

course left open by his Lordship's interlocutor.

The Court adhered.

Counsel for the Reclaimers—H. Johnston, K.C.—J. A. Fleming—Tait. Agents—Forrester & Davidson, W.S.

Counsel for the Respondents and Claimants—Jameson, K.C.—Dundas, K.C.—M'Clure—Younger—Blackburn—Graham Stewart—Maxwell Fleming—H. A. Young. Agents—Clark & Macdonald, S.S.C.—Dundas & Wilson, C.S.—Macandrew, Wright, & Murray, W.S.—Millar, Robson, & M'Lean, W.S.—F. H. Lockhart Thomson, W.S.

Wednesday, March 4.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

RENNET v. MATHIESON.

Right in Security—Transaction in Form of Sale, but Intended to Operate by Way of Security—Security over Moveables—Sale—Sale of Goods Act 1893 (56 and 57 Vict. c. 71), sec. 61, sub-sec. 4.

A firm of wood-turners, the tenants in certain premises, entered into an agreement with their landlord under which they received £79 from him, and acknowledged themselves to have taken on hire from him for payment of a specified sum per annum certain plant "purchased by him from them" (being the plant which they had in the premises for use in their business), and bound themselves to take over the plant when called upon to do so by the landlord, paying him therefor £79 in addition to whatever hire might be due at the date of taking over, the hirers to be entitled to take over the plant on the same terms at their own option. Four half-yearly payments were made by the tenants under the agreement, for which the landlord granted receipts "for half-year's interest on loan at 4½ percent." The tenants thereafter having become insolvent and granted a trust-deed for creditors, the trustee raised an action against the landlord to have it declared that the plant in the premises was his property as trustee, and for interdict against the landlord interfering with him in the possession thereof. A proof was allowed as to the nature of the transaction between the tenants and the landlord, in which the latter deposed that he would never have thought of buying the machinery. *Held (diss. Lord Young)* that the transaction between the parties was truly of the nature of a loan on security of the plant, and as no delivery had been made to the landlord, it remained the property of the tenants, and passed to the pursuer under the trust-deed granted by them.

On 13th October 1898 Bisset & Wyllie, wood-turners, Saint Peter Street, Aber-

deen, entered into an agreement with John Mathieson, Lochwood Park, Drumoak, the landlord of the premises occupied by them in Saint Peter Street. The agreement was in the following terms:—"First, The second parties (Bisset & Wyllie) hereby acknowledge to have taken on hire from the first party (Mathieson) the gas-engine to be purchased by the first party from Crossley Brothers, engineers, Openshaw, Manchester, and the seven turning-lathes, band-saw, three circular-saws, moulding-machine, boring vertical, shafting, pulleys, and belting, hereinafter called 'the plant' purchased by him from them as at the date hereof, the said second parties being bound to pay said first party for the hire and use of said gas-engine and 'plant' the sum of £9 per annum in equal parts at the half-yearly terms of Martinmas and Whitsunday, beginning the first term's payment at Martinmas next for the portion due in respect of said hire from the date hereof to said term of Martinmas next. Second, The said second parties shall be bound to take over from the first party the said gas-engine and 'plant' at any time when called upon by said first party, paying him therefor the price of £200 sterling, and paying in addition thereto whatever hire may be due at the date of taking over, which hire shall be estimated at the above-mentioned rate of £9 per annum. But, without prejudice always to the said first party's right to exact payment of said purchase price and hire, it shall be in the power of the said second parties to acquire from the said first party at any time the said gas-engine and 'plant' on paying the first party the said price of £200 and whatever hire may be due at the time of taking over; Declaring that, whether the said gas-engine and 'plant' be taken over by the second parties under the first party's requisition or at their own option, the property of said gas-engine and 'plant' shall not pass to the second parties until the whole price of £200 and hire then due shall have been paid to the first party."

On the same day Bisset & Wyllie granted a receipt in the following terms:—"Received from John Mathieson, Esquire, Lochwood Park, Drumoak, the sum of £79 sterling, being price of seven turning-lathes, band-saw, three circular-saws, moulding-machine, boring vertical, shafting, pulleys, and belting purchased by him from us as at this date, and let on hire by him to us, as per minute of agreement between him and us as at this date."

