mises referred to in sub-section (3) were premises in which the trade carried on was that of making articles for sale or repairing them for customers, and that the sub-section did not apply to premises in which the work of making or repairing articles was merely incidental to a trade or business which did not consist in selling or giving out the goods in question. Now, the work which is carried on in the appellants' machine-room and workshop and partly in the sheds is not in itself a trade carried on for the sale of articles made or repaired in the machine-room. The trade or business of the appellants is that of carriers and not that of the makers or repairers of tramway cars, and therefore the operations which go on in the machine-room and workshop are simply incidental to that trade or business, although indirectly they may be necessary to earning gains in the appellants' business. The work done is simply necessary repairs on the cars.

That is the footing on which I understood that the case of the *Caledonian Railway Company* v. *Paterson*, 1 F. (J.C.) 24 (in which I concurred) was decided. The Factory and Workshop Act of 1895, section 22, sub-section 1, enacts that with respect to any laundry "carried on by way of trade or for purposes of gain" certain provisions of the Factory Acts, including powers of inspectors and fines, should apply. The laundry in question was attached to one of the Railway Company's hotels, and a complaint was lodged to the effect that in this laundry the Railway Company had failed in terms of the Acts to affix an abstract of the Factory and Workshop Acts, and therefore became liable in a fine. It was held that the laundry was not in the sense of the statute carried on by way of trade or for purposes of gain. The work done in it was (1) washing of hotel linen, (2) washing of the clothing of the hotel staff, and (3) washing of the clothing of visitors to the hotel. The first purpose is the one most applicable to this case. In order to carry on the trade or business of hotelkeepers the company required to have their hotel linen washed (no doubt at considerable expense), just as they required to keep the furniture of the hotel in a good state of repair. That is exactly what the appellants in this case are doing. They do not sell or hire out tramway cars, but they require to keep their rolling-stock in good repair, and they do this with the assistance of their own workmen in their own workshop. I therefore cannot see any solid distinction between the two cases.

Your Lordships, however, are prepared to give a more liberal interpretation to the Factory and Workshop Act, and I cannot say that I regret it, because for the purposes of the Workmen's Compensation Act work carried on in such an establishment is just as dangerous and likely to cause injury to the workmen employed in or about it as work in premises in which the trade carried on is making or repairing articles for sale.

But as your Lordship's judgment finding these premises to be a factory will be attended with not unimportant consequences, such as inspection, I have felt bound to express my dissent.

The Court answered the question of law in the affirmative and affirmed the award of the arbitrator.

Counsel for the Appellants—Campbell, K.C. — Spens. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Claimant and Respondent —M'Lennan—Munro. Agents—Cumming & Duff, S.S.C.

Friday, December 20.

SECOND DIVISION.

[Sheriff Court at Kilmarnock.

ALLAN *v.* JONES & COMPANY'S TRUSTEE.

Right in Security—Transaction in Form of Sale but Intended to Operate by way of Security—Security over Moveables Retenta possessione—Bankruptcy Act 1696, *cap.* 5—*Sale—Sale of Moveables—Sale of Goods Act* 1893 (56 *and* 57 *Vict. cap.* 71), *sec.* 61, *sub-sec.* 4.

In 1899 a borrower, who was a bicycle agent, obtained a loan of £40, and in consideration thereof gave to the lender a promissory-note for that sum, and also as one of the conditions of receiving the loan gave to the lender a receipted invoice for certain bicycles priced at £72, 12s. No price was in fact paid, and the bicycles remained in the possession of the borrower. The borrower having granted a trust-deed for behoof of his creditors on 13th August 1900, and left his business in the hands of a manager, the lender thereafter claimed five of the bicycles invoiced, and at his request the manager sold three of them and paid the proceeds to the lender, and also removed the two remaining bicycles to the lender's house. These two bicycles were subsequently sold by the manager and the proceeds were paid to the lender. On 7th September 1900 the estates of the borrower were sequestrated. In an action at the instance of the borrower's trustee in bankruptcy against the lender for payment of the proceeds of these bicycles, *held* (*diss.* Lord Young) that the receipted invoice was an attempt to create a security over moveables left in the possession of the debtor, that no security was thereby created, that the realisation by the borrower within sixty days of bankruptcy of five of the bicycles specified in the invoice on behalf of the lender was in contravention of the Act 1696, cap. 5, that the payment of the proceeds thereof made to the lender was not in whole or in part a cash payment in ordinary course of business; and that

consequently the trustee was entitled to recover from the lender the entire proceeds of such realisation.

