ing majority, but subject always to the said annuity to my wife, in regard to which (he continues) I give my trustees full power to make all necessary arrangements in the event of her surviving all or any of the periods of majority of my said children, born or to be born." One of the sons, William, died intestate on 1st August 1895 survived by his mother, his wife, and two children, having meantime assigned his interest in the trust-estate for value. The question is, whether William's interest in his father's trust-estate was vested so as to pass to his assignees. If the destination in the will had stopped at the end of the passage which I have read, its construction would not, as I conceive, present any difficulty. The shares of children are declared to be "payable" at majority, subject to their mother's annuity, which I take to mean that the children were to have all the right which their father could give them to their shares of succession consistently with the retention of a capital sum sufficient to secure their mother's annuity. This implies that the surplus estate was to be paid over to each child at the age of majority. Now, it is a perfectly settled point in the construction of wills that the existence of a charge affecting residue does not suspend the vesting of the beneficiary interest in right; and to hold that the children should only take vested interests in so much of the estate as admitted of immediate division would, I think, be contrary to the rule of construction which I have stated. But the will contains further directions as to the disposal of residue, which in substance amount to this—1st, In case of any child dying without leaving lawful issue before his share becomes "payable," his share is to accresce to the survivors of the family of children; and 2nd, that if the child so dying shall have left lawful issue, such issue shall be entitled to the parent's share.

Now, the condition upon which this double destination takes effect is the death of a child before his share becomes "payable," and I do not think that the use of the word "payable" in this collocation is ambiguous, because I think it is a referential word, and that we are entitled to look to the original gift in order to ascertain the sense in which the testator has used the word. This being done, we find that the testator has marked the shares as being payable at majority, and therefore, as I conceive, the true meaning of the conditional institution of survivors or grandchildren, as the case may be, is that it is to come into operation in the event of the death of a child before attaining majority. I think it would not be good construction to hold that the testator uses the word "payable" in different senses in two parts or members of the same residuary destination, and I can find nothing in the context which would necessitate the putting a forced construction on the word.

When William Stirling attained majority the conditional institution fell, so far as it applied to his share, and it is unnecessary to consider whether the testator used the word "payable" in a sense precisely equivalent to "vested." William at his death had right to a share of residue burdened only with a fixed charge, and with no subsisting ulterior destination affecting it. It follows, in my opinion, that the claim of his assignees is preferable to that of his widow and children, and that the second question ought to be answered in the affirmative.

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court answered the second question in the affirmative.

Counsel for Stirling's Trustees (First Parties) and for William Stirling's Children (Second Parties)—Dundas. Agents—Wishart & Sanderson, W.S.

Counsel for William Stirling's Assignees (Third Parties)—A. J. Young—R. Scott Brown. Agent—J. Knox Crawford, S.S.C.

Tuesday, November 10.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

ROBERTSON *v.* WALKER.

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

A, who had acquired by purchase an engineer's business and plant at a price of £2112, to be paid by instalments, entered into negotiations with B for an advance of £400 to meet the first instalment. B, on the advice of his law-agent, agreed to advance this sum, provided the subjects were conveyed to him by a contract of sale. The parties accordingly executed the following deeds:—(1) A disposition by which A, in consideration of the sum of £400, sold the subjects as per inventory to B, with power to B "to take possession thereof at any time he may think proper," and also with power to sell the subjects in such portions and at such prices as he (B) could procure, and subject to the admission that the subjects disponed "are the property of B, and that they are in my possession only on loan;" (2) a back-letter containing the following clauses:—(1st) an obligation on the part of B to re-sell the subjects to A at the price of £400, to be paid by instalments of £60 every six months; (2nd) a proviso that until repurchased, A was to pay "by way of hire therefor" interest on the balance of the sum of £400 unpaid at the rate of 20 per cent.; (3rd) a further proviso that failure to make these payments should entitle B to enforce the disposition and forfeit the instalments already paid; (4th) a proviso that further advances should be covered by the disposition and should be repaid under

the penalties imposed by clause 3rd. These documents were not followed by delivery of the subjects to B. A carried on the business until he was sequestrated, and in the course of business used up some of the raw material included in the disposition to B.

In a question between A's trustee in bankruptcy and B, *held*, after a proof (*aff.* the judgment of Lord Kincairney—*diss.* Lord Young), that the terms of the deeds and the circumstances under which they were entered into showed that the parties intended the disposition to operate as a security and not as a sale, and that the security not having been completed by delivery of possession, was ineffectual.

Observations by Lord Moncreiff as to the effect of sec. 61, sub-sec. 4, of the Sale of Goods Act 1893.

M'Bain v. *Wallace*, 7th January 1881, 8 R. (H.L.) 106, *commented on.*

In 1894 Alexander Buchanan Hall, engineer, Edinburgh, entered into negotiations with James Carrick & Sons for the purchase of the business of engineers and crane-makers carried on by them at Dalry Iron Works, of which they were proprietors. By offer, dated 30th May 1894, addressed to them, and acceptance by them, dated 4th June 1894, it was agreed that he should purchase from them, at a price to be ascertained by valuation, and to be paid, £300 on 18th June, and the rest by instalments, for which bills were granted, the business carried on by them at Dalry Iron Works, with the goodwill of the business, and the fixed and other plant in the premises, and also that they should grant to him a lease of the premises for ten years at a rent of £100 per annum.

As Hall was unable to meet the payment of £300, he entered into negotiations with Alexander Robertson, who carried on the business of a money-lender in Edinburgh. Robertson agreed to make an advance of £400 on the condition that the subjects should be conveyed to him on a contract of sale, this being the method recommended by the law-agent acting for both parties. On 21st August, Hall having received this sum, paid the instalment of £300 to James Carrick & Sons, and afterwards took possession of the business.

