foundations, there is a certain presumption in favour of the building from the fact that it had been used as a store for a long time (latterly as a sugar store loaded in the usual way), and that until the day when the building fell there were no indications of unsoundness. If the foundations were originally insufficient, one would expect that in the course of years this would manifest itself by the subsidence of one or more of the pillars at least to a small extent. But there is no evidence that any sign of weakness in the foundations had been observed.

But again, a foundation may be strong enough to bear the weight that it is designed to carry, and yet not strong enough to bear an abnormal weight. If so, it is quite conceivable that when the building is overloaded the foundation may begin to yield to the statical pressure, and that a pillar may subside one or more inches, and may be seen in that condition some hours before the actual fall of the building. A witness, Tosh, a contractor, who came to inspect the building when the floors were found to be giving way, speaks to having seen one of the pillars in this condition. There was very little light to see by, and the Lord Ordinary is of opinion that Tosh was mistaken as to what he though he saw, the other evidence being inconsistent. I do not wish to intimate a doubt as to the Lord Ordinary's conclusion in this matter of fact. But assuming, for the purposes of argument, that the pillar in question was found to have subsided, this to my mind only proves that the foundation of this pillar had given way under an improper load, and I fail to see how this circumstance can have the effect of shifting the responsibility for the fall of the building from the tenant to the landlord. At most it can only be said that the foundations ought to have been strong enough to bear a load which though excessive was not extravagantly greater than the building was designed for. This may be quite sound from the point of view of an architect or builder who is designing a new building, but this building has served the purposes of a store for a long time, and if on this occasion it had been used in the ordinary way, there is no reason to believe that the foundation would not have remained secure. If the building was in fact brought down by overloading, it is not, in my judgment, a legal defence that the foundations were not sufficient to support a weight which they were not intended to bear. Some reference was made to legal authority in the course of the argument, but I do not see that there is any legal principle involved in the case except that the building must be reasonably fit for the purposes for which it was let, and must be reasonably used by the tenant; the general and recognised practice of the trade being, in my opinion, the criterion of reasonable use.

I have written at greater length than I intended, because I should have been content to found on the Lord Ordinary's opinion. But the case was argued with great anxiety on both sides, and I have dealt chiefly with certain points which are less fully divulged in his Lordship's judgment. In my opinion the interlocutor should be adhered to.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuers—Dean of Faculty (Asher, Q.C.)— M'Clure. Agent — Hugh Patten, W.S.

Counsel for the Defender—Salvesen, Q.C. —Crole. Agent—W. B. Rainnie, S.S.C.

Tuesday, February 13.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

DRUMMOND *v.* MUIRHEAD AND GUTHRIE SMITH.

Agent and Client—Hypothec—Law-Agent's Lien — Law-Agent Acting for both Borrower and Lender.

Where a law-agent acts for both borrower and lender in negotiating a loan on the security of heritable subjects owned by the former, his lien against the borrower is not affected except to the extent that it cannot be pleaded against the lender.

A purchased a house, and on the same date borrowed a sum of money from B and granted him a bond and disposition in security over the property containing a clause of assignation and delivery of writs. The same law-agents acted for A and B, and the seller delivered the title-deeds to these agents. Thereafter A became bankrupt, and on a trustee being appointed on his estate the law-agents refused to give him the title-deeds till a debt due to them by A, for professional services, had been paid.

A's trustee thereupon raised against the law-agents an action seeking declarator that they had no right of lien over the deeds, on the ground that the deeds were in their possession, not as agents for A but as agents for B.

Held (*aff.* decision of Lord Kincairney) that in a question with A or his trustee the agents had a right of hypothec over the title-deeds for payment of their accounts.

Arthur Drummond, C.A., Edinburgh, as trustee on the sequestrated estates of James F. Waldie & Company, coal merhants and exporters, Glasgow, and of James Francis Waldie and George Kirk Goalen, the individual partners thereof, conform to act and warrant of the Sheriff-Substitute of Lanark dated 18th February 1898, raised an action against James Muirhead and John Guthrie Smith, as trustees for their firm of Muirhead & Guthrie Smith, writers, Glasgow, in which he asked the Court to declare that at the date of granting, or at least

sixty days after the registration of a bond and disposition for £410 granted by James Francis Waldie in favour of the defenders, dated 18th and recorded 21st January 1898, James Francis Waldie was insolvent and notour bankrupt, and to reduce the said deed, and further, to declare that the defenders had no right of lien, hypothec, or retention over the title-deeds of 16 Lilybank Gardens, Govan.

