single witness, but that the whole case cannot stand on the testimony of a single witness unsupported, and I need not say that this Court would not in such circumstances affirm it. But Mrs Thomson's evidence is not unsupported; it is conform to documents called significantly the real evidence in the case. It is also corroborated by the testimony of others, who say the husband expressed an intention to make such a gift.

I am of opinion therefore that there is sufficient corroboration to make it legal evidence, and to entitle the Court to judge of it on the question of sufficiency to supply the facts which it is brought to support.

There was a gift of money completed in so far as there was power to complete it, and as I have no doubt as to the intention of the donor, I think the interlocutor of the Sheriff must be recalled, and the view of its being a gift sustained.

LORD CRAIGHILL—I am of the same opinion. It appears to me that the ground of the Sheriff-Substitute's judgment cannot be maintained, because I am satisfied that if the intention to make the gift is once established all that was necessary to carry out that intention was performed. I am satisfied that there was such intention (1), because he lodged the money in bank in her name, and (2) because of the evidence on that matter given by the defender.

Nothing has been said to make me doubt the credibility of that evidence, and I concur with your Lordship that her testimony, though not sufficient by itself, still, corroborated as it is both by other witnesses and by the real evidence in the case, sufficiently establishes the donation of this money.

LORD RUTHERFURD CLARK—I am of the same opinion. Whatever questions were raised in the discussion, the case ultimately turned, according to the concession of the counsel for the respondent, on a short point—Whether or not in depositing the money in the bank the late Mr Thomson intended to make a gift to his wife?

I am of opinion (1) that there is sufficient legal evidence to establish that he did intend to do so; and (2) I see no reason to doubt the credibility of the evidence led in support of the donation.

The Lords pronounced the following judgment:—

> "Find that on the 25th January 1879 the deceased John Thomson paid to the branch at Newington, Edinburgh, of the British Linen Company Bank, the sum of £424, 19s. 10d. in exchange for a deposit-receipt for that sum in name of the defender, his wife, and at the same time paid to the said branch of the said bank a sum of £100, and directed it to be placed to the credit of the defender on current account then opened by him in her name with the bank: Find that in so paying the said sums he intended to make, and did make, a gift of the same to the defender: Therefore sustain the appeal, recal the interlocutor of the Sheriff-Substitute complained of, assoilzie the defender from the conclusions of the action, and decern: Find the pursuer entitled to the expenses incurred by him in the Inferior Court in relation to the second conclusion of the action."

Counsel for Appellant—Mackay—Thorburn. Agent—John Rutherfurd, W.S.

Counsel for Respondent—Keir—A. J. Young. Agents—W. Adam & Winchester, S.S.C.

Thursday, June 8.

SECOND DIVISION.

[Sheriff of Fife and Kinross.

TODD *v.* ARMOUR.

Sale—Stolen Property—Effect of "Open Market" in Ireland—Vitium reale.

An Irishman raised an action to recover a horse in the hands of a Scotsman, on the averment that it had been stolen from his field in Ireland, and that he was entitled to restitution of it. The defender replied that he had bought it at Falkirk Tryst from a third party who had bought it in "open market" in Ireland. It was conceded that by the law of Ireland such a sale extinguished the *vitium reale* which would otherwise attach to stolen property. The Court *dismissed* the action, being satisfied on a consideration of the proof that the horse had been in point of fact sold in Ireland in "open market" to the defender's author, who thereby acquired an unexceptionable title to sell to the defender.

Sale—Vitium reale—*Where Sale in Scotland and Theft in a Foreign Country.*

Does the *vitium reale* which by Scots law attaches to stolen property apply in cases where there has been a sale in open market in Scotland, but the theft has been committed in a foreign country where such a sale is held to cure the defect in the title?

Opinions—affirmative per Lord Justice-Clerk and Lord Craighill; *negative per* Lord Young.

