claimants shall be bound to repay the sum to such person or persons as the Court may direct."

Counsel for the Claimants (Mrs Gracie and Others) — Salvesen. Agents — H. B. & F. J. Dewar, W.S.

Agents for the Union Bank.—J. & F. Anderson, W.S.

Thursday, November 17.

SECOND DIVISION.

[Sheriff of Ross, Cromarty, and Sutherland.

ROBERTSON AND ANOTHER (MACKENZIE'S TRUSTEES) *v.* ROSS.

Retention—Factor's Right to Retain his Principal's Documents—Implied Contract.

A proprietor of heritable estate placed in the hands of his factor the documents necessary to enable him to collect rents, and generally to perform his duties as factor. The factor collected the rents and paid them over to his principal, thereby leaving his factorial account unpaid. His principal subsequently granted a trust-deed for behoof of his creditors, and the trustees called upon the factor to deliver up the documents belonging to the estate. The factor claimed a right to retain them until his factorial account was paid. *Held* that the factor was entitled to retain the documents on the ground of implied contract.

Meikle & Wilson v. *Pollard*, 8 R. 69, *followed.*

This was an actiou in the Sheriff Court at Dingwall, at the instance of James Alexander Robertson, chartered accountant, Edinburgh, and James Anderson, solicitor in Inverness, trustees acting under a trust-disposition and conveyance in their favour, dated 19th June 1886, by Sir James Dixon Mackenzie, Bart., of Findon and Mountgerald, in the county of Ross, against David Ross, bank agent, Dingwall, who had been, prior to the granting of the trust-disposition, factor for Sir James Mackenzie. The purpose of the action was to obtain delivery of the writs, titles, books, leases, plans, documents, papers, and evidents of every description in the defender's possession which belonged to Sir James Mackenzie, or related to his estates of Findon and Mountgerald, in the county of Ross.

In defence it was pleaded—"(1) The defender having acquired actual possession of the writs, books, and documents referred to, from the owner thereof, is entitled to retain possession of them until paid the amount due to him under his contract."

From the accounts as finally stated it appeared that the defender's claim was for a sum of £477, 13s. 9d., in respect of outlays in connection with drainage on the estates, and a further sum of £1661, 19s. 9d. in respect of a balance on general factorial outlays, being in all £2139, 13s. 6d.

After the defender's accounts had been lodged, the pursuers added these pleas—"(1) The defender as factor having admittedly received rents sufficient to meet his advances as factor, was bound to discharge all burdens affecting the estate out of such rents before making cash advances to the truster. (2) The defender having made cash advances to the truster while there were burdens undischarged, must be held to have made them on his own personal responsibility." The facts which raise these pleas are stated in the notes of the Sheriff-Substitute and Sheriff, of date 21st March and 8th April 1887, quoted *infra.*

On 8th November 1886 the Sheriff-Substitute (CRAWFURD HILL) found that the defender was in law entitled to retain the writs, books, and documents in his possession as factor until he was paid the balance due on his intromissions.

"*Note.*—That a factor has a lien over money or property of his principal, which may have come into his hands in the course of his employment, in security of what may be due to him by the principal, is undoubted. Bell, in his Commentaries (7th ed. vol. 2, p. 109) says, 'Both in England and in this country a general lien has been allowed to factors for the balance due on their general accounts with the principal. . . A lien is allowed to factors not only for their advances in the course of their employment, but also for their engagements and advances of cash to the principal. This is established by a number of decisions.' But it is maintained by the pursuers that there is no authority for saying that a factor on a land estate, as the defender was, is entitled to retain writs and documents belonging to the principal which may have come into his hands as factor. That, it is said, is a right which belongs only to a law-agent. The point does not appear to have been ever expressly decided in regard to a factor, but there seems to be no ground for making a distinction between the two. The foundation of all, then, is agreement, express or implied, and there is nothing peculiar in the relation of a law-agent towards his employer which should be held to create such implied agreement, and confer on him the right to retain papers which does not apply with at least equal force to the relation of a land-factor towards his principal. Both get into their hands papers belonging to their employer essential for conducting the business in which they are employed, and the one no less than the other is, the Sheriff-Substitute thinks, entitled to retain such papers till his business account is settled. Of course, the books or documents must be only such as the factor *qua* factor is entitled to have, and the right of retention will cover only such intromissions as were properly within the province of the factor. Both these requisites are satisfied here, and the Sheriff-Substitute has no hesitation in holding that the defender is entitled to retain possession of the books and papers in his hands till paid the balance found to be due on his account as factor. In the case of *Meikle and Wilson* v. *Pollard*, Nov. 6, 1880, 8 R. p. 69, in circumstances similar to the present, a firm of accountants was held entitled to retain documents till paid their business account on the ground of implied contract, and the opinions expressed by the Judges there seem to be quite applicable to the present case."

