

this duty and invaded the complainers' rights that interdict was granted. The case here is entirely different, because, as I have said, no restriction was placed upon the respondents for the protection of the complainers' business. What they are attempting to do is to sue in respect of the breach of a statutory obligation which was not conceived in their favour. It is settled by authority that that is not permissible—*Monklands Railway Company v. Waddel*, 23 D. 1167; *Gorris v. Scott*, (1874) L.R. 9 Exch. 125.

We have had a great many authorities quoted to us, but none of them, so far as I can see, supports the claim which the complainers now make. The only occasion upon which a similar claim was presented was in the *Clyde Steam Packet Company* case, to which I have already referred, and it was rejected. The law of Scotland therefore has never recognised the claim. And it has been authoritatively settled in England in the case of the *Stockport Waterworks Company v. The Mayor of Manchester*, (1863) 7 L.T. (N.S.) 545, that although a corporation may exceed its parliamentary powers, the Court will not restrain it at the instance of a private trader who complains that he is being deprived of profits by illegal competition. In delivering judgment the Lord Chancellor said—“ . . . The only arguments which I am disposed to accept are the arguments founded on the public interests, and the general advantage of restraining an incorporated company within its proper sphere of action. But in the present case the transgression of these limits inflicts no private wrong upon these plaintiffs, and although the plaintiffs in common with the rest of the public might be interested in the larger view of the question, yet the constitution of the country has wisely entrusted the privilege with a public officer, and has not allowed it to be usurped by a private individual.” It appears from this that two points were decided—(1) that the plaintiffs had no title to sue in their own private interests, because no private wrong had been inflicted upon them; and (2) that it would be contrary to public policy to permit them to appear in the public interests. It is said that this decision, which has settled the law in England, should not be followed here, because the Attorney-General may intervene in England in the public interests, whereas the Lord Advocate in Scotland has no such power, or at all events never exercises such power, and consequently if we applied the English rule there would be no one entitled in a case such as this to call public bodies to account when they transgressed their parliamentary powers. That is to say, it is proposed to permit the complainers to sue, not because they have a good title of their own, but because the Lord Advocate has no title at all. I cannot assent to that view. If it be true that public bodies require further control in the public interests, and that the Lord Advocate has at present no power to control them, that matter can easily be remedied by the Legislature. But I am of opinion

that it would be contrary to public policy to permit the complainers, upon whom no private wrong has been inflicted, and who have a private purpose of their own to serve, which may be, and I think is, contrary to the public interests, to appear on behalf of the public. It is just as important in Scotland as it is in England that the control of public interests should be entrusted to a public officer, and that this privilege should not be usurped by a private individual.

I am accordingly of opinion that the complainers have failed to establish their case, and that the note should be dismissed.

THE LORD JUSTICE-CLERK was absent and LORD DUNDAS was sitting in the Extra Division.

The Court adhered.

Counsel for the Complainers—Clyde, K.C. —Paton. Agents—Maxwell, Gill, & Pringle, W.S.

Counsel for the Respondents—Sandeman, K.C. —Ingram. Agents—J. K. & W. P. Lindsay, W.S.

Saturday, July 12, 1913.

#### FIRST DIVISION.

[Sheriff Court at Aberdeen.

HEPBURN v. LAW.

*Sale—Right in Security—Sale or Security—Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), sec. 61, sub-sec. 4.*

L., who had lent £130 to W., pressed him for payment. W. offered an assignation of his furniture in security. L. being advised that an assignation in security without delivery would be of no avail in a question with other creditors, and that there should be simply a contract of sale, granted a receipt for £130 “in payment” of certain specified articles of furniture “sold to him at date hereof.” These articles had been picked out as approximately worth £130. No discharge of indebtedness was granted by L. to W., no money then passed, nor was the policy of insurance transferred, and W. remained in possession of the furniture. It was understood that L. would give W. the opportunity of buying back or redeeming the furniture. Following upon a decree obtained by another creditor, W.'s effects were poinded, but L. claimed that the specified articles of furniture should be excluded from the sale as being his property. He explained that he had not removed the furniture from the house, as he did not want to raise a “claick” throughout the parish.

Held that the parties intended the transaction to operate as a security and not as a sale.

*Robertson v. Hall's Trustee*, November 10, 1896, 20 R. 120, 34 S.L.R. 82, followed.

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 18—“Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:—Rule 1—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.” 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.”