James Todd, farmer, at Ballynaskergh, County Down, Ireland, presented a petition in the Sheriff Court of Fife and Kinross, in which he prayed the Court to ordain John Armour, farmer near Leslie, to deliver to him a dark chestnut horse belonging to him, and failing such delivery to pay the pursuer the sum of £60 sterling.

The ground of action was stated in the pursuer's condescendence as follows:—The pursuer was on the 3d of August 1881 in the lawful possession of a dark chestnut horse, which was then in a field on his farm of Ballynaskergh. On the morning of the 4th it was stolen. The pursuer learned afterwards that the said horse had come into the possession of a person named David Black, who sold it to the defender for the sum of £23 at Falkirk. The pursuer called on the defender to deliver up the horse to him, but this request was refused.

In his statement of facts the defender made the following averments in reply:—On the 10th August 1881 he was introduced at Falkirk Tryst to David Black, farmer, Portadown, Ireland, who said he had a horse for sale. This horse he bought for £23. The horse was a sooty black animal with four white feet, a white spot on its forehead of a peculiar shape, like a leaf with two tails, a white strip on the near nostril of about two-and-a-half inches in length, and part of his mane grey, which is very uncommon. On or about 3d September Black was arrested

and charged with purchasing the said horse knowing it to have been stolen; and on the 12th September the pursuer and his servant came to the defender's farm and endeavoured to take it away on the ground that it had been stolen from the pursuer. David Black was at the Newry Quarter Sessions, on the 3d November, put forward and indicted that "he on the 4th August one horse of the goods and chattels of James Todd (the pursuer) feloniously did steal;" and on a second count he was charged with receiving the same knowing it to have been stolen. The jury returned a verdict of not guilty, and Black was discharged. In article 7 the pursuer averred that Black bought the horse at Armagh Fair (a public market) on the 4th August from a very respectable-looking man, and the usual forms required in Ireland for a sale in public market were carried out. In article 9 the defender averred that by the law of Ireland the buyer of property in public market, or in market overt, is under no obligation to give up his purchase to the real owner unless in the single case of theft, where the thief shall be prosecuted by the owners to conviction. The averment in this statement was denied by the pursuer, who counter-averred that by the English statutes 2 P. and M. c. 7, and 31 Eliz. c. 12, and also by the Irish statutes 4 Anne c. 11, and 6 Anne c. 12, horses are an exception to the rule as to purchases in market overt unless certain formalities are gone through.

The pursuer pleaded:—"(1) The said horse being the property of the said James Todd, and it being now illegally in the possession of defender, he should be ordained to deliver the said horse to the pursuer within such period as the Court may appoint. (2) Or, alternatively, in the event of the defender failing to deliver the said horse, as aforesaid, the pursuer is entitled to decree in terms of the alternative prayer of the petition. (3) The averments in article 7 of defender's statement of fact being irrelevant, they cannot be admitted to probation. (4) The alleged rule of Irish law not applying to a transaction which took place in Scotland, and being subject to the exception already referred to, the pursuer is entitled to decree and the expenses as craved. (5) The defender being a domiciled Scotsman, this case ought to be judged by Scots law. (6) The defender's first and fourth pleas being irrelevant, in respect that he does not aver that the formalities required by the statutes before mentioned were complied with, they ought to be dismissed without being submitted to probation. (7) The said horse not having been brought by Black in *bona fide* in market overt, the pursuer is entitled to decree as craved."

The defender pleaded:—"(1) The horse in defender's possession having been purchased by Black in a public market in Ireland, and no conviction of the alleged thief having taken place, the action is groundless, and should be dismissed. (2) The horse in defender's possession not having been stolen from the pursuer, the action is groundless, and should be dismissed. (3) The horse in defender's possession never having been the property of the pursuer, he has no ground to claim restitution. (4) Black, after the purchase in Armagh Fair, having been in lawful possession of the horse (even though stolen), the sale to the defender in Scotland was by the law of Scotland sufficient to transfer the property to him. (5) The question as to the effect of the sale in Armagh fair is regulated by Irish law, and a case should be stated for the opinion of a Superior Court in Ireland."