On appeal the Sheriff (CHEYNE), on 11th December 1886, pronounced this interlocutor—"Recals

the interlocutor of 8th November last: Finds, as regards the defender's first plea, that the defender is entitled to retain all books and documents that came into his possession in his capacity of factor on the truster's heritable estates until any salary due to him as factor has been paid, and his reasonable factorial outlays have been made good, but that he is not entitled to retain said books and documents in security of cash advances made by him to the truster; and with these findings remits to the Sheriff-Substitute to proceed with the cause as may be just.

"*Note.*—I cannot assent to the pursuers' contention that writs and documents cannot be retained in any circumstances by anyone except a law-agent, to whom the law has, on grounds of expediency, allowed a lien of a well-defined character. On the contrary, it appears to me that where writs and documents have been put into a person's possession for the purposes of a particular contract or employment, they may—at least in a question with the employer or his voluntary trustees, who can plead no higher right—be retained by the possessor until his claims under the contract or employment are satisfied. This proceeds upon a familiar principle of law, of the application of which a recent illustration is furnished by the case of *Meikle & Wilson* v. *Pollard*, 9th November 1880, 8 R. 69, referred to by the Sheriff-Substitute. Obviously, however, the principle will not justify retention for anything not falling within the lines of the particular contract or employment. Now, as I understand the mutual obligations of the contract on which the defender's claim is founded, they are simply these: On the one hand, the factor undertakes to manage the estate for the principal—to collect the rents, to pay all charges, to keep regular rental-books and cash-books, to account for his intromissions, and to return all writs and documents put into his hands in connection with, and to assist him in, the management. On the other hand, the principal undertakes to homologate all the actings of the factor within the scope of his commission, to pay him the agreed-on or a reasonable salary, and to reimburse him in all reasonable outlays made by him in the course of his management. It is, however, I apprehend, no part of the contract that the factor is to make cash advances to the principal; and if he does make such cash advances, he does so, in my opinion, in his individual character, and not *qua* factor. If I am right in that view, it follows, in the present case, that the Sheriff-Substitute has gone too far in holding that the defender is entitled to retain the documents in his hands for the whole balance appearing in the account No. 5 of process—that balance being to a large extent composed of cash advances, and that further inquiry must take place before the extent of the defender's right of retention can be determined."

On 21st March 1887 the Sheriff-Substitute sustained the pursuers' second additional plea in law, and decerned against the defender.

"*Note.*—It has been already decided that the defender would be entitled to retain the books and documents in question in security of his proper factorial outlays, but not of cash advances. The question now is, whether certain payments for which credit is taken in the account are or are not cash advances? The accounts produced bear out the correctness of the defender's statement that accounts, with the exception of the drainage account No. of process, were settled between him and the truster as at the end of February 1885, by a cheque granted by the truster for the amount of the balance at that date, viz., £1838, 18s. 3d., so that it is only with subsequent transactions and the drainage account we have to deal. The defender claims retention of the books and documents in respect of outlays in connection with drainage, amounting to £477, 13s. 9d., and in respect of a balance on general factorial outlays of £1661, 19s. 9d.; together, £2139, 13s. 6d. Assuming that the accounts are correct, there is no doubt that that balance consists of proper factorial outlays, and that the defender would be entitled to retain the books, &c., in respect of it if there was nothing else in the account. But it cannot be left out of view that between the end of February 1885, when the accounts were squared, and the close of the account, the defender, as factor, received rents of the estate to a large amount. The accounts show that during that period he had received upwards of £2600 of rents, more than sufficient therefore to meet all the above outlays. Had they been applied as they came in to payment of the factorial outlays, there would have been no balance now due to the factor. But not a penny of these rents was so applied. The whole was paid as soon as received to the credit of the truster's bank account, as appears from the numerous entries on the credit side of the accounts produced. The Sheriff-Substitute has been unable to come to any other conclusion but that these payments to the truster, made in the face of a growing balance on the other side, can be regarded only as cash advances, and that the defender is not entitled to retention of the books and documents in respect of a balance which would not have existed had these cash advances not been made."

