the defenders: Finds, as matter of law, the facts being as above set forth—(1) That the defenders are not entitled to retain from the price of said horses other sums than the said sums of £24, 19s. and £20; and (2) That the pursuer is entitled to recover from the defenders the said balance of £11, 6s., with interest at the rate of 5 per centum per annum from the 23d July 1879 until payment, as concluded for in the summons; and decerns."

The defenders reclaimed, and argued—Their relation with the bankrupt was not that of livery stable-keepers, who have only a special lien, but that of factors or commercial agents. They were therefore entitled to a lien for their general balance—Bell's Comm. ii. 109 (M'Laren's ed.); *Sibbald* v. *Gibson and Clark*, Dec. 11, 1852, 15 D. 217; *Strang* v. *Phillips*, March 16, 1878, 5 R. 770; *Gairdner* v. *Milne & Co.*, Feb. 13, 1858, 20 D. 565; *Hutton (Anderson's Trustee)* v. *Fleming*, March 17, 1871, 9 Macph. 718. It was plain from the proof that Neilleay would not have traded at all except on the footing alleged by the defenders, that they had a general lien over his stock in their hands.

Argued for pursuer—The presumption is against preferences, and no ground had been shown why defenders should have a preference. An auctioneer is not a factor or general agent; such an agent has his peculiar right of general lien, because he has often to pledge his own credit on his principal's behalf. The evidence does not show any such right to be constituted by agreement between the defenders and the bankrupt as is contended for.

At advising—

Lord Justice-Clerk—It is only with hesitation that I differ from the Lord Ordinary in this case, but after the full and able argument which we have had on this matter, which is not without some commercial importance, the conclusion I have reached is at variance with that of his Lordship. The real question is, whether these stable-keepers have a lien for a general balance due to them over the horses consigned to them for sale? Over moveables, putting aside hypothec, no security can be constituted without possession. But possession there was here beyond question. Again, a security may be constituted with possession by contract over the goods of a person who is a party to the contract. Thirdly, lien is presumed in certain commercial relations without any express contract. In my apprehension the question for decision here is, whether these stable-keepers are within any of the categories known to law in which a lien can be constituted in their favour? and I think that they are, because they are in the position of a factor selling the goods of a principal for him, and claiming a lien for a general balance, and a factor is entitled to retain goods coming in ordinary course of dealing into his hands until a general balance due to him be paid. If, then, the defenders here are ordinary commercial agents, there is no doubt. But it is said that they are only auctioneers, and also that at all events they are only livery stable-keepers, and that in either case they are not general commercial agents, and therefore not entitled to any general lien. Now, as to the first point, I do not know what an auctioneer is if he be not a commercial agent. Goods are sent to him that he may turn them into money by public sale, and he may, if he chooses, advance money on the goods consigned to him. These defenders made advances on the horses consigned to them, sold the horses, and retained so much as would pay the balance due them, or when they had other horses in hand they said, "We have a lien on these horses until the balance due us is discharged." I do not see how they were in any different position from commercial agents in this sense. I do not see how this conclusion can be, as has been contended, any extension of the law of lien, and in my humble opinion these defenders are just in the position of factors having a general lien. So much, then, for the first ground.

But then, in the second place, it was said that the defenders are livery stable-keepers, and that the public and the bankrupt Neilleay dealt with them as persons keeping horses for hire.

But I am satisfied that that is not a proper description of the calling which the defenders really follow. Mr Scott, a partner in the defenders' firm, says the stables are not livery stables, but simply saleyard stables, and there is no evidence that the defenders ever received any horses for any other purpose than that of sale. No doubt they allowed the bankrupt to take his horses out of the stables from time to time to be

shown to intending purchasers. Any man who sends goods to an auctioneer to be sold by him may still deal with any purchaser who is willing to buy them before the sale comes on. Here it is not disputed that when the horses were consigned they were consigned for sale and nothing else, and that according to the course of dealing followed by the parties, as the bankrupt explains it in his evidence, he was not entitled without permission of the defenders, or some responsible person in their service, to take away horses belonging to him which were standing in their stables.

I am therefore of opinion that the defenders were commercial agents, and entitled to retain for a general balance horses consigned to them.

