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, assoilzied 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;

Gracie v. *The Pulsometer Engineering Company*, 24 S.L.R. 239."

Westren appealed.

At the hearing it was stated that Kerr had been discharged from his office, but as the parties desired to obtain the decision of the Court on the general question of law raised in the case, counsel were heard on the assumption that the trustee was still a party to the case.

The appellant argued — The question was whether the goods which were in Fraser's shop on sale and return at his sequestration passed to his creditors, or whether they were not to be regarded, from the nature of the transaction, and in the circumstances, as still the property of Westren? Though the question had never been settled by decision, yet the nature of sale and return had been quite clearly defined by institutional writers. The property of goods sent on sale and return was in suspense till sold by the person to whom they had been sent. Until thus disposed of by him the goods were the property of the sender, and could be attached by his creditors—Bell on Sale, p. 111; Bell's Prin. sec. 1315. Here Fraser had not disposed of the jewellery in any way. It was in his shop at the date of the sequestration, and was therefore the appellant's property. The case of *Brown* v. *Marr and Barclay*, January 8, 1880, 7 R. 427, relied on by the Sheriff-Substitute, was distinguishable from this. In that case the goods had been pawned. Here they had been merely assigned by force of the sequestration, and the trustee held them *tantum et tale* as they stood in the bankrupt. In that case Lord Gifford (p. 447) had defined the contract in a way favourable to the appellant.

The trustee argued—A contract of sale and return gave the purchaser right to return the goods within a reasonable time. *Quoad ultra* it was a complete sale, with all the incidents of a sale. If Fraser had returned the goods within a reasonable time they would not have come under his sequestration—Benjamin on Sale (3rd ed.), p. 591. He had not, however, done so, and they therefore passed to his creditors on his bankruptcy. No seller of goods, as Westren was, was entitled to vindicate them in preference to the general creditors of the estate.

The landlord relied on the case of *Brown* v. *Marr and Barclay*.

At advising—

Lord Young—In this case, although we have been told that the trustee in the sequestration has been discharged, we have been asked to decide a question of some importance as if he were here. That question is, whether goods sent on sale and return to a jeweller, and which were in his shop at his bankruptcy, passed to his creditors, or whether the merchant who sent them is not entitled to get them as against the trustee in the bankruptcy? and I am of opinion that he is.

The contract of sale and return is quite familiar in our practice. We have met with it frequently. It is of this character—A retail dealer has his shop supplied with goods, on the footing that he may deal with them as his own by selling them, in which case he is held to be the purchaser at a previously agreed-on price; or he may, after keeping them for a longer or shorter time, decline to make them his own, or fail to sell them. He is in these circumstances entitled to send them back, or the merchant is entitled to demand them. It is a peculiar and very special contract, but quite intelligible, as is also the convenience of trade which led to it. Retail jewellers, even in a larger town than Inverness, cannot always afford to purchase jewellery of such an amount as they require to have in their shop. In these circumstances they resort to a wholesale dealer to allow them to have the goods on the footing of sale and return, *i.e.*, the retail jeweller may sell them if he can, and if not, return them. I think the goods in the present case were so sent, and I think that the property did not pass, although it might have passed at any time as long as the contract stood, by the retail dealer dealing with the goods as his own. It is not very complicated, and it is quite intelligible. The contract does not *ipso facto* pass the property; delivery of the goods under the contract does not pass the property; but if the retail dealer deals with the goods as his own by selling them to a customer, then the property passes, first to the retail dealter, and then to his customer. But I have no idea that if the retail dealer becomes bankrupt without having done anything to appropriate the goods his bankruptcy will transfer the property in them to him.

The question with the landlord, with which we have not to deal, stands on a different footing. The goods over which he has a hypothec need not necessarily belong to the tenant.

But laying the case of the landlord aside, I am of opinion that the contract of sale and return does not of itself pass the property, although the recipient may acquire it at any time he likes.

We were referred to the case of *Brown* v. *Marr and Barclay*. I do not think that that case is in point. I have not read it carefully, but I have looked at the import of the decision, and if there are any observations made in that case contrary to the view of the law now stated, I must be regarded as dissenting from them. But on the judgment pronounced I am not prepared to offer any observations whether a retail dealer taking goods on sale and return may make the goods his own property by dealing with them in some other way than selling them. In the case referred to the recipient pawned the goods, and I do not think it can be said he got them on a contract of pawn or sale; at the same time there is a good deal to be said for the view that if the wholesale dealer chooses to put the retail dealer into the position of being able to hand them over to a pawnbroker, the wholesale dealer must take the risk. But as that question does not arise here the case is not in point.

I am of opinion that the judgment of the Sheriff ought to be recalled.

Lord Rutherfurd Clark—I am of the same opinion.

Lord Justice-Clerk—I concur in the result of Lord Young's opinion. I only wish to say in reference to the case of *Marr*, that in that case the jeweller was enabled to deceive the pawnbroker through the act of the sender of the goods, and we held that the sender of the goods must be taken to be responsible for this consequence of his own act. That decision does not conflict with the observations of Lord Young.

