which I entertain, dissent from the result which your Lordship in the chair has reached.

On the import and effect of the clauses in the Glasgow Police Act as bearing upon the question at issue, I concur in the opinion of your Lordship.

The Court recalled the Lord Ordinary's interlocutor, and remitted the cause to him to proceed therein.

Counsel for the Pursuer—Jameson—N. J. Kennedy. Agent—J. M. Bow, W.S.

Counsel for the Defender—Wilson—Constable. Agent—J. H. Dixson, W.S.

Friday, February 2.

SECOND DIVISION.

[Sheriff of Lanarkshire.

CROSS & SONS *v.* PAGE & COMPANY, THE NORTH-WESTERN BANK, LIMITED, AND POYNTER, SON, & MACDONALDS.

Right in Security—Pledge—Arrestment—Agent and Principal—Bill of Lading.

On 1st April 1892 the shippers of a cargo of phosphate rock then afloat, obtained a loan from a bank, giving by way of pledge the cargo, and handing the bill of lading blank endorsed to the bank. It was agreed that the bank should have immediate and absolute power of sale over the cargo, in respect of which they authorised and empowered the shippers "to enter into contracts for the sale of the pledged goods on our behalf in the ordinary course of business," and directed them "to pay the proceeds of all such sales immediately and specifically received by you, to be applied towards payment of the said advance," &c. The shippers further agreed, when required, to give the bank full authority to receive all sums due or to become due from any person in respect of such sale. No such request was ever made. Some months before this the shippers had sold, through their agents in Glasgow P. & Co., a quantity of phosphate rock to C. & Co., which was not stated to be the cargo of any particular vessel, but which amounted to nearly the quantity in the bill of lading endorsed to the bank by the shippers. The sale-note bore that the shippers had sold to C. & Co. per Messrs P. & Co.

When the cargo arrived on 12th April the bank, in consideration of the shippers undertaking to sell the cargo on behalf of the bank, transferred to the shippers, "as trustees for us," the bill of lading. The shippers forwarded the bill of lading to P. & Co. with instructions to hand it to C. & Co. on arrival of the vessel. This was done, and C. & Co. took delivery of the cargo and paid part of the price. Neither P. & Co. nor C. & Co. had any knowledge of the shippers' transaction with the bank.

P. & Co., on the dependence of an action against the shippers, arrested the balance of the price of the cargo in the hands of C. & Co., who raised an action of multiplepoindiug to have it determned whether the balance was payable to the bank or to P. & Co.

Held (*diss.* Lord Young) that although the delivery by the shippers of the bill of lading to the bank completed the contract of pledge between the parties, yet when the bank parted with the pledge to the shippers, the latter resumed possession of their own property freed from the security-burden, leaving the bank only their personal right against the shipper; that therefore the bank could not claim as the price of their property the fund *in medio* to which the arresters had secured a preferable right.

On 1st April 1892 Charles Page & Son, brokers, Liverpool, applied to the North-Western Bank there for an advance of £5000 "upon security by way of pledge of 3455 tons phosphate rock" then on board the "Cyprus" and the "Storra Lee." The nett value of the cargoes was valued at £6733. This case related alone to the cargo of the "Cyprus."

Upon 4th April 1892 the bank wrote this letter to Charles Page & Company—"We now beg to put in writing the conditions on which we advance to you the sum of £5000, say five thousand pounds, repayable by you on or before 1st June, on the security of the under-mentioned merchandise, which you pledge to us and warehouse in our name. It is distinctly agreed that we are to have immediate and absolute power of sale, and under that power we authorise and empower you to enter into contracts for the sale of the merchandise on our behalf in the ordinary course of business, and we expressly direct you to pay to us from time to time the proceeds of all such sales immediately and specifically as received by you, to be applied towards payment of the said advance, interest, commission, and all charges. You are at any time at our request to give to us full authority to receive all sums due, or to become due, from any person or persons in respect of any sales of the merchandise so made by you on our behalf."

Upon the same date Page & Company answered—"We have received your letter of date, of which the above is a copy. It correctly details the conditions on which you made the advance referred to, and we hereby undertake to carry out your directions."