The Sheriff-Substitute (Gillespie) allowed the parties a proof of their averments. He added this note:—"It lies on the pursuer to show that the horse he claims was his, and that it was stolen from him. This he does not dispute, but he maintains that if he establishes these points he is entitled to decree. The defender maintains that another question remains behind. He avers that Black, from whom he purchased the horse, bought it in market overt in Ireland, and that the forms were observed which are required by Irish law to give a good title to the purchaser, and he maintains that the horse having been validly transferred to Black according to the law of the place where it was transferred, the transfer must receive effect everywhere. The pursuer does not admit that either the facts of the Irish law (which is matter of fact in a Scotch court) are as stated by the defender, but in judging of the relevancy of the defence it must be assumed that the defender will be able to instruct his averments.

"The pursuer maintains that the defence of market overt is not relevant, and that the present action being a *rei vindicatio*, must be decided by the *lex fori*, and that as the law of Scotland knows nothing of the protection afforded by some other systems to a purchaser of stolen goods in open market, it is immaterial whether Black had a good title to the horse in Ireland by the law of that country. In other words, the pursuer contends that, assuming that Black had a good title to the horse in Ireland, it became bad when he came to Scotland. It appears from the passage cited by the pursuer's agent that his contention is supported by the high authority of Savigny (Guthrie's Translation, 186), but so far as the Sheriff-Substitute has been able to learn, Savigny's views have not been accepted by other jurists. A different rule has been laid down in England, viz., that a transfer binding by the law of the place where it is made is in general binding everywhere. A leading case is *Cammell* v. *Sewell*, 1860, 5 Thurlston and Norman, 728. Mr Justice Crompton, in delivering the judgment of the majority of the Court —the Exchequer Chamber—which it may be observed included Chief-Justice Cockburn — puts the very case of stolen property sold in market overt in England, and afterwards coming into a foreign country the law of which does not recognise the privilege of market overt in the case of stolen goods, and expresses the opinion that the courts of that foreign country would hold the property as bound by the transfer in England. It humbly appears to the Sheriff-Substitute that even if Ireland is to be regarded as strictly a foreign country, the principle laid down in the case of *Cammell* v. *Sewell* is more in accordance with expediency and international comity than the rule contended for by the pursuer. But the courts of one part of the United Kingdom are more especially bound to give effect to the law of another part operating within its proper sphere. The Sheriff-Substitute therefore thinks that the defender should have an opportunity of proving the alleged purchase by Black of the horse in Ireland. After the facts in regard to that purchase have been ascertained, the application of the law

of Ireland to these facts must, if necessary, be ascertained in the proper way."

A proof was taken, the result of which appears from the judgments given below, and thereafter the Sheriff-Substitute having heard parties' procurators, and considered the cause, found in fact—"(1) That the horse mentioned in the prayer of the petition belonged to the pursuer, and was stolen from his field at Ballynaskergh, County Down, Ireland, on the night of the 3d or the morning of the 4th August last; (2) that at Falkirk Tryst, on the 10th of same month, the said horse was sold by the said witness David Black to the defender; (3) that the defender purchased the horse in good faith and for a fair price; (4) that it is not proved that Black purchased the horse in open market in Armagh Fair on 4th August, or that the horse was sold in open market in Ireland at any time after it was stolen from the pursuer; (5) further that it is not averred by the defender that by the law of Scotland anything short of a sale in open market will give a good title to the purchaser of a stolen horse as against the true owner; in law that the right which the defender took by his purchase at Falkirk must be determined by the law of Scotland, which gives no protection to the purchaser of a stolen horse even in open market against a claim for restitution by the true owner. Therefore repelled the defences, and ordained the defender to deliver up the horse mentioned in the prayer of the petition to the pursuer or his agent within fourteen days from this date, with certification."