James Hepburn, Alloa, *pursuer*, raised an action in the Sheriff Court at Aberdeen against the Reverend John Symington Weir, The Manse, Rayne, Aberdeenshire, and on 9th October obtained decree in absence. On 22nd October 1912 he extracted the decree, and on 24th October charged upon it. On 1st November certain goods, gear, and effects belonging to Mr Weir were poinded, and on 7th November warrant was granted to a licensed auctioneer to sell as much of the poinded goods as would pay the debt. William Law, Kirktown of Rayne, *minuter*, however, intervened and lodged a minute claiming that the articles in a list produced should be excluded from the poinding as being his property. He produced the following receipt:—

“*Manse of Rayne,*  
“*Aberdeenshire, 14th June 1912.*

“Received from Mr William W. Law, Kirktown of Rayne, Rayne, the sum of one hundred and thirty pounds sterling, in payment of the following specified articles of furniture belonging to me in the manse of Rayne, and sold to him at date hereof.

“J. S. WEIR. £130 June 14th, 1912.”
---

[*Here followed a list of articles of furniture.*]

Proof was allowed and led, the import of which appears from the opinion of the Sheriff-Substitute (Young) and of Lord Johnston.

On 6th March 1913 the Sheriff-Substitute found that it was not proved that the articles claimed by the minuter William Law were his property, dismissed the claim, and found the pursuer James Hepburn entitled to expenses.

*Note.*—[*After narrating the procedure which had occasioned the claim*].—“The question then which has been raised is whether there was here really anything except a security in the form of a sale. In reference to this point it has to be kept in

mind that while by sections 17 and 18 of the Sale of Goods Act 1893 the property of specific goods sold passes to the buyer according to the intention of parties and independent of delivery, it is enacted by section 61 (4) that the provisions of the 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 pledge or other security. It may be that parties in order to surmount the difficulty of creating a security over undelivered moveables resort to what has the appearance of a contract of sale, but to use the words of Lord Moncreiff in *Robertson v. Hall's Trustees* (1896, 24 R. 120), ‘if contrary to the form of the contract, and even the declaration of parties, it appears from the circumstances that a true sale was not intended, it will be held that the property has not passed and that no effectual security has been acquired.’ If the purpose is to give a security to the buyer for a loan, the transaction is to be regarded as a security only which is not effectual without delivery—(*Rennet v. Mathieson*, 1903, 5 F. 591, and *Jones & Company's Trustee v. Allan*, 1901, 4 F. 374).

“On the evidence it appears that at the time of the transaction Mr Weir was in financial difficulties and was being pressed by creditors. Mr Law, it is said, was a creditor to the amount of £130 in respect of advances previously made. There was no writing to instruct these advances, but his claim was assumed and not disputed, and on his request for payment he was offered by Mr Weir an assignation of the furniture in security. This offer was refused, Mr Law being advised, as is not uncommon in such cases, that an assignation in security without delivery would be of no possible avail in a question with other creditors, and that there should be simply a contract of sale, a receipt being given for money on account of certain specified articles. Obviously it was not intended that Mr Law should take away the furniture, and accordingly the transaction had the form expressed in the receipt granted by him on 14th June; and the furniture was left in his undisturbed possession. It seems to me that in the circumstances the document is not conclusive evidence of a sale, and that the fair inference from the facts is that in substance and reality it represented not a sale but a security for a loan. The transaction was not one in the ordinary course of trading. It had its inception in an alleged previous loan. Though the receipt bears that on its date the sum of £130 was paid to Mr Weir, that was not the fact, for no money then actually passed. The articles were not disposed of at a market price or at a price stated by the seller, but what happened was this—that, acting for Mr Law, his bank agent made a selection and took a note of furniture representing, according to his appraisal, a value approximately equal to the amount of the debt said to be due to Mr Law. Mr Law had no need of the furniture for his own use and no intention to convert it into cash. The object of the supposed seller was, not to realise for a

price to be paid, but to secure, or, as he terms it, safeguard, his creditor in respect of advances. There was no suggestion about removing the furniture, and no obligation undertaken as to its delivery. It remained with Mr Weir as it had been, and in relation to it or its use nothing was done by Mr Law in the character of owner. In this connection the bank accountant, W. M. Morrison, makes the significant statement that 'Mr Law did not want to take away the furniture and sell it again; his intention was to leave the furniture where it was until Mr Weir was in a position to buy it back.' And Mr Weir himself says that he sold the furniture on condition that he would be allowed to buy it back for £130 within a reasonable time, and he adds—'It was simply a verbal understanding that I could buy back the furniture. He just said I was to understand the furniture was his, and that I could get it back when I paid him that sum.' No doubt parties went through the form of a sale, and speak of selling and buying back, but, after all, the arrangement made involved the understanding that the furniture was to continue with Mr Weir for his use and enjoyment, and would not be removed if he paid up the debt. Mr Law did not become the absolute beneficial owner of the articles, free to remove them and deal with them as he pleased. If Mr Weir repaid the alleged advances he could insist on keeping the furniture. I think, therefore, that, looking to the real substance of the thing, this was a transaction in the form of a sale, but intended to operate as a security, and neither as a sale nor as a security could it be effectual without delivery."