The statements of the pursuer and defenders on record disclosed the following facts:—James F. Waldie purchased 16 Lilybank Gardens in 1893. The defenders acted as his agents. At the time of the purchase he borrowed, on the security of the subjects, £925 from a body of trustees, for whom the defenders also acted as agents. He granted to the lenders a bond and disposition in security dated 12th and recorded 16th May 1893. The clause of assignation of writs contained in the said bond and disposition in security was in the following terms:—"And I assign the writs, and have delivered numbers eleven to sixteen inclusive of the inventory of writs annexed and signed as relative hereto." After the transaction the sellers delivered the disposition and title-deeds of the subjects to the defenders, and the deeds remained thereafter in their possession.

The defenders stated that in January 1898 J. F. Waldie and his company were due to them accounts for professional services amounting to £514, 6s. 11d. and £198, 12s, 8d. On 18th January J. F. Waldie granted a further bond and disposition in security for £410 in favour of the defenders over 16 Lilybank Gardens, and in return therefor they granted the following receipt:—"21*st January* 1898.—Received from James F. Waldie, Esquire, bond and disposition in security for £410 (Four hundred and ten pounds sterling), in full of our claims to 31st December 1896, and of Mr Goff, C.A., Glasgow, for professional services against him and his firm of James F. Waldie & Company, under reservation in the event of the said bond and disposition in security being found to be reducible of our right to full payment of our accounts, and to our right of hypothec over the title-deeds of the above property, and other papers in our possession. MUIRHEAD & GUTHRIE SMITH."

On 21st January 1898 the estates of James F. Waldie & Company and of J. F. Waldie and G. K. Goalen, the partners, were sequestrated, and on 18th February the pursuer was appointed trustee.

The defenders maintained that they had a lien over the titles till the debt due to them was paid. They admitted that if their lien was bad they could not resist reduction of the bond.

The pursuer pleaded, *inter alia*—"(3) The writs or title-deeds of the property in question having been unreservedly delivered to the first bondholders, the defenders hold the same for them, and have themselves no right of lien, hypothec, or retention on the same as against the pursuer, and decree of declarator, as concluded for, ought therefore to be pronounced, with expenses."

The defenders pleaded, *inter alia*—"(3) The defenders should be assoilzied from the declaratory conclusion, in respect they have a good and valid lien or hypothec over the documents in question for their claims against the bankrupt."

On 25th July 1899 the Lord Ordinary (KINCAIRNEY) repelled the third plea-in-law for the pursuer, and appointed the cause to be put to the roll for further procedure.

Note.—"The pursuer is trustee on the sequestrated estates of Waldie & Company and of the partners of that company, one of whom is J. F. Waldie. The defenders are law-agents in Glasgow, and state that at the date of the sequestration J. F. Waldie and the company were due them accounts for professional services amounting to £514, 6s. 11d. and £198, 12s. 8d. On 18th January 1898 they took from J. F. Waldie, immediately before his bankruptcy, a bond and disposition in security for £410 over his heritable property 16 Lilybank, Gardens, Govan, and in return for that disposition they granted a receipt, which bears that the disposition is accepted in full of all their claims, but 'under reservation, in the event of the said bond and disposition in security being found to be reducible, of our right to full payment of our accounts, and of our right of hypothec over the title-deeds of the above property.'

"The action has two conclusions—first, for reduction of this bond, and secondly for declarator that the defenders have no right of lien, hypothec, or retention over title-deeds of that property

"The defenders do not maintain that they have right to claim both on the bond and the lien. They admit that the bond if allowed to exist supersedes the lien. They do not dispute that the bond would be reducible but for the lien, but they say that the pursuer has no interest to reduce it, because he would thereby rehabilitate the lien. But if the lien were held to be bad, then the defenders do not dispute that they cannot resist reduction of the bond.

"The pursuer no doubt denies that the reduction of the bond would restore the lien if it existed. He maintains that whether the lien was good or bad it was lost when the defenders took the bond which is under reduction. He maintained this on the view—not very intelligible in its application to this case—that restitution does not take place in reductions in bankruptcy. He referred to *Lenning* v. *Douglas*, June 27, 1821, 1 S. 88, which seems against him; and to *Taylor*, 1891, L.R., 1 Ch. 199. But looking to the terms of the receipt granted by the defenders in exchange for the bond, I do not understand how it can be argued that if the bond be reduced, the right to plead a lien would not necessarily revive. The question—at least the main question—about the lien is whether it existed before the bond was granted. It is not maintained that it exists now because of the bond.

