to apply the gift to other purposes cognate to that to which it was formerly applied. At the same time, as they ask our opinion as to the disposal of the money, it seems reasonable, although not necessary, that we should give it. At all events, we may give judgment to the effect that no trust was constituted which laid the managers under obligation to return the gift to the donee in case of the failure of the objects for which it was intended.

LORD KINNEAR — I agree with Lord Adam that the property in question and the price that may be obtained for it are impressed with a trust in the hands of the petitioners, because in the conveyance to them the subjects are stated to be conveyed for certain specified purposes. Accordingly, the petitioners were right in supposing that when they sold the subjects they were not entitled to divide the price among themselves, or to appropriate it to any purpose they pleased, but were bound to apply it to some purpose falling within the general objects of the trust, though the specific object could no longer be carried out. I agree with Lord Adam and on the clear report of Mr Cook that the purposes proposed by the petitioners are exceedingly suitable for the application of the money, and no reason has been suggested why we should not grant the authority craved.

On the only question which has been discussed at the bar, the right of the Ferguson Trustees, I agree with your Lordships that the trustees having been empowered by their truster to give donations out-and-out to ragged.and industrial schools, gave this donation of £150 in 1859 without consideration save that a building should be purchased and converted into a school. By making that grant to the petitioners they were discharged of their trust so far as it applied to the particular sum of money in question, and of their duties and obligations to the extent of the grant; on the other hand, they were precluded from interfering further with money which they had absolutely given away.

The LORD PRESIDENT concurred.

The Court found that the Ferguson Trustees were not entitled to receive repayment of the £150 claimed by them, and authorised the petitioners to dispose of the free proceeds of the sale of the subjects, and of the other assets in the manner set out in the petition.

Counsel for the Petitioners—H. Johnston—Cook. Agent—Robert D. Ker, W.S.

Counsel for the Ferguson Trustees—Tait. Agents — Carment, Wedderburn, & Watson, W.S.

Wednesday, July 19.

FIRST DIVISION.

[Sheriff of Fife.

DOUGALL *v.* LORNIE.

Accounting—Appropriation of Payments — Indefinite Payment — Tradesman's Accounts.

Where a tradesman's account is paid by instalments, the payments are not applicable to the items charged in order of date so as to preclude the debtor from challenging any of these items.

The rule in *De Vaynes'* case (*De Vaynes* v. *Noble*, *Clayton's* case, 1816, 1 Mer. 529, 15 RR. 161) does not apply to tradesmen's accounts.

George Dougall, plumber, Kirkcaldy, raised this action in the Sheriff Court of Fife against John Guthrie Lornie, for payment of £196, 18s. 7d., being the balance of an account due by the defender to the pursuer for work executed upon a linoleum factory belonging to the defender.

The account in question began on 10th November 1891, and ended on 27th May 1895. It was rendered in instalments to the defender, who made the following payments to account:—(1) On 9th February 1893, £70, (2) on 24th August 1893, £163, (3) on 21st May 1894, £170, and (4) on March 9, 1895, £50.

The defence was that the pursuer's whole account was overcharged, and that the pursuer had failed to render an account so detailed that it could be scrutinised and checked.

The pursuer pleaded, *inter alia*—"(2) The defender is barred from raising any objection to the account sued for so far as the same has been extinguished by the payments made by him to account."

The defender pleaded, *inter alia*—"(4) The account libelled on being continuous, and the payments by defender to account thereof having been made on the condition that the accounts would be adjusted on completion of the work embraced therein, none of the items in the account have been extinguished by such payments, and the defender is not barred from objecting to any of these items."

On 15th December 1897, after a proof on certain matters, the Sheriff-Substitute (GILLESPIE) pronounced an interlocutor in which he found in law that "the payments by the defender must be held to have extinguished the items of the accounts 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 so far as not covered by the last payment to account;" and remitted to a man of skill to examine and report on the work contained in the last account and the latter part of the previous account.

The Sheriff (MACKAY) on 18th March 1898 adhered to this interlocutor, and thereafter, on the report by the man of skill, the Sheriff-

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