Friday, October 28.

SECOND DIVISION.

[Sheriff Court at Glasgow.

BRYCE *v.* EHRMANN.

Right in Security—Pledge—Transaction between Wholesale and Retail Dealers—Right Conferred Involving Power to Pledge Goods—Property in Goods Sent for Sale and Pawned without Consent of Sender.

A, a wholesale jeweller in London, sent to B, a retail jeweller in Glasgow, a diamond necklace, in order that the latter might endeavour to sell it in terms of an approbation note, which specified the price to be paid by B to A in the event of a sale being effected, and contained a provision that the necklace should remain A's property till invoiced by him, B being in the meantime responsible for loss and damage, and the necklace while uninvoiced being returnable on demand. After receiving the necklace, B, without the knowledge or consent of A, pledged it to C, a pawnbroker acting in good faith, for a loan.

Subsequently A, while believing B's false representations that he was still negotiating a sale, but not induced by B's concealment of the truth, wrote to B, proposing that B himself should purchase the necklace and grant bills for the price. B agreed to this proposal, and on his granting bills to A, A invoiced the necklace to B. Thereafter the bills were dishonoured, and B became bankrupt.

Held that in respect of the terms of the contract between A and B, B was in a position to pledge the necklace, and had validly pledged it to C, and that C was entitled to retain the necklace till the amount he had advanced on it was repaid with interest.

Brown v. *Marr*, January 8, 1880, 7 R. 427, 17 S.L.R. 277, *followed*. *Macdonald* v. *Westren*, July 19, 1888, 15 R. 988, 25 S.L.R. 710, and *Mitchell* v. *Heys & Sons*, February 27, 1894, 21 R. 600, 31 S.L.R. 485, *distinguished*.

On 13th December 1902 Benzion Ehrmann, wholesale jeweller, London, sent a diamond necklace to Robert Anderson, retail jeweller, Glasgow, in order that he might endeavour to find a purchaser for it among his customers. The necklace was accompanied by an "approbation note," which specified £110 as the price to be paid by Anderson to Ehrmann in the event of the former effecting a sale. The approbation note had the following heading:—

"18 *Hatton Garden, London, E.C.*

M..... ....190...

On Approbation from B. Ehrmann,

Speciality: Gem work of every description. Diamond Merchant, Wholesale and Manufacturing Jeweller.

The goods specified below remain my property until invoiced by me, you in the meantime being responsible for loss or damage. All uninvoiced goods to be returned on demand."

Anderson had been in the habit of dealing with Ehrmann on similar terms for a number of years.

On 18th December 1902 Anderson, without the knowledge of Ehrmann, pledged the necklace with Thomas L. Bryce, a licensed pawnbroker and money-lender, carrying on business at 67 Oswald Street, Glasgow, against a loan for £100. Between 18th December 1902 and 21st April 1903 a correspondence was carried on between Ehrmann and Anderson, in which the former repeatedly requested the return of the necklace and other jewellery, while the latter kept asking for delay on the ground that he had a customer for the necklace with whom he was on the point of concluding a bargain. On April 21st Ehrmann wrote the following letter to Anderson:—

"18 *Hatton Garden,*

"*London, E.C., April* 21*st*, 1903.

"Dear Sir,—With reference to the two dd. necklaces, £64 and £110, and two pendants, £31 and £30 = £235 in all, which has been so long in abeyance, I have to make the following proposal to you—If you will accept invoice for these goods I am prepared to draw for the amount at 3, 4, 5, or 6 months. This will enable you to take your own chance with your customer. As far as I am concerned, I will on no account leave the matter longer in abeyance. If you cannot get your customer to decide forthwith, or are [not] willing to agree to the above terms, I must ask you to return my goods without further delay. Please also to send the promised post-dated cheque for the crescent. I await your reply.—Yours, &c., B. EHRMANN."

On April 22nd Anderson wrote to Ehrmann agreeing to his proposal. Bills were accepted by Ehrmann from Anderson in payment of the price, and on 23rd April the diamond necklace was, along with other goods, invoiced by Ehrmann to Anderson as his absolute property. The bills were dishonoured and remained unpaid. In July 1903 Anderson was sequestrated, and William Brodie Galbraith was appointed trustee on his estate.

In August 1903 an action of multiplepoinding was raised by Bryce in the Sheriff Court of Lanarkshire at Glasgow, the fund *in medio* in which was the diamond necklace. Claims were lodged by Ehrmann, Bryce, and Anderson's trustee in bankruptcy. Ehrmann claimed the necklace as his absolute property, or alternatively as his property on repaying to Bryce the amount advanced by him on security of the necklace, with interest. Bryce claimed to retain the necklace until repayment of the money he had advanced upon it, with interest. Anderson's trustee claimed that he was entitled to delivery of the necklace on repayment to Bryce of the amount of his advances, with interest.