On 7th September 1899 Jones & Company, bicycle agents, Saltcoats (of which firm Mrs Margaret Hunter or Jones was the sole partner), applied for a loan of £40 to William Allan, local agent of the Royal Bank at Saltcoats. The defender stipulated for some security as the condition of granting the loan. Jones & Company offered as security six bicycles then in their place of business at Saltcoats, which offer Allan accepted. On 7th September 1899 Allan took from Jones & Company a promissory-note for £40 in favour of the Royal Bank and a receipted account in the following terms:—

"*The Wheeleries, 27 Dockhead Street, Saltcoats, Sept. 7th* 1899.

Mr Allan

To Jones & Coy., Cycle Builders, Practical Repairers, and Enamellers.

	Nett.		
1 Calcott Lady's Cycle, . .	£14	0	0
1 Lady's Bradbury, . . .	13	0	0
1 Lady's Royal Endfield, . .	12	12	0
1 Bradbury, Gent.'s, . . .	14	0	0
2 Gent.'s Cuninghame Cycles,	19	0	0

JONES & CO.,
7 Sep. 1899,
Paid, with thanks."

In point of fact nothing was paid by Allan for the six bicycles, and possession of them was retained by Jones & Company. In April 1900 one of the bicycles was sold by Jones & Company, with the permission of Allan, and the price of £10 was paid to him, and applied by him in part payment of the loan. On 4th July 1900 a further payment of £5 was made, thus reducing the debt to £25. For this sum a new promissory-note was granted by Jones & Company on 10th August 1900.

On 13th August 1900 Jones & Company executed a trust-deed for behoof of their creditors in favour of Joseph Kirkland, solicitor, Saltcoats, and immediately thereafter Mrs Jones and her husband took their departure for a time, leaving the business in charge of William Donaldson. Before the end of August, Allan went to Donaldson, produced the receipt for the six bicycles, and claimed the five which remained as his property. At Allan's request Donaldson sold three of the bicycles, and paid over the price, amounting to £17, 10s., to Allan. At the same time Donaldson, also at Allan's request, removed the two remaining bicycles along with another claimed by Allan from Jones & Company's place of business to Allan's house. These two bicycles were subsequently sold by Donaldson for £10, 15s., which was paid by him to Allan. On 7th September 1900 the estates of Jones & Company were sequestrated, and thereafter William Brodie Galbraith, C.A., Glasgow, was elected and confirmed as trustee on their sequestrated estates.

In December 1900 Galbraith, as trustee foresaid, raised an action in the Sheriff Court at Kilmarnock against Allan, in which he craved decree (1) for payment of £28, 5s., being the proceeds of the five bicycles sold, and (2) for delivery of the other bicycle, or failing delivery, for payment of £10.

The pursuer pleaded—"(1) The said bicycles, or the realised proceeds thereof, having, at the date of sequestration of the said Jones & Company's estates, formed part of their estate, the defender is bound to pay to the pursuer the price received by him, and to deliver the unsold machine in his possession. (2) The said bicycles having been allowed to remain in the possession of the said Jones & Company until their notour bankruptcy and the granting by them of a trust-deed, no effectual security over the same was secured by the defender, who is therefore bound to make the payment and delivery concluded for, with expenses. (3) In any event, assuming the sale-note to be valid, the defender is bound to pay over the price or the value of the bicycles to the pursuer as trustee. (4) The transaction founded on by the defender is void or at least reducible under the Act 1696, cap. 5."

The defender at first took up the position that he had an absolute right of property in the bicycles. He, however, gave up this contention before the record was closed, and undertook on record to pay the pursuer the balance of £3, 5s. remaining of the price received for the five bicycles after payment of the debt of £25 due to him, and to deliver to them the sixth bicycle still in his possession. After payment and delivery as so offered by the defender had been made the conclusions of the action were restricted accordingly.

The defender pleaded—"(3) *Separatim.* Even assuming the sale of said bicycles made by Jones & Company to the defender on or about 7th September 1899, was intended as a security for a *novum debitum* to be contracted by them to the defender as agent foresaid, and the defender having made the advance before narrated *simul et semel* with the granting of said security, and in reliance thereon, Jones & Company were under obligation to deliver said bicycles to him, and the defender was entitled to enforce delivery thereof from them, or the trustee deriving right from them, at the time and under the circumstances narrated in the foregoing defences. (4) The defender having acquired the property of said bicycles, or at least having been entitled to implement of the obligation incumbent on Jones & Company to deliver the same to him at any time, in taking possession of said bicycles within sixty days of sequestration of their estates being awarded, merely secured specific implement of an obligation for value received, undertaken outside the sixty days, the transaction is not reducible, and the defender, on paying the balance of £3, 5s. in his hands, and delivering the bicycle in his possession, should be assoilzied from the conclusions of the action."