"It seems convenient to consider first the question, which is the only difficult question, whether the defenders had the right of lien they claim before they granted the receipt. The state of the facts is this, that Waldie purchased the property in question in 1893, and the defenders acted as his agents in the

purchase; that at the date of the purchase he borrowed £925, and granted a bond and disposition in security to the lenders, who have taken no part, and I suppose (being adequately secured) have no interest, in this question. The defenders acted as law-agents for both Waldie, the borrower, and the lenders. The clause of assignation in this deed bore—'I assign the writs, and have delivered Nos. 11 to 16 inclusive of the inventory of writs annexed.' The argument, I think, was taken as if the writs Nos. 11 to 16 were the writs to which this case relates, and the argument of the pursuer was that the effect of this transaction, and especially of the terms of the assignation of writs, was that the defenders thereby lost their right to possess the title-deeds as Waldie's agents, and therefore lost their lien.

"Seeing that the defenders were agents for both parties, it is not said that any change in their possession of the titles was outwardly manifest or apparent. They simply continued to hold them, and the question is in what capacity did they hold them?

"It is, I think, settled law that as a general rule the lien of the law-agent of an owner of property prevails over every heritable creditor of the owner. This was decided in the *Ranking of the Creditors of Provanhill*, August 9, 1781, M. 6253, and has since been confirmed beyond question—see Bell's Comm. ii. 108—so that it is not necessary to quote the authorities for that proposition.

"An exception, however, has been admitted to that rule in the case (which is the present case) where an agent acts for both borrower and lender, and I think, after considering the able arguments of counsel on this point, and the cases quoted, that the exception comes to this, that a law-agent will not be allowed to plead his lien so as to defeat the rights of the heritable creditor for whom he has acted, but that the general rule that a law-agent will prevail over a heritable creditor is not affected to any greater extent. The cases quoted on this point were *Campbell* v. *Clason & Goldie*, Nov. 15, 1822, 2 S. 16; *Wilson* v. *Lumsdaine*, June 24, 1837, 15 S. 1211; *Allan* v. *Sawers*, July 3, 1842, 4 D. 1356; *Paterson* v, *Currie*, July 3, 1846, 8 D. 1005; and *Graham* v. *Graham*, Aug. 14, 1855, 2 Macq. 435, and 27 Scot. Jur. 621. These cases seem to show that the right of a law-agent is not affected by the circumstance that he acts for both lenders and borrower except in a question with the lenders. If this were a question with the lenders the exception to the rule would apply. But it is not; the lenders, as I have noticed, take no interest in it at all. It is with the borrower's trustee, which is the same thing as if it had been the borrower.

"The pursuer quoted an English case which seems to go further, and indeed would seem to support his case altogether—*in re Nicolson*, December 10, 1883, 53 L.J., Ch. 302, in which it certainly seems to have been held by Bacon, C.-J., that 'A solicitor acting for mortgagee as well as for mortgagor in the preparation of a mortgage thereby loses his lien on the title-deeds in his possession for costs due to him from the mortgagor'—a judgment which goes further than any Scottish case of which I am aware. The defenders, on the other hand, quoted *in re Messenger*, July 10, 1876, L.R., 3 Ch. Div. 317, which I regret to be able to distinguish, in which the decision (by the same Judge) was or seems to have been the reverse. In that state of the English authorities I think I must follow what seems the principle of the Scotch cases.

"The pursuer rested a good deal on the terms of the assignation, which, he said, showed that the defenders had parted absolutely with the possession of the titles, and therefore with their lien. I do not think that is so, or that it would be consistent with the Scotch cases to hold it so. A proprietor does not lose his interest in his land or his title-deeds by granting a bond and disposition in security, and I see no reason why a law-agent should not hold the title-deeds for both owner and lender if they desire it or do not object. The pursuer seems to make a case on record to the effect that the defenders never held the titles at all as agents for Waldie, but received them as agents for the bondholders directly from the seller. But I do not see how this can be held consistently with the fact that the disposition to the bondholders is granted by Waldie as proprietor.

"I have said that the case seems the same as if this action were with Waldie himself. The pursuer, his trustee, seems in this question to be in no better position. Now, could it be contended that Waldie could, immediately after the bond and disposition in security was executed, have demanded delivery of the title-deeds without paying the defenders' account? I think not. The only persons who could so insist would have been the heritable creditors. If they had been insisting the case would have been utterly different, and Waldie seems to have no title to insist on the defenders delivering the writs to the heritable creditors, and if Waldie would have no title to make that demand the pursuer, his trustee, can have none.

"In these circumstances I do not think it necessary to order a proof as to the slight and immaterial differences as to fact which the record shows, but think that I am in a position to affirm that the defenders had a good right of lien over the title-deeds before the bond and disposition was granted, and to repel the pursuer's third plea. I do not seem to be in a position to go further as to that matter.