Lord Craighill was absent.

The Court, after findings in fact as above, pronounced this interlocutor:—

"Find in law that the right of property in the jewellery remained with the claimant Westren: Therefore sustain the appeal; recal the judgment of the Sheriff-Substitute; repel the claim of the claimant Kerr, and sustain the claim of the claimant Westren." . . . .

Counsel for the Appellant—D.-F. Mackintosh—Dickson. Agent—P. Morison, S.S.C.

Counsel for the Respondent—Goudy—Adam. Agents—Morton, Neilson, & Smart, W.S.

Wednesday, July 18.

SECOND DIVISION.

[Dean of Guild of Greenock.

MILLER *v.* CARMICHAEL.

Property—Feu-Contract—Restriction on Building—Self-contained House.

A feu-contract, by which were feued four building stances, provided that dwelling-houses were to be erected thereon, which were to be self-contained and occupied by one tenant or occupier only. After the houses were built the feuar sold the lots under the above condition. One of the purchasers presented a petition to the Dean of Guild for authority to alter a villa on his stance by cutting off the stair between the first and second floor of the house, and constructing a separate outside stair to the upper flat and attics, so that it could be occupied by two tenants. The purchaser of one of the other lots objected. There was no appearance for the superior, and it was admitted that there was no common plan, and that the neighbourhood was given up to shops and flats.

Held (*following Buchanan, &c.* v. *Marr*, June 7, 1883, 10 R. 936) that the proposed alteration was unobjectionable, as not being one affecting the structure, but merely the use of the house—Lord Young being further of opinion that there was no such community as gave the objecting sub-feuar a *jus quæsitum* which entitled her to object.

By feu-contract dated 18th and 19th March and recorded 5th April 1880, Sir Michael Shaw Stewart of Ardgowan, near Greenock, the first party, feued out to Messrs Miller & Brown, joiners in Greenock, the second parties, all and whole those pieces of ground lying on the north-east side of Finnart Street, Greenock, described as plots 1, 2, 3, and 4, and laid down on a plan subscribed as relative to the feu-contract. The contract narrated that it was granted under "the burdens, conditions, provisions, declarations, restrictions, prohibitions, obligations, and others" therein set forth; and, *inter alia*—"*Third*, The only houses, buildings, or erections which it shall be competent to the second parties and the survivor of them, and the heirs of the survivor, and their or his foresaids, to erect and maintain on each of the said several pieces of ground, shall be a villa dwelling-house and cellars and washing-house." Then followed a minute description of the plan of the houses to be erected, which provided that "each of the said villa dwelling-houses shall be detached from the others, and shall be self-contained and occupied by one tenant only . . . and the second parties . . . . shall be bound within twelve months from the last date hereof to erect, and thereafter in all time coming to maintain, on each of the said several pieces of ground a villa dwelling-house of the foresaid description." These conditions, as well as all the other conditions of the contract, were made real burdens on each of the said several plots of ground in the following terms:—"Which conditions, provisions, declarations, restrictions, prohibitions, obligations, feu-duties, casualties, and others before and after specified are created and declared to be real burdens on the said several pieces of ground and others before deponed, and real conditions of the feu-right thereto, and as such shall be duly observed, paid, and performed by the second parties and the survivor of them, and the heirs of the survivor and their and his foresaids, and be inserted and duly referred to in statutory form in every future charter, disposition, conveyance, sub-feu right, and deed of investiture of the said several pieces of ground and others, or any part thereof, under the pain of nullity."

On each of the four plots of ground, which were all contiguous, and which formed Nos. 74, 76, 78, and 80 Finnart Street, self-contained villas were built by the feuars in conformity with the feu-contract, and were occupied by one tenant only. In 1881 Miller & Brown sold to Miss Annie Carmichael the plot described in the feu-contract as No. 3, together with the villa built thereon, and the disposition to her was granted always "with and under the burdens, conditions, provisions, declarations, restrictions, prohibitions, obligations, and others, so far as applicable to the piece of ground so disponed to her," contained in the feu-contract. On this disposition Miss Carmichael was infeft in the said plot and villa. Miller & Brown also disponed to Mr Miller, joiner, the plots Nos. 1, 2, and 4 as specified in the feu-contract, and as delineated on the plan annexed thereto, "always with and under, so far as applicable to the said subjects, the real burdens of the feu-duties, casualties, and others, and burdens, conditions, provisions, declarations, restrictions, prohibitions, obligations, and others specified and contained in the said feu-contract and recorded as aforesaid."

On 14th May 1888 Mr John Miller presented a petition to the Dean of Guild for authority to alter the villas erected on the plots 1 and 2, known as 78 and 80 Finnart Street. The plan produced showed that he proposed to turn one of his villas into a flatted house by cutting off the stair or communication between the first and second floors, and constructing a separate outside stair to the upper flat and attics. This object was to enable him to let the dwelling-house to two tenants, the one tenant occupying the main flat and basement, and the other tenant the first flat and attics.