On 29th August, Hall executed in favour of Robertson a disposition in the following terms:—"I, Alexander Buchanan Hall, . . . in consideration of the sum of £400 sterling, paid to me by Andrew Robertson, . . . the receipt of which I hereby acknowledge, do hereby sell, assign, convey, dispone, and make over to and in favour of the said Andrew Robertson, his executors or assignees whomsoever, All and Whole the fixed plant and articles enumerated in the inventory and valuation thereof, and situated in Dalry Engine Works, Edinburgh, which, with the receipt thereto annexed for the price of the same, paid by me to Messrs James Carrick & Sons, from whom I have purchased the same, is here referred to, and held as repeated *brevitatis causa*, and is herewith delivered up and signed by me as relative hereto; surrogating and substituting the said Andrew Robertson and his foresaids in my full right and place in said fixed plant and whole articles, with power to him or his foresaids to take possession thereof at any time he or they may think proper, and that without any warrant or authority other than these presents: Also with power to sell, use, and dispose of said fixed plant and whole articles, in such portions and at such prices as he can procure, and give delivery thereof to the purchaser or purchasers, to receive and discharge the price or prices, with the application whereof the purchasers shall have no concern: And I bind myself during the period I may be permitted to retain possession of said fixed plant and articles, to take proper care thereof in every respect, and on the said Andrew Robertson or his foresaids demanding delivery, I bind myself to give him delivery, otherwise he shall be entitled to take delivery as above stated: And so long as said fixed plant and articles remain in my possession, I hereby recognise and admit that they are the property of the said Andrew Robertson, and that they are in my possession only on loan." In the inventory and valuation the fixed plant and articles were valued at £2112, 14s. 8½d. Some of the articles included in the inventory were raw material of the nature of fungibles necessarily exhausted by use.

A back-letter, dated 1st September 1894, was granted by Robertson to Hall. Its terms were as follows:—"With reference to the disposition granted by you to me, on the 20th ult., of the fixed plant and articles situated in Dalry Engine Works, Edinburgh, as per inventory and valuation thereof, referred to in and subscribed as relative to said disposition, for the sum of £400 sterling, it is covenanted and agreed on between us as follows:—1st. That I resell you said plant and articles at the price of £400, and I undertake to do so on being paid that sum, and any interest in the way of hire due, at the rate after mentioned. 2nd. That till repaid said sum and interest as hire, you are to retain possession of said plant and articles, but that only on loan. 3rd. That so long as you delay re-purchasing said plant and articles, you are to pay me, by way of hire therefor, interest on said sum, or whatever part thereof may be unpaid, at the rate of £20 per centum per annum. 4th. That you pay me £60 every six months, commencing the first payment on 29th February 1895, and continuing the payments till said £400 be fully paid. 5th. That you shall pay me every six months the hire above stipulated for, calculated on whatever part of the £400 may remain unpaid. 6th. Failure to make said payments shall entitle me to enforce said disposition, and should I have to do so, all payments made shall be forfeited as if they had not been made. 7th. Any sums I may advance you are to be repaid within a month after the advance, otherwise the condition in article 6th hereof shall be enforceable by me."

Robertson never received actual possession of the subjects. They remained in the

possession of Hall, who continued to carry on business on the premises under the name of James Carrick & Son, down to 31st November 1895. On that date he became bankrupt, and on 13th December James Walker, C.A., was appointed trustee on his sequestrated estates.

Thereafter Robertson presented a note of suspension and interdict against Walker to have him interdicted from working, selling, or removing the plant and other articles enumerated within the Dalry Engine Works recently occupied by Hall.

He pleaded—"(1) The plant and other articles enumerated in the prayer of the note being the property of the complainer, and the respondent having unwarrantably interfered therewith, and having threatened to dispose thereof, interdict should be granted as craved."

The respondent pleaded, *inter alia*—"(5) The transaction between the complainer and the bankrupt not having been a *bona fide* sale, but a device to create a security over moveables, which remained the property and in the possession of the bankrupt, is ineffectual to create any right in the complainer in competition with the respondent. (6) In respect the complainer never obtained delivery or possession of the machinery and other articles in question, the property thereof remained in the bankrupt, and is now vested in the respondent as trustee on his sequestrated estate."

After proof the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds (1) that the fixtures and other plant, the sale of which the complainer seeks to interdict, belonged to the bankrupt at the date of sequestration, and passed to the respondent as trustee on the sequestrated estate; (2) that the complainer's title thereto was a title in security only; (3) that it was not completed by possession, actual or constructive, or by intimation, and is insufficient to exclude the title of the respondent as trustee foresaid: Therefore refuses the prayer of the note, and decerns: Finds the respondent entitled to expenses," &c.

Opinion.—"This action, involving questions of law which I have found to be of very great difficulty, regards the effect of a transaction consisting of the advance of money by Robertson, complainer, to Hall, now represented by the respondent, his trustee in bankruptcy, and the disposition by Hall to Robertson of fixed and other plant on the premises in which Hall at the date of the bankruptcy carried on the business of an engineer and crane-maker under the name of James Carrick & Son, accompanied by a back-letter by Robertson. It is a case about a security over moveables *retenta possessione*. I speak throughout, for convenience, of Hall as the bankrupt, it not being material that the business was carried on in the name of Carrick & Son.

"The question is raised in the form of a note by Robertson craving interdict against the sale by Hall's trustee of the fixed and other plant of the premises. The crave in the petition has been limited by a minute, and I consider that all the articles against the sale of which interdict is now asked can be identified as having been included in the disposition by Hall to Robertson.

"The opinion which I have ultimately formed is in favour of the trustee, although I cannot say that I entertain it with much confidence. Whatever difficulty there may be as to the law, there is little, if there be any, as to the facts, which are as follows:—[*His Lordship here narrated the facts, and the terms of the deeds above quoted*].

"It is not pretended that Robertson ever took actual physical possession of the articles. These remained in the possession of Hall, and were used by him in his business.

