

and also that the defence set up cannot be allowed to go to proof. If the Crown can show that the claimer's horse and cab were *de facto* used for the illegal purpose alleged they were entitled to seize them as forfeited.

I do not agree in thinking that this is necessarily a case of hardship. If such words were inserted in the statute as the defender seeks to have introduced, the result, as it appears to me, would be that it would be impossible in probably ninety out of a hundred cases to give the check or remedy of forfeiture which it is the purpose of the Legislature to provide in order to prevent smuggling. The illegal proceedings of the smuggler are always conducted with the greatest secrecy, and a person about to allow his ship or his cab to be used in this way, if forfeiture were made to depend on his guilty knowledge, would take very good care to avoid having knowledge, and certainly would take care that there should be no means of proving his knowledge of the use which was to be made of his property. Accordingly, to avoid this evil and yet to provide the sharp and ready remedy of forfeiture, proof of illegal use has been made sufficient.

On the other hand, however, seeing that this is so, the Legislature have, as a protection to the subject, placed the administration of the statute in the hands of a public department, subject to the control of Parliament; and while on the one hand, in order to obtain convictions which are necessary for Exchequer purposes, and to authorise forfeitures which are necessary for Exchequer purposes there are the provisions in section 202; on the other hand we find a clause (section 209) which expressly enables the Commissioners of Customs in the administration of the statute, even if they obtain a conviction or a forfeiture of property, to give up penalties and forfeited articles, and thus in the end to decline to avail themselves of the legal proceedings which they may have thought fit to take. That is the protection which the Legislature has provided as a counterpart to the sharp remedies of penalties and forfeitures which the statute gives for the sake of securing that the revenue of the country shall not be diminished by smuggling.

In regard to what has fallen from Lord Mure as to this being a case of hardship, I shall only say that this refers to a matter which has no doubt been well considered by those who are in the administration of this department, and by the Lord Advocate, and I express no opinion upon it. It may be that they have good reason to know that this cab proprietor had knowledge of the use to which his horse and cab were put, though the statute does not make it a condition of the forfeiture that this shall be proved. We have no means whatever of knowing how this stands, and I express no opinion about it further than this, that if he can satisfy the department of his complete ignorance and freedom from blame he will have a favourable case for an appeal to the Commissioners to exercise the power given to them by section 209 of the statute.

LORD ADAM—I am afraid we cannot dispose of this case on general principles of justice and equity, but according to the terms of the Act of Parliament. I see no doubt or difficulty in the statute. Forfeiture follows the commission of

the act. It is very easy to figure cases of hardship, but, as Lord Shand says, there is a public department between the public and the Crown to see that no hardship is suffered. I do not know the facts, and pronounce no opinion as to whether this is a case of hardship. I have no difficulty in concurring with your Lordship in refusing the reclaiming-note.

The Court refused the reclaiming-note.

Counsel for the Reclaimer—C. S. Dickson—M'Clure. Agents—Smith & Mason, S.S.C.

Counsel for the Respondent—Sol.-Gen. Robertson—Kennedy. Agent—R. Pringle, W.S.

Thursday, July 19.

## SECOND DIVISION.

[Lord Trayner, Ordinary.]

### ROBERTSON V. ROBERTSON.

#### *Husband and Wife—Divorce—Proof.*

In an action of divorce on the ground of adultery, evidence of the character of the defender is evidence to show the character of his or her conduct on the occasions when the adultery is alleged to have taken place, but it is not evidence to prove the existence of these occasions as matter of fact.

*Collins v. Collins*, February 18, 1884, 11 R. (H. of L.) 19, distinguished.

#### *Husband and Wife—Divorce—Alleged Condonation pending a Reclaiming-note.*

In an action of divorce on the ground of adultery the pursuer alleged several specific acts of adultery. The Lord Ordinary, affirming one of these acts only, granted decree of divorce. The defender reclaimed, and at the hearing stated that pending the reclaiming-note the pursuer had resumed cohabitation with her and so condoned the adultery, assuming it to have been committed; and she moved the Court to allow her to aver and to prove this condonation. The Court declined to consider the motion *in hoc statu*, but on coming to be of opinion that the act of adultery on which the Lord Ordinary had proceeded was not proved, they recalled his interlocutor, and before considering the other alleged acts of adultery, allowed the defender to plead condonation.

#### *Proof—Evidence of Young Child.*

In an action of divorce on the ground of adultery the Lord Ordinary declined to allow a boy nearly seven years of age to be examined, "in respect of his tender age and the nature of the case."

*Opinion* that the Lord Ordinary had rightly rejected the evidence.

