Substitute decerned against the defender for £173, 16s. 4d.

The defender appealed, and argued that the examination of the items of the whole account was not precluded by the payments to account. The doctrine of indefinite payments was not applicable to a case such as the present.

The pursuer argued that the doctrine of indefinite payments applied, and cited *Johnston* v. *Law*, July 15, 1843, 5 D. 1372.

LORD PRESIDENT—The first question we have to consider is, whether the ground of judgment in the Sheriff-Substitute's interlocutor of 15th December 1897 is sound, for the Sheriff has adopted the whole of the Sheriff-Substitute's interlocutor, and therefore his judgment, as well as that of the Sheriff-Substitute, rests on this ground. That ground is that in the circumstances the payments must be held to have extinguished the items of the account in order of date, and that the defender is not entitled to raise objections of the kind which he seeks to raise except to the last account, and to the latter part of the previous account. Now, the rule which it is suggested here exists has not been shown to us to rest upon any authority whatever, and accordingly it seems to me impossible to sustain this judgment. The theory that when a man makes a payment to account it is to be applied to the items in order of date does not seem to me to be founded on reason, and we have had no argument or authority to support it. In these circumstances I think this judgment cannot stand.

LORD ADAM—I agree. The rule in *De Vaynes*' case applies to cash accounts-current, and has no application whatever to tradesmen's accounts. Payments to account of a tradesman's account go to the summation.

LORD M'LAREN—I agree that the interlocutor is wrong.

LORD KINNEAR—I also agree with your Lordships. I think it clear enough that the rule in *De Vaynes*' case has no application to the question.

The Court recalled the interlocutor appealed against, and remitted to the Sheriff-Substitute to proceed.

Counsel for Pursuer and Respondent—W. Campbell, Q.C.—J. B. Young. Agents—Watt, Rankin, & Williamson, S.S.C.

Counsel for Defender and Appellant—Sandeman. Agent—W. B. Rainnie, S.S.C.

Wednesday, July 19.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

BARNTON HOTEL COMPANY, LIMITED *v.* COOK.

Retention—Lien Claimed by Secretary of Company over Company's Books, &c.

Held that the secretary of a company employed merely as such has no lien over the books, registers, and documents belonging to the company for debts due to him by the company.

This was a petition presented in the Sheriff Court of the Lothians and Peebles at Edinburgh by the Barnton Hotel Company, Limited, craving the Sheriff to ordain John Macfarlane Cook, accountant, Edinburgh, to deliver up to the pursuers the whole minute - books, ledgers, account books, registers, and all other books, documents, and property of every description belonging to the pursuers, and in the defender's custody, or under his control.

The pursuers averred that since their incorporation as a company on 8th February 1896 the defender had acted as their secretary down to 15th March 1899, when he was dismissed by the directors. The interim secretary appointed in his stead called upon the defender to deliver up to him the books and papers of the company, but the defender declined to do so until full payment was made of all his claims against the company.

The defender lodged a statement of facts in which he set forth claims against the company amounting to several thousand pounds, and made averments with respect to the nature and terms of his employment of which the following are selected as typical: — "(Stat. 4) The company's business premises have all along consisted of the Barnton Hotel, situated at Barnton. The company has never acquired any premises for a registered office; but upon its incorporation, and the defender's appointment as secretary, it was arranged that his private office at 5 Queen Street, Edinburgh, should be registered as the registered office of the company, and the defender's said office continued to be the registered office up till the termination of his engagement on 15th March 1899. The company has never paid the defender any rent for said premises, and had never furnished or paid for any clerical assistance to the defender. The defender was appointed secretary of the company at a meeting of the directors held on 11th February 1896. No salary was then fixed, but it was agreed that his remuneration should be mutually arranged after fully taking into account the time occupied, and the work and the nature of the services rendered; and it was understood that he was not only to act as secretary in the strict sense, but that he was to act as accountant and financial adviser to the company. In particular, he was at the same time appointed