On appeal the Sheriff, on 8th April 1887, pronounced this interlocutor—"Recals the Sheriff-Substitute's interlocutor of date 21st March last: Finds that on a proper statement of accounts there is no balance due to the defender *qua* factor on the truster's heritable estates, though the truster is largely indebted to him in respect of cash advances; and having regard to this finding, and to the findings in the interlocutor of 11th December 1886, decerns against the defender in terms of the prayer of the petition, &c.

"*Note.*—The account prefixed to the affidavit No. 5 of process, and therein described as an account-current between Sir James Dixon Mackenzie and the deponent (defender), as his factor on the estates of Findon and Mountgerald, undoubtedly bears out the defender's statement, that the rents received by him during the period embraced by it were (with few exceptions) paid by him on the day they were received, or within a day or two thereafter, into Sir James' private bank account; but it also shows that he regularly debited himself with them as received, and then took credit for the same sums on the other side as payments to his constituent. What he now proposes to do is to remodel his factorial account by striking these sums out of both sides of it, treating them in effect as if they had been paid directly to Sir James by the tenants. In my opinion he is not entitled so to do. The rents

received must stand in the factorial account as against the factorial outlays; and as there was at the date when the payments to Sir James were made a large unsettled and growing balance of factorial outlays due to the defender, these payments must in my judgment be regarded as advances of cash made to Sir James by the defender in his private capacity. This view warrants the finding in the above interlocutor, and is in accordance with the opinion of the Sheriff-Substitute, whose interlocutor I have, however, thought it necessary formally to recal, as it sustains a plea which is not happily expressed."

The defender appealed, and argued—According to the case of *Meikle & Wilson* v. *Pollard*, Nov. 6, 1880, 8 R. 69, the factor was entitled to retain the documents. They had come into his hands to enable him to do his work as factor, and until he received the amount due to him under his contract he was entitled to retain them. There had been no cash advances here. What had been done by the factor was merely to pay over the rents as they were collected, instead of applying them to pay off the amounts due to him as factor.

The respondents argued—The factor had here no right to retain the documents until his factorial account was paid. The factor's lien known to the law of Scotland extended only to property and effects, but not to documents, which were *extra commercium*—*York Buildings Company* v. *Dalrymple*, 1738, Elchies' Hypothec, No. 9; *Largue* v. *Urquhart*, July 17, 1883, 10 R. 1229. The only person who had a lien over documents was a law-agent, and the reason of that right of retention was to encourage him to give his professional services to a poor client. Documents were *extra commercium*, not valuable in themselves, but merely as a means of putting pressure upon the debtor—Bell's Prin. 1438; *Christie* v. *Baxter*, June 27, 1862, 24 D. 1182. Even if it should be held that a factor had a right to retain the documents of his constituent, he had no more claim than a law-agent to retain them for money advances. Here the factor had practically made advances. When he had collected the rents, then instead of paying off the amount of the account due to himself, and paying over the balance, he had handed over the whole amount to Sir James Mackenzie. In so far as he had handed over more than the balance, after deducting the amount due himself, he had made cash advances to Sir James. The case of *Meikle* was to be referred to the category of cases of artificers who were entitled to retain goods made by them until they were paid for. Here the factor was claiming the right of retention for disbursements, not even for payment of a salary.