A joint-minute of admissions, from which the facts above narrated are taken, was put in by parties.

On 19th February 1904 the Sheriff-Substitute (BOYD) found the claimant Ehrmann entitled to a ranking on the subject *in medio* in terms of his alternative claim.

Anderson's trustee appealed to the Sheriff (GUTHRIE), and on 13th June 1904 the Sheriff recalled the Sheriff-Substitute's interlocutor, repelled the claims of Anderson's trustee and Bryce and preferred the claimant Ehrmann to the subject *in medio* absolutely. In the course of his note the Sheriff said—"I apprehend that *Brown* v. *Marr*, 7 R. 427, has not been authoritative since *Macdonald* v. *Westren*, 15 R. 988."

Bryce appealed. When the case was heard before the Second Division of the Court of Session no appearance was made on behalf of the claimant Anderson's trustee.

Argued for the appellant—The pledge was valid. Under the contract between Ehrmann and Anderson the former conferred on the latter such a right in the goods as enabled the latter to give a good title to a *bona fide* purchaser, and therefore *a fortiori* to a *bona fide* pledgee, the greater right implying the less. The contract was one of "sale and return," and possessed all the features set forth as necessary to such contract in *Brown* v. *Marr*, January 8, 1880, 7 R. 427, 17 S.L.R. 277, which with *Kirkham* v. *Attenborough* [1897], 1 Q.B. 201, and *Lee* v. *Butler* [1893], 2 Q.B. 318, settled the law applicable to the present case. If the contract were looked upon as one of "sale on approbation," Anderson signified his approbation by the act of pledging the necklace. Ehrmann's contention that the provision as to "invoicing" made it impossible for Anderson to confer a good title on a purchaser or pledgee without referring the matter to Erhmann was absurd and inconsistent with the obvious object of the arrangement. The purpose of the provision as to invoicing was merely to secure Ehrmann in his right of property as in a question with Anderson or Anderson's creditors so long as the goods were in Anderson's possession. The cases of *Mitchell* v. *Heys & Sons*, February 27, 1894, 21 R. 600, 31 S.L.R. 485; *Macdonald* v. *Westren*, July 19, 1888, 15 R. 988, 25 S.L.R. 710; and *Helby* v. *Mathers* [1895], A.C. 471, were all distinguishable from the present and the circumstances different. Moreover, apart altogether from the effect of the contract, it was settled that where one of two innocent parties must suffer through the wrongous act of a third party, he must suffer who puts the third party in a position to perpetrate the wrong—*Brown* v. *Marr*, *supra*; *Henderson & Co.* v. *Williams* [1895], 1 Q.B. 521; *Farquharson & Co* v. *King* [1901], 2 K.B. 697. Section 18, rule 4 (*a*), of the Sale of Goods Act 1893 was applicable to the present case. Anderson by pledging the goods "adopted the transaction," and the property in the goods passed to him enabling him to give a good title to Bryce. But assuming that the title was originally bad, the goods were ultimately invoiced and paid for and became the property of Anderson, with the result that the pledgee's originally bad title was retroactively made good. It was said that Ehrmann's letter offering to invoice the goods to Anderson was induced by the fraudulent representations of the latter. As a matter of fact that was not the case, but even if it were, the sale that followed remained valid until reduced on the ground of fraud.

Argued for the claimant and respondent Ehrmann — *Brown* v. *Marr* and the other cases quoted by the appellant were all distinguishable. In them there was some document of title; here nothing except the possession of a corporeal moveable. The rule that the party who enables a wrongdoer to commit a wrong must suffer in a question with an innocent third party was indisputable, but it postulated some distinct act of carelessness such as would naturally lead to the deception of the third party. It was really a question of personal bar or estoppel — *Mitchell* v. *Heys & Sons*, *supra*; *London Joint-Stock Bank* v. *Simmons* [1892], A.C. 201. Here it would have to be shown that Ehrmann acted in such a way as to mislead Bryce as to Anderson's rights in the necklace. There was no such act upon the part of Ehrmann. Under the express contract of the parties there could be no effective sale until the goods were invoiced, and it followed there could be no effective pledge. This feature distinguished the present from the cases quoted, where a free hand was left to the persons receiving the goods to dispose of them. Section 18 of the Sale of Goods Act 1893 did not help the appellant, for the rules therein laid down for determining the time at which property passes are qualified by the words "unless a different intention appears," and "a different intention" was clearly indicated here by the provision as to invoice. As to the effect of the invoicing of the goods, a pledge originally bad could not be made good by a fraudulent transaction, the doctrine of accretion being inapplicable to fraud—*Watt* v. *Findlay and Hendrie*, February 20, 1846, 8 D. 529; *Molleson* v. *Challis*, March 11, 1873, 11 Macph. 510; Bell's Com. (M'Laren's edition), vol. i, p. 263. It was owing to the fraudulent misrepresentations of Anderson that Ehrmann invoiced the goods.

