to great risks from any sudden change in the state of that market was a vice inherent in the constitution of the company and in the nature of their business, and when the bad times actually came the insolvency of the company was produced by the nature of the securities which they held, and not by misconduct in the management. It is quite obvious therefore that in the absence of any general statement of the kind which I have referred to, and which was made in all the previous cases, the allegations of the pursuer must be confined to matters of detail, and he must substantiate that in these matters of detail there was upon the part of the directors false and fraudulent misstatement calculated to deceive, and which did mislead the pursuer in acquiring the shares of this company.

Now, I am not going through the details of this case. I have had the benefit of reading Lord Mure's opinion, and I entirely concur in the view that he takes of the facts and the evidence. I shall therefore confine myself entirely to stating shortly the legal principles upon which I think this and all similar cases fall to be disposed of.

The directors of a company have access to knowledge of the company's affairs which is not enjoyed by the shareholders and the public, and therefore when they address the shareholders, and the public through the shareholders, they are bound to be cautious in the statements they make. But the office of director is very different from that of manager or of auditor of a company. These last-mentioned officers are bound by the nature of the duties devolving on them to be fully acquainted with the real state of the company's business and the contents of the books. This is not, and cannot be, expected from the directors. They cannot be expected to devote so much time and attention to the business as this full knowledge would require. They rely, and are entitled to rely, on the honesty of the paid officials, and on the accuracy of the statements they receive from them. Further, a man becoming a director of a company does not necessarily hold himself out as a person of exceptional intelligence—indeed there is no guarantee or assurance that he is a person even of average intelligence. He may be selected as a director by the shareholders not because of his intelligence or business capacity, but because, though perhaps a man of very little intelligence, he is from other causes influential or popular, and therefore likely to promote the business of the company. When, therefore, directors are charged with making false and fraudulent statements to the shareholders regarding the affairs of the company it is not sufficient to say that they might by ordinary diligence, or even with very little further inquiry, have satisfied themselves that the statements were inconsistent with fact. If they make the statements in the *bona fide* belief that they are true, they are not guilty of fraudulent misrepresentation merely because in the judgment of the Court or of a jury they had not reasonable—which I understand to mean sufficient—grounds for believing the statements to be true; for this would be to make them answerable for the erroneous inference which they draw from the facts within their knowledge, which is only an error of judgment. A man making a statement on any subject which he believes to be untrue, though he does not know it to be false, is dishonest, but if he merely makes a statement which he does not actually believe to be true, that is a negative state of mind, and his honesty or dishonesty will depend on his relation to the facts which he states, and to the persons whom he addresses. A statement on a matter of indifference both to the speaker and the listener, even though the speaker has no actual belief in the truth of the statement, provided he does not believe it to be false, will not infer dishonesty on his part. He is not seeking to mislead anybody. But a statement of facts made regarding a matter of interest both to speaker and listener stands in a very different position. If the speaker, having no actual belief in the statement, though not believing it to be untrue, volunteers the statement, inconsistent with facts, to a person interested in the statement, and likely to act on it, he is dishonest and guilty of deceit, because he produces, and intends to produce, on the mind of the listener a belief which he does not himself entertain. It has been said that if a person in such a position, having full means of information within his reach, turns his back on the light, and wilfully abstains from acquiring the requisite information he ought to be answerable for the statement which he makes if it be contrary to fact. To this proposition I assent, because the person making the statement in the circumstances supposed can have no actual belief in its truth. The legal proposition which I desire to state will apply to no man who has not a *bona fide* belief in the truth of the statement. But if there be such belief, then, in my opinion, there is no occasion to refer to the sufficiency or insufficiency of the grounds of that belief unless they be so slender or flimsy as to destroy the idea of *bona fides*. Upon that ground, therefore, I concur with the judgment which your Lordships pronounce, being of opinion on the evidence that the directors in this case entertained a *bona fide* belief in the truth of the statements which they made.

The Lords adhered.

Counsel for Pursuer and Reclaimer—Lord Advocate (Balfour, Q.C.)—Trayner—Wallace. Agent—David Hunter, S.S.C.