"Now, in cases of this kind—and they have been not infrequent—the principal question which has hitherto arisen has been, whether the deed in favour of the lender was a true deed of sale effectual without delivery in respect of the provision of the first section of the Mercantile Law Amendment Act, or only a disposition in security ineffectual without delivery, and to that question a large part of the discussion in this case was directed, although since the repeal of the first section of the Mercantile Law Amendment Act that question has lost much of its importance. But in all, or almost all of the cases of this class, there has been inquiry by parole about the true character of the transaction, as to which the deeds have never been held to be conclusive, and accordingly a proof has been led in this case which leaves very little room for doubt about the facts. The transactions between Hall and Carrick & Son, and Hall and Robertson, may be regarded as really simultaneous, although some time, it is true, elapsed between the dates of the contract with Carrick & Son and of the disposition to Robertson. They were carried out at the same time. There is no doubt that Hall desired to acquire and also to retain the property of the articles. He wished to carry on a business with them and to use them, and in some cases use them up in his business. It is at least difficult to hold that he contemplated the acquisition of them for his business, and the sale of them by simultaneous transactions. His need of a loan initiated the whole affair. Robertson, again, who advanced the money, desired to obtain security for repayment with interest, which, though high, may not have been exorbitant, or otherwise than commensurate with the risk he ran. It was a transaction in the ordinary course of his business as a money-lender. He depones, frankly and honestly, that if he should sell the articles, and obtain more than £400 with the stipulated interest, he would pay the balance to the trustee. He did not admit that he was under any obligation to do this; but I must believe that there was an understanding between the parties to that effect, and I cannot hold that Robertson meant that he would make this payment out of pure charity or good will for Hall. I cannot doubt that the motive and object of the disposition and back-letter were that repayment of the advance should be sufficiently secured to Robertson, while at the same time Hall should retain the

possession and use of the articles. They were advised by their common agent to carry out the transaction in that fashion. In short, these two deeds constituted a device by which it was thought that Robertson might obtain a security which he could not obtain by a bond with an assignation of the plant without delivery.

"When I use the word 'device,' I do not use it in any invidious sense. I do not suggest that the transaction was tainted by any fraud, dishonesty, or undue concealment. I see no reason to think that it was. The whole transaction seems to have been quite fair and above-board. Parties endeavoured to get over a difficulty created by the law. What they intended and attempted to effect was that Robertson should be duly secured. There is nothing to be condemned in such an intention and attempt, and I confess that my inclination would be to sustain this transaction according to its true intent if the law would permit that result.

"There have been a considerable number of cases of this class, all of them of the nature of attempts to effect a security over moveables without delivery. In some of these cases the attempt has been successful—the legal writs devised having been held sufficient for that effect--among which I may quote as probably the most important cases—*M'Bain* v. *Wallace*, 7th January 1881, 8 R. (H.L.) 106; *Robertson* v. *M'Intyre*, 17th March 1882, 9 R. 772; *Liquidators of West Lothian Oil Coy.* v. *Mair*, 8th November 1892, 20 R. 64; and *Liddell's Trs.* v. *Warr & Co.*, 18th July 1893, 20 R. 989. In other cases, which may no doubt be distinguished from them, although the distinction is narrow, the attempt has been unsuccessful, and of these *The Heritable Securities Coy.* v. *Wingate*, 1880, 7 R. 1094, and *Paterson's Trs.* v. *Liston*, 14th June 1893, 20 R. 806, are probably among the most notable recent examples. I am disposed to think that a conveyance of moveables has been sustained, to the effect of constituting a security for an advance where the transaction has been in reality a pure sale, although the whole object of it has been to effect a security, and although there may be an understanding that the ownership shall revert to the borrower when that purpose has been served; and it seems to me that the rule of law that an assignation of moveables without delivery is totally ineffectual has not as yet been relaxed by decisions to any greater extent. That seems to have been the express ground of judgment in *M'Bain* and in *Liddell*. It appears to me that Lord Young in several opinions has gone further, and has been disposed to sustain a conveyance of moveables as a security wherever the form adopted has been an absolute disposition or a contract of sale—where the lender, as in one case he expresses it, has received a proprietary title. But I think there is as yet no decision going that length. Following the judgments, as I understand them, I think the question here is, whether there was any true sale in this case, or any true contract of hiring; and I, although with much hesitation, answer that question in the negative. It was argued that *Liddell's Trs.* was in point, and ruled this case; and I admit the similarity of that case. At the same time the circumstances were different. Counsel for the respondent pressed, *inter alia*, two distinctions—first, the great discrepancy between the sum advanced and the value—a feature which did not exist in *Liddell's* case; and secondly, the fact that some of the subjects said to be sold in this case were fungibles to be used in the borrower's business. I am especially impressed by the first of these distinctions, and think it hardly possible that an absolute sale for £400 of subjects valued above £2000 —although no doubt not as at a break-up value—was really contemplated; and I think that the evidence of Robertson was almost tantamount to an admission to that effect. I keep in view that the mere circumstance that there was an understanding that any surplus on a sale should be paid to the borrower, although material, cannot be regarded as in itself conclusive, bearing in mind that that specialty, or something like it, occurred in *M'Bain* v. *Wallace*. I think the whole history of the transaction is also against the view that there was a real sale, or at rue contract of hiring, and that the provisions of the back-letter to which I have referred can hardly be reconciled with any definite contract of hiring. I think that the whole transaction of the parties was, in truth, a loan, with an ineffectual attempt to create a security over movables without delivery.