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71) enacts as follows:—Section 61, sub-section (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."

Proof was led, and on 10th July 1901 the Sheriff-Substitute (HALL) pronounced an interlocutor finding the facts as above narrated, and pronouncing further as follows:—"Finds in law (1) that the document [the receipted account] was an attempt to create a security over moveables which were left in possession of the debtor; (2) that no security was thereby created or conferred; (3) that the realisation by Jones & Company, within sixty days of their sequestration, of five of the bicycles specified in the said document, on behalf of the defender, was in contravention of the Act 1696, cap. 5; (4) that the pursuer is entitled to recover from the defender the entire proceeds of such realisation: Therefore repels the defences, and decerns against the defender for £25, with interest, as concluded for."

The defender appealed to the Court of Session.

The arguments on both sides and the authorities are fully set forth in the opinions of the Judges.

At advising—

LORD JUSTICE-CLERK—The facts in this case are (1) that George Jones in autumn of 1899 negotiated an advance from the Royal Bank at Saltcoats for £40 for the aid of the business of Jones & Company; (2) that he granted a promissory-note for the amount to the Royal Bank of Scotland; (3) that on 7th September 1899 Jones & Company delivered to the defender, the agent of the bank, in his own name, a receipt as for six bicycles amounting to £72, 12s; (4) that no bicycles were delivered to the defender or set apart in any way as being his property, but that all the bicycles remained as they had been before in the shop of Jones & Company along with a considerable number of bicycles, amounting in all to twenty or thirty, and that no money was paid by the defender for the bicycles; (5) that between the date of the promissory-note and 10th August 1900 £15 was paid to account of the loan for which the promissory-note had been granted, the £10 being got by the sale of one of the bicycles by Jones & Company, and £5 being paid in consideration of the defender allowing one bicycle to be hired out to a customer; (6) that a new promissory-note for £25 for the balance of the advance was granted to the bank on 10th August 1900; (7) that three days afterwards, on 13th August 1900, a trust-deed for creditors was granted by Jones & Company; (8) that thereafter, towards the end of August 1900, William Donaldson, a salesman of Jones & Company, and by their instructions, sold three of the bicycles, and paid the price, viz., £17, 10s., to the defender, and that he also delivered three bicycles to the defender, and that he sold two of these, and paid the price, £10, 15s., to the defender; (9) that on 7th September 1900 the estates of Jones & Company were sequestrated; (10) that after this action was raised the defender repaid £3, 5s. to the pursuer and delivered up the remaining bicycle to him.

On these facts the question is, whether the defender can be held to have validly secured his debt by the transactions above stated so as to be entitled to claim so much of the proceeds of the sales as to clear off the balance of indebtedness of Jones & Company as at the date when the receipt of 7th September 1899 was granted. That these bicycles were not bought and paid for by the defender is clear. And that they were not taken over to pay off a debt is also clear. For the value is £72 while the debt was only £25. They were intended to be a security both by Jones & Company and by the defender. Jones says so distinctly, and although the defender struggled hard under examination to give the transaction a different complexion from one of security, he failed, and had to admit—"They gave me these cycles in security of the loan to keep me safe," *i.e.*, that as the bank would hold him liable if the debt was not paid, he desired, and they were willing to give him, some security against personal loss. But the security was never made effectual. The debtor retained possession of the goods, they not having been in any way delivered or set aside or even identified. In point of fact the defender himself, so far from holding that special bicycles had been made his, insisted when one of the class of bicycles mentioned in the receipt could not be produced to him, on having another of a different make, and which was not in existence at the time of the receipt being handed over to him.

I am unable to hold that there was here any valid security substantiated. And if there was no security the basis of the defender's case falls away. For there was nothing of the nature of cash payment in ordinary course of business about the transaction. The firm of Jones & Company had incurred a debt to the Royal Bank of Scotland and given a promissory-note to the bank. The plain purpose of the bicycle transaction was security, to secure the bank agent, who knew that he would be held responsible to recoup the bank should Jones & Company fail to meet the promissory-note.

I have therefore come to the conclusion that the Sheriff-Substitute has rightly decided the case.

