obtained, and with which he paid off the £500 bond, was a fund provided by Ritchie, the principal debtor, I should have thought that difficult and delicate questions of relief between cautioners were raised. But that allegation is not substantiated by the proof.

LORD JUSTICE CLERK—I concur in the opinion of Lord Young.

The Court pronounced this judgment:—

"Find in fact, 1st, that the pursuer did not agree to relieve the defender of liability under the cash-credit bond referred to; 2nd, that Mr Ritchie did not provide funds for payment of the debt due under the cash-credit bond, and did not hand any funds to the pursuer or to the bank; 3rd, that the pursuer paid to the bank the whole debt due under the said bond amounting to £172, 8s. 6d: Find in law that the pursuer is entitled to relief against the defender to the extent of one-half of said annuity, being £86, 4s. 3d: Therefore recal the interlocutor of the Sheriff-Substitute appealed against, repel the defences, and decern against the defender in terms of the conclusion of the petition."

Counsel for the Appellant—Dickson—Constable. Agents—N. Briggs Constable, W.S.

Counsel for the Respondent—Sir C. Pearson—F. T. Cooper. Agent—P. Morison, S.S.C.

Thursday, January 23.

SECOND DIVISION.

[Sheriff of Forfarshire.

MARTINEZ Y GOMEZ *v.* ALLISON & SONS.

Principal and Agent—Pledge—Right of Agent to Pledge Principal's Goods—Factors Act 1842 (5 *and* 6 *Vict. cap.* 39), *sec.* 3—*Antecedent Debt.*

The Factors Act 1842 (5 and 6 Vict. cap. 39), section 1, provides—"From and after the passing of this Act any agent who shall thereafter be entrusted with the possession of goods, or of the documents of titles to goods, shall be deemed and taken to be owner of such goods and documents so far as to give validity to any contract or agreement by way of pledge, lien, or security, *bona fide* made by any person with such agent so entrusted as aforesaid, as well as for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract and agreement shall be binding upon and good against the owner of such goods and all other persons interested therein." Section 3 . . . . "And nothing herein contained shall be construed to extend to or protect any lien or pledge for or in respect of any antecedent debt owing from any agent to any person with or to whom such lien or pledge shall be given."

In March 1888 a firm of British manufacturers sold goods to a Spanish firm, and sent them for transport to the forwarding agent of the buyers in Dundee. In the same month this agent pledged these goods to merchants in Dundee in security of a debt contracted by him to them in the preceding month of December.

In an action by the Spanish firm against the pledgees, *held* that the agent had no power at common law to pledge the goods, and even assuming that he was a factor in the sense of the Factors Act 1842, the Act did not apply, as the goods had been pledged for an antecedent debt.

In March 1888 the Bessbrook Spinning Company, Armagh, Ireland, sold to Martinez y Gomez, merchants, Valencia, Spain, a case of linen goods, and sent it for transport to David Dorward Bain, Dundee, the agent of the buyers. Bain instead of forwarding the case deposited it with the Ladywell Callendering Company in Dundee.

On 23d December 1887 James Allison & Sons, rope and sail makers, Dundee, drew a bill for £82 at three months, which Bain accepted, which was discounted, and of which he received the whole proceeds. When the bill fell due on 26th March 1888 Bain could not meet it, and it was taken up by Allison & Sons. This payment was made by them in consideration of the case of goods above mentioned being transferred from Bain's name to their name and order in the books of the Callendering Company, as security for repayment of the said £82.

Decree of cessio was granted against Bain, and a trustee was appointed on his bankrupt estate on 7th June 1888. He thereafter absconded.

In October 1888 Martinez y Gomez brought an action against Allison & Sons for recovery of this bale of goods pledged to them.

The defenders pleaded—"(5) The defenders having obtained possession of said case of goods in security for a debt which has become due and is still unpaid, are entitled to retain said case until payment is made, and ought to be assoilzied with expenses. (6) The defenders being in possession of said case, and having acquired possession in *bona fide* and in security of a debt which is resting-owing, the pursuers are bound to prove a preferable title to said case."

The Factors Act 1842 (5 and 6 Vict. cap. 39), sec. 1, provides—"From and after the passing of this Act any agent who shall thereafter be entrusted with the possession of goods, or of the documents of titles to goods, shall be deemed and taken to be owner of such goods and documents so far as to give validity to any contract or agreement by way of pledge, lien, or security *bona fide* made by any person with such agent so entrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or

documents, as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon and good against the owner of such goods and all other persons interested therein." Section 3—" . . . And nothing herein contained shall be construed to extend to or protect any lien or pledge for or in respect of any antecedent debt owing from any agent to any person with or to whom such lien or pledge shall be given."

