The LORD JUSTICE-CLERK and LORD GIFFORD concurred.

The Court adhered.

Counsel for Drummond, Carse's Judicial Factor (Reclaimer) — C. Smith — Millie. Agents — M'Caskie & Brown, S.S.C.

Counsel for Edward Carse's Representatives (Respondents)—Asher — J. A. Reid. Agent—Thomas White, S.S.C.

Saturday, January 10.*

SECOND DIVISION.

[Sheriff of Lanarkshire.

MP.—BROWN (PROCURATOR-FISCAL OF GLASGOW) *v.* MARR AND OTHERS.

Sale—Sale on "Sale and Return"—Right of Third Parties Purchasing bona fide *from a Party who had Fraudulently Bought from Others in a Contract of Sale and Return.*

A party by fraudulent practices obtained goods from another without paying for them, on a "sale and return" contract. He then pledged them for advances of money with certain pawnbrokers who were ignorant of the fraud. *Held* that the latter were entitled to refuse to restore the goods to their original owner until their advances were repaid.

Observed per the Lord Justice-Clerk (Moncreiff) that the only difference between a contract of "sale and return" and an ordinary contract of sale is that in the former case the buyer has the right to return the goods to the seller within a reasonable time and of thereby extinguishing his liability for the price, and the seller must receive these in satisfaction of the buyer's obligation.

Observed per the Lord Justice-Clerk (Moncreiff) that a condition annexed to a contract of sale empowering the buyer in a certain event to return the goods is not suspensive of the sale.

Sale—Sale or Return—Sale and Approbation.

Observations per curiam upon the destinctions between a sale of goods on "sale or return," and on "sale on approbation," and upon the rights of parties purchasing under the two contracts.

This was a multiplepoinding brought in the Sheriff Court of Lanarkshire by the Procurator-Fiscal in that Court, in order to determine the right of property in 36 gold watches and five diamond rings of which the pursuer was the holder. In January 1878 James Marr junior had been apprehended on a charge of having stolen during the months of November and December 1877, and of January 1878, *inter alia*, the watches and other articles forming the fund *in medio*, and he was thereafter indicted at the Circuit Court of Justiciary, held at Glasgow in April 1878, on a charge of having stolen or embezzled, *inter alia*, these articles, and having pleaded guilty to part of the charge made against him, was sentenced to five years' penal servitude. James Marr junior and others were called as defenders.

Robert Barclay and others, pawnbrokers in Glasgow, respectively claimed certain of the watches in question, or otherwise sought decree against the claimants or claimant who might be found conditionally entitled to obtain delivery of these watches, ordaining them to repeat the sums advanced by them in security. They averred that in accordance with a practice of trade, and in accordance with the lawful and usual course of their pawnbroking business, they had advanced money on watches pledged by Marr. It was stated that for upwards of a year prior to Marr's apprehension he had carried on business as a watchmaker in Glasgow, and in the course of his business he had had dealings with the claimants upon the security of goods of which he was the lawful or reputed owner, or of which he was in the lawful possession. It was averred that the goods pawned, which had been handed to the police authorities, were still subject to the claimants' rights.

A claim was also put in by Benjamin Smith for delivery of a watch which he had purchased on 30th Nov. 1877 from Marr, and which he had delivered to the police for the purpose of the proceedings against Marr.

R. & G. Drummond, James Crichton, Lorimer & Moyes, John Jamieson, John Scouler, and others, who were wholesale watchmakers and jewellers, and who had, on the understanding that he was to effect a sale of them, handed various watches and other goods to Marr, which he had forthwith pledged, were also claimants in respect of the said watches.

It was stated in Scouler's condescendence—"(Cond. 2) On or about 14th November 1877 James Marr junior, then watchmaker and jeweller, 58 Edmund Street, Dennistoun Street, Glasgow, called upon the claimant at his said business premises, and stated that he had received an order for a gold watch, and requested the claimant to entrust him with four gold watches, that he might submit same to the person from whom he had the order, that the latter might select one therefrom. (Cond. 3) The claimant, in the belief that the statements so made by the said James Marr junior were true, handed to and entrusted him with four gentlemen's gold lever watches for the purpose of submitting same for selection, as aforesaid, to his intending purchaser, and on the distinct, express, and sole understanding that he should so submit same for selection, and thereafter return to the claimant the three remaining watches if one had been selected, and pay the price of the watch so selected; and in the event of none of the watches being selected, that he should return the whole four watches to the claimant. (Cond. 4) On or about 30th November 1877 the said James Marr junior called upon the claimant, explained that the watches referred to in article 3 had not been returned to him with a selection made, and stated that he expected an order for another gold watch, and requested the claimant to entrust him with other three gold watches, that he might submit same to the intending purchaser, in order that he might select one therefrom." These were given him upon the same understanding as in the previous case. Upon the 1st December, being next day, Marr again

* Decided 8th January.

called upon the claimant, and requested to be entrusted with other three gold watches on approbation, and these were given. On the 19th December Marr's wife called with a letter from her husband requesting the claimant to entrust him with other three gold watches for the same purpose, and these were given. On 9th January 1878 Marr again called on the claimant, and made plausible excuses for not returning the watches received by him, and requested to be entrusted with some diamond rings, to be submitted to a gentleman in Partick to whom a presentation was about to be made by his friends, and the claimant, in the belief that these statements were true, entrusted Marr with four diamond rings, forming part of the subjects *in medio*, upon the same footing as the watches had previously been given.

The pleas-in-law for Barclay and the other pawnbrokers were, *inter alia*, as follows:—"(1) The gold watches claimed having been lawfully pawned with the claimant by James Marr junior, and not having been lawfully redeemed from pawn, and no part of the principal and interest advanced thereon having been repaid to the claimant, he is entitled to retain the watches until payment. (2) The watches having been *pro tempore* delivered by the claimant into the custody of the pursuer and nominal raiser, through the police authorities, for the specific purpose of production as evidence in the criminal prosecution of, or the criminal inquiries regarding, the foresaid James Marr junior, and that purpose having now been satisfied, the present claimant is entitled to obtain delivery of the watches in exchange for the receipts produced. (4) *Separatim*, and without prejudice to the foregoing pleas, the present claimant Robert Barclay is entitled to decree against any other claimants or claimant who may be found conditionally entitled to obtain delivery or possession of the said gold watches, and that for the sum legally advanced by the present claimant, with interest thereon and expenses. (5) The criminal quality, if any, of the conduct and acts of James Marr is *res judicata*, and no *labes realis* attaches to the goods claimed."

For Smith it was pleaded that—"(1) The watch being the property of the claimant, and the purpose for which it was borrowed having been served, he was entitled to delivery thereof, and with expenses. (2) The said James Marr junior being the owner or in the lawful possession of said watch, he was entitled to sell the same. (3) At least being in the lawful possession of said watch, and having sold it, the purchaser's right thereto cannot be defeated."

For R. & G. Drummond and the other jewellers it was pleaded—"(1) The articles in question being the property of the claimants, and having been stolen from them, they are entitled to be preferred thereto. (2) There being a *labes realis* attaching to said articles in the possession of third parties, the claimants are entitled to vindicate the same. (3) In any event, the claimants are entitled to delivery of the watches claimed by them on paying the sums, if any, advanced thereon."

Scouler and Jamieson also pleaded respectively—"The watches and rings claimed by this claimant being his property, and having been stolen or theftuously obtained from him, or at all events having been obtained from him by means of falsehood, fraud, and wilful imposition by Marr, Marr had no title to pledge same, and the pledgees having no title to said watches, and no valid security over same for sums advanced, and no valid claim against this claimant for said sums, their pleas ought to be repelled, and this claimant preferred to said watches and rings, and found entitled to expenses."

Bayne, another claimant to Smith's watch, stated that he was the owner of it, and had entrusted it to Marr; and pleaded, that "The property of said watch being that of the claimant, and no other party having a right thereto, he is entitled to be ranked and preferred to the fund *in medio* to that extent."

The facts of the case beyond those mentioned, and as appearing from the proof, are sufficiently stated in the opinions of the Court.

The Sheriff-Substitute (GUTHRIE) on May 10, 1879, pronounced this interlocutor—"Finds that the party James Marr was a travelling jeweller carrying on business in Glasgow and different parts of Scotland in the end of the year 1877: Finds that in November and December 1877, and January 1878, Marr obtained the various watches and rings to which the claimants R. & G. Drummond, &c. . . . are severally hereinafter preferred, from the said claimants, by pretending that he wished to have them to show to customers, with a view to sell one of those got on each occasion, and to return the rest, or all of them, if he should not effect any sale: Finds that the said representations were false, and that Marr on each occasion of obtaining the said watches and rings immediately, or very soon thereafter, pledged the watches for his own purposes: Finds that the property in said watches and rings never passed to Marr, and that in so pawning the watches and rings he was guilty of theft: Therefore prefers the claimants . . . R. & G. Drummond, &c.; repels the claims for the parties Barclay," &c., &c. . . .