At advising—

LORD JUSTICE-CLERK—In this case the question to be decided is between Ehrmann, who supplied the necklace in question to Anderson, the bankrupt, and Bryce, the pawnbroker with whom Anderson had pawned the goods a considerable time before his bankruptcy. Anderson's trustee does not now appear, and therefore the question is narrowed down to this—Is Ehrmann entitled to a decerniture to deliver the goods to him unconditionally, or is he only entitled to the goods on the terms on which the pawnbroker is willing to deliver them up, viz., on being recouped the amount which he advanced on them.

The contract in this case is peculiar, as Ehrmann in sending his goods to Anderson stipulated that the goods were to remain his property until invoiced by him, his purpose evidently being to keep up his right to them while they were in Ander-

son's hands or if they fell into the hands of his creditors. But it is clear from the documents in process that the purpose of the arrangement was that Anderson should as a retail dealer endeavour to effect a sale of the goods. He had the goods for that distinctly understood purpose. If Anderson could find a purchaser, then Ehrmann was bound to let him have the goods at the arranged price of £110. The whole of the correspondence bears this out. Ehrmann's constant complaint is that Anderson does nothing to bring matters to a point with his customer, and he calls upon Anderson to "get your customer to make his decision one way or another." It is quite true that Anderson's side of the correspondence was deceitful, as he was not dealing with a customer but had put the goods in pawn. But the point is that Ehrmann was in the belief that Anderson was negotiating a sale, as in the course of what it was understood between them was the purpose for which the goods were in his hands.

The case seems to me to be practically on all fours with that of *Brown* v. *Marr* Anderson had by his possession a right to sell on his own account and for his own profit. Although Ehrmann put in his written conditions as between him and Anderson a special stipulation, the act which he did in handing over the goods to Anderson that he might sell them for his own profit placed Anderson in the position to do what he did—to do an act by which loss has been caused—and the loss must fall, not upon the innocent party who dealt with Anderson, but upon the party whose actions enabled him to do so. The Sheriff thinks that *Brown* v. *Marr* is no longer an authority, and refers to the case of *Macdonald* v. *Westren* as detracting from it. I do not so read the decision in that case. That was a case in which goods held by a person on sale or return, and who became bankrupt, and which were in his possession at the date of his bankruptcy, were claimed by his trustee as against the consignor, and it was held that they could not, the bankrupt never having dealt with the goods as his own, as he had not effected any sale to a third party, or done any other act by which it could be held that he became the purchaser liable for the price. That is a different case from *Brown* v. *Marr*, and the Lord Justice-Clerk gives an exposition in it of the grounds on which *Brown* v. *Marr* was decided, which are instructive in reference to the present case. He says — "I desire to say with reference to the case of *Brown* v. *Marr* that that decision did not turn on any question of property, but on the necessary inferences arising from the possession of the goods. There the retail dealer had possession, and he pawned the goods, and we hold that as it was through the act of the wholesale merchant in putting him in possession of the goods and allowing him to deal with them as his own that he was enabled to deceive the pawnbroker, the wholesale merchant and not the pawnbroker ought to stand the risk of loss." And he added that that did not conflict with what had been said by Lord Young in giving the leading judgment.

Another case referred to by the Sheriff is the case of *Mitchell* v. *Heys & Sons*, but I am unable to see that there is any analogy between that case and the present one.

In the view I take of the case it is unnecessary to consider the effect of the invoicing of the goods to Anderson, which took place after the pawning, although had it been necessary I should have held that the invoicing to Anderson and the granting of the bills made the condition of Ehrmann untenable. My opinion is in accordance with that expressed by Lord Moncreiff in the case of *Brown* v. *Marr* which I see no ground for holding has been superseded by the subsequent decision.

I am therefore in favour of recalling the interlocutor of the Sheriff, and of finding that Ehrmann can only receive delivery of the goods in question which Bryce is willing to deliver up, on the condition which Bryce annexes, that the amount of his advance be made good to him.

LORD YOUNG—I am substantially of the same opinion. The case is an interesting one, but it did not appear to me at first to be a very difficult one, although it has always been with reluctance that I have differed from the judgment of Mr Sheriff Guthrie. I have a very high opinion of his good sense and legal knowledge, and it is only upon careful consideration that I have agreed to reverse a judgment of his. But I have given the present case that careful consideration and reconsideration, and with the result, as I have stated, that I concur with your Lordship in thinking that the judgment ought to be recalled and another pronounced. I do not think that I can usefully add anything to the observations which were made by me indicative of my opinion, or rather I should say impression, in the course of the argument, but I shall add a few words explanatory referring to the joint-minute of admissions, article 7, which states—"On or about 23rd April 1903 Ehrmann invoiced the said necklace to Anderson as his absolute property along with certain other goods which had been sent to him on approbation by Ehrmann in the same manner." That is an admission that the necklace, the fund *in medio* here, was like the other goods referred to in this article, sent on approbation by Ehrmann. "Bills of exchange were accepted by Ehrmann from Anderson in payment of the price of the said goods, but the said bills have since been dishonoured, and are still unpaid." On that admission it is impossible to doubt that the necklace, which was then in possession of Anderson, was invoiced and declared to be his absolute property, and that bills of exchange were received in payment of the price. There might be grounds upon which this might be set aside. The Sheriff is of opinion that there is a ground for setting it aside or disregarding it in this, that Anderson had