Lord Young—I am of the same opinion. This summons concludes for a decree against the defenders for £42. I confess I always see with some pain an action in this Court for a sum so small. The expenses on each side will doubtless be as great. In this case the Lord Ordinary by his judgment has reduced the sum claimed to £11, and the pursuer seems to be satisfied with his success to that extent, for he has not said a word against the interlocutor of the Lord Ordinary. But it was explained that there is a large principle in this case, in which the defenders as auctioneers are much interested. I have endeavoured during the argument to point out that there is no question here of general interest, everybody being at liberty to make what contracts he pleases, and it is with reference to that point only that I propose to make any observations, for I concur with your Lordships as to the law to be applied to this particular case.

Lien is just a contract of pledge collateral to another contract of which it is an incident. If the principal contract be about a horse—that it is to be fed and kept by one man for another,—to that contract there is the incident called lien—that is, an agreement that the person to whom the possession of the horse is committed shall have right to retain the possession till his claim for the food and attention given to the horse shall be satisfied. That is a special lien, and it stands like general lien, on which I shall say a word presently, upon contract, express or implied. The law always, in the absence of evidence of an agreement to the contrary, assumes that the owner of the horse shall not reclaim possession till he has satisfied the claim of the other party for what he has done under the contract.

There is also general lien, which is this, that a factor possessing goods, having that possession as a lawful contract, may retain that possession until the general balance due to him by the owner of the goods is satisfied. Such a lien may in any case be constituted by contract. It stands on contract. That contract may be expressed, or it may be implied from the course of dealing of the parties, or from the usage of trade. Mr Smith spoke as if it were a dangerous thing to hold that such liens may be constituted by contract. But it is only the common law of freedom applying to all who are *sui juris*. If there be no fraud or force, or any such ground for setting aside what a freeman has done, a contract to give a general lien will hold good. The law of general lien, which does not differ in England and Scotland to any material degree, is most accurately stated by Mr Bell—(Comm. ii., p. 87 of M'Laren's ed.)—"General retention or lien is a right to withhold or detain the property of another in respect of any debt which happens to be due by the proprietor to the person who has the custody, or for a general balance of accounting arising on a particular term of employment. These rights are either founded on express agreement, or are raised by implication of law, which again may be from the understood and accustomed construction of particular contracts and connections, or from the usage of trade, or from the course of dealing between the parties."

The late Mr Smith also (Mercantile Law, 561), after defining lien at common law, says—"Whenever one of any other kind is sought to be established, the claim to it is not deduced from principles of common law, but founded on the agreement of parties, either expressed or to be inferred from usage, and will fail if some such contract be not shown to have existed;" and again he says that the question whether a lien by express agreement has or has not been created "depends on the terms of each individual contract. Where the intention of the parties to create one is plain, there can be no doubt of their legal right to carry it into effect." And again he says—"As to liens resulting from usage, these depend on implied, as those last mentioned upon express, contract."

I make these observations, because for my part I will not have this question about £11 magnified into a question of importance. People can contract as to liens as they please, and these stablekeepers can refuse to take in horses except on such terms as they choose, and can, as shippers do, contract that there shall be a general lien over the goods entrusted to them for the balance owing to them at the time. The law of general lien for bygone freight stands on that.

In this case I am of opinion that the proof shows, that while reasonable advances were to be made by the auctioneers, the horses which might be in the stables were not to be removed by Neilleay without leave from the auctioneers. I therefore agree that there was a general lien, and concur in the judgment your Lordship has proposed.

Lord Craighill—I adhere to the findings, both in fact and in law, which I pronounced when the case was before me in the Outer House, though it cannot be expected that I should do so without hesitation after hearing the views expressed by your Lordships. The facts of the case are—[*His Lordship here narrated the facts above set forth*]. The defenders do not dispute that the horses were the property of the bankrupt, but they have claimed right of lien for (1) an advance of £20 made on the two horses referred to in this case, (2) for the keep of those horses, and (3) for a general balance due to them, which they said is secured by the possession of the horses. Only as to the last question has there been any controversy in the Inner House.

It appears to me that, as was said by Mr Jameson at an early stage of the argument, this is a controversy more of fact than of law, and therefore while I am not to be held as adopting all the views of the law which your Lordships have expressed, I think we may not very greatly differ upon the legal questions involved. The

defenders have maintained their right to a general lien on three grounds.

They have argued—"(1) That in reference to the transactions referred to in the case they were the factors of the bankrupt, that his goods came into their possession as factors, and that therefore they were entitled to factor's lien. (2) Their next ground was that of general usage of trade. (3) Lastly, they said the course of dealing between the parties was that there should be a right of retention of any horse or horses for the general balance which might be due at the time."