He added this note:—

"*Note.*—As it appears to be very plain that the crime committed by James Marr, which has occasioned this litigation, falls under the category of theft, there would be little advantage in entering upon the discussion of the larger and more difficult and interesting questions which were argued as to the rights of innocent third parties who have got possession on an onerous title of property obtained from the owners by fraud. I listened with interest to a very able and ingenious argument on that subject, with regard to which I will only say that the position of the pawnbrokers here does not seem to be so favourable as that of a purchaser or even pledgee in the open market; and that though Marr, under the contract of sale on approbation or sale and return (see Bell's Pr. 109, and authorities cited), may have been in a position similar to that of a factor, who at common law in Scotland, and under the Factors Acts, is entitled to make valid pledges of his principal's goods in his possession, yet he was clearly not within the terms of these Acts, and not, I think, within the principle or reason on which the factor's common law right to pledge is founded, viz., his being often in advance for his principal. I take it that that, and not the principle of ostensible ownership, which is the governing principle of the Factors Acts (see *per*

Lord Chancellor in *Vickers* v. *Hertz*, March 20, 1871, 9 Macph., H.L., 69), is the ratio, or a main part of the ratio, of the old Scotch law as to factors, and that that old law is not to be extended beyond the case of factors or agents. The Factors Acts as lately extended just fall short of including the case in hand; and I am therefore compelled to decide it according to what I conceive to be the settled rules of the common law.

"I have only to explain that the articles in question all stand in precisely the same position in regard to the mode of their acquisition and the mode in which they were dealt with by Marr and those from whom he got them. All were got upon a contract of sale, which embraced a suspensive condition that prevented the passing of the property to him. His right to deal with them was strictly limited, just as much as that of the hirer of the pianoforte in the case of *Muir, Wood & Company* v. *Moore & Kidd*, Guthrie's Sheriff Court cases, 444, so often referred to in the debate, or of a watchmaker entrusted with a watch to repair; and his forthwith pawning them for his own ends was just as clearly a theft as that of the bailee of the pianoforte or the watchmaker. In one case Marr paid part of the price of the watches got—these got from Mr Scouler on 14th November—and Mr Scouler seems to have dealt with that transaction as a completed sale to Marr on credit. The condition was purified by the agreement of both parties that the sale should become absolute and the property pass, and there is no ground on which Mr Scouler, having taken part payment, can now reclaim his property."

On appeal the Sheriff (CLARK) adhered.

Barclay and others appealed to the Court of Session, and argued—The evidence showed that truly they were entitled to the property in question. What was the position of goods on "approbation?" Truly that meant goods on sale with an option to return. That option suspended the change of property. The moment, however, the party in possession indicated an election, as he did, by any act putting them beyond his own control, the property passed. In all the authorities on this point there was always the fact present that it was in contemplation that they might be sold.

Authorities—Macdonald on Criminal Law, 22, 41; *Kingsford* v. *Merry*, Nov. 27, 1856, 1 H. & N. 503; Addison on Torts, 5th ed. 340; *Moss* v. *Sweet*, Jan. 15, 1851, 20 L.J., Q.B. 167; Bell's Comm. (M'Laren's ed.) 288; Brown on Sales; Benjamin on Sales, 483; Stair, i. 14, 5; Ersk. iii. 5, 10; *Brown*, July 1839, 2 Swinton 394.

Argued for the respondents—It was quite true that the pawnbrokers might have acted in perfect *bona fide*, but they lent on property to which Marr had no title whatever. He was a mere agent or factor for the sale of the goods in question.

Authorities—*Taylor Keith*, June 14, 1875, 3 Coup. 125; Macdonald on Criminal Law, 2d ed. 41; *Boyd*, April 25, 1874, 2 Coup. 541; *Mitchell*, Dec. 21, 1874, 3 Coup. 77.

At advising—

LORD JUSTICE-CLERK—This is an interesting as well as an important case, and raises not only questions of fact of considerable difficulty, but points of commercial law of wide application, and of novelty as well as of nicety.

The outline of the facts out of which the action has arisen is simple enough. A man of the name of James Marr, who gave himself out to be, and for a short time seems really to have been, an itinerant retail jeweller in Glasgow, obtaining his stock from some of the larger firms in that city, on something of the footing of sale and return, appears in the autumn of 1877 to have commenced a system of obtaining from the dealers watches and jewellery on the pretence that he meant to trade with them, and straightway pawning them with different pawnbrokers. This system he carried on to a considerable extent for four or five months, when he was detected, tried, and convicted on a charge of falsehood, fraud, and wilful imposition, and sentenced to five years' penal servitude.

In the meantime the produce of these frauds, in the shape of a number of watches and other articles, were found in the hands of different pawnbrokers in Glasgow. These were taken possession of by the police authorities, and this process of multiplepoinding has been raised by two of the defrauded dealers in the name of the Procurator-Fiscal in order to decide to whom they belong. They are claimed by the different traders from whom Marr received them, and by the different pawnbrokers with whom they were pledged. The fund *in medio* consists of 41 articles, of which nearly 30 gold watches and 4 diamond rings are now in dispute. Five pawnbrokers and six of the traders have lodged claims in this process, with which it is necessary to deal. One or two of the articles originally condescended on are not now in dispute. The Sheriff-Substitute has preferred the dealers in all the claims, and repelled those for the pawnbrokers, and we have now to review that judgment, which was affirmed by the Sheriff.

It may be assumed that all the instances now in question were acts of deliberate fraud, that Marr obtained the goods without any intention of trading with them, and for the most part took them to the pawnshop immediately after receiving them.

It will be thus seen that the process raises as many different cases as there are claims on either side, and that even the different transactions with the same dealers might disclose different circumstances. I shall, however, mainly address myself to one of the larger claims, as a fitting theme for the explanation of my views on the legal principles on which I conceive the case must be decided—[*states the facts in Scouler's case*]. I am of opinion that the instances on which Scouler's claim is founded were transactions intended by him to be, and were in fact, contracts of sale and return, under which the unsold goods were to be returned by Marr to Scouler within a month. I think Scouler has entirely failed to substantiate the statement in the record—that only one of the watches obtained on each occasion was to be retained or sold. There was no such bargain and no such understanding. The mention of the contemplated presentation which Marr may have made to Scouler was only a false inducement. It made no part of the contract, and if Marr could have sold all the watches at the invoice price, Scouler would and could have made no question of his right. It remains to inquire what was the legal effect of these several contracts of sale and return, and

what the effect of the operation of pawning them.

A contract of sale and return is a bargain which has for its object, on one hand, to increase the market of the wholesale merchant, and, on the other, to enable a retail dealer to acquire a stock for the purposes of trading on his own account without being liable absolutely in the price of the goods to the merchant from whom they are acquired. It differs in its practical effect from an ordinary contract of sale in one respect, and one only, namely, that the buyer has the right of returning the goods themselves to the seller within a reasonable time, and of thereby extinguishing his liability for the price, while, on the other hand, the seller is bound to receive the goods returned in satisfaction of the buyer's obligation, and he is so reinvested in the property. In all other respects the rights and obligations of vendor and vendee seem to be precisely those which are the result of an ordinary contract of sale. In particular, the following seem some of the characteristics of this contract—(1) The price is fixed to the buyer, and he may pay it on delivery and at any time thereafter. (2) If he sells the goods, he does so solely on his own account, and for his own benefit, and at any price he pleases. (3) The seller cannot reclaim the goods while they remain unsold, either within or beyond the period allowed for return. (4) After the expiration of that period, if the goods are not returned, the seller may sue for the price, which becomes absolutely due by the seller, without any right to return. I shall say a few words in illustration of these results.

It is manifest that this contract has no analogy to that of principal and agent, or others in which factors or trustees have possession of goods belonging to others in a fiduciary character. In these cases the power which the holder has to sell is entirely derivative, and the property never passes to the agent or trustee, whether before or after sale. It is no doubt now fixed by statute—and our Courts had previously inclined to the same result—that even a factor who has no individual right to goods of which, or of the symbols of which, he has possession, but only holds them as the representative of the true owner for a limited and special purpose, may yet confer on a *bona fide* purchaser or pledgee a valid and effectual title, but this proceeds, not on the footing of any individual right of property in the factor, but entirely on the ostensible title implied in the possession of the goods themselves or of the documents which give right to obtain possession. In these cases the factor only holds or sells for another. But a purchaser on sale and return is not an agent or representative in any sense. He holds and sells for himself. Marr was entitled to have sold all the watches if he could, and the price when received was his, and not that of Scouler. The distinction I refer to is well brought out in the case of *White in re Neville*, Jan. 1871, 6 Chan. Apps. 397, in which the question was whether certain goods which were in the hands of a holder were held by him as a commission agent *del credere*, or on sale and return. Lord-Justice Mellish gave these *indicia* of the latter right—"If," he says, "the consignee is at liberty . . . to sell at any price he likes, and receive payment at any time he likes, but is to be bound if he sells the goods to pay the consignor for them at a fixed price and a fixed time—in my opinion, whatever the parties may think, their relation is not that of principal and agent, and . . . in point of law the alleged agent in such a case is making on his own account a contract of purchase with his alleged principal, and is again re-selling." Nothing could more accurately describe the position of Marr in the present case, or exhibit more clearly the distinction between one who has a right to sell on his own account, flowing from his title of possession, and one who has ostensibly a right to sell, but who in reality has only a power to sell, bestowed by and for the benefit of another.

It is important to disencumber the case of this false and misleading analogy, because if it be once fixed that Marr was in no respect the mandatory or agent of Scouler, but held the articles entirely in his own right, which if not complete he might at any time make complete by payment of the price, little more requires to be said, for a right of absolute disposal for his own behoof implies that the buyer had a right to put the article to the inferior uses of property, and therefore was entitled to pledge it. It may no doubt be said that if Marr was a factor, falling under the statutes, he would still have a right to pledge. That is true; but such was not his true position.

