return from the estate depended on the proprietor, then in impecunious circumstances, being able to make profit from about half of the estate in his own possession, while if Blinkbonny were again let there is every reason to believe it must be let at a reduced rent.

The circumstance most favourable to the defender is that apparently two opportunities occurred for a sale of the estate—one late in 1880, or early in 1881, when a price of £80,000, or possibly even of £85,000, might have been got; and another in 1882 or 1883, when the trustees of a Mr Grieve seem to have been willing to negotiate for a purchase at a price of about £80,000. The former of these opportunities for a sale occurred some time before the loan in question. It was not known to Mr Turnbull, and was therefore not a circumstance in his view in agreeing to make the loan, but his counsel very properly founded on what is proved as to the proposed negotiations on both occasions as showing that the property had a value which would much more than cover the burdens, including the additional £3000 in question. The first observation to be made on this is that it leaves out of view what would happen if Mr Roy were to decline, as he was likely to do, and did, to sell at these prices. In that case there was a very serious risk that the return from the estate would not meet the interest on the securities, and the defender was, I think, bound to have carefully in view that the regular payment of interest was of vital consequence to his clients. But it was further a matter which a man of ordinary prudence exercising reasonable care should have taken into view that Mr Roy was a gentleman not likely to act on sound advice in the sale of the estate, but would in all likelihood insist on holding it for an extravagant price, acting on a speculative view very unfavourable to the security holders at a time when property was falling in value.

It was strongly pressed upon the Court in the argument for the defender that the utmost that can be imputed to him here was that with full information before him he committed an error of judgment in taking the security, and that his *bona fides* and confidence in the security was such that he would himself have advanced the money had he desired to make an investment.

It may be true that the defender might have taken such an investment for himself, but assuming this to be so, I am humbly of opinion that in doing so he would not in the circumstances which I have stated have acted as a man of ordinary prudence seeking an investment free from unusual risk would do. As Lord Watson observed in the passage above quoted—"A trustee is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. It is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard."

If, again, I had been of opinion that with full information before him the defender merely committed an error of judgment, I should have held that he could not be responsible for the result, provided that it appeared that he had exercised reasonable care in forming a judgment. It appears to me, however, that looking to the burdened condition of the estate, the large part of which was in the proprietor's hands, and the probability of an additional farm falling in, it would have been a proper and reasonable precaution, which ought not to have been omitted, to have had a report from a man of skill after visiting the estate and examining the farms as to the probability of the rents being maintained. Had this course been followed I think the defender would have been advised in estimating the rental to make allowances or deductions of larger or smaller amounts such as were spoken to by several of the pursuer's witnesses, and his special attention would have been directed to the risk attending the falling in of the lease of Blinkbonny. He acted on his own views without taking any professional assistance, but in doing so I think his responsibility must be judged of in the light of the advice which he would in all probability have received had he taken the proper step of consulting a man of skill who had visited and examined the property. There was, I think, want of due consideration and care of the whole matter which, if given, would have resulted in the defender's resolution not to make the investment. I am therefore, with regret, of opinion that he is legally responsible for the loss which has been sustained.

Lord Rutherfurd Clark—I also think the defender is liable.

Lord Adam concurred.

Lord President—I am of the same opinion. I wish only to add that this was a case in which the trustee was bound to be specially careful about the security being sufficient for the interest of the loan, because the primary purpose of the trust was to secure an alimentary annuity.

Lord Young concurred.

The Court adhered.

Counsel for the Pursuers and Respondents—R. V. Campbell—Lorimer. Agents—Maitland & Lyon, W.S.

Counsel for the Defender and Reclaimer—D.-F. Mackintosh—Low. Agents—Romanes & Simson, W.S.

Thursday, July 19.

FIRST DIVISION.

[Lord Fraser, Lord Ordinary in Exchequer Causes.

LORD ADVOCATE *v.* CROOKSHANKS.

Revenue—Customs—Customs Consolidation Act, 1876 (39 *and* 40 *Vict. cap.* 36), *sec.* 202—*Forfeiture.*

The Customs Consolidation Act, 1876, provides by section 202 that all ships, carriages, and other conveyances, together with all horses and other animals and things used in the importation, landing, removal, or conveyance of uncustomed goods liable to forfeiture under the Customs Acts, shall be forfeited.

Held that in an information of seizure under this section it is not necessary to aver knowledge on the part of the owner of the conveyance.

On the 26th March 1888 a cab and horse were seized near Gourock by the coastguard officers, as being used in the conveyance of uncustomed tobacco, and an appraisement of seizure with regard thereto was returned to the Court of Session as the Court of Exchequer in Scotland.

Joseph Crookshanks, a cab proprietor in Greenock, lodged a claim for the goods so seized, and an information of seizure was lodged against Crookshanks at the instance of the Lord Advocate, containing the following count—"That on or about the 26th day of March 1888, at or near Lavan Point, near Gourock, in the county of Renfrew, the said cab and horse were made use of by John Smith, cabman, Greenock, presently a prisoner in the prison of Edinburgh, or other person or persons to Her Majesty's Advocate unknown, in the importation, landing, removal, or conveyance of 343 pounds weight or thereby of manufactured tobacco, or other uncustomed, prohibited, or restricted goods liable to forfeiture under the Customs Acts, contrary to section 202 of the Customs Consolidation Act, 1876 (39 and 40 Vict. cap. 36), whereby the said cab and horse became forfeited or liable to forfeiture."