At advising—

Lord Justice-Clerk—The question that arises in this case is one that arises upon simple facts, and which presents no difficulty. It appears that the defender Ross was the factor upon Sir James Mackenzie's highland estate, and in that capacity he got possession of a variety of documents, leases, plans, &c., and I suppose account-books also, for the purpose of carrying out his contract of employment. It seems that Sir James' affairs got into difficulties, and the factor has now been called upon to restore these books, documents, &c., to the pursuers, as trustees under a trust-disposition and conveyance in their favour by Sir James. Mr Ross replies that he is quite willing to hand over these books and papers whenever his factorial accounts are settled, but not till then. The Sheriff has taken a special view on the course of dealing pursued by the factor. He says the factor got the rents from the tenant, and if he had applied these in extinction of his factorial accounts, then there would have been nothing due. The factor did not do so, but put them as he got them to the credit of Sir James Mackenzie, and the Sheriff's view is that the defender desires to keep these books, &c., not as security for the payment of his factorial accounts, but as security for money lent to Sir James. I do not think that is so. The rents properly belonged to his employer, and whether he could have applied them to the extinction of his factorial accounts is not a question which we are called upon to decide here. The question is whether the factor has a right to retain the books and documents which came into his hands for the purpose of being used in his work as factor, until his factory accounts are settled. There is no right of hypothec here or of lien, but a right of retention.

The whole question was very carefully considered in the case of *Meikle and Wilson* v. *Pollard*, November 6, 1880, 8 R. 69. That was a case of papers put into the hands of an accountant to enable him to collect debts due to his employer. When the work was done he refused to give up the documents and papers until his account for the charges and outlay incurred in the employment were paid. There was a similar argument there as here, that there was no writer's hypothec in the case of an accountant. We were of opinion that there was no hypothec or lien, but that the accountant's right to retain the documents arose from the implied conditions of the contract, one of them being the duty upon the accountant to restore the papers, &c., when he had performed the work for which they had been given him, but that he was not bound to do this until the other party had performed his part of the contract by settling his account. It is the same claim as any artificer has for work done.

I would just wish to read two sentences from Lord Gifford's opinion in the case of *Meikle*—"I agree that this is not a case of lien. It is simply a case of the retention of a subject put into a person's hands for a special purpose, and resolves itself into a case of the relative duties of parties under a contract—the one party to it is bound to perform his part of the contract just as much as the other. The counterpart here of the duty of the one party to do the piece of business is that the other shall pay the price, and I think that until the latter is done the party employed need not hand over articles which were put into his hands to enable him to fulfil his part of the contract."

Lord Young—I am of the same opinion. I think this question is one of lien, which I take to be merely a short form for what we used to call a right of retention. The pursuers seek the recovery of certain books and papers which are in the hands of the defender. These books are the property of the pursuers as trustees upon Sir

James Mackenzie's estate, that is, they are the property of Sir James, for it was admitted that the case was the same as if the action had been at the instance of Sir James himself. Delivery of these books, &c., is asked as the property of Sir James, and the proprietor would certainly be entitled to recover his property, unless the person who has them has a lawful right to retain them, which is what I understand by lien. These books came into the hands of the defender under a lawful contract, he keeps possession of them under the contract, and he claims that his right under the contract must be satisfied before he performs his part by handing over the books and papers. Any right that one person may have to retain the property of another must stand upon paction—upon contract, express or implied. The owner of property may make any lawful contract with another that the two may agree upon, but in the absence of an express contract the law will imply one under a variety of circumstances. The most familiar instance of the implied right of retention is just the case where property of one man comes into the possession of another under a contract with the owner, from which rights and obligations arise *hinc inde*. The property which thus comes into the hands of a person other than the owner may be kept until all claims which he has are satisfied. I would wish to point out, however, that the debt to be satisfied must be a debt arising out of the very contract by which the possession of the property is given. That is the explanation of all ordinary liens, and I do not know how else they would be accounted for; the right must always proceed from the owner himself.