"As I have indicated, I am not certain that it is of much importance whether the transaction be regarded as importing an absolute conveyance of moveables, or only a disposition in security. It was of vital consequence in the cases referred to. But between their dates and the date of the transaction under consideration, the first section of the Mercantile Law Amendment Act has been repelled by sec. 60 of The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71); and at common law an absolute sale of moveables without delivery is just as ineffectual as a disposition of moveables in security. It is true that under sec. 17 of the Sale of Goods Act delivery is not essential to the passing of property in moveables under a sale in the sense of that Act. But then subsection 4 of section 61 provides that '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 mortage, pledge, charge, or other security;' and I cannot doubt the disposition by Hall, if it imports a sale, falls clearly within these words, and therefore was not a sale falling under the Sale of Goods Act.

"Be it, then, that this disposition expressed an absolute sale of these moveables, it would be ineffectual unless it could be shown that possession had followed on it. Actual physical possession did not follow. Robertson threatened, indeed, to enter on possession, but admittedly he never did so, unless it could be held that he was constructively in possession, in virtue of the possession of Hall, under the contract of

hiring said to be expressed in the back-letter.

"On this question of constructive possession there are not many authorities; for so long as (in respect of the first section of the Mercantile Law Amendment Act) possession by a buyer was not necessary at all, it was needless to raise the question of constructive possession; and the Court has generally proceeded on the former ground. The leading case on this point is, I think, still *Orr's Trustees* v. *Tullis*, July 2, 1870, 8 Macph. 936. It has, however, been followed in *Robertson* v. *M'Intyre*, March 17, 1882, 9 R. 772; *Darling* v. *Wilson's Trustees*, Dec. 16, 1887, 15 R. 180; and in the recent case of *Mitchell's Trustees*, February 27, 1894, 21 R. 567. I am of opinion that these cases do not apply. They cannot apply if the true right of Robertson was merely that of a security-holder. In that point of view Hall's possession is to be attributed to his proprietary title, and not to any subordinate title, and his possession must be regarded as his own possession, not Robertson's. But even if Robertson's title were that of owner, I doubt whether these cases could be held applicable. The circumstances in all of them were materially different. When these cases are examined they appear to be special, and to amount to this, that in the particular circumstances the possession of one person was attributed to another who authorised the possession. They were all cases in which it was held that the only intention was to confer a proprietary title, and that all the possession followed which was possible in the circumstances, or at least which could reasonably be expected. The rule has never been applied where the whole object of the transaction was only to secure a loan." . . .

The complainer reclaimed, and argued—The plant and articles in the iron works had been validly transferred to him, and were his property. A *bona fide* sale had been intended by the parties, and a *bona fide* sale had been completed. The Court were not entitled to consider the primary motive of the transaction if it were proved that the intention of the parties was to carry through a sale, and that the transaction had taken the form of a sale. Here there was a good title, and there had been good constructive delivery. Wherever there was a property title given by one to another, and a subsidiary contract of hire given to the seller by the purchaser, there was good constructive delivery to the purchaser. This principle ran through all the cases—*M'Bain* v. *Wallace & Co.*, January 7, 1881, 8 R. 360, *aff.* July 27, 1881, 8 R. (H.L.) 106; *Robertson* v. *M'Intyre*, March 17, 1882, 9 R. 772; *Allan & Co.'s Trustee* v. *Gunn & Co.*, June 20, 1883, 10 R. 997; *Darling* v *Wilson's Trustee*, December 16, 1887, 15 R. 180; *Liquidator of West Lothian Oil Co., Limited* v *Mair*, November 18, 1892, 20 R. 64; *Liddell's Trustee* v. *Warr & Co.*, July 18, 1893, 20 R. 989. The case of *Pattison's Trustee* v. *Liston*, June 7, 1893, 20 R. 806, was distinguished from the present, because in that case there was an admission in the back-letter that although the sale was *ex facie* absolute, it was truly in security of an advance. It was argued against him that the price paid was inadequate, but in the first place, as pointed out by Lord Young in *M'Bain* v. *Wallace & Co.*, *supra*, 8 R. p. 371, the complainer's title of property in the plant might be available to the extent of the payment of the advance and no more; and in the second place, the break-up value of the plant, &c., was not greater than the £400 advanced. Then it was argued on the other side that the back-letter disclosed that the transaction was a loan, because interest and hire were used as synonymous terms. But if the rate of hire was fixed at so much per cent. on the purchase price, it was natural to speak of it as interest. In the 7th article of the back-letter there was a collateral agreement between the parties that did not affect the sale. He founded strongly on the fact that in the agreement between the parties no option was given to Hall to repurchase. This showed that the transaction was a true sale—*Helby* v. *Matthews* [1895], Ap. Cas. 471.

Argued for respondent—The Lord Ordinary's judgment was sound. There had been no *bona fide* sale to Robertson. The Court was bound to look at the motives of the parties. The parties contemplated a loan from the very beginning. It was not compatible with a proprietary right in Robertson that Hall should be allowed to continue in possession, and use as his own the articles, many of which were fungible. —*Sim* v. *Grant*, June 3, 1862, 24 D. 1033. The terms of the documents showed that the parties did not consider Robertson a purchaser. Power of sale was granted to him in the disposition, which under article 6 of the back-letter could only be enforced on Hall's failure to pay interest on the money lent. Clause 7 of the back-letter also conclusively showed that there had been no *bona fide* sale—that the transaction was one in security. In any event, the fixed plant on the premises did not belong to the complainer, as the sale had never been completed by intimation to the landlord—*Millar* v. *Muirhead*, March 10, 1894, 21 R. 658.