Section 202 provides—"All ships, boats, carriages, or other conveyances, together with all horses and other animals and things made use of in the importation, landing, removal, or conveyance of any uncustomed, prohibited, restricted, or other goods liable to forfeiture under the Customs Acts, shall be forfeited."

In defence Crookshanks averred—"Not known and not admitted that the horse and cab in question were made use of in the importation, landing, removal, or conveyance of manufactured tobacco, or other uncustomed, prohibited, or restricted goods liable to forfeiture under the Customs Acts. Explained that upon said 26th March 1888 a horse and cab were ordered of the present claimant Joseph Crookshanks, who is a cab and carriage hirer and funeral undertaker in a large way of business, in the ordinary course of his said business, by Walter Walker, coachman to John Macdougall, Esq., Rosemount, Greenock, and the horse and cab which form the subject of the present claim were in accordance with said order despatched on the night of the said 26th March 1888 from the claimant's premises in charge of John Smith, night coachman in the claimant's service. This was done in good faith, and in the usual course of business, and the destination and particular use to which said horse and cab were to be put were unknown to the claimant. It is further explained that the said John Smith had been in the claimant's employment for about seven years, and the claimant had every reason to believe from the opinion he had formed of his honesty and trustworthiness that the horse and cab intrusted to his charge would not be used except in the legitimate exercise of the claimant's said occupation. The said John Smith was on 30th May 1888 tried before Lord Fraser and a special jury on an information at the instance of the Lord Advocate, for Her Majesty's interest, on a charge of being knowingly concerned in carrying, removing, depositing, or concealing, or dealing with certain uncustomed goods, to wit, the said 343 pounds of tobacco, when the jury unanimously found for the defender."

The defender pleaded—"(1) The information being irrelevant, should be dismissed. (2) The subjects seized not having been made use of in the manner libelled, should be restored to the claimant. (3) *Separatim*—The subjects seized having been made use of in the matter libelled without the knowledge or responsibility of the claimant, he should be assoilzied from the declaratory conclusion of said information and the consequent penalty."

The Lord Advocate pleaded—"(1) The defences being irrelevant, except in so far as denying that the said horse and cab were made use of as libelled, should be repelled except to to that extent. (2) The defender's third plea being unsound in law, should be repelled."

The Lord Ordinary (FRASER) on 5th July 1888 pronounced the following interlocutor:—"Repels the first and third pleas-in-law stated for the claimant Joseph Crookshanks: Allows to the Lord Advocate a proof of his averment that the cab and horse mentioned in the information were made use of in the importation, landing, removal, or conveyance of 343 pounds weight or thereby of manufactured tobacco, or other uncustomed, prohibited, or restricted goods liable to forfeiture, and to the claimant a conjunct probation.

"*Opinion.*—The offence in this case was the using a cab for the conveyance of uncustomed goods. It is not necessary that the prosecutor should prove, in order that that cab shall be forfeited, that the owner of it knowingly lent his cab for the carriage of such goods. The fact that it was used for that purpose by his servant, or by the person to whom he hired it out, is all that requires to be proved. There are certain offences for which penalties are imposed by the Customs laws, in which the *scienter*, on the part of the offender, must be proved, but this is not one of them. That a person may be convicted of an offence under the Excise or Customs laws committed by a servant against his master's knowledge, nay, against his positive injunctions, is settled in various cases, such as in *Advocate-General* v. *Matheson* in 1852, before a full bench of the Court of Exchequer, as reported in Douglas' Manual, p. 256, and in *Advocate-General* v. *Grant*, July 20, 1853, 15 D. 980. I therefore repel the first and third pleas stated by the defender. And the only matter for investigation is as to whether the cab belonging to the defender was used for the carriage of uncustomed goods. Of course the rule as to liability to forfeiture cannot be carried to an extreme. A conviction, for example, could not be obtained against an omnibus proprietor into whose omnibus a person carrying uncustomed goods had entered without the knowledge of the conductor that his passenger had on his person goods of that description. But that is not the present case, which is the employment of the cab for the sole purpose of carriage of the goods, and if that be proved it is enough."

The defender reclaimed, and argued—The charge was irrelevant. It was necessary to aver and prove knowledge on the part of the owner or his servant of the unlawful purpose to which his property was put before such property could be forfeited. The general principles of

equity demanded such a qualification of the strict words of the statute. The analogy of proceedings against persons for penalties was in favour of such a modification—*The Queen* v. *Woodrow*, May 1, 1846, 15 Meeson & Welsby, 404, *per* Baron Pollock; *Attorney-General* v. *Hurel*, May 29, 1843, 11 Meeson & Welsby, 585; *Greenhill* v. *Stirling*, March 19, 1885, 12 R. (Just. Cases) 37.