to assist a committee of the directors to carry through all the necessary contracts for the erection of a hotel at Barnton, and to make all such financial and other arrangements as might be necessary or expedient for the various purposes of the company, including the arranging of a heritable bond over the subjects to be erected. The remuneration of the defender for his services to the company thus falls to be fixed upon the principle of *quantum meruit*. . . . (Stat. 5) The duties which have devolved upon the defender under his employment by the company have been extremely onerous. He has supervised and regulated the work of the company in its every detail, involving great trouble, responsibility, and anxiety on his part. Only a very limited portion (about £500) of the cost of erecting and furnishing the hotel, which amounted to £10,000, was contributed in cash by the shareholders, and the whole of the arrangements for borrowing the rest of the money required were conducted by the defender. These necessitated delicate handling. The defender attended to the estimates for the hotel, scrutinised every detail of the contracts for the building and furnishing, settled with the contractors, and carried through all the necessary arrangements with the officials appointed to conduct the hotel when completed and opened, and all to the entire satisfaction and approval of the pursuers and the directors of the company. Further, the defender framed a large number of advertisements, and attended to their insertion in such journals as brought the hotel before the public. In connection with, and for the purpose of the duties above detailed, a large number of documents and papers connected with the company's affairs were placed in the defender's hands." He also narrated his efforts, which ultimately proved successful, to secure an hotel licence for the hotel.

The pursuers pleaded—"(2) The defences are irrelevant."

The defender pleaded—"(3) The defender having acquired possession of the books and documents relating to the pursuer's business which are now in his possession, in connection with and for the purpose of enabling him to perform (1) services undertaken by him on behalf of the pursuers, and (2) services for payment of which they have assumed liability, and the pursuers having failed to pay the defender the remuneration due to him in respect of said services, the defender is entitled to retain possession of the books and documents relating to said classes of services respectively until paid the amount due to him under his contracts in respect of said services."

On 16th May 1899 the Sheriff-Substitute (HAMILTON) sustained the second plea-in-law for the pursuers, repelled the defences, and ordained the defender to deliver to the pursuers the books, registers, documents, &c., belonging to the company, as craved.

"*Note.*—The Sheriff-Substitute is not aware of any case in which it has been held that the secretary of a company constituted under the Companies Acts has a lien or right of retention over the books or documents belonging to the company. On the other hand there is one case (*Gladstone* v. *M'Callum*, 16th June 1896, 23 R. 783) in which the contrary has been held. See also the case of the liquidator of the *Garpel Hematite Co.* v. *Andrew*, 28th March 1866, 4 Macph. 617. Two cases which counsel for the defender founded upon (*Meikle & Wilson* v. *Pollard*, 6th November 1880, 8 R. 69, and *Robertson* v. *Ross*, 17th November 1887, 15 R. 67) are clearly distinguishable from the present, being cases of implied contract to do a special piece of work, and as such not involving any question of lien."

On 16th June 1899 the Sheriff (RUTHERFURD) adhered to that interlocutor and dismissed the defender's appeal.

"*Note.*—In cases of this kind the first point to be ascertained is the title on which the defender obtained possession of the articles which he claims right to detain until his debt is paid; for it is hardly necessary to observe that the mere circumstance of possession will not in every case confer the right of retention.

"On the other hand, papers or other articles forming the subject of a mutual contract may be retained by one of the parties who has been employed to do work upon or in connection with them, until the other party fulfils his part of the agreement. *Meikle & Wilson* v. *Pollard* (1880), 8 R. 69, and *Robertson* v. *Ross* (1887), 15 R. 67, are examples of that. On the other hand, the right of retention must arise out of the contract on which the possession of the articles was obtained. Thus a servant is not entitled to retain his employer's property until he has received payment of his wages—*Burns* v. *Bruce* (1799), B. Hume, 29; *Dickson* v. *Nicholson* (1855), 17 D. 1011, *per* Lord Ivory, 1014; and *Gladstone* v. *M'Callum* (1896), 23 R. 782.

"In the present instance it appears that the register of shareholders, the books, and other documents belonging to the pursuers came into the defender's hands as secretary (*i.e.* as a servant of the company), and not under any special contract of employment relative to these documents. The defender was, properly speaking, merely the custodier of the books, &c., and his possession was for behoof of the company, whose registered office was no doubt in the premises occupied by him as an accountant. But it was not in his professional capacity of an accountant that he was employed by the pursuers, but as their secretary. If he had not been secretary to the company, the books, &c., would never have been in his possession or custody at all. In these circumstances the Sheriff is of opinion that the defender had not such possession as to create a right of retention or lien, and he concurs with the Sheriff-Substitute in holding that there is no relevant defence to the action."