The plant referred to in this receipt was the plant which Bisset & Wyllie had been previously using in their business at the premises in St Peter Street, leased by them from Mathieson, and it continued to be used by them in their business there, and it never left the premises.

Mathieson purchased the gas-engine referred to from Crossley Brothers, who delivered it on Mathieson's order at the premises in St Peter Street. Crossley Brothers rendered their account to Mathieson for the price, which was £121, and this sum was paid by him to them.

In June 1900 the firm of Bisset & Wyllie dissolved partnership, and the firm's business was thereafter carried on by James Bisset and Alexander Bisset under the name of Bisset & Son.

On 7th July 1902 Bisset & Son granted a trust-deed in favour of Ernest Rennet, advocate and chartered accountant, Aberdeen, as trustee for their creditors.

The plant referred to in the receipt remained in the possession and use of Bisset & Son after the change in the partnership. They left the premises when they became embarrassed, but the plant remained in the premises, and the keys continued with them until they handed them over to the trustee.

In August 1902 the trustee under the trust deed raised the present action in the Sheriff Court at Aberdeen against John Mathieson for declarator that the whole machinery and plant in the premises occupied by the trusters in St Peter Street, Aberdeen, were his property as trustee, and for interdict against the defender from interfering with him in the possession thereof.

The defender averred that the plant in question other than the gas-engine was purchased by him from Bisset & Wyllie, and delivered to him at the premises belonging to him in Saint Peter Street on 13th October 1898, and was hired by Bisset & Wyllie from him in terms of the agreement quoted above.

The pursuer in answer averred that the transaction between the defender and Bisset & Wyllie was not a genuine sale and letting on hire, but a loan on the security of the machinery, plant, and others, and that the receipt and minute of agreement were an attempt to constitute a security over moveables *retenta possessione*. He also averred that the loan was made at $4\frac{1}{2}$ per cent. interest, and that interest on the loan was paid to the defender every half-year.

The pursuer pleaded—"The machinery, plant, stock, and fittings in question being the property of the pursuer, and being wrongfully claimed by the defender, pursuer is entitled to decree as craved."

The defender pleaded—" (1) The engine and plant being the defender's property, and not the property of the pursuer, defender is entitled to absolvitor, with expenses."

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71) enacts—(Section 17) (1)—"Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case." Section 61 (4)—"The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security."

A proof was allowed and led. The de-

fender deponed—"When Bisset & Wyllie approached me first they wanted money. (Q) A loan?—(A) Well, of course it was a loan. They mentioned a loan first, but I did not take it as a loan; after I saw my agent it was a hire. . . . (Q) Now, supposing you had sold the machinery and it had realised £300, what would have come of the balance over £200? (A) I don't say that I could have sold the machinery at all. I don't suppose that I would have been entitled to another £100. (Q) Any balance and the interest would have gone to them? (A) I don't know about that. I could not say who it would have gone to.

"By the Court.—The article in the agreement, 'The said second parties shall be bound to take over from the first parties,' &c., having been read and being interrogated—Having regard to that article in the agreement, do you not think that the Bissets would have been entitled to any balance over and above £200 and interest? (A) Certainly. I don't think I would have been inclined to ask anything if I had got my own. . . . The machinery was to be used until it was paid for. I would never have thought of buying the machinery. I had no use for it."

Four receipts by the defender for termly payments under the agreement of 13th October 1898 were produced. The receipt dated 11th May 1900 was as follows:—"1900. May 11. Received from Messrs Bisset and Wyllie the sum of four pounds ten shillings for half-year's interest on lone on two hundred pounds at $4\frac{1}{2}$ p. ct. Paid 2/7/1900.—JOHN MATHIESON."

The other three receipts produced, dated respectively November 11th, 1900, May 15th, 1901, and November 11th, 1901, were in terms precisely identical with those of the receipt dated May 11th, 1900.