But it is said that there is something peculiar in books and papers and title-deeds because they are *extra commercium*. The notion is that there is some special law which enables law-agents, writers to the signet, solicitors before the supreme courts, and others to retain title-deeds, &c., committed to their charge, but that this is a special and peculiar law not existing in the case of other agents. But that is a totally unfounded idea. I think the right of retaining papers in lien is implied from the contract on which anyone becomes possessed of them from the owner, and is just the right of keeping the papers until his claim is satisfied. Suppose you were to send your charter chest, with title-deeds inside, by a public carrier—the railway—and the railway company refused to deliver them up until their claim for carriage was settled, would your answer be that these papers were *extra commercium*, and that they were not entitled to keep them. I take it that the carrier could retain the chest and papers until his claim was satisfied. How is a writer's lien different from that? I do not think it is at all different. Suppose you were to put your title-deeds into the hands of a custodier—one of those safe companies that now advertise that they will give a private safe to anyone—I suppose the ordinary law would come in there too, and they would be entitled to retain the goods until their claim was satisfied. I do not understand the expression, or the idea of the words, *extra commercium* in these circumstances. *Extra commercium* simply means that the things will not bring their price, but I do not know that books and papers will not bring their price.

Now, with regard to a factor, I must say I see no reason for not applying the ordinary rule of law that re-delivery of goods possessed by him under a contract cannot be claimed until his rights arising out of the contract are satisfied. That rule is not extended to claims in general, but only to those arising out of the contract. It is the same in the case of a law-agent. If he acts as a money-lender or otherwise than as a law-agent the law will not imply a right in him to retain his client's title-deeds for money advances, or for anything else than his law-agent's account. Parties may agree specially that the right of retention is to be exercised otherwise than merely for the law-agent's account, and the law will enforce the agreement, but that is not an implied lien. If there is no such contract the law will not imply a lien, but will only imply a right of retention until the law-agent's account is paid. That is in harmony with the law in all other cases. Sometimes the law implies a general lien, but the usual rule is that only a specific lien is implied. Why should that not apply to the case of this factor? The books and papers were in his hands under a lawful contract. It is admitted—because I think the Sheriff's judgment was abandoned—that his claim here is for money laid out when performing his duty as factor, which still remains unpaid, and he asks the law to imply that under the contract he has a right to retain the books and papers until he is paid. We considered the case some time ago in the case of *Meikle*, and decided it in favour of the factor upon the laws of common sense applicable to the subject. If I thought that decision was wrong I would have no hesitation in going back upon it, but I think it was rightly decided upon the principles of law applicable. Now the Sheriff-Substitute is quite of opinion upon the facts here that the factor had a lawful right of retention until his charges were paid. The Sheriff-Principal was of that opinion, and pronounced a judgment to that effect—"Finds, as regards the defender's first plea, that the defender is entitled to retain all books and documents that came into his possession in his capacity of factor on the truster's heritable estates until any salary due to him as factor has been paid, and his reasonable factorial outlays have been made good." He goes on to say, "but that he is not entitled to retain said books and documents in security of cash advances made by him to the truster." That is my opinion too. The case cannot be distinguished from that of a law-agent. But then the Sheriff went off upon this view; he says the factor might have paid his factorial accounts out of the rents he received, that he did not do so, but gave them to his constituent, leaving his own accounts unpaid, and the result is that his own account must be held to be paid, and that he is to be held to be a money-lender to that exact amount, and that therefore the law gives him no right of retention. I must dissent from that view. I am of opinion that the right of retention is a lawful right which the law implies in this case and in all similar cases in the absence of any special contract.

Lord Rutherfurd Clark—The case of *Meikle* was cited as an authority on which the appellant relied, and it is not possible for me to distinguish this case from it. I think I am bound to follow that decision. I therefore agree with your Lord-

ship's judgment. But I think it right to say that I consider the case of *Meikle* as a new departure in our law. If the law of that case is sound we should never have heard of a law-agent's hypothec as an exceptional right. Probably we should never have heard of it at all. But being bound by the judgment in the case of *Meikle*, I agree.

Lord Craighill was absent on circuit.

