

ledgments constitute *prima facie* evidence against the bank. I think it is not doubtful that if a customer of the bank should pay money into the bank agent's hands, and that he instead of paying it into the bank puts it into his own pocket, he is a thief from the bank, and the bank is responsible for the money so paid in. In this case Mr Reid was agent and factor for these trustees, and he received trust funds and embezzled a certain portion of them. With respect to the items there seemed to be a certain confusion, but the parties have now reduced the sum to about £80. The question is, whether Reid embezzled this money as factor, or as agent for the bank? He filled both capacities, but he could not embezzle in both capacities; the money could not be embezzled twice; he must have embezzled it in one capacity or the other. If he embezzled it as a factor for the trustees, then the money was never paid into the bank, but the suggestion of the pursuers is that he passed it from himself as factor to himself as agent for the bank, and then embezzled it, so that the money was in the bank's hands, and they are now liable to repay it. Now, looking at it as a matter of fact, I do not think that that view has much to recommend it. I think the money had never been paid into the bank before it was embezzled, and therefore it never came into Reid's hands as bank agent. And I think the facts as they were told us as regards the latter two items which have two sets of initials to them point in the same direction, for while initialing the items himself he forged the initials of another official of the bank. If the sums of money had come into his hands as bank agent there would have been no necessity for his forging the name of the other official. When he made up his pass-book no one can tell, for he kept it in his own possession, and probably no eyes but his own ever saw it, but I think the conclusion to which the forgery points is that he never paid the money into the bank. The doquets in the bank ledger also are evidence that the money was never paid. I therefore agree with the finding of the Sheriff-Substitute, and hold it proved as matter of fact that the bank never received the sums claimed by the pursuers. That being so the *prima facie* evidence of the pass-book has been displaced by satisfactory evidence that the money was not paid in, and I would suggest to your Lordships that we should dismiss the appeal with expenses.

LORD RUTHERFURD CLARK and LORD LEE concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor:—

“Find in fact that on 1st November 1886 the balance due by the defenders on the cash account with Richard Reid as agent and factor for the pursuers was £1, 17s., and that on 1st November 1887 there was a balance due to the defenders on said account, and that no sum is now due by the defenders to the pursuers: Therefore dismiss the appeal, and affirm the interlocutor of the Sheriff-Substitute appealed against: Find the defender entitled to expenses,” &c.

Counsel for the Pursuers—Balfour, Q.C.—Murray. Agent—Donald Mackenzie, W.S.

Counsel for the Defenders—Low. Agents—Mackenzie, Innes, & Logan, W.S.

Wednesday, February 6.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MURDOCH & COMPANY, LIMITED *v.* GREIG.

Possession—Sale—Suspensive Condition—Hiring Agreement—Reputed Ownership.

A customer obtained a harmonium from a firm of music-sellers under a contract whereby she undertook “to pay to them a deposit of 30s. on delivery of the harmonium, and a further sum of £1 every four weeks thereafter as hire, until the full price shall have been paid, when the goods shall be the property of the hirer, without any further payment whatever.” It was further stipulated that until the full sum was paid “the hirer should have no property in the goods otherwise than as a hirer.”

The sum stipulated was deposited on delivery, and one instalment of 20s. was paid; thereafter the customer left the country, and on her instructions her furniture, including the harmonium, was sold by public roup.

In an action by the music-sellers against the purchaser of the harmonium—held that the pursuers were entitled to delivery thereof, on the ground that the transaction between them and their customer was a sale under a suspensive condition, and that as she had not paid the full price, no right of property had passed to her, and therefore she was not in a position to give a good title to the defender.