At advising—

LORD JUSTICE-CLERK—The complainer is a money-lender in Edinburgh, and entered into a transaction with one Alexander Buchanan Hall, in the following circumstances:—Hall was desirous to purchase a crane-making business, with the machinery, plant, and stock of materials, belonging to Messrs Carrick & Son, crane-makers in Edinburgh. He had no capital, and Messrs Carrick were willing to take a sum of a few hundred pounds down and Hall's acceptances for the remainder, the price of the whole being £2100. Hall agreed with Messrs Carrick to purchase at that price, and applied to his agent Mr Broatch to endeavour to raise the cash required, and Mr Broatch applied to Mr Robertson, who was also a client of his. Mr Broatch advised that the transaction must be by a sale by Hall to Robertson of the whole subjects, the price being the amount of the cash which he was to receive from

Robertson for payment of the money instalment to Messrs Carrick, and that Robertson was to grant a back-letter undertaking to hire the subjects of the sale to Mr Hall, and to reconvey on getting repayment of the price. This transaction was accordingly carried through. Hall granted a disposition, and Robertson granted a back-letter, the disposition bearing that Hall recognised and admitted that the machinery, plant, &c., were the property of Robertson and that "they are in my possession only on loan," and Robertson in the back-letter stating that Hall was to retain possession, but only on loan, and undertook to resell at the same sum on receiving that sum and "any interest in the way of hire due," at the rate of £20 per cent. per annum. There was a stipulation in the back-letter that £60 was to be paid every six months, until the whole sum was paid up, and the hire to be paid proportionally on the balance, failure in making the payments to entitle Robertson to "enforce the disposition" and forfeit all previous instalments. And lastly, the back-letter declared that "any other sums I may advance you are to be repaid within a month after the advance, otherwise the condition" as to enforcing the disposition and the forfeiture was to come into operation.

Following on this arrangement £400 was found by Mr Robertson and paid to Messrs Carrick. Hall got possession of and retained possession of the whole subjects, the fixed machinery remaining *in situ*, and the materials being used up by him as necessary for the conduct of the business. There was no delivery either actual or by formality to Robertson, and no intimation of an assignation of any right to sever the fixed machinery. Subsequently Hall became bankrupt, and the judicial factor appointed entered into possession under section 102 of the Bankruptcy Act. Robertson now desires by suspension to restrain the judicial factor from dealing with the subjects of the transaction between Hall and him as falling under the bankruptcy.

It is plain from the whole history of the case that what Hall required was a loan of money. He desired to become the owner of certain property that he might carry on a manufacturing business, and it was for the purpose of getting such a loan that he applied to Mr Broatch for assistance. But the question is whether by the form in which the transaction was put Robertson was placed in a better position than that of a lender of money, who does not obtain delivery of the property constituting the security for the loan, and is now proprietor of the articles and in such a position in law in regard to them that he can prevent their being realised as part of the bankrupt's estate, for the benefit of all the creditors.

In considering the question it is necessary to keep in view that the first clause of the Mercantile Law Amendment Act has been repealed by the Sale of Goods Act of 1893, and that accordingly a party who has by purchase a right to goods, but has not received delivery, actual or constructive, is no longer in a position to vindicate his right as against other creditors of the seller, as he might have done previously. The complainer therefore cannot insist upon now taking possession merely because he holds a document of sale. His case must be considered as if the first clause of the Mercantile Law Amendment Act had never been passed.

Now, the conduct of the parties here seems to me to be most correctly described by the Lord Ordinary when he says that the form of the transaction here "constituted a device by which it was thought that Robertson might obtain a security which he could not obtain by a bond with an assignation of the plant without delivery." Mr Broatch, the agent who advised the form of the transaction, is constrained to admit that it was just a money-lending transaction. A loan was its sole intent, and the form it took was only a straining after a mode of securing the loan, the actual circumstance making the ordinary mode of security practically impossible. The whole transaction was for an inadequate price, and with the intention, not that the complainer should receive the thing purchased, but that the seller should remain in possession, and even use up that considerable part of the subject of the transaction, which consisted of materials, being under no obligation to replace them. In the original back-letter there was a simple stipulation for interest on the sum handed by Robertson to Hall—a stipulation quite inconsistent with the idea of a true sale—and the effort was made to get rid of this difficulty by interpolating the words "by way of hire therefor." Then by the 5th article it is made plain that what is called "hire" is just instalments of repayment, for the hire is to be paid on whatever part of the £400 shall remain unpaid." And lastly, there is a stipulation as to "any other sums to be advanced," thus making the subject which the complainer proposed to have bought a security to him for future advances.

Taking into consideration the conduct of the parties, and the whole circumstances of the case, I feel it impossible to arrive at any other conclusion than that to which the Lord Ordinary has come, and I would move your Lordships therefore to affirm his judgment.

LORD YOUNG—I am of opinion that the disposition of 29th August 1894 being delivered by Hall to Robertson in return for the sum of £400, constituted a contract of sale of the property specified in the prayer of this suspension, and must have effect accordingly. The legal capacity of the parties to contract is not in question, and on the evidence, documentary and parole, I see no reason to doubt that they intended a contract of sale on the terms specified, intelligibly enough, although inartistically or even clumsily, in the disposition. Nor is there a suggestion or ground for suspicion of unfairness by either party to the other, or that either was ignorant of anything material to the con-

tract, known to the other. Then if sale was the contract intended, it follows that the relation intended to be thereby constituted between the parties was that of buyer and seller, and that the title of the buyer to the subject sold was a title of property. That sale was the contract intended I should have held on the terms of the disposition, which I think admits of no other construction. But it is on the parole evidence too distinctly proved to admit of dispute that Mr Hall was distinctly informed, and quite understood, that he could not have the money he desired from the complainer on a contract of loan, or otherwise than on a contract of sale, whereby he should as buyer become owner of the inventoried property. The complainer's reason for declining to pay his money on any other terms is good, and certainly intelligible, and that Mr Hall understood it and so agreed to the terms and took the money upon them is, as I have said, not doubtful as matter of fact.

The complainer being thus the owner of the goods on a valid property title was in a position to contract with respect to them as he did by the back-letter of 1st September 1894. And if what I have said of the contract of sale effected by the disposition be well founded, this letter was thereafter Hall's title of possession. He had no other. What was its character? I think clearly enough a contract of hire on specified terms, unless and until he should avail himself of an option thereby given him to repurchase the goods within a specified time and on specified terms. I did not understand it to be maintained that this was an unlawful contract for the owner of property to make with anyone who was willing to agree to it, or that there was any exceptional ground to hinder him making it with the former firm when he had himself purchased it.