Upon 14th February 1889 the Sheriff-Substitute (CAMPBELL SMITH) pronounced this interlocutor— . . . "Finds in law that Bain's act was an act of fraud injurious either to pursuers or defenders, and that the power to commit this fraud was derived by Bain from the pursuers: Therefore finds that the burden of Bain's fraud must be borne by the pursuers, and that the goods in question are lawfully pledged to the defenders."

On appeal the Sheriff (COMRIE THOMSON) adhered.

The pursuers appealed, and argued—There was no doubt that a person who had a right of property in goods could pledge them to *bona fide* and onerous pledgees, although the goods did not belong to him in the ordinary sense of the word—*Brown* v. *Muir, Barclay, & Company*, January 8, 1880, 7 R. 427; *Macdonald* v. *Westren*, July 19, 1888, 15 R. 988. But this case differed from those. In the first place, the evidence showed that Allison was not in *bona fide* when he accepted this case of goods as he knew, or at least had good reason to expect, that Bain was in insolvent circumstances. It was not an onerous pledge. Bain pledged the goods in security of a prior debt for £82, 10s. It was void by the Act of 1696, as granted within 60 days of bankruptcy. The Factors Act 1842 (5 and 6 Vict. cap. 39), did not avail the defenders. (1) The pledge was given in security of an antecedent debt. Thirdly, it had been decided by the courts in England considering the provisions that the only agent who could be considered a factor in the sense of the statute was a general agent. Bain did not possess this character, but was employed merely for the purpose of forwarding the goods from the makers to the buyers—Smith's Leading Cases, 815 *et seq.*; *M'Nee* v. *Girst*, June 26, 1867, L.R., 4 Eq. 315; Storey on Agency, 126; Bell's Com., 516, 517.

The respondent argued—The Factors Act 1842 applied even although it was true that Bain's only duty was to forward the goods to the buyers. There was no evidence that the Allisons were not in *bona fide* when they accepted the security of these goods. The goods were not pledged in security of a prior debt. A bill had been granted for a loan by the defenders to Bain. Bain had failed to meet it and the defenders had paid the debt to the bank; that had wiped off the old debt, and security given after that was for a new not for an antecedent debt—*Vickers* v. *Hertz*, March 20, 1871, 9 Macph. 65; *Hamilton* v. *Western Bank of Scotland*, December 13, 1856, 19 D. 152; *Monk* v. *Whittenbury*, May 28, 1831, 2 Barn. and Adolph. (2) Bain was entitled to pledge these goods at common-law—*Pochin & Company* v. *Robinson & Marjoribanks*, March 11, 1869, 7 Macph. 623; *Rose* v. *Spavens*, June 15, 1880, 7 R. 925; *Badcock* v. *Lawson*, June 10, 1879, L.R., 4 Q.B.D. 394; Bell's Com., i. 306.

At advising—

LORD JUSTICE-CLERK—We have heard an able argument on the part of the respondent. I have, however, come to the conclusion that the judgment of the Sheriff cannot stand. It was maintained to us that Bain having been in possession of the bale of goods which is the subject of the action with the consent of the seller of it was entitled to pledge it, and that anyone who dealt with him by advancing money upon it ought to be protected. But, in the first place, I think that the Factors Act (5 and 6 Vict.) gives no right to one in Bain's position to pledge the bale. The Factors Act uses words inconsistent with the contention that anyone who is a mere custodier can be held to be a "factor." One who has possession merely that he may convey to another is not a factor. If, therefore, it were necessary to this action I should have no hesitation in holding on the facts that Bain was not such a person as is contemplated by the Act under the term factor. But I think it is not necessary to go into that. I think it is very clear that in this case, assuming that Bain was a factor in the sense that he was entitled to pledge goods which came into his hands as these goods did, the present is not a case in which he could have put them effectually under pledge. The proviso in section 3 of the Factors Act (5 and 6 Vict.) is very clear, and is quite in point. It is as follows—"Provided always that . . nothing herein contained shall be construed to extend to or protect any lien or pledge for or in respect of any antecedent debt arising from any agent to any person with or to whom such lien or pledge shall be given." Now, what are the facts? Bain was in debt to the respondents Allison & Sons in a sum of £82, 10s. for money borrowed. In acknowledgment of that debt he on 23rd December 1887, when it was contracted, accepted and handed to Mr Allison a bill for the amount at three months' date. In January it was discounted at the bank. Now, that turned out to be in form only and not in fact a payment of the debt, for on 26th March 1888, when the bill fell due, Bain could not meet it, and Allison having of course no defence in a question with the bank had to take it up himself. The result was that the debt remained due by Bain. Naturally enough, and so far as we can see, in perfect good faith, Allison having had to meet the bill himself, now wished some security for the debt, and he made an arrangment with Bain, who professed himself to be the owner of the goods in question, by which Bain pledged them with him as his security. But the goods had only been received by him from the Bessbrook Spinning Company, the sellers, for safe transmission to the appellants, the purchasers, in Spain.