On 20th November 1902 the Sheriff-Substitute (HENDERSON BEGG) assolized the defender.

On appeal the Sheriff (CRAWFORD) pronounced the following interlocutor, on 13th December 1902:—"Recalls the interlocutor appealed against: Finds in fact (first) that the pursuer has failed to prove that the Crossley gas-engine mentioned in the record is his property; (second) that he has proved that the whole machinery, plant, stock, and fittings in the St Peter Street turnery, other than the said gas-engine, are his property: Therefore refuses the prayer of the petition in so far as it relates to the said gas engine: *Quoad ultra* finds and declares in terms of the said prayer, and grants interdict as craved."

Note.—"It is beyond question that the sole object of the transaction between Bisset & Wyllie and the defender was to enable the former to obtain a loan of £200 from the defender, their landlord, for the purpose of carrying on their business, the loan being secured by a transference *ex facie* in absolute property of the machinery and plant in the works, including a new gas-engine which was supplied at the defender's expense. The defender's own evidence, which is candid and creditable to him throughout, is clear on this point.

The object was a legitimate one, but it is always difficult to constitute an effectual security over moveables which remain in the possession of the debtor. In order to effect this purpose the agreement was drawn up by the defender's agents and signed by the parties, and the receipt was granted by Bisset & Wyllie.

"The accommodation required by Bisset & Wyllie was granted in two ways. The defender purchased and paid for a new gas-engine, which they required, costing £121, and handed it over to them. The remaining £79 required to make up the £200 is stated in the receipt to be the price of certain articles of machinery and plant therein enumerated, which were Bisset & Wyllie's property, which they were using in their works, and which never left their possession.

"With regard to the gas engine, I am of opinion that the contemplated arrangement was valid, and that it never became the property of Bisset & Wyllie. The true legal position of the rest of the machinery included in the receipt is much more difficult. The law now stands upon the Sale of Goods Act 1893, section 17 and section 61 (4), and I have come to be of opinion that this transaction was not a sale but simply an attempt to create a security over moveable property belonging to the debtor and remaining in his possession. The case would have been more clear if there had been more proof of gross discrepancy of value. Mr Bisset's evidence, though not precise, is quite clear on the point, and it is not definitely contradicted by the defender, who really had no occasion to apply his mind to the subject. There is no doubt that all that he looked to was to make sure that there was sufficient to cover the balance of the £200—namely, £79. But the other evidence in the case, such as the receipts for interest in the defender's own hand, appear to me to leave no doubt that the transaction was a loan.

"I do not agree with the view that the written agreement is conclusive. It is settled that in similar cases the true nature of the transaction may be investigated by parole proof. If a technical ground were required for that practice, it might be found in this, that the agreement is impugned on grounds which would be relevant for reduction, and those grounds may be pleaded by way of exception in reply to the agreement when produced by the defender. At all events the practice is well settled.

"Nor do I think that the pursuer is disqualified from taking action because he has not the power of attacking illegal preferences. This is not an illegal preference. The question is whether there was a sale at all. Accordingly, in my opinion, it makes no difference that the pursuer is acting under a voluntary deed and is not a trustee in bankruptcy. As Mr Munro very properly admitted, if the pursuer has the right to claim this property, the trusters would equally have had that right, and that at any time after the agreement. If

that be not so, it would, I think, follow that if the defender had become bankrupt the property of this machinery, however much its value may have exceeded the price, would have belonged to his creditors. Also that he might have sold it, and would not have been obliged to account for any surplus. In his own evidence he does not take up that position. He does not claim that he would have been entitled to sell it, and he admits that if it was sold the surplus would have gone to Bisset & Wyllie. Yet the power of sale is one of the principal incidents of property, and it was not stipulated that he should let the machinery on hire to Bisset & Wyllie for any definite time.

"I am of opinion that the case is ruled by that of *Robertson v. Hall's Trustees*, 24 R. 120, which it closely resembles. There no doubt the trustee was a trustee in bankruptcy, but it does not appear that there were any prior creditors, and I have given my reasons for holding that the distinction is not material in the present case.