The Lord Advocate argued—This was not a prosecution for penalties against a person, but a proceeding *in rem*—against a cab and horse. The only condition of forfeiture in the statute was that the articles should have been used in the conveyance of uncustomed goods. In proceedings against persons it was not always necessary to prove knowledge as part of the offence. If the defender could make out a case of hardship he might have his property restored under section 209 of the Act—*Advocate-General* v. *Matheson*, May 17, 1852, Douglas' Manual, 256; *Advocate-General* v. *Grant*, July 20, 1853, 15 D. 980; *Blewitt* v. *Hill*, November 9, 1810, 13 East. 10; 21 Geo. III. cap. 39, preamble and section 2; *Attorney-General* v. *Norstedt*, July 22, 1816, 3 Price, 97; *Queen* v. *Bishop*, February 28, 1880, 5 Q.B. Div. 259; Modern Practice of the Exchequer, 1739, 2nd case.

At advising—

Lord President—This is a proceeding *in rem*. An application was made to the Court of Exchequer, the object of which was to give effect to the forfeiture of a cab and horse. The success of that application of course must depend on the terms of the statute providing for forfeiture. The words of section 202 of the statute are that "all ships, boats, carriages, or other conveyances, together with all horses and other animals and things made use of in the importation, landing, removal, or conveyance of any uncustomed, prohibited, restricted, or other goods liable to forfeiture under the Customs Acts, shall be forfeited." Now, these words admit of no construction but one. If the things specified, among others cabs and horses, are used to convey uncustomed goods the statute provides that they shall be forfeited. It is not necessary to make any allegation against any person to the effect that he has committed an illegal act. The mere fact that the cab and horse have been used in the particular manner referred to in the statute is a sufficient ground for forfeiture. Now, the information here on the part of the Exchequer alleges that certain officers of Her Majesty's Customs did seize and arrest the cab and horse described in the appraisement of seizure, and which are now claimed by Crookshanks; and the charge is to the effect that "on the 26th day of March 1888, at or near Lavan Point, near Gourock, in the county of Renfrew, the said cab and horse were made use of by John Smith, cabman, Greenock, presently a prisoner in the prison of Edinburgh, or other person or persons to Her Majesty's Advocate unknown, in the importation, landing, removal, or conveyance of 343 pounds weight or thereby of manufactured tobacco, or other uncustomed, prohibited, or restricted goods liable to forfeiture under the Customs Acts, contrary to section 202 of the Customs Consolidation Act, 1876 (39 and 40 Vict. cap. 36), whereby the said cab and horse became forfeited or liable to forfeiture." The words of the count correspond precisely to the words of the statute. That being so, it is not possible to say that the charge is not relevant under the statute. No doubt it may be said that there is great hardship in certain cases, and in some cases it may be so great that the officers charged with the administration of this branch of the law will not go on to enforce the provisions of the statute. We, however, have to administer the statute according to its strict terms, and if we find the charge corresponding precisely to the words of the statute, is it to be listened to for a moment that the Lord Advocate is not entitled to prove the allegations which he has made, and if he proves them to obtain the penalties he has asked for under the statute. I do not think there is anything more to be said. I agree with the Solicitor-General that the cases of proceedings to enforce penalties against persons have very little to do with this question. Most of these cases have to do with the particular words of the statutes under which the proceedings are taken. Some of these require guilty knowledge, others do not. Here the penalty follows on the fact that the goods have been used in a particular way, and no question of innocence on the part of anyone arises. Accordingly the reclaiming-note must be refused.

Lord Mure—My view is that we must adhere to the Lord Ordinary's interlocutor. The words of the statute are very clear as to what is to be done with carriages which are used to convey uncustomed goods. It is a very strict statute, and on the face of the record it seems to me that this is as hard a case as could be brought under it. The servant of Crookshanks, the owner of the cab, was unanimously acquitted by a jury of having done anything wrong, and yet after that the officers of the Crown go on to resist this claim of the owner.

Lord Shand—The words of the statute founded on are plain and unambiguous—"All vehicles made use of" in the conveyance of uncustomed goods shall be liable to forfeiture. The argument for the reclaimer is that the Court shall read into the statute after the words "made use of" the words "with the knowledge of the owner of the illegal use thereof" or some similar words requiring proof of guilty knowledge on the part of the owner as a condition of forfeiture of the vehicle. But there are no such terms in the statute, and from beginning to end of the clause I see nothing to indicate by way of implication or inference that anything of the kind was intended. There has been nothing pointed to from beginning to end of the statute itself which could lead to the idea that by implication, necessary or even slight, the guilty knowledge of the owner or of his servants was to be made a condition of the forfeiture of the vehicle used. Indeed, the only way in which it appears to me that an argument has been rendered possible in the case—and we have had an able argument—has been by those references which have been made to the general principles of equity and justice which appear to me to have no place in interpreting the unambiguous language of the statute. And therefore I agree with your Lordship in thinking that this complaint is relevant,

and also that the defence set up cannot be allowed to go to proof. If the Crown can show that the reclaimer'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