LORD YOUNG—The appellant Mr Allan is agent for the Royal Bank of Scotland at Saltcoats, and the sole purpose of his transaction with Jones & Company was to obtain for the bank a satisfactory security for the loan to them by the bank of £40 for which they had applied. The security which they offered was the six bicycles specified in the account, which they showed to him standing together on a platform of their shop, of the aggregate value of £72, 10s. If the cycles were to remain where they were—that is, in the possession of Jones & Company, as owners—neither the

bank nor its agent Allan had any security for the desired and contemplated loan. It was, however, possible, consistently with leaving them where they were (in Jones & Company's shop) to transfer the property of them from Jones & Company to Allan by contract of sale, and thereby to give a good security over them to him as the bank's agent and representative. The appellant's case here is that such contract of sale was made on 7th September 1899, and that the loan was made the same day and given and received on that footing—that is, on security afforded by a simultaneous contract of sale. The negotiations and resulting agreement were between Mr Allan, the appellant, on behalf of the bank, the lender, and Mr George Jones on behalf of Jones & Company, the borrower, and were commenced and concluded on the day I have mentioned, 7th September 1899. That Mr Allan had authority to act for the bank is admitted, but it is not admitted that Mr Jones was a partner with authority to act for Jones & Company. I think it is clear that he was a partner, and was properly sequestrated as such. It is stated by the pursuer of this action, the trustee in the sequestration, that he (Mr Jones) was sequestrated as one of the two partners, his wife being the other, and he is so designed in the summons and in the record. It would be idle to dwell on this, it being not doubtful that as to all such matters as negotiating a loan and selling cycles, in which the company dealt, he was, as the Sheriff expresses it, the real Jones & Company. The contract made on 7th September 1899 was not made in writing expressing it by any technical name or names, or specifying its terms, but it is certainly not doubtful that cycles may be sold in a shop without written contract, and that a receipted shop account, such as No. 7 of process, if admitted or proved to be genuine, is *prima facie* evidence of a sale by the therein named tradesman of the goods therein specified, being such as he deals in, and of payment of the price by the person to whom it is addressed and rendered as the buyer of these goods. It is an ordinary document such as is commonly given by a shopkeeper to a customer when he pays his account—his account as buyer of the goods specified. Can any other explanation be given of it? It is proved, indeed admitted, to be genuine, and to have been handed by Jones & Company to Allan on 7th September 1899. I have heard and can conceive no other. But if the only reasonably conceivable purpose of the writing, subscribing and delivering an admittedly genuine written document is to show that one of the two parties therein named, to whom it was delivered by the other, was the purchaser from that other of the goods therein specified, and had paid the agreed-on price, why, I venture to ask, should it not be taken as *prima facie* evidence to that effect between the parties to it? Further, if the party delivering the document desired to give, and the party to whom it was delivered desired to receive, a property title in the specified goods by contract of sale, such as that of which the document is *prima facie* evidence, although to be only used in security, why should the evidence not be received and acted on? I understand the proposition which has been often stated and argued, that however clearly a contract of sale is made in form, if the purpose is to give a security to the formal buyer for a loan, it is ineffectual, indeed invalid. That is what was maintained in the leading case on the subject—*M'Bain* v. *Wallace*, 8 R. 106, and it received very serious countenance from Lord Rutherfurd Clark, who, as Lord Ordinary, held that a sale made for that purpose, and for that purpose only (of giving a security for money lent) was not good in law not good as a sale—that the transaction was to be regarded only as a security, and that a security over goods could not be given without delivery, although property in goods sold might be given without delivery, not only by virtue of the Mercantile Law Amendment Act, but also at the common law if the seller retains possession on arrangement with the buyer. But the Mercantile Law Amendment Act, which subsisted when *M'Bain's* case was decided, dispensed with the necessity of delivery in any case of sale. This Court decided the case of *M'Bain*, irrespective of that Act, on the ground that the seller retained possession in fulfilment of his contract with the buyer. The case went to the House of Lords on appeal, and there the judgment was affirmed, although no doubt the Mercantile Law Amendment Act was pointedly noticed as affording sufficient answer to the argument rested on non-delivery, but without questioning or casting doubt on the soundness of the view of the law on which this Court, irrespective of the Mercantile Law Amendment Act, rejected that argument. I think it right also to notice that the noble and learned Lords, while indicating doubts of the sufficiency of the evidence on which the Court held that a security for loan was the sole purpose of the contract, expressed their belief that in all probability it was, and that the view of this Court to that effect was probably right; but whether it was or not, and assuming it to be intended as a security only, that nevertheless the sale was good without any delivery—a perfectly good sale, although the only object was to give security to the lender of money by the borrower, who was *ex facie* the seller. I refer to the judgment of the Lord Chancellor, which distinctly expresses his view to that effect. Lord Blackburn puts it thus:—"It has been endeavoured to be argued that if there was here by the side of the contract of sale a collateral agreement that the ship should be only held as security, that would prevent the contract of sale operating under the Mercantile Law Amendment Act so as to require no delivery to prevent any diligence or sequestration. I cannot agree with that argument at all. I do not think that the point exactly arises here. I listened to the observations of the noble and learned Lord on the Woolsack, and I agreed in the reasons he gave. It seems to me that in this case