When that pledge was made I think it is perfectly clear that it was made for an antecedent debt, and therefore that the Act has no application. If the Act has none, I think that the common law, of which the Act is an expression, and in my opinion an extension, has no application either. I cannot adopt the view (which would be the result of part of the argument submitted to us) that the Factors Act is one which gives, but in less wide terms, what the common law gives already. And if the common law were really as Mr Dickson maintained, that whoever has with the owner's consent possession of goods is his agent and entitled to pledge them, I think it would be very strange that so many elaborate opinions as we were referred to should have been given on questions of this kind. For the opposite case would not be stateable.

I am for recalling the judgment of the Sheriff and giving decree.

LORD YOUNG—I am of the same opinion. I do not go a step beyond the very case in hand. Substantially the facts are that their goods were sent by the Bessbrook Company, the sellers of them, to Bain in Dundee to forward them to the pursuers in Spain. Allison & Company were creditors of Bain in a loan of money contracted in December in 1887. In March 1888 Bain, who had been unable to pay that debt, pledged the pursuers' goods with them in payment of that antecedent debt. That statement really exhausts the facts of the case.

The questions of law are only these, viz., first, whether by the common law of Scotland the person to whom goods are sent to be forwarded may pledge them with his creditor in security of his debt, so that the pledge of them will be good against the owner. Now, I am prepared to find that that is not the common law of Scotland.

The second question is, whether that, if not the common law, is the statute law—the statute appealed to being the Factors Act (5 and 6 Vict. cap. 39). I am of opinion that the pledge is not protected against the true owner by that statute. I think it has no application, in the first place, to the case of goods sent to Bain for the exclusive purpose of being forwarded to the pursuers, and also in the second place to the case of this pledge, which was a pledge for an antecedent debt. I am prepared on these grounds to give the pursuers decree in terms of their conclusions.

LORD RUTHERFURD CLARK and LORD LEE concurred.

The Court pronounced this judgment:—

"Find in fact (1) that the goods specified in the condescendence for the pursuer were purchased by them from the Bessbrook Spinning Company in the county of Armagh, Ireland, in March 1888, and by order of the pursuers were sent by that company to David Dorward Bain, of Dundee, in a case to be forwarded to the pursuers; (2) That in the same month of March the said David Dorward Bain impledged the said goods to the defenders in security of a debt contracted by him to them in the preceding month of December: Find in law that he was not entitled so to pledge the goods: Therefore sustain the appeal: Recal the interlocutors of the Sheriff and Sheriff-Substitute appealed against: Ordain the defenders to deliver the said case with the goods to the pursuers: Find them liable to the pursuers in expenses," &c.

Counsel for the Appellants—H. Johnston—G. W. Burnet. Agent—George Andrew, S.S.C.

Counsel for the Respondents—D.-F. Balfour, Q.C.—Dickson. Agents—Emslie & Guthrie, S.S.C.

HIGH COURT OF JUSTICIARY.

Thursday, January 23.

(Before the Lord Justice-Clerk, Lord Shand, and Lord Lee.)

WRIGHT AND WADE *v.* ROWAN.

Justiciary Cases—Cruelty to Animals Act (13 *and* 14 *Vict. cap.* 92), *sec.* 1—*Charge against Master for Act of Servant—Personal Knowledge.*

In an appeal against a conviction for cruelly ill-treating a horse by driving it or causing it to be driven in a cart when it was unfit to be worked, owing to an open sore upon its back under the saddle, the case set forth that the horse was driven by a servant of the accused on his authority and directions, but did not set forth that the accused had any knowledge of the condition of the horse, or any reason to believe that its being driven would cause suffering. *Held* that the conviction was *wrong.*

Opinion (*per* Lord Shand) that where the act complained of is committed by a servant the master is not guilty of an offence unless he has knowledge of the act complained of, and knowledge or obvious reason to believe that it will produce pain and suffering.

Opinions (*per* the Lord Justice-Clerk and Lord Lee) that in such a case mere carelessness on the part of a master might constitute the offence.

John Wright junior, timber merchant, Irvine, and John Wade, carter, Irvine, were convicted in the Police Court of Ayr upon a complaint at the instance of Carruth Boyle Rowan, Procurator-Fiscal of the Court, charging them "with a contravention of the Act of Parliament 13th and 14th of Victoria, cap. 92, entituled 'An Act for the more effectual prevention of Cruelty to Animals in Scotland,' actors or actor, or art and part, in so far as on the 18th day of May 1889, or about