On 11th December 1886 Mrs Taylor, 4 Bellgrove Street, Glasgow, obtained from John G. Murdoch & Company, Limited, pianoforte and harmonium dealers, 83 and 85 Union Street, Glasgow, a harmonium in terms of a signed agreement whereby she undertook, *inter alia*, “to pay to the owners the sum of 30s. on delivery of the said harmonium, as deposit, and a further sum of 20s. every four weeks thereafter as hire until the full amount of £15, 15s. (including the deposit) shall have been paid, when the goods shall be the property of the hirer without any further payment whatever; and she further undertook ‘to keep the goods in the hirer's own custody;’ further, that the hirer should ‘have no property in the goods otherwise than as a hirer thereof only;’ and said contract or agreement provided further, that ‘should the hirer through change of circumstances be unable to continue such payments he may transfer his interests in the goods under this agreement to any responsible person (to be approved of by the owners in writing) who shall continue the payments in the stead of the hirer.’” The agreement contained, *inter alia*, the following condition—“2. The hirer agrees that until the said full sum be paid the hirer shall have no property in the goods otherwise than as a hirer thereof only, and that if the hirer

do not duly observe this agreement the owners may put an end to the hiring, and retake possession of the goods; and in case they do so, that all payments that may have been made shall be in respect of the use and tear and wear of the goods only, and not for the purchase of the same."

Mrs Taylor paid the deposit of 30s., and a further sum of 20s., being one month's hire of the said harmonium. She made no further payments in respect of the said harmonium.

On 19th April 1887 a public sale of furniture took place at No. 4 Bellgrove Street, Glasgow. It was conducted by Mr Tait, auctioneer, Glasgow, who acted under the instructions of the tenant of the house, the said Mrs Taylor, and ostensible proprietrix of the furniture. The furniture included the harmonium in question, which was purchased for £8 by John Greig, cooper, Glasgow, who on payment of the purchase price obtained delivery of the instrument.

Murdoch & Company raised an action against Greig in the Sheriff Court at Glasgow, concluding for delivery to them of the said harmonium. They averred that Mrs Taylor did not transfer her interest in the said harmonium to any person approved of by them, and that the purchaser Greig had no legal title to the instrument.

At a proof before the Sheriff-Substitute the defender deponed that he saw the sale of furniture advertised by bills in the street, and attended it in consequence; that among the furniture exposed was the harmonium in question, and that he secured it for £8. In cross-examination he deponed—"I had before that seen the hire-purchase system casually advertised. I did not see the makers' name on the harmonium."

The pursuers pleaded that as the harmonium was their property they were entitled to delivery thereof by the defender, in whose possession it was.

The defender pleaded, *inter alia*—“(1) The defender having in *bona fide* purchased the harmonium referred to at a public sale by an auctioneer, instructed by the ostensible owner of the instrument, and having paid the price thereof, he is not bound to deliver it to the pursuers as craved. (2) In any case, in the circumstances he is not obliged to deliver the instrument to them without being repaid the price thereof paid by him. (4) The pursuers having put the said Mrs Lister Elliot or Taylor in possession of the instrument referred to, the defender was entitled to rely upon her being owner.”

On 4th July 1887 the Sheriff-Substitute (SPENS) sustained the first plea-in-law for the defender, and assoilzied the defender.

In a note he explained that his judgment was based on two grounds—“(1) Reputed ownership, and (2) that the transaction in question must be regarded as a sale to Mrs Taylor in a question with a *bona fide* purchaser from her.”

The pursuer appealed to the Sheriff (BERRY), who on 31st May recalled the said interlocutor and ordained the defender to deliver the harmonium as craved.

“Note.—Two questions arise in this case—(1) whether the contract between the pursuers and Mrs Taylor was a contract of sale or of hire, and (2) whether the doctrine of reputed ownership applies to the case. In regard to the former question, namely, as to the nature of the contract, it is clear that the mere language which

parties have used in describing their contract is not conclusive of its nature. It may be that the terms of their agreement are such as to show that it has been a contract of sale, although they may have given to it the name of a contract of hire. This is shown in particular by the case of *Cropper & Company v. Donaldson*, 7 R. 1108, where a transaction bearing to be a hire was held by the Court to be truly a sale. In the present case the contract bears to be one of hiring, and a consideration of its terms leads me to think that that is its true nature. The terms differ materially from those in *Cropper & Company's* case, where a bill at three months was at once granted for £58, which was the price of the instrument, and that amount was to be payable by instalments at intervals of three months, the bill being renewable in each case for the instalments still remaining due. In effect, the ground of judgment was that there was an attempt to create a security over a moveable subject belonging to the debtor. Here a certain sum was to be paid every four weeks as hire; and no doubt when the sums paid amounted to £15, 15s. the harmonium was to become the property of the hirer, but it seems to me that the transaction is to be regarded as substantially and in effect one of hire, and that the rights of the parties are to be governed by the rules applicable to that contract. If the case is treated as one of hire, it follows that the hirer had no power by a sale to confer a valid title on a third party, without at all events that party being approved by the pursuers, in terms of the third condition attached to the contract.