This was an action of divorce at the instance of Andrew Robertson against his wife Margaret White Stalker or Robertson. It proceeded on several specific acts of alleged adultery with men named. The defender denied the adultery, and a proof was allowed. At the proof the pursuer adduced evidence in support of the acts of adultery on which he

founded, and *inter alios* tendered as a witness a boy named Robert Macdonald, nearly seven years of age. The Lord Ordinary (TRAYNER), "in respect of the witness' tender age, and the nature of the case," refused to examine him. The pursuer also put in letters bearing to be written by the defender admitting certain acts of adultery, which he stated he had condoned. The defender admitted writing the letters, but not the adultery. The proof was adjourned till 10th January 1888, on which date the pursuer obtained leave to make an averment of another act of adultery. The averment and the defender's answer to it were in these terms:—"The defender committed adultery in a cab belonging to and driven by John Doull, residing at No. 1 North Saint James Street, Edinburgh, in or about the month of September last, whilst being driven round the Queen's Drive, Edinburgh, with a man other than the pursuer, whose name and designation are unknown to and cannot be discovered by the pursuer." In support of this averment the pursuer adduced Doull, the cabman therein referred to. Doull deponed—"I am a cab-driver, and my cab belongs to me. My stand is in St Patrick Square. I know the parties to this case. I at one time lived in St Patrick Square, below where they lived. I know Mrs Robertson quite well by sight. [Shown defender.] That is the lady. I remember a man hiring my cab at the Register House on one occasion in September last. I don't know the man, and could not identify him. The defender was with him. It was between six and seven o'clock in the evening. The man hired my cab for an hour's drive, but he did not say where. He went into the cab, as did Mrs Robertson. The two were alone in the cab. I took them round the Queen's Drive." Doull then stated that he had got off his cab in going up the hill to Dunsappie in order to relieve his horse, and when walking beside the cab he saw the defender and the man in the act of connection. The pursuer adduced no other witness to speak to this alleged act of adultery.

The defender deponed—"I have heard what the witness Doull said as to a drive round the Queen's Drive in September last. There is no truth at all in what was stated by him. I have never been round the Queen's Drive in a cab in my life. I certainly was never driven in Doull's cab round the Queen's Drive. *Cross*.—I know Doull by sight. I have known him in that way for about three years, I think. He lived in the same stair where I lived."

The Lord Ordinary (TRAYNER) pronounced this interlocutor:—"Finds facts, circumstances, and qualifications proved relevant to infer that the defender Margaret White Stalker or Robertson committed adultery with a man other than the pursuer, whose name and designation are unknown to the pursuer as libelled: Finds her guilty of adultery accordingly: Therefore divorces and separates the defender from the pursuer, his society, fellowship, and company," &c.

There was no note to this interlocutor, but it was admitted that in giving judgment the Lord Ordinary stated that the only act of adultery which he held proved was that spoken to by Doull.

The defender reclaimed.

At the hearing on 14th March she asked leave

to open up the record with the view of averring, what she stated to be the fact, that the pursuer had resumed cohabitation with her since the date of the Lord Ordinary's interlocutor, and so condoned the adultery if, which she denied, it had been committed.

LORD YOUNG pointed out that as long as the Lord Ordinary's interlocutor stood the plea of condonation was excluded, for if that interlocutor were affirmed the date of the divorce would be the date of the Lord Ordinary's interlocutor, but if the Court should be of opinion that the adultery in Doull's cab was not proved, and recalled the Lord Ordinary's interlocutor, it would then be open to the defender to plead condonation should the Court be of opinion that any of the other acts of adultery were proved. Counsel were accordingly requested to open on the Lord Ordinary's judgment.

The defender argued that that judgment ought to be recalled on the ground that it was based on the uncorroborated evidence of a single witness.

The pursuer argued that Doull's testimony was distinct and trustworthy in itself, and, on the authority of the case of *Collins*, Feb. 18, 1884, 11 R. (H. of L.) 19, sufficiently corroborated by the defender's letter admitting adultery which had been condoned, and by the evidence adduced in support of the other acts of alleged adultery, even though that evidence was insufficient to prove those acts of adultery. The pursuer also maintained that the evidence of the boy Macdonald had been incompetently rejected.

At advising—

LORD YOUNG—A difficulty was suggested at an early stage of the debate about cohabitation having been resumed standing a decree of divorce by the Lord Ordinary. The argumentative difficulties thence arising were suggested with a view to avoid these if possible. Counsel for the reclaimer was called on to open on the whole reclaiming-note, and to state the grounds on which it was maintained the Lord Ordinary was wrong. That proposal was accordingly adopted, and the reclaimer's statements were answered by the respondent. The Lord Ordinary, by the interlocutor under review, has found an act of adultery to be proved which was not libelled, not stated on record at all, and not known to the pursuer when he raised the action, but added to the record after evidence on all the facts stated on record had been concluded. The Lord Ordinary has found that act of adultery to be proved, and on that finding has pronounced decree of divorce.