The defender appealed, and argued—It must be admitted that if the theft had taken place in Scotland the facts proved were such as would entitle the pursuer to have the horse stolen restored to him, because of the *vitium reale* introduced by our law as an exception to the general rule which protects a *bona fide* purchaser for full value. But (1) the theft took place in Ireland, by the law of which country the buyer of property in "market overt" is under no obligation to give up his purchase to the real owner, unless in the single case of theft when the thief shall have been prosecuted within six months to conviction by the owner—(24 and 25 Vict. c. 96, sec. 100). In the present case the evidence went clearly to prove that the horse was actually bought by David Black in "market overt" at Armagh; and further, the indictment which charged him with having stolen it knowing that it belonged to the pursuer failed. But (2), even admitting that the *vitium reale* was not so purged by the sale in "market overt," it was, being a foreign *vitium*, completely removed by the sale *bona fide* in open market in Scotland for full value.

The pursuer replied—Unless the defender could prove a *bona fide* sale in "market overt," with the necessary formalities, the pursuer might claim restitution of the thing stolen, the conviction of the thief not being necessary—Benjamin on Sale, 2d edit. p. 10. Now, in point of fact, it had not been proved that Black had bought the horse in Ireland *bona fide*, but even supposing the purchase was made in *bona fide*, it was not such a purchase in "market overt" as would entitle the defender to protection, and this for two reasons—(*a*) In the laws of England and Ireland "market overt" was distinguished as market *de jure* from market *de facto*. The *onus* lay on the defender of proving the former on the authority of *Lees* v. *Bayes and Robinson*, May 26, 1856, 18 Scott's Reps. C.B. 599; *Benjamin* v. *Andrews*, June 22, 1858, 5 Scott's Reps. C.B. (N.S.) 299; and *Gauly* v. *Ledwidge*, February 18, 1876, 10 Com. Law Rep., Irish, 33. He had only proved the market *de facto*. (*b*) Market overt, in the case of horses, was in Ireland regulated by 4 Anne, c. 11, and rendered perpetual by 6 Anne, c. 12. These statutes required, *inter alia*, that the parties to the sale of a horse should appear before a toll-keeper or bookkeeper at the market, and have all the particulars of the transaction entered in a record kept by him. Absolute nullity of the sale attended the non-compliance with these regulations. There was an *onus* resting with the defender to prove compliance with these regulations; they could never be matter of presumption—*vide* Benjamin on Sale, 11 and 12; and *Moran* v. *Pitt*, February 5, 1873, 42 L.J., Q.B. 47, where the validity of the corresponding English statutes—2 and 3 Philip and Mary, c. 7, and 31 Elizabeth, c. 12—was recognised and enforced, and the question as to *onus* given effect to. Therefore the pursuer was entitled to rely on the *vitium reale* as giving him right to restitution, and when once this attached to moveable property by the law of one country it could not be removed by the mere transference of the property to another, particularly where the law of the latter recognised a similar *vitium*.

At this stage of the case the Court indicated that the validity of the Irish statutes referred to could only be ascertained in the manner prescribed by the Statute 22 and 23 Vict. c. 63 (Foreign Law Ascertainment Act), by a case stated for the opinion of the Irish Court as to the law applicable there to the facts of the case; and further that the pursuer, while setting forth in his pleadings that the statutes in question prescribed certain formalities, neither stated what these formalities were nor averred non-compliance with them. Accordingly, the pursuer's counsel moved for a case to ascertain the law of Ireland as suggested, but declined the suggestion of the Court to amend his record on payment of expenses.