Counsel for Defenders and Respondents—Solicitor-General (Asher, Q.C.)—Mackintosh—Pearson. Agents — Carment, Wedderburn, & Watson, W.S.

Friday, March 17.

SECOND DIVISION.

[Sheriff of Forfarshire.

ROBERTSONS *v.* M'INTYRE.

Bankruptcy—Sale—Bona fides—*Reputed Ownership—Mercantile Law Amendment Act* (19 *and* 20 *Vict. c.* 60), *sec.* 1.

The tenant of a factory having been sequestrated, the proprietors claimed the machinery, on the ground that it had been sold to them, and was at the date of the sequestration let to the tenant. *Held* that as the evidence showed a *bona fide* contract of sale, and as possession by the tenant had been continued after the sale on a separate contract, viz., a contract of hiring, the trustee in bank-

ruptcy was not entitled to retain the machinery on the ground of reputed ownership by the tenant.

The appellant and defender in this case was the trustee on the sequestrated estate of George Robertson, manufacturer in Dundee. The respondents and pursuers, the Misses Robertson, were two sisters of the bankrupt. The material facts of the case as disclosed on proof were these:—The pursuers were proprietors of a factory in Dundee which they let to their brother George Robertson in the month of February 1880. At the time when Mr Robertson became tenant of the factory, or very soon thereafter, he purchased the looms and machinery which form the subject of the present action, most of which, if not the whole, had been in the factory before Mr Robertson's occupancy began. The machinery so bought remained in the factory down to the time of Mr Robertson's sequestration in June 1881. In or about the month of August 1880 Mr Robertson, who was in need of ready-money, proposed to his sisters, the pursuers, that they should purchase from him the foresaid machinery at a price then named. The pursuers and their brother concurred in stating that the former on 2d August 1880 bought the foresaid machinery from the latter at the price of £270, 18s., which sum on that day they paid to him. A receipt for that sum and of that date was produced. No actual or corporal delivery was then given to the pursuers, but at the time when the purchase of said machinery was made it was arranged between the pursuers and their brother that they should enter into a formal lease of the factory and the machinery, the lease under which Mr Robertson held being then a merely verbal one. A formal lease was accordingly executed by the pursuers and their brother on 18th December 1880, under which the factory, and *inter alia* the machinery in question, were let to Mr Robertson for a period of two years from and after 2d August 1880, which was declared to be the date of the tenant's entry. Mr Robertson continued tenant of the factory and in possession of the machinery down to the date of his sequestration in June 1881. In these circumstances the defender, as trustee on Mr Robertson's sequestrated estate, claimed the machinery in question as belonging to the estate, and having advertised it for sale, the present action was brought to have him interdicted from doing so.

The Sheriff-Substitute (CHEYNE) found in fact as stated, and also:—"(5) That notwithstanding the sale and lease just mentioned, and notwithstanding also that the pursuers must have known for a considerable period preceding his sequestration that he was in embarrassed circumstances, George Robertson continued to have the full beneficial use and enjoyment of the articles sold by him to the pursuers as aforesaid down to his sequestration, and was at the date thereof the reputed owner of them;" and in law that the machinery belonged to the sequestrated estate, and that the trustee was entitled to sell it, and assoilzied the defender accordingly.