“The question then arises whether the doctrine of reputed ownership can avail the defender. I do not think that it can. On this point I may refer to the judgment of the Second Division in *Marston v. Kerr's Trustee*, 6 R. 898, where it was held that the principle of reputed ownership is not applicable where a subject is in the possession of a person on a limited title under a fair and ordinary contract; and again to the judgment of the same Division in *Hogarath v. Smart's Trustee*, 9 R. 964, where the Lord Justice-Clerk said—“The cases of hire and purchase have all proceeded on this, that the title of possession was good without attributing it to purchase, and no one is entitled to attribute possession to a title which would carry the property where there is a subordinate title to which it may be ascribed.” Here, on the assumption that the contract was one of hiring, there was a subordinate title to which Mrs Taylor's possession was attributable, and it is material that the defender admits that he had seen the hire purchase system advertised. He was therefore not ignorant of the existence of such a right of possession as that of possession under a contract of hire and purchase, and he has the less ground for complaining of having been deceived. At the same time, his good faith is not disputed, and the question is, on which of two innocent parties, the pursuers or the defender, the loss can fall. It is said that *Brown v. Marr and Others*, 7 R. 427, justifies the view that the loss must be thrown on the pursuers, who enabled the fraud to be committed. That case, however, was materially different, in respect that the goods were placed in the hands of a retail jeweller for the express purpose of his selling them. Here there was never any intention on the part of the

pursuers that Mrs Taylor should dispose of the goods in any way without their consent. The fact that the sale was by public auction does not seem to me to affect the rights of parties, inasmuch as it is not suggested that the pursuers were aware of the sale till afterwards. I regret in these circumstances to be obliged to take a different view of the case from that taken by the Sheriff-Substitute."

The defender appealed to the Court of Session, and argued—This was a case of sale, or of concurrent hire and sale; it could in no case be called a simple case of hire, as the monthly instalments were out of all proportion to what would in such a case have been paid. Besides, the so-called hirer had no right to terminate the contract, and might have been compelled to pay the agreed-upon monthly sum. The money paid was not hire, but was an instalment of the purchase price—*Cropper & Company v. Donaldson*, July 8, 1880, 7 R. 1108. Or it might be called a sale with a suspensive condition—*Marston v. Kerr's Trustee*, May 13, 1879, 6 R. 898; *Clark & Company v. Miller & Son's Trustee*, June 3, 1885, 12 R. 1035; Bell's Prin., sec. 109; Bell on Sale, 80, 110. Besides, the article was purchased at a public sale, and in such a case mere fraud by the hirer would not (as theft would) tell against the purchaser—Bell's Prin., sec. 1320; *Henderson v. Gibson*, M. voce "Moveables," App. 1; Broun on Sale, sec. 32. There could be no analogy drawn from the law of England, which on this matter materially differed from the law of Scotland, and to give effect to the pursuers' contention would be to allow the owner to retain a security over moveables—*Crawcour v. Salter*, 18 Ch. Div. 30; *Hattersby v. Blanshard*, 8 Ch. Div. 601; *ex parte Brock in re Fowler*, 23 Ch. Div. 261; *Cropper & Company v. Donaldson*, *supra*; *Marston v. Kerr's Trustee*, *supra*.