At advising—

Lord Justice-Clerk—This case, though it has arisen on a comparatively trivial matter, in the sense of being a case in which the subject-matter is of trivial value, has raised important considerations, which we have now to dispose of. First, we must dispose of certain questions of fact involved in the case. This horse was bought by the defender Mr Armour at Falkirk Tryst from David Black, who said he had bought it at a fair at Armagh ten days before, and who was at all events supposed by the defender to have a good title to sell. The next point is that the horse had been stolen from the pursuer Todd the night before the sale at Armagh fair, and in these circumstances Todd asserts that he is entitled to vindicate his right to the horse, although it is in the hands of a *bona fide* purchaser for value. The answer made to that is twofold—1st That the horse was bought by the defender at public market at Falkirk; and (2d) That the defender's author bought it in open market in Ireland. If the first answer is not sufficient, it is argued then the second must be, because by the law of Ireland a sale in open market removes any *vitium* which attaches to a stolen article in consequence of the

theft. The pursuer answers to this again—(1) That the sale was not a fair sale, for at all events Black is in such suspicious possession of the animal that he is not entitled to be regarded as a *bona fide* purchaser; and (2) It is then hinted on record that mere sale in public market in Ireland will not justify the *vitium reale* attaching to the sale of the stolen property unless it be accompanied by the formalities required by Act of Parliament.

Now, on the evidence I am of opinion that the sale by David Black was good, and that the horse was sold in open market on the 4th August, and although I will not say that there are not circumstances which are not altogether satisfactory in the matter, I am not prepared to say that the evidence shows that Black was then cognisant of the theft. I am therefore bound to treat him as a *bona fide* purchaser. The next point to be considered is, Did David Black buy the horse in open market? It is not disputed on record that the market at Armagh was open, and it is indeed clear on the evidence that it is a known and open market, and in the absence of a specific allegation to the contrary we must assume that it is so. Secondly, the pursuer, in answer to the defender's averment that by the law of Ireland a sale in open market purges the *vitium reale* attaching to a stolen article, merely avers that by certain old English and Irish statutes, which are cited, "Horses are an exception to the rule as to purchases in market overt unless certain formalities are gone through." Then a plea is stated to the effect that as the defender does not aver that the formalities required by the cited statutes were complied with, his pleas based on the effect in Ireland of a purchase in open market should be dismissed. Now, it will be observed that there is no allegation made on record by the pursuer, in answer or otherwise, as to what formalties are required by these statutes, or which of them, if any, have not been complied with. The plea is, as I have said, that the defender is bound to aver, and I assume prove, that the statutory formalities required by statute had been complied with. I am not prepared to sustain that plea. If the pursuer had set forth the formalities required by statute and offered to amend his record on the subject, I should have listened to that application, and I think it is an omission that nothing was done to ascertain the law of Ireland in regard to a sale under the circumstances proved here. The defender has averred in answer. "By the law of Ireland the buyer of property in polled market or in market overt is under no obligation to give up his purchase to the owner unless in the single case of theft when the thief shall be prosecuted by the owners to conviction." The pursuer, on whom the *onus* of the case lies, has made no allegation that the market was not an open market, and in the absence of such I think the defender has done enough when he has proved that the horse was bought by the man from whom he purchased in what appears to have been an open market.

That being so, I come to this, that by the law of Ireland, which is undisputed, a sale in open market carries a good title to the purchaser even if the article has been dishonestly acquired by the seller, and the *vitium reale* is thus extinguished. That being the state of the law then, and so holding it, David Black's title is as good as if the horse had come from the seller, and therefore will be good all the world over. He is the proprietor, and was so at Falkirk, and therefore the purchaser from him is entitled to prevail. These are my impressions in the case. I should not be disposed to say that mere purchase in open market in Scotland would validate the sale where the horse had been stolen in another country. I know no authority for that. On the whole matter, my impression is that our system in Scotland, where there is a *vitium reale* which can never be removed attaching to stolen property, is preferable to that of England and Ireland, and this case is only a good illustration of how the system in the latter countries may work for dishonest ends. I therefore am of opinion that we must decide for the defender.