"I have already expressed the opinion that if the bond under reduction were reduced—and it may be that the pursuer has right to insist on reduction if he chooses—the right of lien would revive. But perhaps it is better that I should decide no more at present than I have done in order that if this interlocutor be allowed to stand, the pursuer may consider whether he has an interest to press for reduction, and that the defenders may also consider whether they, on the other hand, have any

interest to resist reduction."

The pursuer reclaimed, and argued—The defenders held the titles as agents for the heritable creditors, not as the agents for Waldie. The assignation of writs in the bond and disposition in security in direct terms assigned the titles to the heritable creditors, and these titles were delivered to the defenders, who were the agents of the latter and must be held to have taken delivery in that capacity. The decision of the Lord Ordinary carried the principle of a law-agent's lien a step further than it had ever been carried before. No case in the Scottish courts had carried it so far, and it had been held that the bounds of law-agent's lien should not be extended to a case not included within the principle of existing decisions—*Renny & Webster* v. *Myles & Murray*, February 8, 1847, 9 D. 619, opinion of Lord President Boyle, 624. The Lord Ordinary's proposition was sound in a case where the heritable creditor or his agent did not get possession of the titles. But where the same agent acted for both proprietor and lender he was in no better position as regards lien over the titles than if he acted for the heritable creditor alone. The English cases cited by the Lord Ordinary were decisions which contradicted each other, and as they were both pronounced by the same Judge (Chief-Justice Bacon), the latter, which favoured their argument, must be held to be the maturer judgment. In any event, when the defenders took the bond of 18th January 1898 they must be held to have given up their lien. The insertion in their receipt reserving their right of hypothec over the titles was not agreed to by Waldie, and even if agreed to it was not binding where other persons were concerned.

Argued for defenders—The decision of the Lord Ordinary was sound. So far as necessary for upholding the rights of the heritable creditor they held the titles for him, but so far as the titles were not required for that purpose they were effectual to uphold the defenders' right of lien against the proprietor. This was the result of the series of Scots decisions referred to by the Lord Ordinary. Much could not be made of the English cases, as the one contradicted the other, but the deed which was the subject of the first in date of these decisions seemed to be the more analogous to the Scottish bond and disposition in security. With regard to the bond of 18th January 1898, the receipt in terms reserved the right of lien if the bond was reduced, and in doing so the receipt merely gave effect to the law on the subject, which provided that a reduction is to be accompanied by a *restitutio in integrum*.

LORD YOUNG—I agree with your Lordships in thinking it is unnecessary to hear further argument here. The question is simple, in the sense of being very easily stated, and the material facts are remarkably few and clear.

Mr Waldie, the bankrupt, was proprietor of an apparently small property in the neighbourhood of Govan — 16 Lilybank Gardens I think it was called—which he purchased in 1898. His men of business were the present defenders, Messrs Muirhead & Guthrie Smith, law-agents in Glasgow. The titles to the property which he got from the seller to him in 1893 were put into the hands of Muirhead & Smith, and they had of course, from the time they came into their hands, a lien over them for any debt which might be owing to or incurred to them by Waldie, the owner of the property, their client. Waldie required money, I suppose, in order to satisfy the price of the property which he had purchased, and borrowed from certain trustees the sum of £925. Muirhead & Guthrie Smith were agents for the lenders also. In the assignation in the bond which was granted to the lenders of the money there is an assignation of the writs, which is in these terms—"I assign the writs, and have delivered numbers eleven to sixteen inclusive of the inventory of writs described and signed as relative hereto." Now, I think we must take it that in these circumstances Messrs Muirhead & Guthrie Smith would be barred as in a question with the lenders from pleading their undoubted legal right of lien over the titles to the prejudice of the lenders and lenders' right under the assignation. But the lenders are not suggesting any prejudice which they would suffer from Muirhead & Guthrie Smith maintaining their right of lien as in a question with the proprietor of the subjects. The defenders are therefore, so far as these lenders are concerned, under no obligation or necessity, expressed or implied, to renounce or modify, or diminish in any way, their right under the lien which they have in a question with their client the proprietor of the ground.

Now, the question is, whether the trustee of the client in bankruptcy, or whether the client himself—I mean the proprietor of the estate, Waldie—could object to their maintaining their lien against him, because they were precluded from pleading that right of lien to the prejudice of the money-lenders. I am of opinion with the Lord Ordinary that they are not. As in a question with their client the money borrower, the proprietor of the property, their right of lien has not been renounced or diminished in any way by anything which they have done, except only that they cannot plead that lien to the prejudice of their other client's right under the assignation. But there is nothing here to indicate, but quite the contrary, any prejudice to the money-lenders' right under the assignation. There is not suggested, as I have already said, any prejudice to them which will arise from Muirhead & Smith's maintaining their right to its fullest extent against the proprietor of the property.