I think the first question for us is, whether that interlocutor is well founded. On looking at the evidence it appears that the fact so affirmed, and on which the decree was founded, stands on the unsupported evidence of one witness, a cabman, who says he took the defender and a gentleman a drive round the Queen's Drive in his cab in September last, and that having got down to walk by his horse up the hill, he looked in and saw them having connection. The defender entirely denies this, and says she never drove there in her life. The cabman is quite distinct as to her identity. He says he knew her before, but he admits that he did not know, and does not now know, the gentleman. He is, however, not corroborated. Mr Thomson argued that with a view to corroboration he was entitled to refer to evidence of other

conduct on her part, and in particular to her own admissions of acts of adultery condoned, and also to the evidence of the other acts of adultery which by the Lord Ordinary were held not to be proved. He referred to the case of *Collins v. Collins*, 11 R. (H. of L.) 19, in which he said countenance was given to the contention that condoned acts of adultery might be referred to in support of other acts not condoned. I remember the case, and I adhere to the view which I there held, and I think expressed, that such evidence may legitimately be referred to as interpreting the woman's conduct on other occasions—as showing whether she is innocent or guilty according to circumstances. One would regard a woman walking alone with a man or sitting alone with him just according to circumstances. If she is a virtuous woman, no one would be inclined to feel the least suspicion as regards this. If it is shown that she is, on the contrary, a vicious woman, it would be otherwise. Therefore for the purpose of the interpretation of ambiguous conduct such evidence as is now referred to is quite legitimate. But the question here is, not as to the character of her conduct in the cab on the occasion libelled, but whether there is any sufficient evidence that she was in the cab on that occasion at all? And previous acts of condoned adultery, or evidence of other acts of a doubtful character, can have no bearing on that question any more than on the question whether she was elsewhere on a particular day. The fact therefore stands on the uncorroborated testimony of the cabman, and, differing from the Lord Ordinary, I am of opinion that the adultery which that testimony, if sufficiently corroborated, would have established has not been proved. Accordingly I think the Lord Ordinary's interlocutor affirming it and granting decree of divorce ought to be altered.

That being so, we have next to consider whether, contrary to the opinion of the Lord Ordinary, there is evidence from which adultery on any of the other occasions may be inferred. Now, I should be slow to interfere with the judgment of the Lord Ordinary that the evidence was insufficient. But the interlocutor which he has pronounced affirming the fact of adultery, and his decree being recalled, we cannot in the face of the averment that the adultery has been condoned, enter on an inquiry whether there is sufficient evidence of the other acts of adultery, not affirmed by the Lord Ordinary, without allowing the new matter to be added to the record. I think the proper course therefore is to allow these averments to be added, and the pursuer to make such answer as he sees fit, and that being done, and a motion for proof being made, I think we should grant it.

I have omitted to say that I have come to the same conclusion as the Lord Ordinary as to examining the child as a witness. I certainly should not interfere with his discretion in the matter, and should myself have adopted the same course.

LORD RUTHERFURD CLARK and the LORD JUSTICE-CLERK concurred.

The Court recalled the Lord Ordinary's interlocutor, and allowed the record to be amended by the addition of the defender's averment of condonation with the pursuer's answer thereto.

A proof regarding the alleged condonation was then allowed and taken, but in the result, the Court having come to the conclusion that none of the acts of alleged adultery were proved, absolved the defender without expressing any opinion on the question of condonation.

Counsel for the Pursuer—Rhind—A. S. D. Thomson. Agent—Robert Broatch, Solicitor.

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

Thursday, July 19.

## SECOND DIVISION.

[Sheriff of Inverness.]

WESTREN v. MACDONALD AND OTHERS,

*Sale—Contract of Sale and Return—Retail Dealer's Sequestration.*

Articles of jewellery which had been sent by a wholesale to a retail dealer on a contract of sale and return, were found in the shop of the latter undisposed of at the date of his sequestration. *Held* that the property had not passed, and that it could not therefore be claimed by the trustee in his sequestration.

On 22nd September 1881 Peter Westren, jeweller in Edinburgh, sent to William Fraser, a watchmaker and jeweller in Inverness, certain jewellery on a contract of sale or return.

On 3rd June 1882 Donald Macdonald, Fraser's landlord, presented a petition in the Sheriff Court at Inverness for sequestration for rent, and for a warrant to inventory and appraise Fraser's whole stock-in-trade, including the jewellery in question. On 3rd August 1882 Fraser applied for and obtained sequestration of his estates, and James H. Kerr was appointed trustee on his sequestrated estate. In the landlord's petition for sequestration minutes were lodged by Westren and Kerr, who both claimed the jewellery.

Westren pleaded that the jewellery having been delivered to Fraser on sale or return, was not subject to the landlord's right of hypothec, and that the trustee in the sequestration had no higher right than the bankrupt.

The Sheriff-Substitute (BLAIR) found, *inter alia*, that the jewellery was, at the date of the sequestration for rent, the property of Fraser, and subject to the hypothec of the landlord, the pursuer. He therefore repelled the claim for Westren, and sustained the claim for Kerr, subject always to the landlord's hypothec.

"*Note.* . . . In the circumstances I am of opinion that the articles now claimed were the property of Fraser as part of his stock-in-trade, and that being so, and these being in the premises occupied by him at the date of the sequestration for rent, these were subject to the landlord's hypothec—Bell on Sale, p. 110; Benjamin on Sale, p. 483; *Brown v. Marr and Barclay*, 7 R. 427.

"Authorities cited for Westren—*Fleming v. Howden*, 6 Macph. (H. of L.) 113, Lord Westbury's opinion; *Davidson v. Boyd*, 7 Macph. 77; *Watson v. Duncan*, 6 R. 1247, Lord Deas' opinion; *Thomson v. Tough's Trustee*, 7 R. 1035;