"On the whole, therefore, though not entirely without hesitation, I have come to a different conclusion from the Sheriff-Substitute on this part of the case."

The defender appealed to the Second Division of the Court of Session.

The Sheriff's judgment with regard to the gas-engine was acquiesced in. With regard to the rest of the plant the appellant argued—Bisset & Son's possession of the plant was as tenants, and no right therein passed to the pursuer, the transaction embodied in the agreement of October 1898 having been a *bona fide* sale—*Robertsons v. M'Intyre*, March 17, 1882, 9 R. 772, 19 S.L.R. 536; *Duncanson v. Jeffries' Trustee*, March 4, 1881, 8 R. 563, 18 S.L.R. 367. "The pursuer's authors could not have set aside the agreement by parole evidence, and the pursuer's right under the voluntary trust-deed could be no higher than theirs; the pursuer had no title to set it aside as an illegal preference—*Fleming's Trustees v. M'Hardy*, March 2, 1892, 19 R. 542, 29 S.L.R. 483. The doctrine of reputed ownership did not aid the pursuer—*Marston v. Kerr's Trustee*, May 13, 1879, 6 R. 898. The case of *Robertson v. Hall's Trustee*, November 19, 1896, 24 R. 120, 34 S.L.R. 82, referred to by the Sheriff, was distinguished from the present case; in that case there was no delivery, but the plant here in question was delivered on 13th October 1898, when parties intended it to be—Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), secs. 17 and 18. Apart from the Sale of Goods Act, actual delivery was not necessary, the plant having remained in the sellers' possession under a new title—*Liddell's Trustee v. Warr & Company*, July 18, 1893, 20 R. 989, 30 S.L.R. 900; this view was supported by contrasting the latter case with *Pattison's Trustee v. Liston*, June 7, 1893, 20 R. 806, 30 S.L.R. 690. The motive with which the agreement of October 1898 was entered into did not affect the defender's rights—*M'Bain v. Wallace & Company*, July 27, 1881, 8 R. (H.L.) 106, 18 S.L.R. 734. Even if the defender had only a personal right, he was in as good a position as the pursuer, who

had failed to prove acquisition of the plant—*Clark v. West Calder Oil Company*, June 30, 1882, 9 R. 1017, 19 S.L.R. 757.

Argued for the respondent—The transaction entered into in October 1898 was a mere attempt to give the defender a security over undelivered moveables. This view was clearly established by the defender's own evidence, and by the receipts granted by him for termly payments of "interest on loan." The defender could have no right in security while the plant remained in the possession of his debtors—*Jones & Company's Trustee v. Allan*, December 20, 1901, 4 F. 374, 39 S.L.R. 263. There could be no true sale when the price was not fixed with reference to the value of the articles sold, and it was not said that it was so fixed in this case. Further, under a contract of sale there could be no right in the buyer to compel the seller to take back the articles sold at his option. The case was governed by *Robertson v. Hall's Trustee*, *cit. sup.*

At advising—

LORD JUSTICE-CLERK—The opinion which I have formed in this case is that the true nature of the transaction between Bisset & Wyllie and the defender was that he made an advance to them of money to the extent of £79, the security for which was to be the machinery in their workshop. The evidence convinces me that the truth of the matter was that he was advancing them money on loan. His own evidence makes this quite plain. He admits that they wanted money from him, and says—"Well, of course, it was a loan." No doubt after he had laid the matter before his solicitors, they naturally suggested that the transaction should be treated not as a loan bearing interest but as a sale to him of the machinery, Bisset & Wyllie paying hire for it. This was, I think, a mere ingenious lawyer's device, not representing the true character of the transaction, but intended to get over the difficulty that if it was a loan no effectual security was created, because possession of the machinery and plant was retained by Bisset & Wyllie, and no delivery was given so as to make the security effectual. There is writing under the defender's own hand showing that at four successive terms of Whitsunday and Martinmas he received payment from the debtors expressly as for interest on a loan of money.

I agree entirely with the views expressed on this matter by the Sheriff, and am of opinion that his judgment ought to stand.