previous to 23rd April pledged the necklace to Bryce, the pawnbroker, and that he did not disclose that. I cannot agree with the view that this would be any ground for disregarding the legal effect of the facts which are here admitted. It is not doubtful that by this invoice and by the bills sent in return Anderson was placed in the position of being able not merely to sell the goods as his own property but also to pledge them. He was absolutely entitled to pledge the goods which had been invoiced to him, and for which his bills had been taken as payment of the price. And to say that the pledging of the goods subsequent to the invoicing and the declaration that they were his property would be good, and that the pledging before that was invalid to the pledgee—that is, the pawnbroker Bryce—is a proposition which I cannot sustain. I think Ehrmann, who sent the necklace to Anderson, could not maintain that these goods remained his property, and that Anderson was not at liberty to pledge them, upon the ground that he had pledged them already. But irrespective of this, which is conclusive, I may indicate my opinion upon the point that was argued, namely, upon Anderson's position to give a good title of pledge to a pawnbroker upon the contract between him and Ehrmann irrespective of the invoicing of the necklace. It is not doubtful that a necklace was sent to him as a retail jeweller in order that he might sell it in the course of his trade, he selecting the purchaser, and when he sold the necklace to any purchaser of his own selection at any price, being only personally liable to Ehrmann for the price stipulated. But the contention was that he could give a title of property to anybody to whom he sold the necklace as his own without any responsibility whatever to Ehrmann, but he could not give a title to a pawnbroker. That is a proposition which I cannot assent to, even considering the stipulation your Lordship referred to, that the goods were to remain the property of Ehrmann until they were invoiced. I think that means only so long as they were in the possession of Anderson, and he had not disposed of them by way of sale to a third party. Neither the purchaser from him nor the pawnbroker receiving them as a pledge was bound to investigate into the title by which he held these goods. The purchaser certainly was not bound, and what ground had the pawnbroker for inquiring into the title by which he had them. So that Ehrmann, according to the view I take of the case upon the facts, which are substantially not in dispute, was in this position, that he had put Anderson in the position of keeping the goods at the price stipulated, or if not of sending them back. Well, Anderson pledged the goods. It was indicated in the argument that that was thought to be inconsistent with a possible transaction with a purchaser to buy them, and to buy presumably at a price which would afford a profit to Anderson. I cannot see any inconsistency in that at all. Any jeweller pawning goods is quite at liberty to transact with an intending purchaser of these goods, and if he can agree to terms he may even tell the party with whom he is transacting "They are in pledge at this moment, but if we can agree upon the price I will get them out of the pledge and hand them over to you." He need not even say anything about the pledge. He may say "I will send the goods, or I can get them to shew you, and if you buy them they will be handed to you; if not, send them back." How is the pawnbroker affected? Anderson found it convenient in the course of his business, while expecting to sell the necklace, and to sell it at a profit, to raise £100 by pledging it. What has the pledgee to do with that, except that he is entitled to keep it until the advance has been paid to him, and give it up only on that footing? I think on pledging the goods Anderson became the purchaser himself, and he was entitled to make himself the absolute purchaser, and to make himself absolutely liable upon a contract of sale with Ehrmann to pay the price therein specified; and I think he did so, and would have been dealt with as having done so had he not become bankrupt, for that bankruptcy alone put him out of the position of being able, or having any interest to make such a condition, or Ehrmann any interest to make a similar condition on his side. By pledging the goods on the footing that he was the owner—for it is only the owner that can pledge goods—Anderson himself became the purchaser, and he put himself in that position in a question with Ehrmann just as completely and effectually as if he had placed a third party, one of his own customers, in that position. That being so, the only question is whether there is any ground upon which the necklace can be taken from the pledgee without giving him the amount which he had advanced upon it. A question might have arisen if the necklace had been of such value as to make it of any interest to the creditors of Anderson, whose interests are maintained or maintainable by the trustee in bankruptcy. It might have been an interesting question worthy of being argued whether Anderson or his creditors, upon his bankruptcy, were not entitled to get the goods and to become liable to Ehrmann only for the price. But the trustee in bankruptcy, no doubt very prudently, taking a careful view of the subject, although there was a claim, does not appear to support it; and it was explained to us that he took that course on the view that he could not, as representing Anderson's creditors, get the necklace from the pawnbroker except upon the footing of paying his advance; and that if he got it upon the footing of paying the advance, he would be liable undoubtedly to Ehrmann for the contract price to him. In the circumstances of the case the trustee for the creditors was plainly of opinion that it was not in the interest of the creditors to maintain that position; and accordingly assented to the view that Ehrmann might have the goods upon deal-