It is also clear that the seller cannot interfere with or control the buyer in the use of the goods either within or beyond the period allowed for return. He cannot do so within the period, because that would be to violate the essence and defeat the object of the contract; he cannot do so beyond the period, because the running out of the time of itself makes the buyer's liability to pay the price absolute, and precludes the right to return the goods. This last was deliberately decided in *Moss* v. *Sweet*, 20 L.J., Q.B. 167, L.R. 16 Q.B. 493, which has fixed the law ever since, and so Mr Benjamin states—Sale 483.

It is, however, a controversy as old as the time of Justinian, and perhaps still unsettled among jurists, whether a condition annexed to a contract of sale empowering the buyer in a certain event to return the goods be in its nature suspensive or resolutive. If the contract of sale and return be of the nature and carries the effects I have described, and for other reasons to be immediately mentioned, the controversy may have no great practical importance in the present state of our commercial code. It is, however, argued for the sellers here that the condition is suspensive, not resolutive, and that therefore until the period allowed for return had expired there was no contract, and the property did not pass. They referred to various authorities to support this proposition, which, if true, they maintained left the right of property in the seller, and rendered the appropriation of the goods by pawning them theft.

It is certainly true that Mr Bell, whose authority is necessarily of great weight, following in that respect Brown on Sale, and concurred with by Mr Brodie in his Supplement to Stair's Institutes, holds that such clauses are suspensive of the sale as long as the condition is in doubt. He states this view in his Commentaries, and again with more precision and detail in his work on Sale, p. 111. His position is, that until the goods are sold the property remains to all effects with the

original owner, and is only transferred by the act of sale or approval, as the case may be.

This doctrine involves one paradox in legal principle which I find it difficult to accept—namely, that a person can sell, on his own account and in respect of his own title, an article which does not belong to him, and which only becomes his when he ceases to have any right to it. It may be true, nevertheless, but there is a fanciful subtlety about the proposition which does not recommend it. If the buyer in a contract of sale and return were a mandatory or agent selling for a constituent, I could understand the result, because the title given to the third party would be that of the original owner, not of the ostensible seller. The authorities, however, are by no means all one way. They are collected in an able note to Mr M'Laren's edition of Bell's Commentaries (i. 289), and I have studied them with attention. The American writer Parsons considers such conditions as resolutive only, and indeed I cannot see any other conclusion which is reasonably in harmony with the admitted effects of the contract. I shall not go into the authorities, but content myself with a quotation from one of the highest of them—Pothier—who in his treatise on Sale solves the question without any hesitation. Writing of the analogous contract of sale on trial, he says (264)—"In the sale of articles the quality of which cannot be known excepting on trial, as a horse, a clock, or a watch, it is common to insert a clause to the effect that if the buyer is not content [on trial] the bargain shall not hold. Ulpian teaches us," he proceeds, "that such sales are not conditional, and that the clause so contained in them is only resolutive;" and then after quoting Ulpian's words to that effect, Pothier states the principle thus—and it seems to me to be a sound and simple rule, and of general application—"By this clause, which is entirely in favour of the buyer, the seller undertakes to the buyer to take back the article if it does not suit the buyer, and to pay him back the price if it have been paid, or otherwise to discharge it."

In this view the right to return the article instead of paying the price is entirely the privilege of the buyer, and if this right be not exercised within a reasonable time the obligation to pay the price becomes absolute. But it is a completed sale from the first, and it does not seem that under any circumstances the stipulation gives the seller a right to demand the return of the goods. While, therefore, all the substantial rights of ownership pass to the buyer, it is more reasonable to conclude that the property passes also, and that the condition of return is a right given to the buyer, and qualifies only his obligation to pay the price, or rather obliges the seller to receive back the goods in fulfilment of it.

But however this controversy may be solved, its solution can only be of importance as long as the goods remain in the hands of him who has obtained them on sale and return without his having exercised the right either of selling or returning them; but whenever the buyer exercises any right of property in the subject of the sale, as by selling, lending, hiring, or pledging the property, his option ceases, and he has no longer the right to return the goods, but becomes absolutely liable for the price. It follows, therefore, that even if this option, while unexercised, were suspensive of the sale, and prevented the property from passing from the original owner, the act which forfeits the right of return at the same time passes the property. In either view, therefore, there can be no *labes realis* attaching to the goods in the hands of the third party, for the condition of return was at an end when the bargain with the third party, whatever it might be, was completed.

Of course when the contract has been induced, as here, by fraud, the question I have been considering can only arise when the goods are in the hands of a third party. The courts of law, both here and in England, have solved such cases as the present by a broader equitable view, but one which really rests on precisely the same foundation. Lord Stair says (i. 14, 5)—"Property or dominion passes not by conditions or provisions, but by tradition, or other ways prescribed in law." From which it follows that possession or some symbol of tradition are the only true indications of property in moveables. Thus it is held in England that when tradition or possession has been obtained by fraud, and has been used to induce transactions with third parties, of two innocent parties he shall suffer who has enabled the wrongdoer to commit the fraud. This is simply another way of saying that a purchaser or pledgee is not bound to look beyond the ostensible title of possession, and that if the true owner have knowingly conferred this ostensible title, although induced thereto by fraud, a *bona fide* purchaser cannot be required to restore what he has bought on the ground of latent stipulations between the seller and his author. This view was very clearly laid down by Lord Chancellor Hatherley in the case of *Vickers* v. *Hertz*, quoted, and as I think misapplied, by the Sheriff-Substitute. The case came ultimately to turn on the terms of the Factors Acts, of the *rationale* of which statutes Lord Hatherley thus expresses himself (9 Macph., H. of L., 69)—"When one person arms another with a symbol of property as the means of acquiring the actual possession of the property—a symbol which to all the world is liable to confusion with the actual right of property—he should be the sufferer when a fraud of this kind takes place rather than the person who gives credit to that which appears to include a right to the property, and is misled by the position in which the person is placed who is trusted by the owner of the property, and by that means is enabled to commit a fraud." Of course the case of actual delivery and possession is stronger than that of a delivery-order of which these words were spoken, as such an order is only a symbol of a right to obtain possession.

The same principle was announced and given effect to in the very recent case of *Babcock* v. *Lawson*, June 10, 1879, 4 Q.B. Div. 394, in which a person having pledged a quantity of goods in store in security of an advance, and given the pledgee a delivery-order on the storekeeper, persuaded the pledgee to redeliver the order on a false statement, and pledged the goods with another, to whom he transferred the order. The Court held that the first pledgee must stand the loss, as he put the wrongdoer in the position of being able to commit the fraud.

Precisely the same views were expressed by Lord Ardmillan and Lord Kinloch in the case of *Pochin & Co.* v. *Robinows & Majoribanks*, 7 Macph. 622—a case which preceded that of

Vickers v. *Hertz*, and which raised the same question.

I conclude, therefore, that apart from the questions (1) Whether the property vested in Marr from the first? or (2) Whether the act of pledging rendered the purchase absolute?—both of which I incline to solve in the affirmative—the loss in this case must fall on the party who put the wrongdoer in possession, and that conclusion must follow although the possession was obtained by fraud, and although in a question between Scouler and Marr the right of property had never been transferred.

I say nothing as to the question of theft, which embraces other elements; for it is plain from the authorities I have last referred to that the original owner, although he had never transferred the right of property, might yet not be entitled to follow his goods into the hands of a *bona fide* purchaser, if by his voluntary act he had placed the wrongdoer in a position to perpetrate the fraud. But of course if the property passed on delivery, there could be no question raised on this head. On the case of Scouler, therefore, I am of opinion that, on the views I have already expressed, he is not entitled to reclaim his goods from a *bona fide* holder.

The next case—that of Jamieson—and the two last—those of Moyes—are not, in my opinion, distinguishable from that of Scouler. They also were clear cases of sale and return.

The cases of Crichton and Drummond are somewhat different, and approach more nearly a proper case of sale on approbation. But I have come to the conclusion that there is no room for making any distinction in their favour. Even had these been pure cases of sale on approbation, I am not prepared, on the grounds I have stated, to hold that the property did not pass by delivery, although in a question between them and Marr the contract might have been set aside on the head of fraud. But I must make this observation about all the cases, that none of them are sales on approbation in the proper sense. They are all cases of sales to a dealer—that he may, if he can, make on his own account a sale on approbation to a third party. The sale is not contingent on the dealer's approval, for that is given when he takes the watches. They are given to him to trade with, and for no other purpose; and this is nothing but a contract of sale and return.

It has been argued that a sale on approbation is an entirely different contract from one of sale and return. It only differs in this respect, that in a sale on approbation the goods may be returned if not approved; while in sale and return they may be returned if not sold; and in both the sale becomes absolute, and the right to return is lost, if the goods are detained beyond a stipulated or beyond a reasonable time. The condition is different, but the effect of it is precisely similar in either case.

It was also argued that the sale in such a case remains imperfect until approval is intimated. But this is clearly not so; for if disapproval is not intimated within a reasonable time, the right to return the goods is lost, and the obligation to pay the price becomes absolute—a result which could not take place if the contract remained in suspense until approval was intimated.