The claimant William Law appealed to the Sheriff.

On 24th April the Sheriff (LORIMER) pronounced this interlocutor—"Finds it proved that the articles of furniture detailed [*in the receipt*] were sold on or about 14th June 1912 by the said Reverend John Symington Weir to the minuter William W. Law for the sum of £130 sterling, and that, according to the intention of parties to the said sale, the property thereof then passed to the purchaser: Therefore recalls the interlocutor of the Sheriff-Substitute of 6th March last, and ordains the said articles of furniture to be withdrawn and excluded from the execution of poinding at the instance of the said James Hepburn, and decerns."

The pursuer James Hepburn appealed to the Court of Session.

At the hearing the following authorities were referred to for the parties, who were at issue rather as to the application of the law to the present circumstances than as to the rule of law to be applied:—*Robertson v. Hall's Trustee*, November 10, 1896, 24 R. 120, 34 S.L.R. 82; *Rennet v. Mathieson*, March 4, 1903, 5 F. 591, 40 S.L.R. 421; *Jones & Company's Trustee v. Allan*, December 20, 1901, 4 F. 374, 39 S.L.R. 263; *Scottish Mercantile Discount Company v. Romanes*, June 17, 1905, 13 S.L.T. 169; and to the sections of the Sale of Goods Act 1893 (56 and 57 Vict. cap. 71) above quoted. Reference was also made to *M'Bain v. Wallace & Company*, July 27, 1881, 8 R. (H.L.) 106, 18 S.L.R. 734, and to

*Liquidator of West Lothian Oil Company, Limited v. Mair*, November 18, 1892, 20 R. 64, 30 S.L.R. 89, decided before the Sale of Goods Act.

At advising—

LORD JOHNSTON—These proceedings commenced by a decree in absence of date 9th October 1912, at the instance of James Hepburn, accountant, Alloa, against the Rev. J. S. Weir, the minister of Rayne, Aberdeenshire. On this decree poinding followed on 1st November, but when it came to sell the poinded effects, another creditor, William Law, Kirktown of Rayne, intervened and craved that certain of the most valuable of the poinded subjects should be withdrawn from the sale, in respect that they were his property. Upon this a litigation ensued, and after a proof the Sheriff-Substitute found that it was not proved that the articles claimed by the minuter William Law were his property, and therefore dismissed the claim with expenses. On appeal the Sheriff reversed his Substitute's judgment, and the case has been brought by appeal to this Court. After carefully considering the evidence, I have come to the conclusion that the Sheriff-Substitute's judgment should be restored, and very much for the reasons very clearly stated by him.

The facts are, that Mr Weir, in connection with settling himself in the parish, had come under certain obligations to Mr Law, and in June 1912 was due him £130, for which Mr Law held, if I am not mistaken, no document of debt and certainly no security. Now Mr Law was himself overdrawn with the North of Scotland Bank at Inch, and Mr Reith, a new agent, having come to that branch, Mr Law was himself pressed to reduce his overdraft, and in turn pressed Mr Weir for repayment of his advance. Mr Weir offered security over his furniture, along with a policy on his life, by way of assignation, but Mr Reith was fully aware that no effectual security could be given over the furniture, and besides had been advised by Mr Shewan, solicitor, Aberdeen, that "the whole difficulty in this matter is that nothing in the form of a sale by way of security would be valid. It must be understood to be an out-and-out sale, and that the property passes to Mr Law. The best will be to take a receipt in the ordinary terms for so much money in respect of certain specified articles. Mr Weir must understand that the articles are no longer his, and that it would be as well to have the insurance policy for the furniture endorsed for Mr Law's interest."