the contract of sale was agreed upon probably with the motive and intention that the party should thereby be able safely to make advances and have the security of the goods that had been sold to him, but whatever the motive and intention might be it was as clear a contract of sale as anything could possibly be in its inception. I think that is perfectly plain. The evidence also leaves no doubt upon my mind that there was in this case a feeling of moral obligation on the part of Messrs Wallace that, if this ship should turn out to be worth much more than £2500, they would not keep the surplus." Therefore, it is no objection to the contract of sale that the only purpose of it was a security to the *ex facie* buyer. It is quite legitimate thus to give security to an *ex facie* buyer who is really a lender. I pointed out in the opinion I delivered in that case of *M'Bain* that banks frequently lend money upon the security of a property title given upon what is *ex facie* a disposition upon a contract of sale, the property being restored to the seller upon the loan being paid or he getting any surplus of price, if the bank sold the property, exceeding the amount of the loan. A bank (or any honest lender of money) would act on that footing if according to the truth of the arrangement, but it never was dreamt of as impeaching the security by a contract giving a buyer's title that the real purpose and intent of the contract was a security for money, and that the disponer should have the property back on paying the loan, or in the event of a sale get any excess of price beyond the amount of the loan. Now, in the case of *M'Bain* the lender of the money maintained (and we decided against him) that he was under no obligation so to deal with it; that is to say, to pay back any excess over the amount of the loan or to restore the security to him. Has anything happened to alter the law decided in that case? It was followed in *Liddell's Trustees*, 20 R. 989. The same question again came up in the case of *Robertson* v. *Hall's Trustees*, 24 R. 120. In that case I dissented from the judgment upon the grounds which I there stated. These were in brief that the case was ruled by the decisions of the House of Lords and of this Court in the cases I have referred to and the grounds of them. But it was there very specially noticed by Lord Moncreiff when referring to the previous decisions—"But these cases were all decided before the passing of the Sale of Goods Act 1893, and I cannot doubt that section 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 & Company*. 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." The decision, as I pointed out, in the *M'Bain* case was before 1893—the date of the Sale of Goods Act,—and therefore it proceeded upon the law as it then stood. Now, what is this section 61 of the Act, sub-section (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." This language indicates unmistakably, I think, that in the opinion of the legislature a transaction in the form of a contract of sale may be intended to operate by way of mortgage, pledge, charge, or other security, and lawfully may so operate, and the only purpose of the clause in which it occurs is to leave the law applicable to every such transaction as it stood before the Act—that is, as it stood when the cases of *M'Bain* and of *Liddell's Trustees* were decided. That law was sufficient for such transactions in England as well as Scotland, and there were obviously some detailed provisions in this Sale of Goods Act which might have given rise to questions if applied to such transactions which it was desirable to avoid by declaring them all inapplicable, as they were certainly unnecessary. Your Lordships will remember a recent case with regard to a clause in a contract for building a ship (*Carmichael, Maclean, & Company's Trustee* v. *Macbeth & Gray*, December 6, 1901, 39 S.L.R. 188), where the Court, in regard to materials, plates, and other things for the building of the ship, brought by the shipbuilder to his building yard, declared that the same had become the property of the customer as purchaser. The question there was—the shipbuilder having become bankrupt when only the keel had been laid down, but when some thousands of pounds' worth of plates had been purchased by him and laid down in his shipbuilding yard—had these been sold to the customer so that he as buyer could take possession of them as security for his claim of damages against the shipbuilder for not fulfilling his contract? Lord Low held it was not a sale, and pointed out very distinctly that the word "sale" was not used with reference to these plates and materials. We held it was a sale, although the sale of these plates could only be available to the customer—that is, the merchant who had ordered the building—could only be used by him as a security for some claim of his against the shipbuilder. I pointed out that in my view it could not possibly operate otherwise. They were only lying there as materials when the contract was given up, that is to say on complete breach of the contract on the shipbuilder's bankruptcy and inability to proceed. The customer had to go elsewhere, and the question was whether he was to have possession of the material as security, and only as security, for his claim of damages. We held that he was, altering the judgment of Lord Low. The result necessarily was that his admitted claim of damage (£7000) would be paid to the extent of £2000 by this security created by formal contract of sale.