But while I have come to these results on the legal aspect of the facts, not without a sense of the difficulties of the questions involved, but still without much hesitation, there is another branch of the case which has given me much more anxiety—I mean the position of Barclay and the other pawnbrokers here,—and although I do not think it can vary the result, I think it right not to omit mention of it. Marr never could have perpetrated these frauds through any other channel than that of pawnbrokers. Although advances on goods are of common occurrence in ordinary trade, it is certainly unusual to find a working jeweller pledging substantially the whole of his stock at 15 per cent. interest within a period of six months, and that at intervals which might have led a pawnbroker of ordinary acuteness to the conclusion that what was withdrawn at one establishment was probably pawned at another. The question arises, Whether the defenders exercised such reasonable care and caution as to give them a right to be considered as *bona fide* or innocent parties in this question? I have had not a little hesitation on this head, and I cannot help concluding that Chief-Justice Abbott's ruling in *Delauney* v. *Barker*, 2 Starkie 539, must have proceeded on some similar demur, although in the end the jury held that case not to be one of sale and return. But as I understand that your Lordships do not participate in these difficulties to the full extent, and as I am not prepared to find that these claimants were not in good faith, I shall content myself with saying that my sympathy does not go with the course of dealing thus disclosed, although I cannot on this ground reject their claim.

Lord Ormidale—The question for decision in this case, stated generally, is, Whether a person who by fraudulent practices obtains goods from another without paying for them, on sale or return, or on sale and approval, can pledge them for advances of money, so as to enable the pledgee, who was ignorant of the fraud, to refuse to restore them to the original owner till his advances are repaid? The facts of the case are these:—

James Marr, representing himself as a travelling dealer in watches and jewellery, in the course of the months of November and December 1877 and January 1878 applied to and obtained various watches and rings at fixed prices from watchmakers and jewellers in Glasgow, on the false and fraudulent representation that he would shortly account for the prices of such of them as he might succeed in disposing of to his customers, and return those which he did not so dispose of. Marr having failed either to return all the watches and jewellery or to pay their prices, but, on the contrary, having pledged the greater part of them with pawnbrokers for advances in money, was apprehended and tried at the Circuit Court of Justiciary held at Glasgow in April 1878, under an indictment which charged him with falsehood, fraud, and wilful imposition, as also theft. Having pleaded guilty to the former charge, he was sentenced to five years' penal servitude, and the charge of theft was departed from.

It was in the course and for the purposes of the criminal proceedings against Marr that the watches and jewellery were removed from the pawnbrokers with whom they had been pledged by him; and it was for the purpose of determining to whom they belong—whether to the

watchmakers and jewellers from whom they were obtained by Marr, or to the pawnbrokers with whom he had pledged them—that the present process of multiplepoinding was instituted in the Sheriff Court at Glasgow. The watchmakers and jewellers claimed them as having been stolen from them by Marr, who could not therefore pledge them, or deal with them at all as if they were his property; and the pawnbrokers claimed them on the ground that they had not been stolen by Marr, but had been obtained by him under a contract or agreement which, although voidable on the head of fraud, was not absolutely void, but, till judicially set aside, enabled him to dispose of them by pledge for advances to parties acting in good faith and in ignorance of the fraud.

The question thus arising has been decided in the Sheriff Court favourably to the respondents, the parties from whom the goods were acquired by Marr, and adversely to the appellants, the parties with whom they were pledged.

It is stated by the Sheriff-Substitute in the note to his interlocutor of 10th May 1879, that although different lots of watches or jewellery were got by Marr from various parties, "all stand in precisely the same position in regard to the mode of their acquisition, and the mode in which they were dealt with by Marr and those from whom he got them." This statement is, I think, substantially correct; but, there being shades of difference as regards the circumstances in which Marr obtained the goods, it is right that these circumstances as they are disclosed in the proof, and especially in the evidence of the respondents, the jewellers and watchmakers from whom Marr obtained the goods, should be carefully examined.

For the respondents John Scouler and John Jamieson there is, besides the testimony of Marr, that of themselves and some other witnesses. Scouler says that in November 1877 Jamieson told him "that Marr was a very respectable lad; he sells a good many watches, and whatever he takes away on approbation he returns, or pays for what he keeps. I said 'on these conditions I will give him two or three watches.'" He then states that on different dates, in November and December 1877, and January 1878, he gave out to Marr various watches, some of which were afterwards returned to him, and that for some of those not returned he received the prices or payments to account of the prices from Marr, while as regards the remainder they were neither returned nor paid for. He also says that Marr when he got some of the watches stated that they were for presentation, but it does not appear that he mentioned to whom or in what circumstances the presentation was to be made. Besides watches, Scouler also mentions that Marr got from him some rings. As regards the watches, Scouler says that he sees from his books they were of the value of £334, 16s., of which there remained unpaid when Marr was apprehended £288, 5s. And he also says—"Although I have no specified time in which to return the goods, I generally like to see them by the end of the month." Scouler's salesman Alison says that Marr got the goods on approbation, "to return what was not kept and pay for those that were kept;" and that he "was free to retain all the watches if he had paid for them. He led me to understand that he had a good business, and that he was travelling over the country."

Besides this parole evidence, which of itself makes the footing on which Scouler transacted with Marr sufficiently clear, there is what Scouler calls his approbation book, in which are entered the goods got from him by Marr, with dates and prices; and there is also a print which was laid before the Court of various letters received by Scouler from Marr, in which the delay in settling is accounted for by Marr, and promises made by him either of payments or return of the goods.

Having regard then to the proof—written and parole—there does not appear to me to be any room for doubt regarding the true nature and character of Marr's transactions with the respondent John Scouler, and the relation in which they stood to each other in these transactions. Very clearly, I think, Marr did not act as the hand or agent merely of Scouler in disposing of goods belonging to the latter. It does not appear that in a single instance Scouler knew or was told or asked who the parties were to whom Marr intended to resell or present the watches or rings. Neither can it be said that Marr was in any way controlled by Scouler in regard to those matters or as to the prices at which he should resell the goods. The prices at which he received them from Scouler were fixed and ticketed on the goods; and provided Marr paid these prices, or returned such of the goods as he did not so pay for within about a month, he did all that was incumbent on him. I cannot doubt, therefore, that so far as the respondent Scouler is concerned, Marr must be held to have obtained the goods on sale or return—that is to say, on the footing of his being held and treated as the purchaser of the whole, or at least of such of them as he did not return.

Such being the nature of Marr's transaction with Scouler, it has next to be inquired whether his transactions with the other respondents were of a different character. As regards the respondent John Jamieson, they certainly were not, for that person says in reference to the watches Marr got from him on Friday 21st December that "he was to return them the next Saturday, and I was to get them at two o'clock, or if I did not get the watches I was to get the money." And again—"I gave the watches to Marr on the understanding that he was to return them on the following Saturday, and that he was to pay the price then if he had sold any." Evidence to the same effect is also given by Robert Kerr, one of Scouler & Jamieson's witnesses. Clear it is therefore that Marr's transactions with Jamieson were precisely of the same character as his transactions with Scouler—in short, that in the one case, as in the other, the watches were given to Marr on sale or return.

With regard, again, to the respondent Crichton, it appears from that person's evidence that Marr came to him and asked for two watches, representing that they were for a Mr Rattray, with whom he had previously done business, and he adds—"I let him have the two on the understanding that they were for Mr Rattray, but before I gave him them he laid down his business card, and said that the watches were for a gentleman in Partick, and that he would see him about five o'clock. I said I did not shut before 10 o'clock on Saturday, but I would like them returned before then. He promised to pay for one, and return the other if he sold one, and he was to return both

if he did not sell either." Although according to this evidence one of the two watches may be said to have been intended for some particular individual, that cannot, I think, affect the real nature of the transaction as being, as in the cases of Scouler and Jamieson, the obtaining of goods by Marr on sale or return; for while Rattray, of whom Crichton appears to have known something, was mentioned first by Marr as the person for whom he wished to obtain a watch, he ultimately, before it was given him, told Crichton that it was for a person, without naming or otherwise identifying him, in Partick, and to this Crichton did not object. Nor do I think that it affects the matter that it was only one of the two watches which it was contemplated at the time Marr was to keep, and that the other was to be returned, for looking at the whole of Crichton's evidence it is obvious that he understood that Marr might re-sell both watches if he found he could do so. Accordingly, Crichton says that Marr called back "either on the Monday or Tuesday night and said he had sold both watches, and he would call in to-morrow and pay them, and would want some more," and to this no objection was made by Crichton. The only conclusion, therefore, which I think can be arrived at in regard to Marr's transaction with Crichton is, that it was of the same character as his transactions with Scouler and Jamieson, that is, the obtaining of goods on sale or return.