He added this note:—"The story of the purchase is in its details a most improbable one, but improbable as it seems I cannot bring myself — having seen the pursuers — who both gave their evidence in a way which impressed me with their truthfulness — to say that I disbelieve it. There, however, my agreement with the pursuers stops; for granting that the transaction of 2d August took place in the way described, I must nevertheless hold that the subjects of it fell under the sequestration, and are now available to their brother's creditors. Had the sequestration occurred before 18th December, I do not well see how any serious doubt could have been felt on the point. Till that date, at all events, there had not been the slightest change in the possession, but the bankrupt had continued in the beneficial use and enjoyment of the articles just as before the purchase, and that being so, the case of *Sim* v. *Grant* (3d June 1862, 24 D. 1033) is, as I read it, a direct authority for saying that section 1 of the Mercantile Law Amendment Act could confer no right on the pursuers to demand delivery after the sequestration. I am aware, indeed, of the *dictum* of the present Lord Justice-Clerk (8 Macph. 947) to the effect that the case of *Sim* v. *Grant* has been misunderstood, and that the statute applies in all cases where goods sold have been allowed to remain in the custody of the seller. But with the utmost possible respect for his Lordship, I find it impossible to reconcile his *dictum* with the opinions delivered in *Sim* v. *Grant*, and it is pretty evident from the report of the case in which it was uttered that Lord Gifford, who was Lord Ordinary in the case, and Lord Cowan would not have agreed with it. Assuming, then, that the pursuers would have had no case had the sequestration occurred prior to 18th December, does the fact that on that date a lease of the factory and its contents, including the articles now in dispute, was executed by the pursuers in favour of their brother, make any difference in the result? I am very clearly and decidedly of opinion that it does not. The case is markedly different in its circumstances from the case of *Orr's Trs.* v. *Tullis* (2d July 1870, 8 Macph. 936) which was founded on so strongly by the pursuers, and in which the *bona fides* of the purchaser was established in a variety of ways. In the present case I doubt extremely whether the execution of the lease, looking to all its surroundings, can be called a *bona fide* transaction. No doubt, it may be said that the parties in executing the lease were only carrying out an understanding arrived at when the purchase was made, but it is somewhat suspicious to find the thing put into writing just at the time when the bank was pulling the bankrupt up. Another thing to be kept in view is, that at the date the lease was signed the pursuers, or at least the elder sister, must have had a pretty good idea that their brother was in deep water; and, again, the appearance of the transaction is not improved by the fact that the rent stipulated for in the lease is precisely the same as the bankrupt was paying before the sale, or by the way in which it was gone about—without the intervention of an agent, and in the presence of witnesses specially brought from a distance to act as such. Let it be, however, that the execution of the lease operated a change in the character of the bankrupt's possession, and constituted the pursuers proprietors of the articles, the assumption will not in my opinion help the pursuers. In that view I have no hesitation in saying that the case is eminently one for the application of the doctrine of reputed ownership. To bring that doctrine into play there must of course be something indicating gross carelessness or collusion on the part of the true owner. Here

it seems to me abundantly plain that the pursuers have laid themselves open to the charge of gross carelessness and—not using the word in any very offensive sense—collusion, for, to say nothing of the privacy with which the transaction was gone about, I take it to be a fact that by the end of the year the pursuers must have had at least a general knowledge that their brother's affairs were in an embarrassed condition, and if in that knowledge they permitted him to remain in apparently uncontrolled possession of the goods, so enabling him to obtain a false credit, I think they are most justly subjected to the penalty of seeing the goods carried off by his creditors."

The Sheriff (TRAYNER) adhered to the findings in fact, with the exception of the fifth above quoted, recalled the interlocutor, and granted interdict, adding the following note:— . . . . . "In dealing with this case it appears to me that the first question to be settled is, whether the sale of the articles in question by Robertson to the pursuers was or was not a *bona fide* sale? A number of circumstances are referred to by the defender as casting doubt upon the *bona fide* character of the transaction. I do not go into these in detail, but I have considered them all carefully, and while admitting that the circumstances referred to may reasonably enough give rise to some doubt or suspicion, I have arrived at the conclusion, reached also by the Sheriff-Substitute, that the sale on 2d August was perfectly *bona fide* so far as the pursuers were concerned—that they did really buy and in cash down pay for the articles in question. This, however, is not enough. There may have been a *bona fide* sale and price paid without excluding the applicability of the doctrine of reputed ownership, and it remains to be seen whether the circumstances of this case are such as to admit of the application of that doctrine. Mere possession is not enough to raise the presumption of ownership; it must be collusive possession, which Professor Bell defines (or perhaps I should say describes) to be a possession where the appearance of ownership is carried beyond the purpose or occasion of a legitimate contract—powers of disposal are ostensibly given or allowed to be assumed (Bell's Prin., sec. 1316). On the other hand, where the possession is such as is fairly required or had 'under some contract requiring temporary possession, the same presumption does not arise. Thus possession under any of the contracts of commodate, deposit, pledge, hiring, &c., does not raise the presumption of ownership' on which creditors are entitled to rely (Bell's Prin., sec. 1315). In the present case it appears to me that the possession of the articles in question had by George Robertson fell under this latter description. He had the use of them undoubtedly, but no power of disposal. His use and possession were just those and none other than he could or would have had if the articles in question had all been the property of the pursuers at the time their brother became their tenant in February 1880. The possession of the articles which George Robertson had after the 2d of August 1880 was the possession of a tenant under a contract of lease, and not the possession of a proprietor. I have therefore come to be of opinion that there is no room in the present case for the application of the doctrine of reputed ownership.