ing with the pledgee Bryce, that is, paying the advance. My opinion is with your Lordship that Ehrmann cannot have them from Bryce on any other footing than that of paying the advance, and that upon doing so he may receive the goods, there being no claim maintained by the trustee in Anderson's bankruptcy that the goods should be handed over to him to make what he can of them in the interest of the creditors. For these reasons I arrive at the same result which your Lordship has stated.

LORD TRAYNER—I gather from what the Sheriff says in the note to the interlocutor appealed against that his judgment would have been other than it is if he had been of opinion that the decision in the case of *Brown* v. *Marr* was still authoritative. He thinks, however, that it is not—that its authority has been derogated from by the subsequent cases of *Macdonald* v. *Westren* and *Mitchell* v. *Heys & Sons*. I think the Sheriff has here fallen into error, for in my opinion the case of *Brown* is still of authority, and the subsequent cases referred to do not impinge upon its authority at all. These subsequent cases are quite distinguishable from the case of *Brown* v. *Marr*, and the decisions in them all are quite consistent. If this case in its particular circumstances falls within the law laid down in *Brown* v. *Marr*, then in my opinion that case rules the present as an authority. But apart altogether from the case of *Brown* it appears to me that the judgment appealed against is unsound.

I do not regard the contract made between Mr Ehrmann and Mr Anderson as contract of sale and return, although it has some features in common with such a contract. Nor was it merely a transaction such as usually takes place where goods are sent by one person to another "on approbation." When A sends goods to B on approbation, they are sent on the understanding that B if he approves of them may keep them at the price which is notified; if he does not approve he returns them to A. In such a transaction no other person's approval is asked or expected except the approval of B; no other person is or can be interested in the transaction but the sender and the receiver of the goods. But in this case, as is apparent from the correspondence produced, both Mr Ehrmann, the sender, and Mr Anderson, the receiver, intended something quite different. There was no expectation on the part of Mr Ehrmann that Anderson would take or keep the goods because he was pleased with them. He could, of course, have done so, but the primary purpose of both Ehrmann and Anderson was that the latter should be put in possession of goods which he might submit for the approval of purchasers from him, and to whom he might sell the goods at any price he pleased or could obtain. In order to carry out this purpose Ehrmann put Anderson in possession of the goods, with full liberty to sell them to anyone he pleased and at any price he might fix, the only consequence of such a sale being that Anderson would become liable for the price which Ehrmann had fixed, but not bound to account for the price he had received, however much it might exceed the price originally notified by Ehrmann. In these circumstances Ehrmann conferred on Anderson such a right in the goods sent as enabled the latter to give a good title to them to anyone who in good faith purchased them from him—a title which could not have been successfully challenged by Ehrmann. If, however, Anderson could have conferred such a title on a purchaser, I think he could equally confer the lesser title given to a pledgee who in good faith made advances on the security of the goods. If I am right so far, it follows that the appellant is entitled to hold the goods pledged with him by Anderson until his advances thereon are repaid.

The counsel for the respondent based their argument in support of the respondent's right on the terms of the approbation note sent by the respondent to Anderson with the goods in question. That note provides or stipulates that the goods should remain the property of the respondent until "invoiced by" him, and the effect of that, it was said, was to prevent any right of property passing from Ehrmann except in the way provided, namely, the invoicing of the goods by him to Anderson. I think the answer to this contention is twofold. In the first place, the provision was made to secure Ehrmann in his right of property as in a question with Anderson or Anderson's creditors, so long as the goods were in Anderson's possession. It was not intended to continue in Ehrmann a right of property preferably to any right granted by Anderson in favour of some third person, the granting of such a right being, in the contemplation of the parties, one which it was the primary purpose of the contract or transaction to enable Anderson to give. But, secondly, if the invoicing of the goods by Ehrmann to Anderson gave the latter a full right of property, that right was so given. In April 1903 the goods in question were invoiced by Ehrmann to Anderson. The Sheriff thinks this transference of property may be set aside on the ground that Ehrmann was induced to make it by the fraud of Anderson. I do not concur in that view. It appears to me that Anderson's repeated statements that he had a customer whom he expected to purchase the goods (statements I assume to be false) was not the inducing cause of the invoicing and transference. It will be observed that Anderson did not ask Ehrmann to invoice the goods to him—that was a proposal which emanated from Ehrmann. And what induced Ehrmann to invoice the goods was his own anxiety to have Anderson personally liable for their price. In effect what Ehrmann said to Anderson was this, Whether you have a customer to take the goods or not I must either have them back or you must take them yourself and become liable for their price, and for that price I will take your bill. Anderson's reply was, Very well I will accept your

terms and grant the bills—and he did so. I see here no fraud on the part of Anderson inducing the contract of sale which made him the owner of the goods. If that was a good sale, and gave Anderson a perfect title to the goods, that perfect title accrued to the appellant, assuming that prior thereto his title was defective or invalid.

