having anything on it of the nature of advertisement in addition to the word "margarine," so placed as to be a description of the thing enclosed, then that would require to be done by a new enactment making that clear. We can only deal with the statute as we find it, and I hold that in this case the accused did not contravene the statutory enactment that in selling margarine he should deliver it in or with a paper wrapper having printed thereon in capital letters, not less than a quarter of an inch square, "Margarine," and that therefore this appeal should be dismissed.

LORDS YOUNG and RUTHERFURD CLARK concurred.

The Court dismissed the appeal with expenses.

Counsel for the Appellant—Lees—Ure. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondent—Comrie Thomson—George Watt. Agents—Clark & Macdonald, S.S.C.

COURT OF SESSION.

Tuesday, July 18.

SECOND DIVISION.

[Sheriff of Lanarkshire.

BARR *v.* W. WARR & COMPANY.

Bankrupt—Sale—Right in Security—Lease—Assignation of Furniture accompanied by Agreement of Lease and Back-Letter.

A applied to B for the loan of £250, and B agreed to advance him that sum on the conditions embodied in the following deeds:—By assignation, A, in consideration of the sum of £250 paid to him by B, sold, assigned, and transferred to B, and his successors and assignees whomsoever, the whole household furniture and effects in his dwelling-house, surrogating and substituting B in and to his full right and place in the premises, and warranting the assignation to B at all hands. By minute of agreement of the same date as the assignation, B agreed to let the furniture on hire to A for three years at a yearly hire of £108, 6s. 8d., payable half-yearly, and in the event of A failing to make timely payment of the hire it was agreed to be in the option of A to cancel the agreement and take possession of and remove or sell the furniture as he thought proper. A back-letter, also of the same date, signed by both parties, set forth that it was understood that A was to have the furniture re-assigned to him in payment of £325, and that he was to pay this sum by half-yearly instalments of £54, 3s. 4d., and that as A had granted to B his acceptance at six months for £325, B undertook to renew this bill for its amount, less each instalment paid, at the end of every six months till the whole sum was paid. The back-letter also set forth that in the event of A's retiring the said bill or any of the renewals he should forfeit all his right in the agreement of lease, and B should be entitled in his option to resume possession of and sell the furniture, and do whatever diligence he might think fit under the bills, and that it was distinctly understood that until A paid the whole instalments he was to have no right of property in the furniture, but that the same was B's absolute property, with this proviso, that B should count and reckon for any surplus remaining in his hands from the proceeds of the sale of the furniture, or sums realised under the bill after payment of the £325 and costs. In the back-letter A also arranged to give B the further security of an insurance on his life for £200, the policy to be maintained till the £325 was repaid.

A having become bankrupt before payment of the £325 to B, *held* that in virtue of the above transaction the furniture was the property of B, and therefore did not form part of A's estate at the date of his sequestration.

In October 1886 James Liddell, proprietor of Leewood, Dunblane, applied to W. Warr & Company, billbrokers, London and Glasgow, for a loan of money. They agreed to lend him to £250 on the conditions contained in the following deeds:—An assignation, dated 4th October 1886, was granted by James Liddell to W. Warr & Company in the following terms—"I, James Liddell, commission merchant, Glasgow, in consideration of the sum of £250 sterling now paid to me by W. Warr & Company, bill brokers, London and Glasgow, do hereby sell, assign, and transfer to and in favour of the said W. Warr & Company, and their successors and assignees whomsoever, All and sundry the whole household furniture and plenishing situated in the dwelling-house known by the name of Leewood, Dunblane, or wherever else the same may be, conform to an inventory thereof annexed and subscribed by me as relative hereto, together with my whole right, title, and interest in and to the same, surrogating hereby and substituting the said W. Warr & Company in and to my full right and place in the premises, with entry at the date hereof, which assignation above written I oblige myself and my representatives whomsoever to warrant to the said W. Warr & Company at all hands." On the same date a minute of agreement was entered into between W. Warr & Company of the first part, and James Liddell of the second part, which agreement "witnesseth that the first party have agreed, and hereby agree to let on hire to the second party the whole household furniture and plenishing belonging to the first party situated in the dwelling-house known by the name of Leewood, Dunblane, and that on the terms and conditions following, viz.—First, The first party hereby let on hire to the