I think this case is governed by the judgment of the House of Lords, affirming that of this Court, in the case of *M'Bain* v. *Wallace*, 8 R. (H.L.) 106, and by that of this Court in the subsequent case of *Liddell's Trustees* v. *Warr & Co.* (20 R. 989). The judgments of the noble and learned Lords in the case of *M'Bain* v. *Wallace* deal with the subject exhaustively. Nor do I think that the authority or application of these decisions is affected by the repeal of sec. 1 of the Mercantile Law Amendment Act, or by sec. 61, sub-sec. 4, of the Sale of Goods Act 1893. It is, in my judgment, clear that as a matter of fact it was absolutely contrary, not merely to the understanding but to the distinctly expressed intention of both parties, to make a contract of loan and to create between them the relation of lender and borrower—making the complainer the holder of a "mortgage, pledge, charge, or other security." It is certain that as a mortgagee, pledgee, or security holder, or, indeed, otherwise than as proprietor, he could not have made the contract expressed in the back-letter of 1st September, and equally so that this was known and understood by both parties. They both knew thoroughly well what they were doing, and in my opinion what they did was lawful and ought to have effect.

LORD TRAYNER—The material question of fact in this case is, whether the transaction between the complainer and Mr Hall was a sale or a security. I am of opinion with the Lord Ordinary that the transaction was not a sale, and that notwithstanding the form which it took, it was intended to operate as a security and nothing else. The circumstances were, shortly, these—Mr Hall purchased from Messrs Carrick & Sons the business then carried on by them as engineers and crane-makers, with their machinery, stock, and plant, at a price of something over £2000. Of this sum, according to their bargain, Mr Hall was to pay to Messrs Carrick £300 in cash, and the remainder by bills. Mr Hall had no money whatever, and to enable him to pay the £300, payable at once in cash, he went to his law-agent, to whom "he mentioned that he wanted a loan of money." This agent applied to another of his clients, the complainer, who agreed to give the money (I refrain from saying at present to *lend* the money) on certain conditions, which I shall immediately notice. Mr Hall having got £400 from the complainer settled the transaction with Messrs Carrick, and got possession of their works, machinery, stock, &c. Thereafter the transaction between the complainer and Mr Hall took this form. Mr Hall executed a disposition by which, in consideration of the payment of £400 to him by the complainer, he sold and assigned to the complainer the whole machinery, plant, and stock which he had purchased from the Messrs Carrick. This disposition, although not signed for a few days after the settlement with the Carricks, by which Hall became proprietor of their works, was intended to be signed the same day, and was practically executed *simul et semel*. A back-letter was granted by the complainer on 1st September and delivered to Hall. The form of the transaction therefore was a sale by Hall to the complainer. The reason why the transaction took this form is clear from the evidence of the law-agent, who acted for both the parties. He says—"When he (Hall) came first, he mentioned that he wanted a loan of money. I asked him what was his security, and he told me that he had none. He said that he was going to make this purchase (*i.e.*, from the Carricks), and I told him that the only way in which he could form a security was by his purchasing the stock and then re-selling it to Mr Robertson." Accordingly, what was wanted was a security, and the law-agent thought and advised that this could be done in the way he describes. I do not leave out of view that the complainer denies that he gave the money to Hall on loan, and repeats "that it was an out-and-out transaction of sale." But the complainer is, to say the least, an interested witness. I prefer to consider the documents which were exchanged at the time as showing what was the real character of the transaction; the evidence they afford is, in my opinion, the best we have.

Before considering these documents, however, I may advert for a moment to certain circumstances which appear to me to make it very improbable that the transaction which we are considering was one of sale. The complainer did not want to buy the business nor the stock and machinery necessary for the business of an engineer and crane-maker. What he did want was a security that the money he was advancing to Hall to enable him to make such a purchase would be duly repaid. Nor is it probable that Hill, after all the trouble he had taken to acquire the business, should be disposed to sell it to another the very day or two or three days after he had bought it. Still less likely that Hill should sell for £400 what he had just bought at a price of over £2000. Mere inadequacy of price, I need not say, would be far from conclusive against such a transaction being a sale, but it does forcibly suggest that the transaction was something else, and something short of sale. Another extraordinary feature in this transaction is this:—Hall, the supposed seller, not only remains in full possession of the whole subject of sale, but was entitled to use the stock for his own purposes and his own profit without being under any obligation to pay for or replace the same. In short, the seller was entitled to use what he had sold as if it had not been sold but remained his own property. The statement of the complainer, therefore, that the transaction was one of "out-and-out-sale" appears to me to be a very improbable story. But turning now to the documents, the disposition and back-letter, I think it is made clear that this story, antecedently improbable, is not correct in point of fact. Keeping in view the circumstances, as I have stated them, under which this deed was granted, it is curious to find in a deed which purports to be a conveyance to a purchaser, the provision that he should have power to take possession of the subject sold "at any time he may think proper, and that without any warrant or authority other than these presents." If the complainer bought the things specified, he could take possession (having already paid the price) without any such "power" being granted by the seller. The clause is quite inappropriate to a conveyance in pursuance of a sale. Its value and significance are apparent if the transaction was not sale but security. Again, the deed under consideration authorises the complainer to "sell, use, and dispose" of the plant and other articles conveyed "in such portions and at such prices as he can procure, and give delivery thereof to the purchaser, to receive the price and discharge the same, with the application whereof the purchaser shall have no concern." Authority to sell what he had bought—that is, authority to sell what was his own—and the purchaser to have no concern with what he did with the price paid to him. This is mere nonsense in a contract of sale, but provisions familiar enough and appropriate enough in deeds conveying subjects, heritable or moveable, in security. Turning now to the back-letter, I find in it also evidence of the real character of the transaction. I do not go over all its articles, but notice (*first*) that it contains an obligation on Hall to repay the £400 he had received from the complainer by instalments of £60 every six months—quite an intelligible obligation if the £400 was a loan to be repaid, but absurd if the £400 was the price paid for goods sold and delivered; (*second*) interest at the rate of 20 per cent. was to be paid by Hall to the complainer on the sum of £400 or "whatever part thereof may be unpaid." This also shows that the £400 was a loan, for interest could not be exacted and would not be paid as a price for which goods had been sold. No doubt the words are introduced "by way of hire." But these words cannot conceal what was the true nature of the transaction, nor even divert attention from it. I venture to think that while 20 per cent. on £400 may be regarded as a very good return by way of interest, the complainer would hesitate considerably before he let out subjects belonging to him which would necessarily deteriorate and be to some extent consumed in the use, and which cost over £2000, for £80 a-year "by way of hire." Lastly, the concluding article of the back-letter indicates that the conveyance was a security, although in form an absolute conveyance, as under that article the complainer is authorised to use the conveyance practically as a security to cover future advances.