I am therefore of opinion that there was here a good contract of sale. That was what the parties intended. The intention

of neither could have been accomplished without it, because without it Allan, *i.e.*, the bank which he represented, would not have had the security which he desired, and without which Jones & Company would not have got the loan.

I am of opinion that the judgment of the Sheriff ought to be reversed.

LORD TRAYNER—In September 1899 the bankrupts Jones & Company (whose trustee the pursuer is) applied to the defender for an advance of £40. This he agreed to give on security being found for the repayment. The form which the transaction then took between the parties was that the bankrupts invoiced to the defender six bicycles, part of their stock-in-trade, at the price of £72, 10s., and receipted the invoice acknowledging that that price had been paid. In fact, no purchase was made by the defender, and he did not pay £72, 10s. or give anything more than the agreed-on advance of £40. The bicycles were not delivered to the defender but remained with the bankrupt, but with the consent of the defender they sold one of them and handed over the price (£10) to the defender, thus reducing their debt to £30. A further payment of £5 was made so that at the date of their bankruptcy £25 was the balance due to the defender. In August 1900 the bankrupts found that they could carry on business no longer—they were in fact insolvent—and in that month they granted a trust-deed for behoof of their creditors in favour of a Mr Kirkland, and quitted the place where their business had been carried on. The bicycles (the one sold excepted) were at that time still in the hands of the bankrupts. The defender says that "they all remained in the warehouse for some time after Jones & Company had left the district." After they had done so the defender informed Donaldson, whom the bankrupts had left in charge of their premises and stock, that certain of the bicycles belonged to him. Donaldson sold three of the bicycles so claimed and handed the price (£17, 10s.) to the defender. He also delivered to the defender two bicycles on the defender's statement that they were his. These were afterwards sold and the price paid to the defender. The pursuer now calls on the defender to pay over to him as trustee on Jones & Company's estate (sequestrated on 7th September 1900) the proceeds received from the sale of the five bicycles. It is clear that the attempt to create a preferable security in favour of the defender over the bicycles was not effectual, for no preferable security can be created over moveables left in the debtor's possession. But had Jones & Company sold the bicycles and paid over the price in cash to the defender, such a payment could not have been challenged although made within sixty days of bankruptcy. This the defender maintains is what took place, at least in so far as the payment of £17, 10s. is concerned. I think such a contention cannot receive effect. The bankrupts neither sold the bicycles nor paid the price to the defender. Mrs Jones (who claims to be the sole partner of the firm) says—"Five of the cycles were in my shop when I granted the trust-deed. Delivery of these five cycles was never given to the defender with my knowledge and approval." It was only on her return to Saltcoats to be examined as a witness in the case that she "learned for the first time that the cycles had been sold and the price paid to the defender;" and she adds "I was surprised at it." If Mrs Jones was the sole partner of the business, and therefore sole owner of the cycles, it is plain that the defender's contention that the cycles were sold by the bankrupts, who therefore made him a cash payment, is not consistent with fact. But assuming that Mr Jones was also a partner (although I think it proved he was not) no difference is thereby made upon the case. He says he told Donaldson that the cycles belonged to the defender and that their price was (when sold) to be handed to him. That was a thing which he could not authorise. If he was not a partner he had no power to dispose of the stock one way or another; if he was a partner he was equally debarred from disposing of the stock which he had already conveyed by trust-deed for behoof of the company's creditors. Jones thought that the transaction in September 1899 had given the defender a real right in the cycles, and he quite honestly wished the defender to get what he (Jones) believed him entitled to. But this view on the part of Jones as to the extent and character of the defender's right will not make that right better or higher than the law recognises it to be. Accordingly, I think the defender cannot retain the £17, 10s. on the ground that it was a cash payment made to him by the bankrupts. Nor can he retain the proceeds of the cycles delivered to him by Donaldson and afterwards sold. These were the property of the bankrupts at the date of their sequestration, and passed to the pursuer as their trustee. The defender had no title to them—never had any title to them—and having sold what was the bankrupts' property, must account for the price thereof to the pursuer.