second party the said household furniture and plenishing for the period of three years from and after the date hereof. Second, The hire payable by the second party to the first party shall be £108, 6s. 8d. sterling per annum, payable half-yearly, beginning the first half-yearly payment at the expiry of six months from the date hereof, and the next half-yearly payment at the expiry of six months thereafter, and so forth, half-yearly, during the currency hereof. . . . Third, In the event of the second party failing to make timely payment of any of the said half-yearly payments of hire, it shall be lawful to and in the power and option of the first party to cancel this agreement without any intimation, and forthwith to take possession of the said furniture and plenishing, and remove the same, or sell and dispose thereof as they shall think proper. The whole expenses of these presents shall be borne by the second party." The following back-letter, dated 4th October 1886, was delivered by W. Warr & Company to James Liddell —"With reference to the assignment by you in our favour of the household furniture in Leewood, Dunblane, and the minute of agreement of lease between you and us, by which the said furniture has been let on hire to you, it is understood that you are to have the furniture re-assigned to you by us on payment of the sum of £325 as after mentioned; you are to pay the said sum by half-yearly instalments of £54, 3s. 4d., beginning the first payment at the expiry of six months from this date; and as you have granted us your acceptance at six months for the said sum of £325, we undertake to renew at the maturity thereof the said bill for the full amount thereof, less the said instalment, at the same currency, and thereafter in the same way at the end of each six months' renewing for the balance less the instalment then paid, until the whole amount is paid. As the said instalments are the amounts which you are taken bound to pay under the said agreement of lease, and the agreement between us is that on your paying up the full amount of £325 foresaid the furniture is to become your property, in the event of your failing duly to retire the said bill or any of the renewals thereof in the manner before provided you shall thereby forfeit your whole right and interest under the foresaid agreement of lease, and we shall in our option be entitled to resume immediate possession of the said furniture, and sell and dispose thereof as we shall think proper, and to do whatever diligence we may think fit under said bills or otherwise, and it is distinctly understood that until payment has been made by you of the whole instalments as aforesaid, you are to have no right of property in the said furniture, but the same shall remain our absolute property, with this proviso only, that we shall be bound to count and reckon with you and your representatives for any surplus that may remain in our hands from the proceeds of the sale of said furniture, and any sums that may be realised on the said bill, or any renewal thereof, after paying ourselves the costs that may be incurred by us in connection with the realisation, and the whole sums we could have demanded from you in the regular carrying out of the transaction entered into between you and us. In connection with the said transaction you have further entered into an arrangement whereby a policy of insurance on your life for £200 shall be taken out with the Queen Insurance Company, in name of Mr Robert Burns M'Caig, accountant, Glasgow, and you are to pay the annual premium, keep up and maintain the said policy in force until the full sum of £325 has been paid as before provided, whereupon the said policy shall be assigned to you or any party to be named by you, all at your expense." This back-letter was signed by both parties to the transaction. James Liddell gave his bill for £325 to W. Warr & Company, and insured his life as arranged in the back-letter.

James Liddell repaid the £325 to W. Warr & Company in instalments.

In October 1889 W. Warr & Company advanced £300 to James Liddell on the same footing as the former advance. The original assignation, dated 4th October 1886, was allowed to stand, but a new minute of agreement and back-letter, dated 18th October 1889, were executed. They were in the same terms as the former minute of agreement and back-letter, except that the furniture was let for four years, and the hire was £50 each half-year. The furniture was thus to be re-assigned to James Liddell on payment by him of £400 in eight half-yearly instalments of £50 each. W. Warr & Company also took James Liddell's acceptance for £400 as arranged in the new back-letter.

James Liddell paid two instalments of £50 each on 21st April and 18th October 1890 to account of the advance of £400. On the latter date James Liddell also renewed his bill for £300.

On 24th December 1891 the estates of James Liddell were sequestrated, and John M'Queen Barr was appointed trustee therein. From the date of the transaction in 1886 W. Warr & Company had never at any time physical possession of the furniture or of the key of the house.

On 5th April 1892 the furniture and plenishing at Leewood were sold by arrangement between the parties, and under reservation of their rights, and realised the net sum of £104, 8s. 3d.

Messrs Nicolson, Macwilliam, & Company, the holders of this fund, thereafter raised an action of multiplepinding in the Sheriff Court of Lanarkshire at Glasgow in order that the Court might decide who was entitled to the money.

Claims were lodged by John M'Queen Barr and W. Warr & Company.

John M'Queen Barr pleaded — "This claimant, as trustee in the sequestration of the said James Liddell, is entitled, by virtue of the Bankruptcy Act, to be preferred to the whole fund, and further, (1) The claimants W. Warr & Company having no property in or completed security over the effects now represented by the fund

in medio, ought not to be preferred thereon to any extent. (2) The sale and assignation to the claimants W. Warr & Company, if any, not having been *in bona fide*, inasmuch as no price was paid therefor, conferred on them no right to delivery of the effects or payment of the proceeds thereof prestable after bankruptcy of the pretended seller. (3) The alleged sale not having been in the regular course of business, the provisions of the Mercantile Law Amendment Act 1856 do not apply."