On the whole matter I am of opinion that the appellant is entitled to hold the goods in question so long as the advances he made on the security thereof remain unpaid. The trustee on Anderson's estates does not appear to contest the judgment by which his claim to the property as part of Anderson's estate has been negatived. As in a question between them, therefore, the right of property must be taken to be in Ehrmann. In these circumstances, the appellant not objecting, it will carry out my view if Ehrmann is preferred to the fund *in medio* in terms of his alternative claim. This is, in effect, a return to the interlocutor of the Sheriff-Substitute in all of whose findings I am not to be considered as concurring.

LORD MONCREIFF — The Sheriff has repelled the claims of Anderson's trustee and the appellant Bryce, and preferred the claimant Ehrmann to the subject *in medio*.

I understand that Anderson's trustee has acquiesced in this judgment, and he was not represented at the hearing before us. It is therefore only necessary for us to decide on the claims of Ehrmann and Bryce. In my opinion the judgment of the Sheriff is wrong. I think that the claimant Bryce, the pawnbroker, is entitled to retain the necklace until repaid the advances made by him to Anderson on the security of the necklace, and that the claim for Anderson's trustee now being out of the way, Ehrmann will be entitled to delivery of the subject on his repaying to Bryce the amount advanced to Anderson with interest.

The Sheriff's judgment proceeds in a great measure upon the assumption that the case of *Brown* v. *Marr*, 7 R. 427, is no longer law, and in particular that it was overruled by the subsequent case of *M'Donald* v. *Westren*, 15 R. 988. In this I think he is wrong. The facts in the case of *M'Donald* v. *Westren* were different in this respect, that at the date of the retail jeweller's bankruptcy the goods sent to him by Westren on a contract of sale or return were still in his possession. The question arose, not between the wholesale jeweller and some one to whom the retail jeweller, Fraser, had sold the goods, but between the wholesale jeweller and Fraser's trustee. In that case Fraser had not declared his option to buy, and had exercised no right of property in the goods by selling or pledging them. They were still in his possession, and on that ground the Court decided as in a question between Westren and Fraser's trustee that the property in the goods never passed to Fraser, and consequently had not passed from him to his trustee.

That was the true ground of judgment, and although at the close of his opinion Lord Young indicated some doubt of the judgment in *Brown* v. *Marr*, it is plain that his remarks were, and were intended to be, *obiter*.

On the other hand, the Lord Justice-Clerk (Lord Moncreiff), who took part in the judgment in *Brown* v. *Marr*, was at pains to distinguish the two cases.

Again, in the case of *Mitchell* v. *Heys & Sons*, February 27, 1894, 21 R. 600, *Brown* v. *Marr* was treated both by the Lord Ordinary and Lord Kinnear as still a binding authority. No better exposition of the ground of judgment in *Brown* v. *Marr* could be given than that of Lord Kinnear in distinguishing the judgment. He says (21 R. p. 613)—"The main ground of judgment was that by such a contract all the substantial rights of ownership pass to the buyer. He has an option to return goods within a stipulated time instead of paying the price. But whenever he exercises any right of property, as by selling or pledging the goods, the option ceases, and accordingly the title he may give to third persons dealing with him in good faith does not depend upon any authority derived from the vendor on sale and return, but upon his own absolute right of property. . . . The difficulty was that the contract had been obtained by fraud. But the answer is that contracts obtained by fraud are valid until they are rescinded, and therefore that they cannot be rescinded to the prejudice of rights and interests acquired by third parties in good faith and for value."

In *Mitchell* v. *Heys & Sons* the goods came into the possession of Mitchell, Johnston, & Company, not under a contract of sale or return, but under a contract of hiring under which, of course, they had no power to appropriate or dispose of the rollers; and the Court held (I must assume rightly) that William Mitchell, from whom they hired the rollers, had done nothing to induce Heys & Sons, to whom Mitchell, Johnston, & Company had sent the rollers with cloth to be printed, to believe that the rollers were the property of Mitchell, Johnston, & Company. That is a very different case from the present and *Brown* v. *Marr*, in both of which the goods were placed in possession of the retail dealer in order that he might dispose of them in the ordinary course of his business, there being nothing to show an intending customer that the goods were held by the retail dealer under conditions which prevented him from disposing of them as his absolute property. It is new to me that a customer going into a jeweller's shop for the purpose of purchasing an article of jewellery is called upon to catechise the jeweller as to whether the goods are his absolute property and as to the conditions on which he is entitled to sell them. For the convenience of trade I think that the customer in such circumstances is entitled to assume that the jeweller has an absolute power of disposal whatever may be the latent conditions under which the retail dealer holds possession of the goods. I am

not aware of any other Scottish decisions which deal with *Brown* v. *Marr*.