LORD YOUNG—The questions in this case arise out of a loan of money transaction in 1898 between the defender (the appellant) and Bisset & Wyllie, who were then in the use and occupation as his tenants of the premises in which they carried on their business as wood-turners. The facts are simple and undisputed. Bisset & Wyllie were desirous of adding to their wood-turning plant a gas-engine which, as they had ascertained, the manufacturers were willing to sell to them for £121 ready money. Not having the money in hand, Bisset & Wyllie arranged with their land-

lord, the defender, to accommodate them with a loan of £200 at 4½ per cent. on the security of the whole working plant in the premises occupied by them as his tenants, including the gas-engine when purchased and delivered there, as it was early in November. The terms of this loan transaction are expressed in the agreement of 30th October 1898. The explanatory part of the pursuer's answer to the defender's second statement on record, together with the correspondence and receipts produced relating to the gas-engine and the remainder of the plant, turning-lathes, &c., show how this agreement between the parties was acted upon. With respect to the gas-engine, the property title agreed to be given to the defender in security of his loan was very simply and sensibly arranged by desiring the manufacturers, the sellers, to make out their account in name of the defender as purchaser. This being done, the engine delivered to Bisset & Wyllie as desired, and the price thereupon paid to the sellers on a discharge of their bill, the defender was admittedly made the owner of the engine, and Bisset & Wyllie the recipients of it from him on the contract of hire expressed in the agreement. I understand all this to be admitted, and the defender's property in the engine consequently not disputed. With respect to the remainder of the plant, the agreement was acted upon and so far fulfilled by the contract of sale expressed in the agreement itself, and the receipt for the price, together with the contract of hire, and the periodical payments subsequently made upon it.

I will now make the few observations which I think necessary on the question of delivery of the plant to the defender, and on this question, although the delivery of the gas-engine is no longer disputed, I think it proper to point out that it was by order of the defender delivered to Bisset & Wyllie as the hirers of it from him, and that this was clearly and admittedly valid delivery to him in fulfilment of the contract of sale between him and the manufacturers. With respect to the remainder of the plant which Bisset & Wyllie themselves directly sold to the defender, who paid them the contract price in cash, they thereafter, that is, from and after 13th October 1898, held and used it upon the contract of hire with the defender, paying him therefor the contract periodical return. It may also be useful to point out that the gas-engine and the remainder of the plant were possessed, used, and paid for by Bisset & Wyllie under one and the same contract of hire.

When a tenant of a house sells the furniture therein, being his own property, to the landlord from whom he rents the house, and thereupon hires it from the landlord, thus becoming the tenant of a furnished house, it is, in my opinion, clear that the transaction imports delivery of the furniture sold to the landlord as purchaser, irrespective of either the Mercantile Law Amendment Act or the Sale of Goods Act. Delivery is imported by the change of title

on which the furniture was held previous to the sale, nor has ostensible or reputed ownership any bearing upon the question. The tenant, or even the proprietor of a house, is not assumed to be the owner of the furniture therein; some of it may be his and some not, and there is no room for presumption or assumption in the matter. Nor can I see any ground for distinguishing between furniture in a dwelling-house and plant such as that now in question in a workshop or yard attached to it. I am accordingly of opinion that the plant in question, which was sold to the defender in October 1898, was then duly delivered to him, and has ever since been in his possession as owner.

With respect to the objection urged by the pursuer to the validity of the contract of sale, it is hardly necessary, I should think, to observe that it can be no objection to the validity of a contract of sale that it is expressed in the form of a contract of sale. The objection, to state it plainly, is that the parties thereto intended thereby to operate a security to the lender in a transaction of loan. Such intention, however, was, in the case of *M'Bain*, decided both in this Court and in the House of Lords to be perfectly legitimate, and to afford no ground of objection to the validity of the contract, or hinder its operation in transferring the property in the subject of it from the vendor to the vendee. The question about delivery of the article sold does not arise in this case.