"The Sheriff-Substitute refers to the case of *Sim* v. *Grant*, 24 D. 1033, as ruling the present case. But the cases seem to me to differ very materially. In *Sim's* case the seller not only remained in possession, but did so with a 'power to sell'—a power which he tried to exercise. The seller had thus a possession falling clearly within the definition of 'collusive' possession already quoted from Professor Bell. Another case illustrative of the same principle will be found in *Edmond* v. *Mowat*, 7 Macph. 59. The nearest case to the present with which I am acquainted is that of *Orr's Trustees* v. *Tullis*, 8 Macph. 936, the circumstances of which were very similar to the present. I regard the judgment in that case as conclusive of the present. In the present day the doctrine of reputed ownership admits of less frequent application than formerly. It is notorious that machinery, and even household furniture, are now the subjects of hire to an extent that was till recently unknown. Creditors are therefore, or should be, more upon their guard in giving credit merely in respect of the things possessed or used by their debtors. For the reasons I have given, I hold that the doctrine of reputed ownership has no application in the present case.

"But further, I am of opinion that the pursuers are entitled to prevail under the provisions of section 1 of the Mercantile Law Amendment Act of 1856. That section appears to me to apply in terms to the present case. We have here a sale of certain goods, which have, however, been allowed to remain in the custody of the seller, and these are the only conditions necessary to entitle the purchaser to the benefit which this Act confers. I am aware that a good deal has been said on *Sim* v. *Grant* and other cases as to what 'custody' means in the sense of the Act. But I need not go back upon these cases, as there has been a more recent judicial interpretation of the clause now under consideration in the case of *M'Meekin* v. *Ross*, 4 R. 154. In that case the Lord President says (p. 160)—'I think that there can be no doubt that the section of the Act of Parliament refers to the case of a present sale where there is a right *ad rem specificam*, and where a certain price has been paid and immediate delivery may be required.' I think all these conditions are fulfilled here. There was a present sale and a right *ad rem* acquired. There was a price paid and immediate delivery might have been required. That delivery was not actually taken only arose from the special circumstances that the pursuers instead of using the articles themselves or re-selling them, leased them or lent them on hire to the person from whom they were bought. This, however, was a mere accident, and did not in any way qualify the preceding contract of sale completed between the parties.

"I am not certain that there is not ground for holding that the articles in question were not only sold but delivered on 2d August 1880, and that the possession after that date was the possession of the pursuers themselves through their tenant. But it is unnecessary to determine that if I am right in the views already expressed."

The defender appealed to the Court of Session, and argued against the *bona fides* of the sale and the lease, maintaining that the *onus* of proving it was on the pursuers, which they had not done.

Additional authorities—*Anderson* v. *Buchanan*,

Dec. 22, 1848, 11 D. 270; *Duncanson* v. *Jefferis' Trustees*, Mar. 4, 1881, 8 R. 563; *M'Bain* v. *Wallace & Co.*, Jan. 7, 1881, 8 R. 360, *aff. ib.* July 27, 1881, H. of L. 106; M'Laren's Bell's Com., i., 272.