W. Warr & Company pleaded—"The claimants having been owners of the furniture and plenishing from which the fund *in medio* is derived, are entitled to be ranked and preferred *primo loco* to the said fund *in medio*. The said James Liddell having, at the date of his sequestration, had no right of property in the said furniture, the trustee in his sequestration having no higher right is not entitled to the fund *in medio*."

After hearing proof the Sheriff-Substitute (D. D. BALFOUR) on 15th August 1892 pronounced the following interlocutor—"Finds that this action applies to the proceeds of certain household furniture which belonged to James Liddell, and was situated in his house at Dunblane, and to which one of the parties (Warr & Company) claim right by virtue of an assignation from Liddell, and the other party (Barr) claims right in respect of being trustee on Liddell's sequestrated estate: Finds that in 1886 Warr & Company obtained from Liddell an assignation of the furniture, and they then entered into an agreement letting the furniture on hire to Liddell for three years, at a yearly hire of £108, 6s. 8d. payable half-yearly: Finds that at the same time Warr & Company granted a back-letter to Liddell narrating the transaction, and declaring that on his paying up the full amount of £325, being the three years' hire, the furniture was to become his property, but in the event of his failing to retire the bill for that amount which they had taken from him, he was to forfeit his interest under the agreement of lease, and Warr & Company were to be entitled to resume possession of the furniture and sell it: Finds that the said sum of £325 was paid, and in the year 1889 another advance of £400 was made to Liddell on the same footing: Finds that when this further transaction was entered into the original assignation was allowed to stand, and another agreement of lease and back-letter in similar terms were executed, the furniture being let for four years, and the hire being £100 per annum: Finds that on the first occasion the cash advanced by Warr & Company to Liddell was £250, and they took his acceptance for £325, being the amount of the advance plus £75 of interest; and on the second occasion they advanced him £300 in cash, and they took his acceptance for £400, being the amount of the advance plus £100 of interest: Finds that according to recent decisions the effect of this transaction was to confer on Warr & Company a valid right to the furniture, which they are entitled to vindicate as in a question with Liddell's creditors: Therefore ranks and prefers the claimants Warr & Company to the fund *in medio*, and decerns against the pursuers for payment to them in terms of said ranking; and on payment being made, exoners and discharges the pursuers of all claims in connection with said fund, and decerns."

John M'Queen Barr appealed to the Sheriff (BERRY), who on 13th April 1893 adhered to the interlocutor appealed against.

Against this decision John M'Queen Barr appealed, and argued—(1) There had been no sale of the furniture to W. Warr & Company. The object of parties disclosed by the deeds was to give security over the furniture to W. Warr & Company for the money advanced by them. But there was no *bona fide* absolute sale—*Heritable Securities Investment Association* v. *Wingate & Company's Trustee*, July 8, 1880, 7 R. 1094, Lord Ormidale's opinion, p. 1100; *Liquidator of West Lothian Oil Company* v. *Muir*, November 18, 1892, 20 R. 64; *Pattison's Trustee* v. *Liston*, June 7, 1893, 30 S.L.R. 690. The case of *M'Bain* v *Wallace*, January 7, 1881, 8 R. 360; July 27, 1881, 8 R. (H.L.) 106, did not apply as there there was an out-and-out sale. (2) If a sale of the furniture to W. Warr & Company was held to have been carried out, the furniture had been re-sold to Liddell under the minute of agreement and back-letter. Although the transaction was in form a lease, it was in reality a sale. The price was to be paid in instalments, and the sale had been completed by delivery of the furniture into the hands of Liddell—*Cropper* v. *Donaldson*, July 8, 1880, 7 R. 1108; *M'All's Trustee* v. *Thomson*, June 30, 1883, 10 R. 1064. The price of the furniture in either view belonged to the claimant as Liddell's trustee.

Argued for the claimants W. Warr & Company—(1) There had been an out-and-out sale of the furniture to them. This was plain from the terms of the contract. The case was therefore ruled by *M'Bain* v. *Wallace*. (2) Assuming there had been a sale to the present claimants, there had been no re-sale to James Liddell, only a lease of the furniture. Before the property passed to the latter, the instalments in the shape of rent had to be paid. These instalments had not been all paid, so that property in the furniture had never been regained by Liddell—*Murdoch* v. *Greig*, February 6, 1889, 16 R. 396.