If, then, *Brown* v. *Marr* has not been overruled, it must be followed if it applies to the present case, and we must therefore next consider whether this case can be distinguished from it. If the so-called approbation note were to be read literally we should perhaps be bound to hold that it was a condition of the contract that property in the goods should not pass until Ehrmann invoiced the goods to Anderson, although even then I should hold that a customer who did not know of the condition would be entitled to deal with Anderson on the assumption that he had full power of disposal. But when we look at the true nature of the transaction between Ehrmann and Anderson I think it is plain that the contract was one of sale or return. The purpose of the contract admittedly was not merely to give Anderson an opportunity of inspecting the goods and purchasing them himself, but in order that Anderson might endeavour to re-sell the goods. In point of fact the necklace in question was not in Ehrmann's possession, but remained with Anderson or with the pawnbroker from 13th December 1902 till 24th April 1903. Thus Anderson was clothed with the ostensible ownership of the goods, and the *bona fides* of the pawnbroker is not impugned. Anderson having thus exercised the right of ownership over the goods by pledging them, I think it is doubtful whether, had it been Ehrmann's interest to do so, he might not, if the fact of pledging had come to his knowledge, have refused to take the goods back and held Anderson liable in the agreed-on price on the ground that in the language of section 18, sub-section 4 (*a*), of The Sale of Goods Act 1893, Anderson had done an act (viz., pledging) adopting the transaction, and that therefore the property had passed to Anderson to the effect of making him liable in the price.

It is right, however, to notice that *ex facie* of the contract the goods were to remain the property of Ehrmann until invoiced by him to Anderson. It seems to me that the only practical effect of that stipulation is that if (as in *Brown* v. *Marr*) Anderson did not dispose of the goods by selling or pledging them, Ehrmann should be entitled to have them returned notwithstanding the bankruptcy of Anderson.

In any other view no sale could have been effected until an invoice was obtained from London.

If it were necessary for the disposal of the case I should be prepared to hold that even if we read the contract literally Ehrmann did pass the property to Anderson on 24th April 1903 by invoicing the goods to him and taking bills for the price. This was not done at the request of Anderson, but on the initiative of Ehrmann, who was anxious to bring the thing to a point and fix Anderson with liability for the price of the goods. No doubt Anderson was anxious to conceal from Ehrmann that the necklace was in pawn, and that in his letters he falsely alleged that he was in treaty with a customer, but on the other hand it is plain from the correspondence that Ehrmann was indifferent whether Anderson got a customer or not, and pressed Anderson to take the goods over as his own property and grant bills for the price. On the effect to be given to such false statements as Anderson made, I may refer to the opinion of Lord Ormidale in *Brown* v. *Marr*, 7 R. pp. 443–4, and the cases which he there refers to.

On the whole matter I am of opinion that the interlocutors of both Sheriffs should be recalled and the claims of Bryce and Ehrmann sustained to the effect which I have already indicated.

The Court pronounced the following interlocutor:—

"Sustain the appeal: Recal the interlocutors of the Sheriff-Substitute and Sheriff, dated respectively 19th February and 13th June 1904: Find that on 13th December 1902 the claimant Ehrmann sent to Robert Anderson, jeweller, Glasgow, a diamond necklace, the subject *in medio*, on the terms specified in an approbation note which contained a provision that the said necklace should remain Ehrmann's property until invoiced by him, Anderson being in the meantime responsible for loss and damage, and the necklace while uninvoiced being returnable on demand; that it was the purpose of the said necklace being sent by Ehrmann to Anderson that Anderson should endeavour to effect a sale of the necklace, and that in the event of his doing so he should be liable to Ehrmann for the price specified in said approbation note: Find that on 18th December 1902 Anderson pledged the necklace to the claimant Bryce for a loan without the knowledge or consent of Ehrmann: Find that by letter dated 21st April 1903 Ehrmann proposed that Anderson should himself become the purchaser of the said necklace, and should grant bills in his favour for the price thereof: Find that Anderson agreed to said proposal and accepted bills for the price, whereupon said necklace was invoiced by Ehrmann to Anderson on 23rd April 1903: Find that said bills were subsequently dishonoured, and that Anderson became bankrupt on or about 9th July 1903: Find that Ehrmann was not induced to enter into the said transaction with Anderson on 23rd April 1903 for the sale of the necklace by Anderson's concealment of the fact that he had pledged the necklace to Bryce; but further find in respect of the terms of the contract between Ehrmann and Anderson that Anderson was in a position to pledge said necklace, and validly pledged the same to Bryce accordingly: Find that the claimant Galbraith not now insisting in his claim, the claimant Ehrmann is entitled to obtain delivery of the subject pledged upon repayment to Bryce of the amount advanced by him