I think I may say that Mr Reith took command of the situation, and armed with the above letter, he and his accountant, Mr Morrison, and Mr Law went to the manse and had an interview with Mr Weir. It was carefully explained to Mr Weir that a security over his furniture was a thing which could not be legally effected, and that nothing but an out-and-out sale would do, and after some discussion an inventory was made of certain articles of furniture

estimated by Mr Reith to be of the value of £130; and Mr Weir executed this document, dated 14th June 1912:—"Received from Mr W. Law, Kirktown of Rayne, Rayne, the sum of one hundred and thirty pounds sterling, in payment of the following specified articles of furniture belonging to me in the manse of Rayne, and sold to him at date hereof,"—and there was appended the inventory of the furniture, also signed by Mr Weir.

The further facts are that no discharge of this indebtedness was granted by Mr Law to Mr Weir; that the document of debt, if any existed, was not returned to Mr Weir; that no money passed, and that possession was not taken of the furniture, which was left with Mr Weir. Mr Law explained in his evidence—"I did not want to raise a 'claick' throughout the parish; and I allowed the furniture to remain in the manse." And it remained in the manse in Mr Weir's possession until the pointing. Nor was the policy of insurance transferred.

I have no doubt that Mr Reith intended that an out-and-out sale should be made, and thought that he had effected his object. But it is not his intention that rules, but that of the principal parties to the sale. The Sale of Goods Act 1893, to comply with the provisions of which the men of business concerned were working, provides (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"; and (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." Having regard to these three considerations, I think it is impossible to hold that the principal parties to the contract intended the property to be transferred on the signature of the document above quoted, or that as between them there was anything but the form of a contract of sale without the reality, for it was admittedly fully understood between them that Mr Weir was to be entitled to redeem his furniture if he paid the £130, though Mr Law might, if he chose, take possession, remove, and realise the furniture in the meantime. The reality of the transaction was, I think, nothing but a security, and a bad security, over the furniture. The transaction is exactly struck at by section 61 (4) of the statute, which says—"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."

I refer to the case of *Robertson v. Hall's Trustees*, 24 R. 120, and particularly to the opinion of the late Lord Moncreiff. As in that case, there was perfect *bona fides* on the part of those concerned in this transaction. All concerned intended to take effectual steps to exclude the diligence of Mr Weir's creditors, and thought they had done so. They came nearer to it than did the parties in *Robertson v. Hall's Trustees*.

But for all that the transaction in substance was not a sale. For these reasons, concurring with the Sheriff-Substitute, I think that Mr Law's claim to have the articles inventoried withdrawn from the pointings must be refused.

The LORD PRESIDENT (DUNEDIN), LORD KINNEAR, and LORD MACKENZIE concurred.

The Court sustained the appeal, recalled the interlocutor of the Sheriff, and affirmed the interlocutor of the Sheriff-Substitute.

Counsel for the Appellant—A. M. Stuart. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondent (Claimant)—Lippe. Agent—W. Croft Gray, S.S.C.

Friday, February 20.

## SECOND DIVISION.

[Lord Skerrington, Ordinary.]

### MACKIE'S TRUSTEES v. MACKIE.

*Husband and Wife—Succession—Donation inter virum et uxorem—Mutual Codicil to Onerous Mutual Settlement—Bequest under Codicil by Wife to Husband's Relations—Revocability.*

A husband and wife, by a codicil to a mutual settlement which was onerous and contractual, made certain provisions in favour of the husband's relatives, to be paid out of the estate belonging to the wife at her death in the event of her surviving her husband. The wife after her husband's death having executed a settlement and codicils revoking these bequests, held that the codicil to the mutual settlement was revocable by the wife as being a donation *inter virum et uxorem*.

*Opinion (per Lord Guthrie)* that apart from the relationship of husband and wife the codicil was revocable.

James Guthrie Shiell and another, testamentary trustees of the late Mrs Elizabeth Mackie, *pursuers and real raisers*, brought an action of multiplepointing and exoneration for the purpose of determining whether a mutual codicil, dated 6th November 1879, executed by Mrs Mackie and her husband to an onerous and contractual mutual settlement, dated 28th June 1855, between them and Mrs Mackie's father, had been revoked by a subsequent trust-disposition and settlement, dated 25th June 1881, and codicils executed by Mrs Mackie after the death of her husband. Claims were lodged by Miss Jessie Bruce Mackie and others, *claimants*, who were beneficiaries mentioned in the mutual codicil, or their representatives, and by Mrs Menzies and others, *claimants*, beneficiaries under Mrs Mackie's subsequent trust-disposition and settlement and relative codicils.

The mutual codicil, the legal effect of which was in dispute, was in the following terms:—"I, Dr Archibald Mackie and Mrs Elizabeth Todd or Mackie, spouses within designed, have resolved, with mutual advice