The bills of lading for the cargoes of the two ships were accordingly handed to the bank.

On 12th April the bank wrote to Page & Son—"In consideration of your undertaking to deal with the merchandise in the manner hereinafter specified, we transfer to you, as trustees for us, the bill of lading, &c., for 1629 tons phosphate rock per

'Cyprus,' marked which we now hold as security for payment of the advance specified at foot (£5000), and we request you to obtain delivery on our account of the merchandise referred to in such bill of lading, and warehouse the same in our name, you paying the freight and expenses of discharge. We further authorise and empower you to enter into contracts for the sale of the merchandise on our behalf in the ordinary course of business, and we expressly direct you to pay the proceeds of all such sales from time to time to us immediately on receipt thereof in order to be applied towards retirement of such advance. You are at any time at our request to give us full authority to receive all sums due or to become due from any person or persons in respect of any sales of the merchandise so made by you on our behalf. You are to insure the merchandise against all fire risks on our behalf, and you undertake to keep it fully covered, to hold the policy in trust on our account, and in case of loss to collect and pay the insurance money to us in the same manner as proceeds of sale."

On the same date Page & Son undertook to carry out the directions in the letter, and also wrote as follows to the bank:—"We have sold for you 1629 tons phosphate rock *ex* 'Cyprus' in your name, and held by you by way of pledge for phosphate advance No. 7 for £5000, and for which b/lading has been handed to us for the purpose of enabling us to complete the sale which we have contracted for on our behalf with Messrs A. Cross & Sons, Glasgow, and in consideration thereof we hereby undertake to pay to you the proceeds of said sale, payment expected about 5th May immediately and specifically as received."

Upon 12th April Page & Company wrote to Poynter, Son, & Macdonalds, chemists, Glasgow, who had for years been agents there for Page & Company—"We beg to enclose you bill of lading for the cargo of phosphate per "Cyprus," also certificate of insurance, which please hand to Cross on arrival of the vessel."

It appeared that in the previous year Page & Company had sold to Alexander Cross & Sons, merchants, Glasgow, about 1600 tons of phosphate rock—almost the amount of the cargo of the "Cyprus" which amounted to 1629 tons—under two sale-notes dated 23rd September and 19th November 1891, and both bearing that Page & Company sold to Cross & Sons, per Messrs John Poynter, Son, & Macdonalds.

Cross & Sons on their contract of sale and the bill of lading took delivery of the cargo of the "Cyprus," and paid part of the price.

Poynter & Company sued Page & Company and obtained decree against them for a debt of £2000, and on the dependence of this action arrested the balance of the price of the "Cyprus" cargo, about £1000, in the hands of Cross & Sons, on 3rd May 1892. Cross & Sons and Poynter & Company were ignorant of the transactions between Page & Company and the bank. The bill of lading gave no indication of the bank's interest in the sale. In August 1892 Page & Company made an arrangement with their creditors. The bank settled with Messrs Page for 10s. in the £, on a statement of accounts in which they took in at its full value the amount of the fund *in medio* as payable to them by Messrs Cross (the arrestees), and the bank claimed as creditors of the arrestees, or, at any rate, and alternatively, of Messrs Page, for the amount of the unpaid balance of the fund *in medio*.

Cross & Sons accordingly raised an action in the Sheriff Court at Glasgow in which they called Page & Company, Poynter, Son, & Macdonalds, and the North Western Bank.

Pleaded for the bank—"(1) The sale to Messrs Alexander Cross & Sons having been made by Messrs Charles Page & Company on behalf of the claimants, the claimants are entitled to be preferred in terms of their claim. (4) The transfer of the bill of lading to the claimants, the North Western Bank, having operated a conveyance *ex facie* absolute to these claimants, they were entitled to retain the goods represented by the bill of lading till repayment of all advances by them to the common debtors at the date of the transfer of the bill of lading and subsequent thereto, and they are entitled to be preferred to the fund *in medio* as a surrogatum for said goods.

Poynter, Son, & Macdonalds pleaded—"(1) The claimants having acted as factors and agents for the said Charles Page & Company, and having as such effected the sale of the cargo before mentioned, are entitled to be preferred to the fund *in medio* in respect of the charges applicable to the said sale, and also in respect of the general balance due to them. (2) The claimants are entitled, in respect of the arrestments used by them, to be preferred to the fund *in medio*.