The Court pronounced this interlocutor:—

"Find in fact (1) that the defenders are in possession of certain writs, leases, books and other papers belonging to Sir James Dixon Mackenzie, the constituent of the pursuers: (2) Find that the said writs and others passed into the hands of the defender in his capacity of factor for the said Sir James Dixon Mackenzie: (3) That the pursuers' said constituent is indebted to the defender in a balance due in his account of intromissions as factor foresaid: Find in law that in these circumstances the defender is entitled to retain the said writs and others until payment of the balance due to him as aforesaid: Therefore sustain the appeal: Recal the judgment of the Sheriff appealed against, and the interlocutors of 8th November and 11th December 1886, and 21st March 1887, except in so far as in accordance with the foregoing findings: Dismiss the petition: Find the defender entitled to expenses," &c.

Counsel for the Appellants—Sol.-Gen. Robertson—W. C. Smith. Agents—Murray, Beith, & Murray, W.S,

Counsel for the Respondents—Asher, Q.C.—Fleming. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, November 17.

FIRST DIVISION.

[Dean of Guild, Edinburgh.

SUTHERLAND *v.* HUNTER AND OTHERS.

Property—Title—Alteration of Buildings.

The proprietor of a shop and dwelling-house in an area presented a petition to the Dean of Guild for authority to bring forward his property to the street, by building over the area *ex adverso* of his shop and house. His title was a disposition to "all and whole that shop and dwelling-house in the area of . . . with a cellar in the front area . . . together also with a right . . . to the *solum* of the piece of ground on which the said shop and dwelling-house are built, in common with the proprietors of the subjects above the same . . . together with the pertinents of the said subjects." The burden was imposed upon the disponee of keeping in repair the pavement in the sunk area and the stair leading thereto, he being freed from all share of the expense of keeping up the roof of the tenement, and the pavement and railings in front, by the other proprietors of the dwelling-houses in the common stair of the tenement. The proprietor of an adjoining house in the area, and also the proprietors of cellars, objected to the proposed alterations, on the ground that they were not confined to the petitioner's own property. For the petitioner it was maintained that although not contained *per expressum* in his title, he yet had by implication a right to the *solum* of the area *ex adverso* of his property. *Held* that under his title the petitioner had no right of property in the area, and that the respondents were entitled to object to his making the proposed alterations.

Superior and Vassal—Restrictions on Building—Common Feuing Plan—Loss of Plan—Proof—Onus.

The proprietor of a house with the whole area and cellarage presented an application for warrant to bring forward his property to the street, by building over the area. He held these subjects under a feu-charter dated in 1825, which provided that houses should be erected by the term of Whitsunday 1826 on the ground thereby feued, in conformity to a plan signed as relative thereto. This feu-charter declared that it should not be in the power of the feuar to make any deviation from or alteration of the plan of the tenement, "all which it is hereby specially provided may be stopped, demolished, or removed by us or our foresaids, or by any of the feuars of the said street at the expense of the feuars offending." Objections were lodged by adjoining feuars, who were under the same restrictions, to the proposed alterations, on the ground that they were in contravention of the feu-charter. The feuing plan could not be produced. *Held* that the presumption was that the house had been built in conformity with the original feuing plan, and that, as it had been built since 1826, the *onus* was upon the petitioner to show that the proposed alterations would be in conformity with the provisions of the title. Petition therefore *refused.*

In February 1887 Donald Stewart Sutherland, baker, Edinburgh, presented a petition in the Dean of Guild Court there for authority to make alterations upon certain heritable subjects in Claremont Place. The petition prayed for authority, *inter alia*, "to slap out the front wall of the present dwelling-house No. 2 Claremont Place, on sunk and ground floors, and carry the walls above on new iron beams; to remove the present stone pier at front between shops Nos. 4 and 6A, and substitute two cast iron columns to support the present beams; to lower the ground floor of No. 2 about 2 feet 8 inches, and the area 1 foot 5 inches; to bring forward a new front at Nos. 2, 4, and 6A, by covering over the areas in front, except at the stair to area No. 4, which will be kept back to allow of headroom, and the corner of No. 2, the latter having a new upper flight of steps provided, and the position of present stair covered by a plat; to remove the present brick partition between Nos. 4 and 6A, and carry the partition over an iron beam; to remove a partition in the area and ground floors of No. 2; to build a brick division wall along back of shops and between new fronts; to construct four new water-closets in area for shops, lighted