upon the security thereof, with interest on said amount at the rate of 15s. per month from 19th August 1903 until the date of said repayment, as stipulated in contract of the pledge: Therefore, subject to said conditions as to repayment of the advance to Bryce, rank and prefer the claimant Ehrmann to the subject *in medio:* Repel the claim of the claimant William Brodie Galbraith: Find it unnecessary to dispose of the claim of the appellant Bryce, and decern."

Counsel for the Claimant and Appellant Bryce—Salvesen, K.C.—Macmillan. Agent—D. Hill Murray, S.S.C.

Counsel for the Claimant and Respondent Ehrmann — Kincaid Mackenzie, K.C. — M'Clure. Agents—Cumming & Duff, S.S.C.

Tuesday, November 1.

FIRST DIVISION.

[Lord Pearson, Ordinary.

HOPE JOHNSTONE *v.* SINCLAIR'S TRUSTEES.

Succession — Legacy to a Class—Period of Distribution—Direction to "Hold"—Date when Members of Class Ascertained.

A testatrix directed her trustees to "hold" the capital and income of a fund "in trust for all the children or any, the child of A, who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry under that age, and if more than one in equal shares." The trust-deed further provided that the trustees might at any time pay or apply a part, not exceeding one half, of the then expectant, or presumptive, or vested share of any child for his or her advancement or benefit.

Held that as there was no direction to pay, the period of distribution of the fund did not arrive until the members of the class were definitely determined, and consequently that a beneficiary who had attained majority was not entitled to demand payment of a share prior to the death of A.

Andrews v. *Partington*, 1791, 3 Brown Ch. Cas. 401, *commented on.*

Miss Olivia Sophia Sinclair, third daughter of the late Sir George Sinclair, Bart., and Lady Camilla, his wife, died at Thurso Castle upon the 24th January 1894, leaving a last will and testament dated 20th May 1892 and relative codicil dated 11th May 1893. By the will and testament the testatrix, *inter alia,* bequeathed to her executors "the sum of £6000 . . . upon trust that they or the survivors or survivor of them, or the executors or administrators of such survivor or other, the trustees or trustee for the time being of this my will (hereinafter called my trustees or trustee) shall invest the same in their or his names or name, . . . and shall pay one-third part of the annual income of the said sum of £6000 or the investments for the time being representing the same to . . . . Emelie Johnstone, the wife of my nephew William James Hope Johnstone, during her life or until she shall marry again: And I declare that, subject and without prejudice to the trust in favour of the said Emilie Johnstone . . . my trustees and trustee shall hold the capital and income of the said trust premises in trust for all the children or any the child of the said William James Hope Johnstone, who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry under that age; and if more than one in equal shares; . . . Provided always, and I declare that my trustees or trustees may at any time or times raise any part or parts not exceeding in the whole one-half of the then expectant or presumptive or vested share of any child of the said William James Hope Johnstone . . . under the trusts of this my will, and pay or apply the same for his or her advancement or benefit, as my trustees or trustee shall think fit, but so that no such part or parts shall be raised or applied as aforesaid during the existence of any prior interest or interests therein under this my will without the consent in writing of the person or persons having such power, interest, or interests."

The codicil contained the following declaration: — "I declare that my said trustees or trustee shall hold my said residuary estate upon the trusts following — that is to say, . . . as to another equal third part or share thereof upon the like trusts, and with and subject to the like powers, provisoes, and declarations in all respects for the benefit of Emilie Johnstone, the wife of my said nephew William James Hope Johnstone, and the issue of the said William James Hope Johnstone, as are in my said will declared and contained in their favour concerning the sum of £6000 and the investments for the time being representing the same." . . .

On 12th March 1903 William James Hope Johnstone and his wife Emelie Johnstone were both alive and had six children, three of whom had attained majority and three of whom were still in minority. On that date the three elder children raised an action against (1) the trustees under Miss Sinclair's testament and codicil; (2) the three minor children of William James Hope Johnstone; and (3) him as their curator. In this action the pursuers, *inter alia,* sought to have it found and declared that under the will and codicil "there was conferred on and became vested in and payable to each of the pursuers at the dates of their respectively attaining majority, but subject always . . . to the liferent of their mother Emilie Johnstone, wife of the said William James Hope Johnstone, at least one-sixth share of the sum of £6000, and one-sixth share of one-third of the residue of the estate of the said Miss Olivia Sophia Sinclair."