It has been suggested as worthy of consideration whether clause 61, sub-sec. 4, of the Sale of Goods Act ought not to be taken as an indication by the Legislature of disapproval of that judgment, and a consequent intention to alter the common law thereby affirmed. I am unable to read that sub-section otherwise than as importing very distinct recognition of the validity of a contract of sale intended by the parties thereto to operate as a security. I think it not doubtful that without this sub-section the whole provisions of the Act would have applied to such a contract of sale as is there specified. It would not, I think, be respectful to the Legislature to read it as an enactment that the provisions of the Act should not apply to an illegal and consequently invalid contract of sale, though expressed in proper form, or rather if expressed in proper form. It is clear enough, I should think, that the parties to a loan transaction who enter into a contract of sale of goods, intending thereby to operate a security, must necessarily mean the security afforded by the property title thereby conferred upon the lender as purchaser of the subject sold.

LORD TRAYNER—The cardinal question here is, whether the appellant bought the machinery and plant of his tenant, or only advanced a loan on the security of it. I think it is established that there was no sale, and need go no further than the appellant's own evidence to show that. He says—"I would never have thought of buying the machinery." He admits, further,

that the advance he made was a loan, but adds, "After I saw my agent it was a hire." But to change the name after he saw his agent did not change the real character of the transaction. The receipt subsequently granted by the appellant bore to be for "interest on loan," showing what he thought and knew the transaction to be, although his agent gave it another name.

If it was in truth a loan, then the machinery did not pass in property to the appellant, nor was any security over it validly constituted, because the machinery never was delivered to the appellant. At the time the loan was made the machinery and plant were in the debtors' premises. They remained in these premises until after the trust-deed in favour of the pursuer was granted, and although the debtors left the premises and the machinery and plant therein on becoming embarrassed, the keys of the premises were (as was stated at the bar without contradiction) always with them until they handed them over to the pursuer. I think this case is the same in principle as the case of *Robertson v. Hall*, 24 R. 120, and it is distinguished from the case of *Robertson v. M'Intyre*, 9 R. 772, where it was held (and the judgment proceeded upon that ground) that there had been a *bona fide* sale. I am therefore for dismissing this appeal.

LORD MONCREIFF — No question is now raised in regard to the gas-engine, which undoubtedly was the defender's property from the first. The only question is in regard to the rest of the plant which belonged to Bisset & Wyllie, and was used by them in the premises in St Peter Street, Aberdeen, which they rented from the defender. The defender maintains that he acquired the property of that plant at the price of £79 in virtue of an agreement with Bisset & Wyllie dated 13th October 1898. I am of opinion that that contention is not well founded, and that notwithstanding the minute of agreement the plant remained the property of Bisset & Wyllie. Although the transaction was in point of form a sale, that was not its true character. It, though "in the form of a sale," was "intended to operate by way of security." Both parties probably intended that the defender should get a good security for the money advanced, but they failed to effect it. Greater pains may have been taken to give the transaction the appearance of a sale than in the cases of *Robertson v. Hall's Trustees*, 24 R. 120, and *Allan v. Jones*, 39 S.L.R. 263, but with no greater success. There may possibly be cases in which the property of moveables will pass without delivery, although the seller remains in possession under another title, such as hire or loan. But in order to effect this there must be a true sale intended to operate as a sale. Here the transaction had not the qualities of a sale. It was simply a loan at call of £79, bearing interest at 4½ per cent. I refer especially to the second head of the agreement. The defender admits that if the plant had been sold and brought more than £79, he would have

had to account to Bisset & Wyllie for the balance. If, on the other hand, the plant had deteriorated and brought less than £79, the defender would still have held Bisset & Wyllie responsible for the full sum with interest. This shows, I think, that there was no true sale; it was a loan, and the defender's receipts for interest bear out this view.

Neither was there a good security or pledge, because there was no delivery.

If so, when Bisset & Company, who succeeded Bisset & Wyllie, granted the trust-deed in favour of the pursuer, the plant in question was their property and not that of the defender. I understand that the plant is still in the premises in St Peter Street, the lease of which is not yet run out. If the pursuer has taken possession of the premises and plant under the trust-deed, he has acquired a real right in the plant. If he has not taken possession of the plant, he has still a personal right to obtain possession of it, although no doubt he has not a right of property as yet. In either case the defender has no right of property in the plant, and no right to resist the pursuer's demand, if in point of fact he is preventing the pursuer from taking possession of the plant.