Lord Young—This is a case about a horse sold for £23 at Falkirk Tryst, certainly in open market there, in the common meaning of that expression, and I am not aware that it has any technical meaning. I wish I could say that the proceedings in the action are perfectly satisfactory. I cannot, however, say so, because we are left to decide the case upon the common apprehension which we have in this country, which is indeed stated in our law books—that by the law of England, which I assume is the same as that of Ireland—the owner of stolen property cannot follow it into the hands of a *bona fide* purchaser in open market for full value. It is stated on record that this horse was bought by David Black in open market at Armagh, who afterwards sold it to Armour at Falkirk, and the question is, whether the horse was so bought, or whether the horse was never there, and the thief carried it direct to Falkirk? With the exception as to some questions as to the presence of a toll-keeper, and lists of the animals bought and sold at Armagh Fair, the case is so presented. But now it is explained to us in argument that under certain old statutes, in order to make that sale in open market available as a defence to a *bona fide* purchaser for full value, certain formalities are necessary at the market. I do not think that the pursuer's pleadings are in such form as to entitle him to raise this question, and he has declined to amend his record. Taking the case, then, as it is presented, I agree with your Lordship that in what is popularly an open market or market overt this horse was bought by David Black, who brought it to Falkirk and well sold it to Armour. That puts an end to the case. Black had a title to the horse which was good against the true owner, and he sold the horse to Armour, and gave him an equally good title.

For myself, I regard the case as chiefly important in a much larger point of view. The case of a purchaser in good faith for a full price paid to a person in the ostensible possession of moveable goods is perhaps more favourably looked on by the law than any other. The safety of commerce and trade require it. It is impossible for people going to Falkirk Tryst or any other market to inquire into the previous history of all the animals there, or of the persons who are in charge of or selling them. Markets are a mere illustration. A person buying in ordinary course of trade must be protected against a defective title in the seller, and the Court will not dis-

possess him because a fraud has been perpetrated on a third party. The law of Scotland to the largest extent, and the law of England to a large but still limited extent, makes an exception in the case of stolen property. Our law gives effect to the exception to the fullest extent. It will ordain the purchaser of stolen goods for full value, and under the most unexceptionable circumstances, to restore them to the true owner, because of the *vitium reale* which attaches to the goods on account of the crime of theft. That is one sole exception to the general rule protecting a *bona fide* purchaser for full value. The law of England has a similar exception, but with this limitation, that the *bona fide* purchaser of stolen goods for full value shall be protected if he bought them in open market. I have pointed out that our rule is dependent on the *vitium reale* attaching to the property in consequence of the crime of theft. That is a matter of municipal law, and must be fixed by every country for itself. Our law is not universal, neither is that of England; nor does the *vitium reale* attach to all things stolen. No such *vitium* attaches to money or bills which are stolen. That is the law of Scotland, as also that of England. The attaching of the *vitium reale* is strictly territorial. What, then, is the law of Ireland, or what have we to do with it? I know nothing at all about the law of Ireland. I have a notion that it differs from our law—in many respects it certainly does. What is the *vitium*, or is there any *vitium* attaching to a horse in respect of its being unlawfully taken out of its owner's possession in the west of Ireland or in any other foreign country? For all we know it may be in the same category as money or bills, to which no *vitium reale* attaches. What are we to do in such a position? Are we to apply the law of Ireland, or are we with respect to the law of Scotland to attach the *vitium reale* which arises out of a Scotch theft? I apprehend if we have to make a choice we must follow the law of Ireland. Then suppose no *vitium reale* attaches in Ireland at all, and the horse is stolen there and brought to Scotland, are we to consider the horse as if it had been stolen in Scotland and to attach the Scotch *vitium reale?*

My understanding is that any *vitium* which attaches in Ireland is not indelible, but that it can be removed by a sale in open market, and in that case the original owner cannot follow his lost property. If that is the law of Ireland, why shall a sale in open market in Scotland not have the same effect? We are not now dealing with ordinary common sense, but we are inquiring whether there is not something mysterious inherent in a sale in Ireland which does not result from a sale in Scotland.