The transactions which Marr had with the firms of Lorimer & Moyes and R. & G. Drummond must, I think, be classed with those already noticed. There is a good deal of evidence relating to them, but it is sufficient, I think, to notice the testimony of William Moyes in regard to his firm of Moyes & Lorimer, and that of George Drummond in regard to his firm of R. & G. Drummond. Moyes says that six watches were given to Marr on approbation, and entered in his approbation book accordingly without discrimination. He also says that he gave Marr along with the watches what he calls an "invoice or approbation-note." It is true that he states in the course of his evidence that Marr had mentioned as his object in getting those watches that they were for a presentation, but where or to whom he did not specify. But he does say that Marr "was introduced to me as a gentleman in the trade. He gave me his card and I shall produce it." And, again, he says that Marr was charged the "price exactly as I would have charged anyone else." So much for the case of Moyes & Lorimer. And as to the case of R. & G. Drummond, it is stated by George Drummond, one of the partners of that firm, when examined as a witness for them, that Marr called at their shop on Tuesday 8th January, and "showed his card stating that he dealt in jewellery throughout the country. He said he wanted a watch for presentation—he did not say for whom—but that he wanted one or two to show." He then, after narrating some further conversation he had with Marr, says that he gave him three gold watches with an approbation-note, and that "Marr was either to bring back the three watches on the Wednesday, or two watches plus the cash for the third, and there was a percentage to be allowed off." It is then explained by Drummond that Marr called next day (Wednesday) and left a message to the effect that he would call the following day (Thursday), and that he did call that day when, on his stating that he desired to have more watches to show to the parties who were interested in the alleged presentation, he got another lot of three in the same way as he had got the previous lot of three on the Tuesday. Both lots were given to him on what are called approbation-notes, and both lots were also entered in R. & G. Drummond's approbation book as being given to Marr "on approval," with a description of the watches and their numbers and prices. The witness further states that Marr "did not say who his customer was. He did not speak of Partick."

Such being the cases of Moyes & Lorimer and R. & G. Drummond, I am unable to find any essential difference between them and the cases of the other appellants Scouler, Jamieson, and Crichton. In all of them Marr presents himself as a travelling dealer or trader in watches, and as such desirous of having watches to exhibit to his customers in different parts of the country for sale. It is true that in some instances and to some of the respondents he represented that the watches were wanted by him in order that one might be selected for presentation, but this comes to be of no consequence when it is kept in view that the appellants did not know or appear to have had any concern with the person to whom the presentation was to be made. Neither do I think it of any consequence that in some of those instances Marr stated that a presentation was to be made of one out of several watches which he got, and the others returned, for I think it clear, having regard to the whole evidence bearing on the matter, that Marr might have kept and re-sold, or disposed of as he pleased, all the watches, provided he paid or accounted for their prices as affixed to or ticketed on them. It was for their sale at these prices that the respondents had them in stock, and when they gave them out to Marr, a travelling dealer or trader in watches, it must have been for the object of enabling him to re-sell or dispose of them in retail as he pleased. Accordingly, Marr himself, when examined as a witness, says with reference to his transactions with all the respondents—"There was no recognised time in which to return goods on approbation. I usually did so monthly—that is to say, when I got goods I understood if nothing was said I had a month either to sell or return them." I can look upon it therefore as nothing more than a pretence set up by some of the respondents for the purpose of aiding them in their pleas in the present litigation that only one out of several watches was given to Marr on sale or approval. I think it too plain to be denied that all the watches were got by Marr from each and all of the respondents in such a way and in such circumstances as to entitle the Court to hold that they were, after being received by him, in his order and disposition and beyond the control of the respondents. No doubt the respondents became from the moment they parted with the watches to Marr his creditors for their prices, payment of which they could enforce after the lapse of the stipulated or a reasonable time, if no precise time had been stipulated. But in the circumstances as they stand, and seeing that all the watches and rings as were not returned or paid for by Marr to the

respondents were, immediately on coming into his possession, pledged by him with the appellants, the question of law has arisen in the present process of multiplepoinding—Who has the preferable right to them? the appellants with whom they have been pledged by Marr, or the respondents to whom they originally belonged, and from whom Marr obtained them?

There can be no doubt that Marr obtained the goods by fraud from the respondents, and if it could be shown that the appellants, the pawnbrokers, were in the knowledge of that fraud, that might be sufficient to entitle the Court to disallow their claims in the present process and to sustain the claims of the respondents. But for myself, notwithstanding some grounds of suspicion which the proof suggests, I must say that I can see no sufficient reason for holding that the appellants received the goods from Marr in *mala fide*. On the contrary, I think it must be held that they acted in *bona fide* and according to the usage of their trade. They appear to have received the goods not under and in terms of the Pawnbrokers Acts, but as private transactions for advances duly made in conformity with what has been proved to be a well known branch of their trade. Accordingly, no allegation or plea is to be found in the record to the effect that the appellants or any of them knew, or had reason to suspect, how Marr when he pledged the goods with them had got possession of them; and it has not been proposed by the respondents that any such allegation or plea should be yet added to the record. It appears to me, therefore, that it must be held that there is no ground upon which the Court can proceed for imputing *mala fides* to the respondents, and that the case must accordingly be dealt with on the footing that this is so.

The question then arises, Under what, if any, contract Marr obtained possession of the watches and rings in question from the respondents? A solution of this question must be come to before it can be determined whether the goods referred to were stolen by Marr, or obtained by him under such a contract as passed the property to him, or, in other words, under which the *jus disponendi* was so transferred to him as to entitle him to pledge them for good and onerous consideration in the way he did.

Neither party, as I understood the argument at the debate, maintained that the goods had been given to Marr by the respondents simply and exclusively as their hand or agent. They certainly were not given to him as a messenger or servant or employee for the purpose of being carried from one place or individual to another; and neither were they consigned to him as a commission agent or factor to sell on account of the respondents, and subject to their orders and control. He was to get no commission from the respondents, and he was not restricted by them in regard to the prices he should ask or obtain in the event of his selling them. He was entitled to sell to whom and at what prices he pleased, and the surplus, if any, which he might get, over the respondents' prices, previously fixed, was to be his own. He might, indeed, be himself the buyer of them at these prices, and do with them what he pleased. The present case is in these respects very much of the same description, although different in some of its particulars, as that of *ex parte White re Nevill* (Law Rep., 6 Chan. App. 397), where it was held that the original owner of goods obtained by an individual very much in the same way as in the present case—that is to say, on sale or return—and re-sold to *bona fide* third parties—had no right to them or their worth in competition with these third parties.

The parties were, as I understood, agreed to this, or any rate did not raise any serious question on the subject, supposing that Marr could be held to have obtained the goods under a contract of sale or return. But the respondents denied and disputed that there was any such contract. They contended that the contract—if there was one at all—was not that of sale or return, but that of sale or approbation, under which they contended that no right of property or *jus disponendi* passed to Marr. As to the precise name of the contract, I do not think that in the circumstances of the present case anything turns upon it, for I think it clear on the facts established by the proof that, as I have already shown, Marr obtained the goods from the respondents on the footing that such of them as he did not return within a specified or reasonable time should be held as sold to him. This, I think, was "sale or return," as in the case of *ex parte White re Nevill*, and nothing else. It certainly was not the case of goods being given out for inspection merely, leaving a bargain or sale to be afterwards come to in such terms as to price and other particulars as might be agreed upon if the goods after inspection were approved of.

It was argued, however, for the respondents that under the contract in the present case it must be held that there was implied a suspensive condition which prevented the completion of any sale till the vendee had declared his option—that is to say, till he had definitely accepted the goods. This might possibly in some circumstances raise a question of delicacy, but not in the actual circumstances of the present case, for I think it free from doubt on the authorities that it was not necessary for the completion of the sale of the watches and rings in question by the respondents to Marr that he should, as seemed to be contended by the respondents, have made an express intimation to them that he had accepted them as purchaser, and that they should then have on their part expressly assented to this. No authority for that was cited, and I know of none. It was quite sufficient that Marr after obtaining possession of the goods on sale or return, or on sale and approbation or approval, re-sold them to others, or dealt with them in such a way as to show that he had taken or accepted them as purchaser from the respondents, and had dealt with them accordingly. It is stated by Mr Bell in his "Inquiries into the Contract of Sale of Goods and Merchandise" (pp. 110, 111), that by the law of Scotland when a commodity is sold by one person to another on sale or return, or on sale and approbation or approval, the vendee shall be held as accepting and keeping the goods if he does not intimate the contrary, or return them within a reasonable time. Mr Benjamin again, in his work on Sale (pp. 483-4-5) states the law of England to be to the same effect; and he refers to authorities in support of his statement, and among others to the case of *Moss* v. *Sweet* (20 L.J., Q.B. 167), in which

it was held that where goods are sold under a contract of sale or return they pass to the purchaser subject to an option in him to return them within a reasonable time, and if he fails to exercise that option within a reasonable time the price of the goods may be recovered as upon an absolute sale in an action for goods sold and delivered.

Now, it cannot be doubted that Marr, who in the present case obtained possession of the goods from the respondents, did very unequivocally show that he had accepted and taken them as the purchaser, seeing that he pledged them as his own property with the appellants for advances in money. But assuming it to be so, the respondents argued that as they gave possession of the goods to Marr for the purpose of re-selling, and not for the purpose of pledging them, the latter act of his was in itself criminal, and cannot be regarded as completing the contract of sale. It appears to me that this contention is quite fallacious. It is true that Marr obtained the goods from the respondents on the representation that he intended to resell them to his customers, and that this was a false and fraudulent representation. But it was obviously of no consequence to the respondents in what way Marr disposed of the goods provided he satisfied them as to their value or price. They know nothing of his customers, and they do not say that the goods were given by them to Marr for the purpose of being sold to any particular individual or set of individuals. The essential thing to be kept in view is that the goods were delivered by the respondents to Marr on sale or return, and that he was thereby vested with the power of disposing of them. Accordingly, in the case of *Pease and Others* v. *Gloachec* (L.R., 1 Privy Council Appeal Cases, 219) it was decided that goods covered by a bill of lading, obtained by fraudulent representation, and pledged by the party so obtaining the bill of lading, could not be reclaimed from the pledgee, who was ignorant of the fraud, and had given good consideration for the goods. The case is valuable for its exposition of the precedents and law generally bearing on such cases as the present, and for the remark of the Lord Chancellor (Chelmsford), sitting in the Court of Chancery, in delivering the judgment of the Court, to the effect that "the power to sell of course included a power to pledge." And in the recent case of *Babcock and Others* v. *Lawson and Another* (L.R., 4 Q.B.D. 394), it was thus decided that a delivery-order for goods obtained by a person under a sale or return contract, on the false and fraudulent representation that he had sold them, and would forthwith account for the price which he was to receive from the purchaser on transferring the order to him, could be pledged for advances in place of being sold, and that a transference of the goods or delivery-order to the pledgees—who had acted in good faith and in ignorance of the fraud—was unchallengeable by the original owners—the Lord Chief-Justice, who delivered the judgment of the Court, remarking that it made no difference "that the goods having been parted with by the plaintiffs with a view to their being sold, were, instead of being sold, pledged." The same principle was also very distinctly recognised, although it did not arise for decision, in the previous case of *Cundy* v. *Lindsay*, in the House of Lords (3 App. Cases 459). In the case of *Babcock* v. *Lawson* the further principle was given effect to, that of two innocent parties, one of whom must suffer, the party (the respondents in the present case) whose actings enabled the fraud to be committed must suffer the consequences. This principle is enough of itself to support the claim of the appellants.