The principles of law applicable to this case appear to my mind so clear that I should not have thought of citing any authority in support of the conclusion I have arrived at. If authority is needed, I may refer to the case of *Robertson*, 24 R. 120. But reference has been made to the cases of *M'Bain* v. *Wallace* and *Macbeth & Gray* (recently decided in this Division of the Court), (39 S.L.R. 188), as authorities against the course which we here propose to take. I certainly cannot so regard them. In *Macbeth & Gray's* case our judgment proceeded upon the construction of a private contract, which we held imported a sale of certain articles, the property in which, according to the provisions of the Sale of Goods Act 1893, had passed to the buyer, although not delivered to him, because it was the intention (the expressed intention) of parties that the property should so pass. In *M'Bain* v. *Wallace* the Lord Ordinary held that the transaction there in question was one under which it had been

attempted to create a security in favour of a creditor over moveables which remained in the possession of the debtor. This his Lordship held to be ineffectual in a question with the debtor's trustee in bankruptcy. The House of Lords reversed that decision on the ground that the transaction was not one of security but was a *bona fide* sale, the price under which had been paid, and that therefore the buyer was entitled to the thing sold under the provisions of the Mercantile Law Amendment Act 1856. The difference in the decisions turned entirely upon the difierent views taken of the facts, as appears from the opinion of Lord Watson, who said that if the Lord Ordinary's view (that it was a security for a loan and not a sale) was "well founded, the judgment of the Lord Ordinary undoubtedly is equally so." Now, in this case the essential fact is not open, I think, to dispute. The defender admits that it was a security for a loan that he wanted and thought he had got. It was not a purchase by him. The case of *M'Bain*, therefore, rightly considered, is an authority not against but in support of the decision we are now to pronounce.

I think the appeal should be dismissed.

LORD MONCREIFF—According to the receipted account the transaction between the appellant and Jones and Company (on 7th September 1899) was a sale of six bicycles at the price of £72, 12s., which the receipt bears was paid to Jones & Company by the appellant. It is beyond doubt that, although in point of form a sale, this transaction was merely an attempted security for a loan of £40 made by the appellant to Jones & Company, for which the appellant took a promissory-note at three months. This promissory-note was renewed from time to time, the last renewal being dated 10th August 1900, by which time the sum due under it had been reduced to £25.

If the transaction had been a sale which was not intended to operate by way of pledge or other security, the property in the six bicycles would have passed to the appellant in terms of section 17 of the Sale of Goods Act 1893, although they were not delivered to him. But as, though in the form of a contract of sale, it was intended to operate by way of security, the provisions of section 17 of the Act did not apply, because by section 61 (4) of the same Act it is provided—"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."

If the Mercantile Law Amendment Act (19 and 20 Vict. c. 60), sec. 1, had still been in force, the provisions of that section might possibly, if there really had been a sale, though intended to operate as a security, have served the appellant's purpose, because under it, where goods had been sold but not delivered to the purchaser, and allowed to remain in the custody of the seller, the purchaser was entitled as in a question with the seller's creditors to enforce delivery. I do not say that it would, but it would have been arguable on the analogy of an *ex facie* absolute disposition of heritage. But that enactment was repealed by the Sale of Goods Act 1893; and now the purchaser's right to demand delivery of goods sold but not delivered depends upon the provisions of the later Statute, which, as I have shown, do not admit of property passing without delivery where the sale is intended to operate by way of pledge or security. I should like to add that I do not dispute that a good security can be effected by means of a sale; but then the sale must be completed by delivery or by what the law considers equivalent to delivery.

As to the case referred to by Lord Young, which was recently decided in this division, *Macbeth & Gray* v. *Carmichael, Maclean, & Company's Trustee*, December 6, 1901, 39 S.L.R. 188, it is sufficient to say that in that case there was an out and out sale of the plates and other materials and not a security in the shape of a sale. That was the sole ground of judgment.

To revert to the facts of this case, it was not part of the bargain between Jones & Company and the appellant that the bicycles should be delivered. On the contrary, the arrangement was that they were to remain in the possession of Jones & Company, and that if and as they were sold the money was to be handed to the appellant till the loan was fully paid up. But Jones & Company came under no obligation to sell them, and there was nothing to prevent them replacing them with others of the same make and value. and there was nothing to distinguish them from others. While they still (with the exception of one which had been sold) remained in the possession of Jones & Company, that firm got into difficulties, and on 13th August 1900 executed a trust-deed in favour of their creditors, and on 7th September 1900 their estates were sequestrated under the bankruptcy statutes. It was not until after 13th August 1900 that the appellant took possession of six bicycles, which he said were the same, and had them removed from the warehouse. Thereafter at his orders some of them were sold and the price, £28, 5s., paid to him.