I am not disposed to entertain an action by an Irishman who comes to a Scotch purchaser at Falkirk Tryst, and says—"True, there would have been no answer to a sale in open market in my country, but your law is different, as a *vitium reale* attaches, and so I can get my horse back although it was sold in open market here." That is a proceeding which is not to be heard of; it is opposed to every consideration of equity. But I go further and say, that while I must recognise the *vitium reale* arising out of theft in Scotland —no doubt on account of the serious nature of that crime in the eye of the law in this country—I am not all prepared to say in the absence of any authority, that we should attach the same *vitium* in respect of theft in another country—say China—Are we to inquire into the nature of the crime of theft in China?

I shrink from introducing a new danger to trade and a new exception to the protection of *bona fide* purchasers for value. Take the present case. The honest buyer of a horse forced into a litigation about an alleged theft in a place called Ballinaskergh, in Ireland. It would have been bad enough to have had to litigate in Ireland, but he has to defend himself in Scotland, and has to bring Irish witnesses here at great expense, and what is the object of the action?—To attach a Scotch *vitium* to an Irish theft in order to introduce the Scotch exception of *vitium reale*, to the general rule of protection of *bona fide* purchasers for full value.

I am not prepared to extend the Scotch *vitium reale* to foreign thefts. It has not been done hitherto, and I am not disposed to encourage the extension of exceptions to the general rule to which I have referred.

It is quite possible in this case to come to a decision on the narrower and more limited view, but I would only protest against deciding the case otherwise than with reference to the Scotch question of *vitium reale*. It will probably appear sufficiently from what I have said that I regard the question to which I have last referred as of great importance. It is one not confined to cattle or horses sold at fairs or markets, but affects also sales made not in open market but in the course of ordinary business. It seems most inequitable that the *bona fide* purchaser for value should be forced into a litigation about an alleged offence committed in a foreign country, about the law of which we know nothing.

I have considered it my duty to give expression to my views on this subject, because, as I have already stated, I look upon the question as one of great importance.

Lord Craighill—I concur with your Lordship in the chair, and I am glad that the case can be decided in accordance with your Lordship's view of the facts and law, because otherwise I should have been obliged to express a different opinion from that of Lord Young on the alternative case presented at the bar.

It appears that the horse was stolen in Ireland and sold at Falkirk Tryst. The appellant, I have no doubt, made the purchase in perfect *bona fides*, but by the law of Scotland, as I have been taught and as I regard that law, stolen property wherever stolen can be vindicated. There is no qualification of that proposition in any of the text writers and I would not be prepared to hold that a different effect would follow from the country in which the theft was committed, because the theft happened to have been committed out of Scotland.

It is not a matter of controversy between the parties here that the *vitium reale* attaches—a *vitium* which can, however, be purged in Ireland, although not in Scotland.

If nothing had followed on the theft of the horse but the sale of it in Scotland, by what can it be said that the *vitium* consequent on the theft was purged? Surely not by the sale in Scotland, by the law of which country no such result can happen. If there is a *vitium reale* by the

law of Scotland, a sale in open market has no effect in destroying the right of the real owner. Such a peculiar proposition as I have referred to seems to me to be opposed alike to principle and to authority. I have thought it necessary to make these remarks because Lord Young's opinion to the contrary was so powerfully stated.

Lord Rutherfurd Clark—I desire to decide this case on what I think are very simple grounds. There is no question that the horse was stolen, and it is proved that it was bought at Armagh by David Black in good faith. It was stated in argument that if the horse which had been stolen was acquired in open market there, and with certain formalities, that any *vitium reale* attaching to it on being stolen would be thereby cured. Taking this admission, the question before me is whether I am to take the horse as having been bought in open market in Ireland. Now, I think that the defender has discharged the *onus* of establishing that. We have heard the pursuer allege that certain formalities required by statute were not complied with, but we have no allegation on record as to what they were nor that they were not complied with. I do not say that the pursuer might not have amended his case, but he declined to do so at our suggestion, and asked our judgment on the case as it stood. Therefore, on the ground that the sale was in open market in Ireland, and that the pursuer has made no allegations on record as to the want of formalities attending it, I am prepared to give judgment in favour of the defender.