I am therefore of opinion that the appeal should be dismissed.

The Court pronounced this interlocutor—

“Dismiss the appeal: Find in terms of the findings in fact and in law in the interlocutor appealed against, and find further in fact as follows:—(1) That there was no sale by James Bisset and Alexander Bisset of the machinery and plant in question to the appellant; (2) that the sum of £200 paid by the appellant to the said James and Alexander Bisset was advanced on loan and not paid as the price of said machinery and plant; and (3) that said machinery and plant were in the possession of the said James and Alexander Bisset at the date of the trust-deed granted by them in favour of the respondent, and passed in property to him by virtue of said assignation and delivery following thereon: Therefore of new refuse the prayer of the petition so far as it relates to the gas-engine mentioned in the record, and *quoad ultra* find and declare in terms of the said prayer, and grant interdict as craved, and decern: Find the respondent entitled to expenses in this Court, and remit,” &c.

Counsel for the Pursuer and Respondent—Salvesen, K.C.—D. Anderson. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defender and Appellant—Campbell, K.C.—Gunn. Agents—Maekay & Young, W.S.

Wednesday, March 4.

SECOND DIVISION.

[Sheriff Court at Kirkcaldy.]

BRAID *v.* JOHN SWAN & SONS,
LIMITED.

Process—Appeal—Appeal under Summary Jurisdiction Acts—Civil Causes—Competency—Court of Session or Court of Justiciary—Jurisdiction—Statute—Construction—Summary Procedure Act 1864 (27 and 28 Vict. c. 53), sec. 28—Summary Prosecutions Appeals Act 1875 (38 and 39 Vict. c. 62), sec. 7—Summary Jurisdiction Act 1881 (44 and 45 Vict. c. 33), sec. 9 (4)—Statute Law Revision Act 1894 (57 and 58 Vict. c. 56), sec. 1.

Held that section 7 of the Summary Prosecutions Appeals Act 1875 is not repealed by section 9, sub-section 4, of the Summary Jurisdiction Act 1881, and that it is still competent to appeal to the Court of Session in causes under the Summary Jurisdiction Acts, where the jurisdiction is of a civil nature.

Public Health—Food—Unsound Meat—Complaint—Relevancy—Public Health (Scotland) Act 1897 (60 and 61 Vict. c. 38), sec. 43.

Held that in prosecutions for contravention of section 43 of the Public Health (Scotland) Act 1897 it is not enough to libel merely that the diseased meat was intended for the food of man, but that it is also necessary to libel either that it was exposed for sale, or that it was deposited in some place, or was in course of transmission, for the purpose of sale, or of preparation for sale.

This was a case for appeal to the Court of Session stated by the Sheriff-Substitute (Gillespie) in the Sheriff Court at Kirkcaldy, in terms of section 3 of the Summary Prosecutions Appeals (Scotland) Act 1875, in a complaint under the Summary Jurisdiction Acts at the instance of Francis Braid, sanitary inspector, acting under the Provost, Magistrates, and Town Council of the burgh of Kirkcaldy, and as such the local authority of the burgh, complainer and appellant, against John Swan & Sons, Limited, live stock agents, The Fife Central Mart, Thornton, respondents.

The case stated was as follows—“This is a cause originating in a complaint under the Summary Jurisdiction (Scotland) Acts of 1864 and 1881, and the Criminal Procedure (Scotland) Act of 1887, brought by the appellant against the respondents, charging them with having contravened section 43 of the Public Health (Scotland) Act 1897, in so far as on the 30th day of October 1902 years they had in their possession in the slaughter-house situated in Cowan Street, Kirkcaldy, the carcase of a bullock which was intended for the food of man, and which was diseased, unsound, and unfit for the food of man, and was seized on said date by the complainer, and by order of