I am of opinion that, the appellant having obtained possession of the bicycles in these circumstances after Jones & Company had executed a trust-deed in favour of their creditors, and within sixty days of their bankruptcy, no effectual security was created in his favour, and the money obtained by their sale was not a payment in cash or in the ordinary course of trade. If they had been delivered to the appellant before Jones & Company's failure, and had then been re-delivered for sale on the appellant's account, it might have been different. Therefore, in any view, the transaction was in contravention of the Act 1696, cap. 5. I do not doubt that the appellant was under the impression that he had effected a valid security, but as the bicycles were allowed to remain in

the possession of Jones & Company, the appellant at the date of Jones & Company's failure had no right to obtain possession of them or to retain their price when sold by his orders. I am therefore of opinion that the Sheriff-Substitute's judgment is right and should be affirmed.

The Court pronounced this interlocutor:—"Dismiss the appeal and affirm the interlocutor appealed against: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor appealed against: Therefore of new repel the defences and decern against the defender for payment to the pursuer of the sum of £25 sterling, with interest as concluded for: Find the defender liable in expenses in this Court," &c.

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

Counsel for the Defender and Appellant—Ure, K.C.—Hunter. Agent—William Croft Gray, S.S.C.

Saturday, December 21.

FIRST DIVISION.

WELSBACH INCANDESCENT GAS LIGHT COMPANY, LIMITED *v.* M'MANN.

Process—Breach of Interdict—Petition and Complaint — Failure of Respondent to Appear—Procedure—Form of Interlocutor.

Procedure and form of interlocutor pronounced in a petition and complaint for breach of interdict where the respondent, although represented by counsel, failed to appear personally, and having been ordered to attend failed to obtemper the order.

On 12th June 1901 the Welsbach Incandescent Gas Light Company, Limited, presented a petition and complaint against David M'Mann, 241 George Street, Aberdeen, in which they alleged that he had been guilty of breach of interdict.

Answers were lodged by the respondent in which he denied having committed breach of interdict.

A proof was taken before Lord Adam on 20th July 1901.

When the case came on for hearing upon the evidence before the First Division, the respondent was represented by counsel, but failed to appear personally, and the case was continued for a week to give him an opportunity of appearing. He again failed to appear, and the Court on 14th December 1901, on the motion of the petitioners, pronounced the following interlocutor:—"Appoint the respondent to appear personally at the bar of this Court on Saturday next the 21st instant at ten o'clock a.m., under certification that if he do not obtemper this order warrant for his apprehension will be issued."

The respondent failed to obtemper this order, and on 21st December 1901 the Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the petition and complaint, and heard counsel for the complainers, in respect that the respondent David M'Mann has failed to appear at the bar of this Court in obedience to the order contained in the interlocutor dated 14th December current, on the motion of the complainers grant warrant to macers of Court and messengers-at-arms, or other officers of the law, to search for, take, and apprehend the person of the said David M'Mann, now or lately carrying on business as the Incandescent Fittings Company at No. 241 George Street, Aberdeen, and residing at No. 88 Great Northern Road, Kittybrewster, Aberdeen, respondent, and if so apprehended during session to incarcerate him in the jail of Edinburgh or other jail in Scotland, and thereafter with all convenient speed to bring the person of the said David M'Mann to the bar of this Court on any sederunt-day during session to answer in the matter of the said petition and complaint, and if so apprehended during vacation to incarcerate the said David M'Mann in the jail of Edinburgh or other jail in Scotland, therein to remain till the first sederunt-day of the ensuing session, and on that day to bring the person of the said David M'Mann to the bar of this Court to answer in the matter of the said petition and complaint, and if necessary for the purpose of so apprehending the person of the said David M'Mann grant warrant to open shut and lockfast places; as also grant warrant to magistrates and keepers of prisons to receive and detain the said David M'Mann as aforesaid: Further, authorise execution hereof to pass on a copy hereof certified by the Clerk of Court, and decern *ad interim*."

Counsel for the Petitioners — W. J. Robertson. Agents — Davidson & Syme, W.S.

Counsel for the Respondent—D. Anderson. Agent—C. M'Laren, Solicitor.

Saturday, December 21.

SECOND DIVISION.

[Sheriff Court at Glasgow.

KERR *v.* DARROCH.

Process — Proof — Witness — Filiation and Aliment—Calling Defender as Pursuer's First Witness.

Opinions per Lord Justice-Clerk, Lord Trayner, and Lord Moncreiff — that a pursuer in an affiliation case is entitled to call the defender as her first witness; that as she is only exercising her legal right there is not anything improper