Argued for respondent—This was a contract of hire and purchase, but there was to be no completed sale until the last instalment of the price was paid. The conditions of the agreement between the parties made that clear. The possession of this harmonium by Mrs Taylor could quite well be explained by something short of sale, it was really a contract of hiring with an agreement for sale in a certain event; hire and sale were not necessarily incongruous, and this was a case in which in certain events the one was to grow into the other. *Cropper's* case was clearly distinguishable from the present, which much more closely resembled *Marston's* case (*supra*), because if this was to be viewed as really a contract of sale, then there was clearly a suspensive condition to which effect must be given—Stair, i. 14, 4; Ersk. iii. 3, 11; 1 Bell's Comm. 257. This was a suspensive sale, where in spite of delivery no property passed—Bell's Prin., sec. 1315; *ex parte Watkins*, L.R., 8 Ch. App. 520.

At advising—

LORD PRESIDENT—In this case a Mrs Taylor obtained possession of a harmonium from the pursuers under a contract, the precise terms of which must be carefully attended to. By the conditions of her agreement she, on getting possession of the instrument, made a deposit of 30s., and thereafter she paid a sum of 20s., which was

the first of a series of periodical payments which she undertook to make to the pursuers. No further payments were, however, made by her, and shortly after she disappeared. Some time after her furniture was disposed of by public sale, and along with it the harmonium in question, which was purchased by the defender Greig for £8.

The pursuers now seek to have the harmonium restored to them, on the ground that it belongs to them, and that the property in it was never transferred to Mrs Taylor. They further say that the contract upon which delivery of the harmonium was made was one of hire, and never became anything else in consequence of Mrs Taylor not implementing her part of the bargain, but that it would undoubtedly have become sale had Mrs Taylor carried out her part of the agreement.

The defender, on the other hand, says that from beginning to end the contract was one of sale, and nothing else, and in that contention I entirely agree with him. No doubt the contract is called in the agreement one of hiring, but it is really sale. When we look at the conditions upon which delivery of this instrument was made to Mrs Taylor, as set out in article 2 of the condescendence, we see that the undertaking on the part of Mrs Taylor to deposit the sum of 30s., and to pay £1 per month thereafter for the time specified, is absolute, and that she cannot resile from the bargain and send back the harmonium. Now, how can this in any sense be called a contract of hiring, especially when it is kept in mind that the payment of fourteen monthly instalments would amount to the whole value of the instrument. No doubt these monthly payments are called hire, but they really are instalments of price, and this becomes the more apparent when, as I have remarked, we compare these monthly payments with the total value of the harmonium. Seeing, then, that the so-called hire has no proportion to the value of the instrument, these monthly payments can only be viewed as instalments of the price. Therefore the true construction of this agreement is, that it was a contract of sale, the purchase price of the article to be paid by monthly instalments until the whole was paid, and the other conditions contained in the agreement go, I think, to support this view. It appears to me that this case is much stronger than that of *Cropper*, to which we were referred in the course of the argument, and although I do not desire to throw any doubt on the decision in that case, I still think that this is in every way a much stronger case.

But a further point was raised by the pursuer, namely, that if this contract is to be viewed as one of sale, it yet has a suspensive condition, and if that condition is not performed the property of the article does not pass to the purchaser. Now, this is a much more difficult question, but in the present case the intention of the parties is, I think, made quite clear by article 2 of the conditions attached to the agreement—"The hirer agrees that until the said full sum be paid the hirer shall have no property in the goods otherwise than as a hirer thereof only, and that if the hirer do not duly observe this agreement the owners may put an end to the hiring, and retake possession of the goods, and in case they do so that all payments that may have been made

shall be in respect of the use and tear and wear of the goods only, and not for the purchase of the same."

Now, the terms of the agreement are very clearly expressed, that until the full price was paid no property in the article was to pass, and that, I think, is a suspensive condition in the fullest sense of the word. What effect, then, has a condition of this kind in a contract like the present.

Upon this matter Stair (i. 14, 2) says:—"Sale being perfected and the thing delivered, the property thereof became the buyer's if it was the seller's, and there is no dependence of it till the price be paid or secured, as was in the civil law, neither hypothecation for the price" Then in sec. 4, after dealing with pactions for reversions, he proceeds—"As to the pactions adjoined to sale, sometimes they are so conceived and meant that thereby the bargain is truly conditional and pendent, and it is not a perfect bargain till the condition be existent; neither doth the property of the thing sold pass thereby, though possession follow, till it be performed, as if the bargain be conditional only upon payment of the price at such a time, till payment the property passeth not to the buyer."