With respect to the other matters touched upon by Lord Young and Lord Craighill, I desire to say that I have formed no opinion, nor do I wish to express one.

The Lords sustained the appeal and dismissed the action.

Counsel for Appellant—J. G. Smith—Shaw. Agents—Curror & Cowper, S.S.C.

Counsel for Respondent—J. P. B. Robertson—Maclellan. Agents—M'Caskie & Brown, S.S.C.

Friday, June 9.

SECOND DIVISION.

(Before Lords Young, Craighill, and Rutherfurd Clark.)

[Lord M'Laren, Ordinary.

EDMONSTONE *v.* POLICE COMMISSIONERS OF KILSYTH.

Police—Public Health—General Police and Improvement (Scotland) Act 1862 (25 *and* 26 *Vict. c.* 101), *secs.* 185, 186, 196—*Public Health (Scotland) Act* 1867 (30 *and* 31 *Vict. c.* 101), *secs.* 76, 91, 93, 94, 104.

In 1875 a portion of a parish was formed into a special drainage district in terms of the Public Health Act 1867. In 1877 a populous place lying within the parish was formed into a police burgh in terms of the Police Act 1862. The new burgh included the whole of the special drainage district above mentioned. During this period nothing had been done by the parochial board as local authority in the way of drainage works. The Police Commissioners after their appointment proceeded to execute certain drainage works for the whole burgh without reference to the special district, to defray the cost of which they levied an assessment on the whole ratepayers in terms of the Police Act. *Held* that the assessment had been rightly so imposed.

In the year 1875, under an application in terms of section 76 of the Public Health Act 1867, a portion of the parish of Kilsyth was formed by the Sheriff into a special drainage district. The town of Kilsyth, which lies wholly within the parish, afterwards formed itself into a police burgh under the General Police and Improvement Act 1862. The boundaries of this burgh were fixed by the Sheriff in the year 1877. These boundaries contain the whole of the special drainage district, and an additional suburban district not forming part of the special drainage district. In virtue of the Public Health Act, the Police Commissioners of the burgh then became the local authority, empowered to execute and assess for drainage works.

The complainer Sir William Edmonstone of Duntreath and Kilsyth, Bart., was proprietor of certain mines and minerals lying within the boundaries of the police burgh. From 1875, when the special drainage district was formed, till 1877, when the Police Commissioners were appointed, during which period the parochial board was the local authority under the Public Health Act, no steps had been taken for the formation of any drains or sewers within the special district, nor had any money been borrowed or rates levied for that purpose. After their appointment the Commissioners proceeded to execute certain drainage and sewerage works for the whole burgh, extending not only over the district defined in the proceedings under the Public Health Act, but also over the portion of the burgh lying outwith that district. They then made an assessment for the cost of the works. In calculating the sums to be paid they made one assessment over the whole burgh for the whole works executed, both within and without the special drainage district, and they assessed the complainer upon the full value of the mines and minerals belonging to him. The defenders averred that the operations were undertaken and the assessments levied by them as Police Commissioners under the Police Act, and not as local authority under the Public Health Act, and that in that capacity they had also borrowed money on the security of the rates.

The present case was a suspension of a threatened charge for arrears of assessments alleged to be due by the complainer. The reasons of suspension are stated in Lord Craighill's opinion.

The Lord Ordinary sustained the reasons of suspension, adding the following opinion:—"I am of opinion that the complaint is well founded, because after comparing the clauses of the two statutes I fail to see how the incorporation of Kilsyth into a police burgh in 1877 can have the effect of abrogating the proceedings taken before the Sheriff in 1874, under which a part of that burgh was formed into a special drainage district.

"*Ex facie* of the Public Health Act, the incorporation of a part of the parish into a police burgh would, as regards sanitary administration,