As to the first ground, I am still of opinion that the facts of the case do not warrant the view that the horses came into the defenders' possession as factors for sale. They have stables, and keep horses. They call themselves in one of their pleas not only auctioneers but livery stable-keepers. If the horses were held by them in that capacity they are not factors. The second finding of this interlocutor is, that the horses were put into the defenders' stables to be kept there till it should be seen whether they should be sold by Neilleay, or whether Neilleay should give positive instructions that they be sold by the defenders. I think that is the result of the evidence. I know what Scott, the partner of the defenders' firm who was examined, and Neilleay say on this matter, but the documents seem to me to show that some horses were for positive and some for possible sale. That distinction appears on the face of these documents. The horses were sold by the defenders only if sales were not accomplished in the interim by Neilleay. On 22d May five horses, including those in question, were put into the defenders' stables. Three were sold by them, not by Neilleay, and two stood unsold for weeks. What does that signify? Weekly and bi-weekly sales come and go, and these horses are not sold, because Neilleay had not made up his mind to give instructions for their positive sale, and until he did so the horses were kept at livery. If that be so, we do not require to consider whether an auctioneer is a factor or not. For my part, I would not commit myself to the opinion that an auctioneer is in all circumstances a factor, any more than I would say that in no circumstances can an auctioneer be called a factor. I am not sorry that it is unnecessary to give a definite opinion on that point. It is enough, I think, to hold that the defenders did not receive or hold the goods for sale in the sense that they must sell them.

On the second point it was hardly even contended that the usage of trade gives any such general lien as is claimed, and so there only remains the question

Third, Whether by the course of dealing between those parties there was conferred on the defenders a general right of retention?

Now, that which influences me in setting aside the account which Scott and Neilleay give of the course of dealing is that their depositions appear to me to be inconsistent with the documentary evidence in this case. That evidence, I think, discountenances the idea of such a course of dealing as is contended for. Sometimes a document recognises that a sum has been received by Neilleay on the security of a particular horse, and at another time it is not so at all. The fact of such special arrangements shows me that it could not be part of the contract of the parties that not only might an advance on a particular horse be matter of claim, but that any general balance should also be claimable. And so I think that the third ground of the defenders' contention is also untenable.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

Counsel for Pursuer—Campbell Smith—J. M. Gibson. Agent—W. Officer, S.S.C.

Counsel for Defenders — Kinnear — Jameson. Agents—Dove & Lockhart, S.S.C.

Wednesday, February 16.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

PAISLEY *v.* MARSHALL.

The General Police and Improvement (Scotland) Act 1862 (25 *and* 26 *Vict. c.* 101), *secs.* 84 *and* 89—*Assessment—Owner or Occupier.*

Held that the owner of premises in a burgh which were let during the whole year on successive contracts of tenancy for periods less than a year, these contracts being in some cases from time to time renewed with the same parties, and none of the premises having been unlet or unoccupied for three months consecutively, was liable under section 89 in assessments made under the Act, though not himself occupier of any of the premises.

The General Police and Improvement (Scotland) Act 1862 (25 *and* 26 *Vict. c.* 101). *sec.* 84—*Assessment—Valuation Roll.*

Section 84 provides that once in each year the commissioners shall, for the year then current, "assess all occupiers of lands or premises within the burgh according to the valuation roll made up and completed in terms of the Acts in force for the valuation of lands and heritages in Scotland." *Held* that an assessment was properly imposed on 8th September 1879, though the valuation roll for 1879–80 was not made up and completed till 30th September.

Gavin Paisley, collector and treasurer in and for the burgh of Partick under the General Police and Improvement (Scotland) Act 1862, sued John Marshall, portioner, for £30, 13s. 6d., as the amount of assessments due by him in respect of certain premises belonging to him in Partick, under the said Act, and under the Public Health (Scotland) Act 1867, which provides, section 95, that the public health assessment shall in burghs like Partick be levied in like manner and under like powers as the said police assessments.

The said Act of 1862 provides (section 84) that "Once in each year the commissioners . . . shall assess all occupiers of lands or premises within the burgh, according to the valuation roll made up and completed in terms of the Acts in force for the valuation of lands and heritages in Scotland, subject to the exceptions hereinafter provided, in the sums necessary to be levied for the police purposes of this Act, in so far as the same may have been adopted, and for the purposes to which the police assessment authorised by any