Commenting on these passages, Elohies (notes on Stair, p. 80) states this further proposition, which is no more than a corollary from the text, that "if in bargains there be conditions or clauses suspensive of the bargain, till the existence or non-existence of which the property is not transmitted, no doubt such clauses will likewise affect singular successors, for the buyer could not transmit the property which he had not."

Mr Mungo Brown, a high authority on this branch of the law, in his comprehensive and scientific treatise on the Law of Sale, after examining all the authorities and cases, sums up the matter thus—"When a sale is made under a suspensive condition, the contract is not complete till the accomplishment of the condition. It is not to be supposed from this, however, that the agreement of parties produced no effect in the intermediate period, or that no right whatever arises to either party from the imperfect contract. On the contrary, while the condition is yet pendent, neither party is at liberty to resile, any more than in the case of an unconditional bargain; and if the condition happens to be accomplished, the accomplishment of it had a retrospective effect to the date of the contract, so that if either party have died in the interim his right under the contract will pass to his heir."

Now, these are very clear expressions of the principle of a suspensive condition, and they have frequently received effect in a series of decisions. But in most of the cases their principles are covered up by specialties, and so we hardly find in the decisions so clear an enunciation of the principle of a suspensive condition as in the passages which I have just quoted. Here nothing is left to implication, for it expressly declared that until the full price is paid the hirer is to have no property in the goods otherwise than as a hirer only. Now, that condition being so distinctly expressed, I come to be of opinion that while I still hold this to be a contract of sale, yet I am for deciding in favour of the pursuers, on

the ground that Mrs Taylor had no right of property in this instrument, and was not therefore in a position to sell it to another.

I am therefore for giving effect to the judgment of the Sheriff, though I base my decision of the case upon slightly different grounds.

LORD MURE concurred.

LORD SEAND—I am of the same opinion, and I adopt all that your Lordship has said.

The appellants having purchased this harmonium at the sale of Mrs Taylor's effects, the question comes to be, whether she had the right to sell it? If she was the proprietor, then undoubtedly she was in a position to give a good title.

It does not appear to me that the circumstance of this instrument having been purchased at a public sale can have any bearing on the present question, because Mrs Taylor can give no higher title than she herself holds. She had not the property of the harmonium, because it was specially stipulated that there was to be a certain sum deposited, and a certain number of monthly payments, and that these were to go on until the full amount of £15, 15s. was paid, when, and not until then, the goods were to belong to her. That being so, the contract was to my mind undoubtedly one of sale. Had Mrs Taylor had the option of returning this instrument, then the contract would undoubtedly have been one not of sale, as there would not have been any obligation upon her to have continued making these periodical payments, and the sums that she had would have been accounted as hire for the use of the instrument.

But I see nothing in this contract to suggest any option on Mrs Taylor's part. She had to pay the full amount agreed upon, and she could have been compelled to continue making these monthly payments. The contract therefore was one of sale, but with a suspensive condition. There was delivery under the contract, but the suspensive condition was that the property of the instrument was not to pass until all the monthly instalments of the price had been paid.

Seeing, then, that the property of this instrument was not in Mrs Taylor, she certainly was not in a position to sell it.

LORD ADAM—Whether this contract be viewed as one of hiring or of sale, it appears to me that the result must be the same. If the contract was one of hiring, then of course the property in this instrument never passed; but I agree with your Lordship in viewing this contract as one of sale under a suspensive condition that the harmonium was to become the property of Mrs Taylor whenever, but not before, all the instalments of price were paid. That was a proper suspensive condition, and the sale was not completed until all these instalments were paid. As this condition was never fulfilled, the property in this harmonium did not pass to Mrs Taylor, and the original owner accordingly is now entitled to recover it.

The Court adhered.

Counsel for the Pursuers—Strachan—A. S. D. Thomson. Agent—William Officer, S.S.C.

Counsel for the Defender—Guthrie—Wilson. Agent—L. M'Intosh, S.S.C.