Assuming that I am right in these views, the conclusion necessarily follows that Marr obtained the goods in question from the respondents not theftuously, but by contract of sale or return, and if so, it is unnecessary for me to deal with the various authorities in criminal law and the numerous decided cases in the criminal courts which were cited at the debate, for it was only upon the assumption that the watches and rings in question had been stolen, as the Sheriff has found, that the respondents contended they had now any right to them. I may, however, refer to the case of *Cowan* (8th January 1859, 3 Irv. 312), which was that of a person who got a watch on trial, to be returned on a certain day if not then approved of, but if approved of it was stipulated that the price should be paid on that day. On the morning of that day Cowan sold the watch and never paid the price. It was held by the Court, consisting of the Lord Justice-Clerk, Lord Cowan, and Lord Ardmillan, that these circumstances did not constitute the crime of theft, but a breach of the contract of sale under which the watch had been obtained.

The result is, that in my opinion the interlocutor appealed against in this case ought to be recalled, and the claims of the appellants sustained, and those of the respondents repelled.

Lord Gifford—I concur with both your Lordships in the result at which you have arrived, and also in the grounds upon which you have proposed to rest the decision.

The case is a very interesting and a very important one, and the very full and able discussion which it has received at the bar has involved many questions of difficulty and of delicacy and of very wide application. In the view which I have ultimately come to take, however, I do not think it is necessary to decide more than one or two of these questions, and I shall explain very shortly the grounds upon which I am of opinion, and at last without much difficulty, that the decision of both Sheriffs is erroneous and ought to be reversed.

There is no doubt whatever that James Marr, the travelling jeweller whose conduct has led to the present questions, was guilty of a very serious and heinous crime in obtaining the watches and jewellery in question, and in pawning them in the manner explained in the record and proof. For this crime he was most justly sentenced to five years' penal servitude, and no one can doubt that the punishment was most richly deserved. It is quite a different question, however, under what precise category his crime fell, and in particular whether it amounted to the crime of theft, or whether, not being theft, the crime was falsehood, fraud, and wilful imposition. James Marr in the indictment before the Court of Justiciary was charged with both these offences. At his trial at the Glasgow Circuit in April 1878 he tendered a plea of guilty of falsehood, fraud, and wilful imposition, and this plea having been accepted, the charge of theft was departed from,

and the sentence of five years' penal servitude followed. The result of the trial, however, does not determine in the present question that Marr was not guilty of theft, and that question is entirely open so far as it has a relevant bearing in the present process. To Marr himself at the bar of the Justiciary Court it mattered little what his crime might be called. His guilt was the same, and his punishment would not have been varied by a mere change in the name of his offence. But in the present question as to the property, and as to the right to retain the thirty-one gold watches and the diamond rings, it may be very material indeed to determine whether James Marr got possession of these theftuously or in some other manner, however fraudulent or criminal it might be. I do not say that it would be conclusive of the questions now at issue if it were once to be held that James Marr obtained the watches and jewellery theftuously, but it would go a certain length in favour of the true owners, and as it would deprive James Marr of all legal title, even of possession, it would require very exceptional circumstances to sustain the validity of a pledge effected by him. If the watches and jewellery were simply stolen by James Marr without the consent or knowledge of the true owners, and without the true owners having entered into any contract whatever—as if, for example, James Marr had broken in by night to the shops where the watches lay, and had stolen them as a burglar—this, if no other circumstances intervened, would have made any pledge by Marr utterly inoperative, and the true owners could have vindicated their property in the hands of an onerous and *bona fide* pledgee.

Accordingly, this seems to be the view which has been taken by both Sheiffs, and if I could concur in this view I would also concur in the result which the Sheriffs have reached. Sheriff Guthrie says—"It appears to be very plain that the crime committed by James Marr falls under the category of theft;" and therefore his Lordship considers it unnecessary to enter upon the more difficult questions as to innocent third parties acquiring property obtained by fraud, and in this view the Sheriff-Principal concurs.

I am sorry that I cannot assent to this mode of disposing of the case, although I was at one time at an early stage of the discussion strongly tempted to do so. There is much to be said in its favour—it has the merit of simplicity and logical clearness, and it supersedes, as the Sheriffs say, ulterior and much more difficult questions. But when the circumstances are closely examined, and the principles applicable are rigidly tested, I am bound to say that the mode in which James Marr acquired possession of the watches and jewellery in question was not, in the strict sense of that term, by theft. I say in the strict sense of that term, for I do not forget the thin and shadowy lines which distinguish theftuous possession from possession obtained by fraud, or from possession obtained for mere custody or carriage, converted theftuously and criminally to the possessor's use. I think it is enough in the present case to decide that Marr's possession was not theft in the strict sense of that term—not theft in the sense that attaches a *vitium reale* to the subject itself, into whose hands soever it may come.

My reasons for this opinion are shortly these:—*First*, Marr obtained possession of the watches and jewellery with the full and deliberate consent of the true owners. The true owners themselves handed over the watches and jewellery to James Marr. There was no burglary—there was no secret abstraction of the property—there was no breaking open of repositories—the goods were given willingly over the counter by the owner to James Marr. *Second*, There was no personation by James Marr—no assumption even of a false character—he was a travelling jeweller, and was known as such, and it was to him in that character that the watches were delivered. James Marr did not pretend to be somebody else—he did not pretend to be anything different from what he really was—there was no deceit and no mistake either as to the person or as to his business and occupation. *Third*, The goods were so delivered to James Marr under a contract with the true owners, in terms of which contract James Marr had the lawful possession, and in certain circumstances the lawful power of disposal, of the property. I am, of course, aware that the mere existence of a contract between the true owner and a custodier of property does not make it impossible for the custodier to commit theft of the subject—as, for example, when the contract is for mere carriage of, for mere custody of, or for mere repair or alteration of, the subject itself. And so in other cases. But the important point in the present case is, that the true owners parted with the possession under a contract which gave the possessor power in certain circumstances to sell the property, and to sell it as his own. This seems to me to be the turning point of the present case. I shall immediately consider what in its legal aspect the contract between the true owners and James Marr really was, for that belongs to the next branch of the case, but in the meantime I think this is conclusive against Marr being held to have got the watches and jewellery by theft, namely, that he got them by the deliberate will of the true owners, with a power in certain circumstances—and I think it does not matter what these circumstances were—to dispose of the property—that is, to sell the property as for himself and as his own. Without enlarging on these grounds—and they afford ample material for discussion—I am of opinion that in strict law, and in the strict sense of the word theft, James Marr did not acquire the watches and jewellery by theft, and that at no time during his possession could he in strictness be called a thief thereof.

I do not care to consider whether under a criminal indictment, which necessarily sets forth the *animus* of James Marr, the motives by which he was actuated, and the secret intention and design which from the first he entertained, James Marr might not have been convicted of what I may call constructive theft. This would lead to curious metaphysical questions and distinctions, interesting no doubt in themselves, but not productive of much practical effect. They would not affect the intrinsic guilt of James Marr. Criminally guilty he undoubtedly was, and in the same degree whatever his crime may be called. Nor would they affect his punishment, which is measured according to his guilt, and in a case like this not according to its nomenclature. Nor do I think that these metaphysical distinctions will govern in civil questions when the point is, In whom are the rights of property or of pledge *ad civilem effectum tantum*, and how far the subject

is tainted with a *labes realis* which will follow it into the hands of all parties, however innocently acquiring rights therein. Stolen goods are subject to such *labes*, and I think it sufficient to say that to this effect the watches and jewellery in the hands of James Marr are not to be held stolen property. The rule about the existence of hidden defect of title which operated penally against innocent third parties is not easily to be extended.

The next question in the case is, What was the exact nature and effect of the contracts or contract between the true owners and James Marr under which James Marr obtained possession—and I may now assume legal and lawful possession—of the watches and jewellery in question. That there was a contract or contracts between the true owners and James Marr is plain from what I have already said, and was not disputed by any of the parties at the bar. There was no forceful or secret abstraction of the articles without the consent of the owners. The possession was given intentionally and freely under contract of some kind, but parties differed widely as to what the contract really was. They differed both as to the name of the contract, the legal category under which it falls, and as to the true nature and effect of the contract itself. Now, these are important questions, which in one aspect have a bearing upon the point I have already considered—whether there was theft or not—and upon the further and strictly civil question, whether a valid right of pledge was obtained by the pawnbrokers with whom Marr pledged the watches?