I therefore agree with the Lord Ordinary in his judgment repelling the third plea-in-law for the pursuer, "that the writs or title-deeds of the property in question having been unreservedly delivered to the first bondholders, the defenders hold the same for them, and have themselves no right of lien, hypothec, or retention on the same as against the pursuer."

LORD TRAYNER—I am of the same opinion; and I do not think that our judgment affirming the judgment of the Lord Ordinary is carrying, as it was suggested it might be thought to do, the principle regarding a law-agent's lien any further than the law has hitherto approved of. A law-agent in whose hands are the title-deeds of the property of his client, has undoubted right to retain these deeds in his hands so long as he has a claim against his client for professional services rendered; and the only exception to that rule is the exception pointed out by the Lord Ordinary, where an agent is barred from pleading his right (which is otherwise good against the world) against those persons, also his own clients, who, transacting through him, had lent money on the property, over the title-deeds of which the lien was claimed. Now, we are not interfering with that principle here, because if the lenders in the first bond to Waldie were to come forward and claim the title-deeds in order to enable them to make their security effectual against Waldie's subjects, I think the defenders would have no answer to their demand. But there is no question here of prejudice to the first bondholders. They are not objecting to the claim which the defenders in the present case are maintaining, and as far as we can judge—for they are silent, and silence implies consent—they are assenting to the view of the defenders. It was argued that it was not possible for the defenders to hold except for the first bondholders, because so soon as the bond in their favour was executed, the assignation to writs which that bond contained put the bondholders in possession of the titles. I do not think that proposition sound. I think the defenders could hold for more than one, but for one preferentially to the other. That, I think, is their position. After this bond was given to their clients they held the title-deeds subject to their preferential right, but that preferential right not being put into competition with their own they held for themselves.

The second question decided by the Lord Ordinary is one which was not seriously pressed at the bar, though not given up, namely, that the lien was renounced when the bond in favour of the defenders was executed; but looking at the terms of the receipt which the defenders gave to their debtor Waldie when this bond was executed, I am of opinion that there was no surrender of their rights until it was determined whether or not the bond was a good and valid security to them. If it was a good and valid security their lien ceased; they gave it up on that footing; if it was not a good and valid security, then they gave up nothing—they revert to their rights exactly as they stood before their bond was executed by Waldie.

I therefore agree that the Lord Ordinary's judgment should be affirmed.

LORD JUSTICE-CLERK—I am of the same opinion. There is nothing broader in our law than the right of an agent over title-deeds which are in his possession. That has been impinged upon by decisions in those cases where an agent having title-deeds in his possession commences to act for another client, and to carry on business for him, whereby the new client obtains right to the property to which those title-deeds apply; in equity the agent is not entitled after that to turn round and say, "I have a lien on these titles and decline to make them available to you." But I see nothing to indicate that the doctrine is to go beyond that, and, as Lord Trayner has pointed out, it is quite possible that an agent may be holding primarily for some-one else, and secondly for himself, and that as long as the person for whom he is holding does not choose to demand the titles and allows him to retain them, the agent is entitled to keep up his own right against the other party. On all other points I agree with what your Lordships have said.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer—Kennedy—Guy. Agent—William Fraser, S.S.C.

Counsel for the Defenders—Younger. Agents—Morton, Smart, & Macdonald, W.S.

Friday, February 16.

FIRST DIVISION.

[Dean of Guild, Perth.

MACDIARMID AND ANOTHER *v.* MOYES AND ANOTHER.

Property—Servitude—Right to Alter Route of Passage through Urban Property where Route Defined by Contract.

Where a servitude of passage is the subject of express grant, and is specified and defined as regards both the route to be followed and the dimensions of the passage, the granter is not entitled, without the consent of the grantee, to substitute for it another passage, although the substituted passage may afford an equally convenient means of ingress and egress to and from the grantee's property. Such a grant differs in this respect from an indefinite right or servitude of way, and probably also from a servitude of way made definite only by use.

M, the proprietrix of urban property through the middle of which there was a passage by which adjoining proprietors had a servitude right of free ish and entry to their own properties, proposed to build over the route of the passage and to substitute for it a passage along one side of her property. D and S, two of the adjoining proprietors, objected, on the ground that as the route of the passage was defined in their titles and their right was contractual, M was not entitled to alter the route of the passage without their consent. *Held* that the objection was well founded.