At advising—

LORD JUSTICE-CLERK—We have had the advantage of an able argument in this case, and it involves questions of some interest. I have now come to be of opinion in favour of the judgment under appeal. The facts of the case are very simple. The proprietor of this machinery was tenant under his sisters of the factory in which the machinery was placed. Being in want of money he applied to his sisters to purchase the machinery in their factory. This, they say, they agreed to do, and both seller and purchasers concur in stating that the price was paid to the seller, and the property in the machinery was transferred to the purchasers. That is their statement. Some months afterwards a formal lease of the factory and the machinery in it, per inventory, was executed by the sisters in favour of their brother, and he continued to possess the factory and machinery. About six months after the date of this lease the brother became bankrupt; and the question now raised is, whether the machinery is the property of the sisters, who are said to have purchased it, or whether it has passed to the trustee in his sequestration? I am of opinion that that question has been settled already by authority, and it almost seems as if the trustee thinks so too, because he states as the ground of his claim that in point of fact no such sale or lease as is spoken to by the bankrupt and his sisters ever took place or existed. I think that it is sufficiently proved that there was a contract of sale, and that there followed on it the payment of the price. There is not a scrap of evidence to raise the suspicion that there was no sale, and no one to contradict the persons who state that a sale took place. In addition to this evidence, moreover, we have the real evidence of the lease which was executed.

With regard to the authorities on this branch of the law, the Sheriff-Substitute seems doubtful whether some expressions of mine in the case of *Tullis* are sound law. That case was decided without reference to the Mercantile Law Amendment Act, and Lord Neaves entirely concurred in the opinion I then expressed. In the more recent case on this branch of the law (*M'Bain* v. *Wallace*, in the House of Lords) I find Lord Blackburn saying—"A simple creditor who issues process and poinds the goods might at common law poind them as against that person who sold the goods, if that person retained the *jus in re*, though he had lost the *jus ad rem*; notwithstanding the statute he may poind them as a creditor where the possession of the vendor (to borrow the phrase used by Lord Justice-Clerk Inglis in the case of *Sim* v. *Grant*) has been allowed by the purchaser to be such as is quite inconsistent with his having the *jus ad rem* by virtue of his personal contract of sale." That is precisely what I said in the case of *Tullis*. *Tullis* gave effect to the principle of Bell, that where possession is continued on a separate contract, and on a distinct and separate title, the doctrine of reputed ownership is not available at all. I find nothing to distinguish this case from that of *Tullis* except the want of any public notification of change of possession, but this is not necessary so long as the transaction is honest, and as to that I entirely concur with the Sheriff-Principal. This being so, the Mercantile Law Amendment Act ceases to be of importance. On this point I shall only read Lord Watson's definition in the case of *Wallace*. Referring to the difference between the laws of England and Scotland on the subject he says—"In Scotland it undoubtedly had not that effect, and in order to place a purchaser in Scotland in the same position as a purchaser in England in questions with creditors of a bankrupt or the assignee or trustee in sequestration of a bankrupt, the Legislature did not enact that in Scotland the completion of a personal contract should pass the property, or have the effect of delivery, but it did enact, by the 1st section of the statute of 1856, that as in a question with the creditors of the seller, or with the trustee in a sequestration of the seller, the purchaser under a personal contract of sale should have precisely the same right to enforce delivery of the goods sold as he would have had against the bankrupt had he remained solvent." Therefore, if this case had disclosed a case of sale only—simply *retenta possessione*—the Mercantile Law Amendment Act would have applied, but it is not so.

LORDS YOUNG and CRAIGHILL concurred.

LORD RUTHERFURD CLARK—I am also of the same opinion. It is necessary that the pursuers should prove a contract of sale. It has been proved here, and that the price was paid. With that qualification, if it be a qualification, I concur.

The Court dismissed the appeal.

Counsel for Respondents (Pursuers)—Pearson—Dickson. Agent—Alexander Wardrop, L.A.

Counsel for Appellant (Defender)—Mackintosh—Hay. Agents—Rhind, Lindsay, & Wallace, W.S.

Friday, March 17.

SECOND DIVISION.

[Lord Lee, Ordinary.

YELLOWLEES *v.* ALEXANDER, *et e contra.*

(Before Lords Young, Craighill, and Rutherfurd Clark.)

Property—Recompense—Bona fide *Possession—Meliorations—Relevancy.*

A person to whom heritable subjects had been conveyed in trust for a body of creditors, of whom he was the chief, having died, his sons, who were his trustees in his private trust property, though without any title, and estate, entered on the management of the sold it to a person who possessed it for many years and expended certain money in repairs and improvements upon it. The sale was made under a minute of agreement by which the sellers undertook to make up as good a title as possible to the subjects, and the buyer undertook to raise no question as to their title. After thirty years the sellers