If I am right in holding, as I do without hesitation, that the transaction in question although in the form of a contract of sale, was intended to operate as a security, and nothing but a security, then the goods over which the security was intended to be given having remained in Hall's possession, no effectual security was constituted. The provisions of the Sale of Goods Act have, in that view, no application to the case. I need not go over the authorities which were cited to us on either side of the bar. The cases are divided into two classes, one class being those cases in which it was held that a *bona fide* sale had been intended and completed (no matter what the motive which led to it), and the other class consisting of the cases where it was held that security and not sale was the contract or bargain. It depends, of course, on the circumstances and proof in each case to which of these classes it belongs. The case of *M'Bain* v. *Wallace* was much referred to, but little aid is obtained from it in deciding the present case. I think it probable that the complainer, in carrying through the transaction in question, had that case before him, and perhaps had not sufficiently before him the terms of sec. 61, sub-sec. 4, of the Sale of Goods Act. But the case of *M'Bain* does not aid the complainer. It did not decide that a security in the form of a sale was effectual in a competition with creditors where the subject of the security was left in the debtor's possession. The decision in that case proceeded distinctly on the ground that the transaction then before the Court was a *bona fide* sale, and Lord Watson remarked—"The Lord Ordinary" (whose judgment was reversed)

"seems to have held that the agreement in reality was one for a loan upon security, and not for a sale and purchase; and if that view were well founded, the judgment of the Lord Ordinary undoubtedly is equally so." If the Court of Session or the House of Lords had been of opinion that in that case the contract was not sale but security, the decision would no doubt have been other than it was.

On the whole matter I am of opinion that the interlocutor reclaimed against should be adhered to.

LORD MONCREIFF—I am of opinion with the majority of your Lordships that the Lord Ordinary's interlocutor is right and should be affirmed. The true nature of the transaction between the bankrupt and the complainer, Andrew Robertson, by which the former professed to sell to the latter the fixed plant and other articles in Dalry Engine Works, was that of a security and not an out-and-out sale. It was a transaction in the form of a contract of sale, but it was intended to operate by way of security for an advance of £400. Admittedly there was no actual delivery of the goods to Robertson; they remained in the possession of Hall just as before. If, however, there was truly a contract of sale, and the intention of the parties, as ascertained from the terms of the contract, the conduct of parties, and the circumstances of the case, was that the property should pass, the property passed to Robertson without delivery — section 17 (1) of the Sale of Goods Act 1893. But section 61 (4) of that Act provides—"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." This is in effect a statutory declaration that a pledge of or security over moveables cannot be created merely by completion of what professes to be a contract of sale. If the transaction is truly a sale the property will pass without delivery. But the form of the contract is not conclusive. The reality of the transaction must be inquired into; and if, contrary to the form of the contract, and even the declaration of the parties, it appears from the whole 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.

I gather from the cases of *Beckett* v. *Tower Assets Company Limited* [1891], 1 Q.B. 638, reversing Cave, J. [1891], 1 Q.B. 1, and *Madell* v. *Thomas & Company* [1891], 1 Q.B. 230, that the same latitude of inquiry is permitted in England where the question is, whether what bears to be a sale followed by a contract of hiring and purchase, is not truly a bill of sale requiring for validity registration under the Bills of Sale Acts 1878 and 1882.

The argument which was unsuccessful in those cases was precisely the argument which was addressed to us on behalf of the complainer, viz., that the intention of parties is to be ascertained by the legal effect of the instruments which have been executed; that if a transaction can be legally carried out by means which do not come within the terms of the Bills of Sale Acts, there is nothing to prevent the parties from so carrying it out, although when completed the same result would be produced as if there had been a bill of sale; and that in the absence of fraud or mistake inducing the contract, the Court is not at liberty to disregard the legal effects of the document and ascertain the intention of parties *aliunde*.

In the present case I assume that in the "disposition" executed by Hall everything was done which could be done by form of words to represent the transaction as truly a contract of sale. I agree that there is no reason to doubt the good faith of the parties. They both, no doubt, intended to take effectual steps to exclude the diligence of Hall's creditors, and thought that they had done so. But for all that, the transaction, in substance, was not a sale. It had not the characteristics of a sale, and it had the characteristics of a security, or an attempt to create a security, not only for past, but also for future advances. The back-letter by itself, apart from the actings and admissions of parties, shows the real nature of the transaction. The sum advanced was only £400, whereas the value of the goods was above £2000. Interest was to be paid on the loan, and the capital was to be repaid by instalments; and if further advances were made, it was provided that the transaction should apply to them also. In short, the back-letter discloses, not a loan or hire of the goods, but a loan of £400 on the security of the goods, to be repaid by instalments. There was no proper loan of goods, no proper contract of hiring. Hall's position after the alleged sale was that of undivested proprietor. He was not merely left in possession of the whole of the goods, machinery, and plant, but on Robertson's own admission he was entitled, in carrying on his business, to use up the stock of timber and iron, and was under no obligation to replace it; and he was entitled to use the machinery, plant, and tools just as if they belonged to himself. He had absolute control over them.