Now, I may say at once that in my opinion the legal category under which the contracts which were entered into between the true owners and James Marr naturally fall is the contract which is known as "sale and return,"—at least this is the legal contract which is nearest to that under which in all the special cases in evidence James Marr received the watches and jewellery in question. That there was some contract in all the cases is plain. I think in all the special cases it substantially agrees with the legal contract of "sale and return." Of course there may be—there always are—special incidents, special representations, and special stipulations; but abstracting incidental specialties the contract in every case was, I think, that of "sale and return."

This is a contract well known to the law merchant, and is treated of by all institutional writers who embrace the various forms of contracts of sale. Its essence is that goods are sent and delivered by one merchant to another, in order that the receiver may in the ordinary course of his trade sell or dispose of as many of them as he can, and with this condition, that such as are not sold and disposed of may be returned to the sender—those only which are sold and disposed of being paid for by the receiver. It is a conditional sale, the condition being that the proposed purchaser shall purchase and pay for only such of the goods as he himself succeeds in disposing of, and shall return the rest, which shall not be held to have been purchased at all. It is needless to go further in abstract definition. We had a large citation both from institutional writers and from decided cases regarding this contract and regarding its legal effects, to some of which effects I shall advert immediately. Now, see how exactly this legal contract fits the circumstances of the present case as with all the different parties. Marr was a travelling jeweller—that is, a jeweller who travels, carrying his stock of watches and jewellery along with him for the purpose of selling them. He may be considered as the retail dealer who receives from a wholesale dealer under the legal contract of sale and return certain goods that he may sell or dispose of as many as he can. The watchmakers or jewellers from whom Marr got the goods are the wholesale dealers who consigned to Marr on "sale and return" or "sale or return," and the essence of the contract was that Marr should be the actual purchaser at the invoice price only of such watches or jewels as he succeeded in selling, the rest being returned to those from whom they came. No simpler case of "sale and return" could be figured. The consigners—the wholesale watchmakers—had nothing to do with the ultimate purchasers; with them they had no contract; that was the concern of Marr alone. Marr might get whatever price he pleased, great or small—for that price he was not bound to account; the profit was all his own; all he had to do was to pay the wholesale dealer the invoice value—that is, the price stated in the wholesale dealer's invoice—and even that price in some cases was subject to discount. What Marr did not sell he was simply to return, and regarding such returned goods the return made an end of it—there was no further contract at all. I must say, after very carefully weighing all the details in evidence, and all the specialties—and they are many—occurring in the different cases, I have no reasonable doubt that "sale and return" is the legal category to which the contracts are all to be referred; but views opposite to this have been pressed upon us with great ingenuity and ability.

Thus, first, the respondents strenuously contended that the true contract between Marr and his dupes—for that they were defrauded there is no doubt—was not "sale and return," but "sale and approbation," or, as it is sometimes expressed more shortly, the goods were sent "on approbation." This also is a well-known category in commercial law, and it means that the goods are sent simply for the purpose of examination, and with this condition, that such of them as are approved of by the receiver, who is the proposed purchaser, may be retained and purchased by him at the prices named, the rest—or if none are approved of, the whole—being simply returned. It may be sometimes a condition in the case of goods sent "on approbation" that the price of such as are retained and purchased shall be instantly paid in cash, and this may be made a suspensive condition. This is quite a different contract from "sale and return," and has in some respects different effects. Both may be considered as conditional sales, but the conditions are different. In "sale and return" the condition is that the consignee shall only buy what he succeeds in selling at his own hand, at his own risk, and at what price and at what credit he pleases, and reasonable time must be allowed him to do this. In "sale on approbation," on the other hand, the condition is that the consignee himself shall instantly or within reasonable time examine the goods and declare his own approbation or disapprobation thereof, which will then fix whether there is to be sale or not. Purchase by a third party is no part of this contract, and reasonable time for examination only is all that the receiver can ask. The receiver is not a con-

signee for sale, but merely an inspector, who must himself decide whether he himself will purchase on the terms proposed, whether for credit or for cash or otherwise. Now, I think it cannot be doubted on the evidence that in all the cases before us it was "sale and return," and not "sale on approbation," that was the true bargain between Marr and the watchmakers. Marr's approbation of the watches had nothing whatever to do with the matter. It was his success in selling the watches which would make him the purchaser from the watchmaker. For he was to sell at his own risk and on his own terms, and to persons totally unknown to the watchmakers, except that in some cases a general description of the supposed ultimate purchaser was given. The necessity of Marr himself selling fixed the time during which his possession was to continue. He was given time to find and to complete a bargain with his supposed customer. If Marr's own approbation had been the condition, much shorter time would have been necessary—the examination might even have been made in the shop of the watchmaker himself. The requisites and character and qualities of sale and return apply—not those of the analogous but still quite distinct contract of sale and approbation.

Nor does it militate against this view that the watchmakers or some of them entered the transactions in what they call their approbation books, for it is plain that in these approbation books all transactions were entered where there was not a complete but only a conditional sale. They had no separate books for sale and return, and, indeed, perhaps they could scarcely have appreciated what is yet quite clearly the legal and deeply founded distinction. All that they meant by approbation was the final conclusion of a sale, depending, as it rather appears, on something to be done between third parties and the party to whom the goods were conditionally sent.

I need scarcely occupy time by considering the other views which were presented as to the true contract between the watchmakers and Marr. They were not very strenuously insisted in although none of them were abandoned or given up. It was urged for the respondents that Marr was the mere hand or messenger or employee or servant of the watchmakers, entrusted by them with the sale of their watches just as they might entrust one of their own shopmen, and that Marr was bound just as the shopmen would to bring back either the watch itself or its price. It was said that Marr was just an occasional servant, not in constant employment, but still only a servant *quoad* the particular watches with which he was entrusted, and bound to the duties of a servant—exactly to fulfil his master's instructions *quoad* each of the watches with which his master entrusted him. If this view were correct it would be conclusive of the question of fact. Marr would have been a thief of all the watches which he pawned, and it would probably be conclusive of the whole case. But in the face of the evidence I think it is impossible to sustain this view. Marr was not a servant or a messenger employed by the watchmakers in any sense of the words. He was an independent merchant carrying on business as a travelling jeweller in rather an extensive way for that class of persons. His travelling stock at times was worth £500. He was not employed by the watchmakers; he came to them—to deal with them—for watches which he himself was to sell in the course of his trade. They had nothing to do with his customers, and were to have no interest in and no concern with the bargains he might make, excepting this, that whatever Marr sold to his customers he himself should be bound to pay for, not according to the price he got, but according to the price at which the article was invoiced to himself. The notion of Marr being a mere servant or messenger is out of the question when the evidence is read.

Nor is it more tenable to maintain that Marr was the agent or factor of the watchmakers for the sale of their watches, and bound to account to them for the price or for the watches themselves with which he was as factor entrusted. There is something to be said for this view which was very plausibly suggested, and which is quite consistent with Marr being an independent dealer. The case was put that Marr was mere agent or factor, and that his commission or factor-fee was to be any profit he might make by the sale of the watches over and above the invoice price. But this view, though plausible, will not, I think, stand in consistency with the evidence. There is nothing that points to the contract of agency either in name or in substance. The word was never used. Agency was no part of Marr's trade, nor in the transactions before us was it any part of the watchmakers' trade to employ agents. Commission or factor-fee was never mentioned or thought of, and the whole communings show that Marr was to act solely for himself, and not for a principal or a constituent. Still further, and what is most conclusive of all in this view, even if Marr were to be held an agent, it would not avail the respondents—nay, it would be fatal to their case—for it is quite fixed both in England and in Scotland—in England under the Factors Act, and in Scotland also at common law—that an agent or factor for sale of goods has power, even against the express terms of his private contract, to pledge the goods, and the pledge will be effectual to an onerous and *bona fide* pledgee notwithstanding that the agent has committed a violation of contract. I was not surprised, therefore, that the counsel for the respondents ultimately declined to maintain the theory of agency.

There only remains on this question of contract one other view which was very strongly urged on the part of the respondents, and to which much ingenious argument was devoted. It was said, that even conceding that the true nature of the contract was "sale and return," still there was a peculiarity in reference to some of the cases on record which took them out of the general rule and placed them in a separate and different category. The cases referred to were those in which Marr represented to the watchmakers that there was a presentation to be made to a mill manager in one town, or to a local doctor in another, and so on, and where on the faith of such representations Marr got three or more watches out of which the presentation watch might in each case be selected. Now, it was urged that in these cases it was not a simple contract of sale and return. On the contrary, it was a very special contract, whereby it was stipulated that only one out of three or more—in

one case out of six—watches might be sold, and that all the others were without fail and in every possible event to be absolutely and simply returned. Now, there is no doubt that this is a specialty applicable to some of the cases before us—I think it is applicable to about the half,—but I do not think it makes any difference in result. No doubt it was the representation of Marr, or I may say the fraudulent and criminal misrepresentation of Marr, that he expected to sell a presentation watch or watches or rings in the cases he falsely stated, and it may be true that it was this fraudulent misrepresentation believed by the watchmakers which induced them to enter into the contract. But it was really no part of the contract that only one watch of the lot should be sold and no more. It would have been no breach of contract if instead of selling only one presentation watch in each town he had sold two for rival presentations to other mill managers or to other rival medical practitioners in the same or in adjoining villages. The fraudulent misrepresentation which induced the contract is one thing, the contract itself so induced is another thing, and the representation is not by any means necessarily a condition of the contract. The more watches Marr could sell, the better for the watchmakers, if they got their prices—that is, the prices named by themselves,—and though he got the watches by pretending that he would probably sell one for a presentation, it would have been so much the better if he could induce the millowners or the local magistrates to purchase the others. Besides, *ex concessu*, Marr had power to sell any one of the watches, and it was left to himself or to chance which one he would sell. Now, if a party who has power to sell has power to pledge, Marr who had power to sell any one of them, might validly in a question with *bona fide* third parties have sold or pledged them all. It appears to me, therefore, that in questions with *bona fide* pledgees, the jewellers, who were the real owners of the watches, are not entitled to recover them without payment of the sums for which they were pledged.