The defender appealed, and argued that the case was ruled by the decision in *Pollard*, *ut sup.*, and *Robertson*, *ut sup.*, and not by that in *Gladstone*, though even in *Gladstone's* case the prayer of the petition

for delivery reserved the defender's right of lien. The books and documents of the company had not come into the defender's hands in his capacity of servant to the company. His title was not the company's title. On the contrary, the books and papers had been sent to the defender's office to enable him to perform certain special pieces of work; and his possession might quite properly be regarded as adverse to that of the company. In addition to the cases above enumerated the defender referred to *York Buildings Company* v. *Robertson*, 1805, M. *voce* Hypothec, App. 2.

Counsel for the pursuers were not called upon.

LORD KINNEAR — I think the judgments of the Sheriff and Sheriff-Substitute are perfectly right, and I think the ground of the decision is extremely well put in the note of the Sheriff, where he says that the books and other documents belonging to the pursuers came into the defenders' hands as secretary (*i.e.*, as a servant of the company), and not under any special contract of employment relative to these documents, and therefore he holds that the possession of the defender was not such as to create a right of retention or lien. I entirely concur and would only add that it is perfectly immaterial whether a person in the employment of another as clerk or servant carries on his work in one place or in another so long as the books and documents with which he is working are put into his hands in consequence and for the execution of that contract of service and no other.

I am therefore for affirming the Sheriff's decision. With reference to the cases cited for the appellant, I would only say that they are not directly in point, inasmuch as the particular employment considered was not identical with that now in question, and without challenging the doctrine laid down I think it will hardly bear the strain of extension by analogy to different cases.

LORD ADAM concurred.

LORD M'LAREN—I am of the same opinion on the merits of the case, and also desire to reserve my judgment as to how far the principle now affirmed, that there is no right of possession on the part of an employee adverse to his employer, would govern the case of the analogous employment of a steward or ground officer. It may be that a distinction exists between these cases and the present, but it is not necessary now to consider that point.

The LORD PRESIDENT concurred.

The Court affirmed the interlocutor appealed against.

Counsel for the Pursuers—W. Campbell, Q.C.—T. B. Morison. Agent—W. Ritchie Rodger, S.S.C.

Counsel for the Defender—M'Lennan—A. O. M. Mackenzie. Agent—John Baird, Solicitor.

Thursday, July 20.

FIRST DIVISION.

[Lord Pearson, Ordinary.

SHEARER *v.* PEDDIE AND OTHERS.

Superior and Vassal — Feu-Disposition — Building Society — Whether Feuing Scheme of Society Binding on Members.

A building company in the course of laying out its estate allotted eleven building stances in a row among its members. A public road afforded access to these stances in front, and part of the company's scheme was to form a lane at the back to supply additional means of access to the houses to be erected on the stances. Such a lane was actually formed, but the disposition of each stance, which was in unqualified terms, included that part of the *solum* of the lane *ex adverso* of the stance. The lane at one end was a *cul de sac*, but on the stance next that end a turning space for carts was constructed on part of the ground belonging to the stance. The full and uninterrupted use of the lane and turning space was enjoyed by the owners of all the stances for more than twenty-five years.

In an action raised by the singular successor of the allottees of the stances at each end of the row against the intermediate proprietors, *held* (*rev.* judgment of Lord Pearson) that no servitude of access in their favour existed over the pursuer's ground, it not being permissible to qualify the titles by reference to the feuing scheme of the society, or to hold members to whom allotments had been made bound by that scheme, except so far as expressly incorporated in their titles.

Property—Servitude—Constitution of Servitude by Implied Grant.

In the course of laying out an estate for building, a proprietor sold eleven stances of ground in a row at different dates between November 1870 and May 1873. Access was afforded to these stances by the public road in front. A lane was also formed at the back on part of the ground included in the titles of the respective stances, while a turning space for carts was constructed at one end of the lane on ground included in the titles of the stance first disponed. These titles were all in unqualified terms. The lane and the turning space were used without interruption by all the proprietors in the row for more than twenty-five years.

In an action raised by the proprietor of the stance first disponed and the stance at the other end of the row and last disponed, against the intermediate proprietors, *held* (*dub.* Lord M'Laren) that there was no implied grant of access over the lane *ex adverso* of the pursuer's stances—*Cochrane* v. *Ewart*,