I do not propose to examine the series of cases, beginning with *Orr's Trustees* v. *Tullis*, 8 Macph. 936, and including *M'Bain* v. *Wallace & Coy.*, 8 R. 360; and (H. of L.) 8 R. 106, which are referred to in the Lord Ordinary's note. On the cases alone, the decision of this case would have been more difficult. The distinction between some of them is extremely narrow; it is hard to reconcile them; and there are judicial observations, especially in *M'Bain* v. *Wallace & Co.*, which, taken by themselves, go far to support the complainer's argument. Nothwithstanding this, I think I should have come to the same conclusion on the decided cases alone, because only in those cases was the transaction sustained to the effect of excluding the alleged seller's creditors, where on the facts the Court was satisfied that a true contract of sale had been entered into. But these cases were all

decided before the passing of the Sale of Goods Act 1893, and I cannot doubt that sec. 61 (4) of that Act was enacted in view of these decisions, and, in particular, of the opinions delivered in the House of Lords in *M'Bain* v. *Wallace & Co.* Without saying that the statute wholly destroys the authority of that case, it at least establishes the competency of contradicting a formal contract of sale by evidence of contrary intention whenever this is necessary to ascertain the true nature of the transaction. In the present case, as I have said, the evidence, when examined, makes it quite clear that the true intention of parties was to create a security only, although, no doubt, they intended to effect that result through the form of an out-and-out sale.

The Court adhered.

Counsel for Complainer—Sol.-Gen. Dickson, Q.C. — M'Lennan. Agent — Robert Broatch, L.A.

Counsel for Respondent—Lees — Cullen. Agents—Auld & Macdonald, W.S.

Friday, November 13.

SECOND DIVISION.

[Lord Kincairney Ordinary.

BURR *v.* BO'NESS BURGH COMMISSIONERS.

Jus quæsitum — Local Authority — Effect of Resolution dealing with Salaries of Officials.

Held that a resolution to increase the salary of a sanitary inspector, passed at a meeting of a local authority and duly minuted, but not officially intimated to the sanitary inspector, did not give the sanitary inspector a *jus quæsitum* entitling him to enforce the increase.

In 1889 William Simpson Burr was appointed sanitary inspector for the burgh of Bo'ness at a salary of £10 per annum, by the Commissioners of the burgh, who were the Local Authority under the Public Health (Scotland) Act 1867.

On 13th August 1894, at a meeting of the Burgh Commissioners, Thomas Thorburn, the burgh surveyor, was appointed chief sanitary inspector, and also inspector under the Dairies, Cowsheds, and Milkshops Order of 1885, with a salary of £40, and Mr Burr's salary was increased by £10, making it £20 per annum, "said increase to date from 15th May last, in consideration of extra duties in connection with the fever epidemic." These resolutions of the Local Authority were duly minuted. On 15th August 1894 they were intimated to the Board of Supervision, and the intimation was acknowledged on the following day.

No official intimation of the increase of his salary was ever made to Burr. He, however, heard about it casually in conversation in the office of the Clerk to the Police Commissioners on the morning after the meeting at which the resolution was passed.

In a letter to the Secretary of the Board of Supervision Mr Burr maintained that Mr Thorburn's appointment was incompetent, and that the resolutions carried at the meetings of 13th August were invalid, on the ground that no notice of the motion to appoint Thorburn as chief sanitary inspector had been given.

On 10th September 1894, at a meeting of the Burgh Commissioners, they, in respect of the doubts expressed as to the validity of their proceedings on 13th August, unanimously resolved and agreed to cancel and annul the portions of the minute of 13th August relating to the appointment of Thorburn and to the increase of the salary of Burr. The meeting thereafter resolved itself into a meeting of the Local Authority, and appointed Thorburn as chief sanitary inspector, but no resolution was passed increasing the salary of Burr.

Thereafter Burr raised an action against the Commissioners for the Burgh and against the Local Government Board for Scotland for its interest, to have it declared *inter alia* that he was entitled to receive from the Commissioners a salary of £20 per annum until he should resign his office of sanitary inspector, or be removed therefrom by the Local Government Board, and to have the Commissioners ordained to pay him that salary. This action was defended by the Burgh Commissioners.

After proof the Lord Ordinary, on 27th July 1896, found that the pursuer had not instructed right to a salary of £20 per annum, and therefore assoilzied the defenders from the conclusions of the summons for payment of that salary.

Note.— . . . "If the resolution of 13th August had been nothing but a resolution to increase the pursuer's salary, I rather think it would have been effectual and binding on the Local Authority, at all events for a year from 15th May 1895, without formal intimation to the pursuer and without any acceptance by him, and if that had been so, I should have considered that the attempted cancellation of it was ineffectual, although it might be within the power of the Local Authority afterwards to withdraw the addition to the inspector's salary. It may be a question whether a local authority has power to reduce the salary of the sanitary inspector. On this point reference may be made to the case of *The Board of Supervision* v. *The Parochial Board of Old Monkland*, January 17, 1880, 7 R. 469, where an analogous question is considered. But it is not necessary to express any opinion on that point, because here what the local authority did was not to reduce the inspector's salary, but to cancel a previous minute, which I think they could not have done if the previous resolution had been nothing but a resolution to increase the pursuer's salary.

"But then the resolution was not of that simple character, for at the same time the Commissioners appointed Mr Thorburn to be chief sanitary inspector, and they there-