

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 assolized 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-

by reduced the position of the pursuer to that of an assistant or subordinate. Whether they had power to do that without the consent of the Board of Supervision or Local Government Board may be open to question, but the Board of Supervision took no exception, and by letter dated 25th August 1894 addressed to the pursuer, the Secretary of the Board of Supervision intimated that 'the Board considers the appointment of a chief sanitary inspector quite legitimate.' The additional salary therefore appears to have been given only on condition that the pursuer agreed to act in subordination to Mr Thorburn. It was substantially a modification of his appointment, and it appears to me that it could not be effectual without his assent. Now, it is certain that up to the date of this action the pursuer never admitted the position of Mr Thorburn. In his letter of 11th October, addressed to the Local Authority, he states that he holds that he is 'still the chief sanitary inspector, and entitled to be recognised as such.' Hence I consider that when the question came up for consideration on 10th September the Local Authority was not bound by the resolution of 13th August in relation to the pursuer's salary, because the pursuer had not assented to the condition on which the addition to the salary was conceded."

The pursuer reclaimed, and argued—The Burgh Commissioners having legally increased the pursuer's salary to £20, were not entitled to reduce it afterwards. No intimation of the increase to the pursuer was necessary. Although there might be no contract between the Commissioners and the pursuer, yet the pursuer, after the resolution had been passed and intimated to the Board of Supervision, acquired a *jus quesitum* to a salary of £20. The local authority, by raising the salary of the pursuer to that amount had thereby confessed that £20 was a proper salary for the pursuer, and were not entitled to reduce it. The resolutions to appoint Mr Thorburn as chief sanitary inspector, and to increase the pursuer's salary, were separate resolutions, and did not stand or fall together. Even if the pursuer never admitted that Thorburn was his superior officer, that did not show that he objected to his own salary being increased.

Argued for defenders—The increase of salary never took effect. The pursuer's salary was to be increased only as a part of the arrangement under which he was to assist Mr Thorburn, who was appointed chief sanitary inspector. The pursuer, having objected to Thorburn's appointment, had repudiated the whole arrangement, including his own increase of salary. Even although the increase had been intimated, that gave the pursuer no *jus quesitum* to demand it until the increase had been intimated to him and accepted by him. Merely hearing of the matter in conversation was not intimation in a legal sense.

LORD JUSTICE-CLERK—The question is, whether the pursuer is entitled to £20 per annum as salary instead of the £10 per

annum he formerly received. It appears that the Burgh Commissioners, who are the Public Health Local Authority of Bo'ness, passed a resolution that the pursuer was to receive a salary of £20. But this was only done as part of an arrangement which involved the appointment of a superior officer to the pursuer. The resolution came to his knowledge, but no official intimation of increase of salary was ever given to him. At the next meeting of the Commissioners the resolution was rescinded. I think this was competent, unless anything had been done giving the pursuer a *jus quesitum* to enforce the increase of his salary. In my opinion nothing was done giving him such a right. I think the Lord Ordinary is right in holding that the pursuer is not entitled to compel the defenders to give him a salary of £20. It is very remarkable that he himself held that the meeting of the Commissioners which granted the increase was an illegal one, his reason being that it had not been formally constituted as a meeting of the Local Authority, but even if the competency of the proceedings at the meeting be assumed, I am of opinion that the pursuer has not established his right to an increase of salary.

LORD TRAYNER—I have come to the same result. The view which the Lord Ordinary takes is a narrower ground than that now proposed as the ground of our judgment, and I am not prepared to assent to it. I think a sufficient ground of judgment is that the resolution of the local authority was never intimated to the pursuer. He has therefore no *jus quesitum*. I am of opinion that the defenders must be absolved, on the ground that the pursuer never acquired any right to an increase of salary, no increase ever having been intimated to him.

LORD MONCREIFF—I agree in the result arrived at. I rest my opinion on the ground that the pursuer has no *jus quesitum* to enforce a rise of salary, the resolution of the local authority never having been intimated to him, and having been rescinded mainly in consequence of his own objections. As at present advised, I do not agree in the grounds on which the Lord Ordinary rests his judgment, but I agree in the result at which he arrives.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuers—Jameson—Younger. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders The Bo'ness Burgh Commissioners—W. Campbell—Cook. Agents—Waddell & McIntosh, W.S.