The only other question is, whether the appellants are entitled to the character and privileges of *bona fide* pledgees, or whether they acted so rashly in making the advances, and in taking the watches in security thereof, as to deprive them of the benefit of being held *bona fide* and onerous holders. Now, although I cannot help feeling that some of the pawnbrokers are not free from blame in rashly—to say the least of it—lending on the watches without inquiry, or without more full inquiry, into Marr's title to the watches which he offered on pledge, still on a full and careful consideration of the evidence I am of opinion that in none of the cases is the evidence such as to make it a warrantable or a safe conclusion to hold that any of the pawnbrokers were *mala fide* possessors of the watches which they received in pledge.

The Court pronounced the following interlocutor:—

> The Lords having heard counsel on the appeal, Find that the property which forms the subject of this process, and is embraced in the causes of the fund *in medio*, so far as now claimed, was obtained from the respective dealers, on the several occasions specified in the record, by false and fraudulent representations made by James Marr, who was then, or professed to be, an itinerant vendor of watches and jewellery; and that the said James Marr pleaded guilty to an indictment charging him with obtaining these articles by falsehood, fraud, and wilful imposition at the Glasgow Circuit Court of Justiciary on the 25th day of April 1878, and received sentence of 5 years' penal servitude: Find that in all the instances libelled the articles libelled were delivered to the said James Marr by the respective dealers voluntarily on a contract of sale and return, under which the said James Marr was entitled to return such of the articles which he was unable to dispose of, in some instances within a reasonable and in others within a specified time; and failing such return the sale became absolute, and the buyer became liable in the price: Find that the articles were not duly returned, but were pledged by the said James Marr with one or other of the pawnbrokers who claim in this process, usually within a very short period of the time when they were delivered: Find that in these circumstances the said James Marr became the purchaser of the articles in question, and was liable absolutely in the price to the different dealers by whom they were delivered to him, and that the said James Marr was entitled to deal with the same as proprietor in so far as related to contracts *bona fide* entered into by third parties: Find, *separatim*, that in respect the claimants from whom James Marr received these articles voluntarily delivered the same to a recognised trader, and thereby vested the buyer in the ostensible right and title to the property implied by the possession thereof, they are not entitled to reclaim the same from a third party who has *bona fide* acquired a beneficial interest therein for a valuable consideration: Find that the other claimants, the pawnbrokers, were not aware when the articles were pledged with them respectively that they had been obtained by fraud: Therefore sustain the appeal: Recal the interlocutors of the Sheriff-Substitute and Sheriff of the 10th and 20th May and 24th July 1879, except in so far as the claimant Scouler is thereby preferred to the watch No. 7/6049, and to that extent adhere to the said interlocutors: Rank and prefer the claimants Robert Barclay, Marion Cameron, W. G. & S. W. M'Lurkin, James Scott, and G. & A. W. Rattray in terms of the first alternative of their respective claims: Repel the claims of the claimants James Crichton, R. & G. Drummond, Lorimer & Moyes, John Scouler, and John Jamieson: Find them liable conjunctly and severally in the expenses incurred by the claimants who have been ranked and preferred as aforesaid, both in this Court and in the Inferior Court: Find the real raisers and nominal raiser entitled to their expenses respectively against the claimants James Crichton, R. & G. Drummond, Lorimer & Moyes, John Scouler, and John Jamieson, jointly and severally: Find the pursuer and nominal raiser liable only in once and single delivery of the subjects *in medio:* Authorise him to deliver over to the

successful claimants, after the lapse of one calendar month from the date hereof, the articles *in medio* still undelivered; and on his doing so, exoner and discharge him from all claims thereon; and decern," &c.

Counsel for Barclay and Others (Appellants)—Kinnear — Mackintosh. Agents — Ronald & Ritchie, S.S.C.

Counsel for the Drummonds and Others (Respondents)—Asher—Jameson. Agents—Dove & Lockhart, S.S.C.

Counsel for Scouler and Jamieson (Respondents)—Trayner—Pearson. Agents—Douglas & Ker, Solicitors.

Tuesday, January 13.

SECOND DIVISION.

[Sheriff of Perthshire.

HENDRY (INSPECTOR OF TILLICOULTRY) *v.* MACKISON (INSPECTOR OF KILMADOCK) AND CHRISTIE (INSPECTOR OF DUNBLANE).

Poor—Settlement of a Pupil Child where the Mother had Married a Second Time.

The father of a female pupil child had at the time of his death in 1872 a residential settlement in K. Immediately after the father's death the pupil's mother left the parish of K. and married a second time. The mother died in 1878, and the pupil's stepfather having refused to support her, she became chargeable as a pauper. *Held* that the parish of the father's settlement at the time of his death was liable for her relief.

Observed that a pupil child cannot lose by non-residence the settlement which it derives from its parent.

The pursuer in this case, the inspector of poor of the parish of Tillicoultry, sued the inspector of the parish of Kilmadock, and alternatively of Dunblane, for repayment of certain sums paid by him as alimentary advances on behalf of Elizabeth Scobie, a pupil pauper who had been born at Deanston on 29th March 1867. Her father John Scobie had been born in the parish of Dunblane, but for a number of years (upwards of five) prior to his death, which took place in May 1872, he had resided at Deanston, in the parish of Kilmadock, and had at the time of his death a residential settlement in that parish. He had married in December 1865 the pauper's mother Elizabeth Richardson. Immediately after her husband's death the latter had removed with the pauper to Tillicoultry, and about two years thereafter had married, about April 1874, Robert Mackay, who resided in Tillicoultry. The pauper had continued to reside with her mother until the marriage, and thereafter resided along with her stepfather and her mother in Tillicoultry until her mother's death in August 1878. After her mother's death her stepfather refused to support her, and she being unable to aliment herself became chargeable as a pauper, and claimed and received parochial relief from the parish of Tillicoultry. Statutory notices were sent by the pursuer to each of the defenders on 26th September 1878.

In this state of the facts a question arose as to whether the pupil Elizabeth Scobie by the removal of herself and her mother from the residential settlement which her father held at his death had lost her settlement there. If she had not, Kilmadock was liable. If she had lost it, decree was asked against Dunblane, which was the parish of her father's birth settlement. Kilmadock and Dunblane both pleaded that Tillicoultry was the parish of the pauper's settlement, and therefore liable.

The Sheriff-Substitute (GRAHAME) on 14th August 1879 pronounced an interlocutor in which he found in point of law "that at the date of the said John Scobie's death his widow and pupil child had derived through him a residential settlement in Kilmadock parish; that the said child could not, up to the date when she became chargeable as a pauper, as being then in nonage, acquire for herself any new settlement; that the settlement in Tillicoultry which her mother acquired on her second marriage was acquired for herself alone, and did not enure to her child, but that the child continued to follow the settlement of her father in Kilmadock, and that when at her mother's death she became chargeable as a pauper, that parish, as having been the parish of her father's residential settlement when he died, was the parish of her settlement, and as such liable for her maintenance." And the Sheriff therefore decerned against Kilmadock.

He added the following note:—

"*Note.*—In this case questions are raised as to the liability of three separate parishes for the maintenance of Elizabeth Scobie, a pupil pauper—the questions being, Whether the parish of Tillicoultry, where the pauper became chargeable, and where her mother had, after the death of the pupil's father, acquired through a second marriage her second husband's residential settlement, was liable? or secondly, Whether the parish of Kilmadock, as having been the parish of the residential settlement of the pauper's father at the time of his death, or otherwise, as being the parish of the pauper's birth settlement, was liable? or thirdly, Whether in the event of the father's residential settlement at Kilmadock being held to have been lost to his child through non-residence under the 76th section of the Poor-Law Act, his birth settlement at Dunblane did not come into effect, and render that parish liable for the pauper's maintenance? The Sheriff-Substitute thinks that the father's residential settlement at Kilmadock determines the liability of that parish. The view taken by the Sheriff-Substitute is that the residential settlement in Kilmadock of the pupil's father on his death passed to his pupil child; that she as a pupil could not lose it for herself, and that no new settlement having been acquired on her behalf through her mother's second marriage, her father's settlement must be held to be still in force. It is an established principle that no settlement can be lost without the acquisition of a new one, and it is a further principle of the poor-law that no pupil child can acquire a settlement for itself. The head of the family of which it is a member is the pupil's responsible representative in all questions of parochial liability for maintenance; and until the child is forisfamiliated, the settlement of parentage, whether of birth