At advising—

LORD YOUNG—It is unfortunate that this question is so frequently raised under circumstances which are generally similar, though no doubt with some variety in them. The question is, whether and how far you can impugn a contract by showing by writing or by parole that the true purpose of the parties was a transaction of loan? My opinion is, that if the parties are acting honestly, and are *sui juris* and not infringing any rule of bankruptcy law, they are at liberty to enter into a contract of sale,

though their purpose be to give security to one of them, a lender of money, which security can be given by that means and cannot be given by pledge. To have the effect desired it must be a contract of sale.

Now, I expressed my views upon that subject at some length in the case of *M'Bain* v. *Wallace*, and it still appears to me that it is lawful and in the interests of the community that it should be possible for the parties to carry out their desire by means of a sale. If the transaction be that the parties really constitute the relation of buyer and seller, there is no reason why we should frustrate their intention because in constituting the relation, with all its legal consequences, they intended that the party who is the buyer should have a security, and should not be at liberty to take advantage of the transaction to any other effect than to get payment of the debt.

The question occurred in the case of *M'Bain*, whether there was a collateral contract to the effect that the subject of the sale should only be held as security, and whether, if so, that would undo the effect of the transaction as a sale? I thought, and the other Judges here thought, that there was a collateral agreement to the effect that if the subject, a shop, realised a profit beyond the sum paid by the buyer, that should be communicated to the other party, the seller. Some of the Judges in the House of Lords held that not to be clear, but that there appeared rather to be an honourable understanding than a collateral agreement. But it was thought by them not to be really pertinent to the question. Such a contract, it was held, might exist along with the contract of sale.

It is, I repeat, expedient and according to law, and in the interests of the public, that a man should be able at a time when he is at liberty to enter into any transaction as to his furniture, to raise money upon it by means of a sale such as was arranged in the case before us. It is quite true that it is the general doctrine of Scots law that there cannot be a security over moveables *retente possessione*. But the law is advancing, and the maxim that there can be no security over anything that is in the debtor's possession has suffered considerably of late years. Thus, the doctrine of reputed ownership as formerly understood was that the furniture in a man's house or the goods in his shop were in the supposed interest of his general creditors regarded as his, and the real owner who had put him in possession of them by loan or hire was held to have given him the means of holding out that they were his, and was not allowed to defeat the claim of the man's creditors who poinded them or did other diligence against them. Many decisions proceeded upon that view. But now greater enlightenment has led to the view that it is not prejudicial to the community to hold that a man can safely hire out furniture or goods without running the risk of their being taken for the debts of the person to whom he hires them by his general creditors. That is another example of the direction in which the law has advanced.

I do not think that the case of *M'Bain* makes any great advance in the law, but it was an advance in what I hold to be the right direction.

I think that the judgment of the Sheriff ought to be affirmed.

LORD RUTHERFURD CLARK—I think that it is proved that there was a true sale, and therefore that the case of *M'Bain* applies.

LORD TRAYNER—I think that it is the law of Scotland that a security for lent money cannot be made effectual over moveables which remain in the possession of the debtor; and it does not, in my opinion, affect that principle or its application that the transaction under which the money is lent takes in mere expression of words the form of a sale. In this case I agree with the conclusion reached by the Sheriffs, on the ground that the evidence before us, both written and parole, establishes that the transaction in question was a sale—a sale intended and a sale completed—and not merely security for a loan.

LORD JUSTICE-CLERK—That is my opinion also.

The Court adhered.

Counsel for Claimant and Appellant—John M'Queen Barr—Dickson—Wilson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Claimants and Respondents, W. Warr & Company—Lees—Salvesen. Agents—Coutts & Palfrey, S.S.C.

Tuesday, July 18.

SECOND DIVISION.

[Lord Stormonth Darling Ordinary.

BRYSON *v.* MUNRO'S TRUSTEES.

Disposition—Construction of Destination—Fee or Liferent.

A husband conveyed certain heritable subjects to himself and his wife and the longest liver of them, in conjunct fee and liferent for their liferent alimentary use allenarly, and to his daughters *nominatim* in fee.

Held (*Watherstone* v. *Rentons*, November 25, 1801, M. 4297, being followed) that the fee was conveyed by the above destination to the daughters, and that the right of the disponer was limited to a liferent.

By disposition dated 10th January 1877, Hugh Munro, grocer and spirit dealer, Crossmyloof, disponed certain heritable subjects in the village of Crossmyloof "to and in favour of himself and Janet Watson or Munro, his wife, and the longest liver of them, in conjunct fee and liferent for their liferent alimentary use allenarly, and to and in favour of his daughters" Mrs Bryson, Mrs Orr, and Mrs Austin, "equally among them in fee, exclusive always of the *jus*