After proof, the Sheriff-Substitute (GUTHRIE) upon 18th April 1893 preferred Poynter & Company to the fund *in medio*.

"*Note.*—The effect of Poynter, Son, & Macdonalds' arrestment is the only remaining question, and here the case is very similar to *Tod & Son* v. *Merchant Banking Company*, 1883, 10 R. 1009. It differs perhaps in so far as the nature of the transaction on which the bank founds is here defined *ab ante* by the bank's letters of 1st and 4th April, but I doubt whether that is a material difference. Now, these letters give the bank right to do that very thing which, according to the opinions in *Tod's* case, would have given the *Merchant Bank* a preference over the arresting creditor, namely, to require buyers of the hypothecated goods to pay the price to the bank. Lord Shand says—'The bank had their security in such a shape that they might have refused to allow delivery of the goods till they got bills or other obligations for the price. . . . Having waived this right they were simply in the position of having parted with their security over the goods which had been sold by the owners,' &c. These words are applicable *mutatis*

mutandis to this transaction in phosphate rock. Page & Company were the owners of it in any view which can be taken, for on the face of it the bank's right is just a security. The bank no doubt was *ex figura verborum* their principal, as a pledgee with an immediate power of sale, and they were in the same way agents for the bank. I do not understand, whatever may be the effect of the documents devised for the protection of the bank, that Page and Company were agents in selling for the bank in the sense intended by the Lord President in the case cited (p. 1018), when it is clear that agents selling for a principal having an absolute property title are intended. Nor is it clear from the opinions what the result would have been if Messrs Bryant had stood in such a position to their creditor."

"The difference between property and security titles in questions of this kind is very important. You may have the possession separated from the property, so that the possessor has a subordinate title flowing from the proprietor, *e.g.*, there may be a *bona fide* sale to A B, who may lease the thing sold to the possessor. The right of property remains in A B. But you cannot have a security over moveables constituted by a written contract without delivery. The higher right of property may be vindicated although possession has been given to a hirer or lessee, but the lower security title cannot be maintained without possession. There is no pledge without possession. If a pledgee delivers up the goods and titles to the owner his security ceases, and no written agreement validates such a security without possession. If the owner being in possession of goods and/or titles, sells in his own name, then, although he may be bound to account to the security-holder, the price is due by the buyer to the owner, and not to the security-holder. The latter cannot, as in the case of a true principal or agent, disclose himself and claim the price in a question with the owner's creditors.

"Whatever may be effect of the pledge or hypothecation to the bank, it is a pledge of the phosphates, and no attempt has been made in argument to maintain that it affects the price. Indeed, the power reserved to the bank to require payment of the price direct to itself, indicates that they knew that that was necessary to their complete security, just as was held in *Tod* v. *Merchant Banking Company*. They therefore fail to prove that Messrs Cross & Sons at the date of the arrestment were debtors not to Page & Company, the common debtors, but to them. The money was due to Page & Company, and was subject to no lien or burden in favour of the bank, Messrs Cross & Sons not having undertaken and not being called upon or bound to pay to the bank. If in truth or reality, or even in title, the bank had been owners of the phosphate cargo, I do not doubt that they could have demanded payment from Messrs Cross & Sons direct, subject to any equities which they as buyers might have against Page & Company. But an arrester in the hands of Cross & Sons has no greater right than Page & Company themselves. He stands in their shoes, and can succeed only by showing that they and not the bank are true creditors of Cross & Sons. That, I think, Messrs Poynter, Son, & Macdonald have done."

The North-Western Bank appealed, and argued—The cargo was transferred to the bank with the bill of lading, and though in security, there was transference of the property, not merely of a claim against the cargo for the amount of their advance. When the bank gave the bill of lading to Page & Son they did not part with their property in the cargo, because Page & Son were their agents, as appeared from the correspondence. The case of *Tod & Son* v. *Merchant Banking Company of London, &c.*, June 21, 1883, 10 R. 1009, did not apply, because the bank in that case had not made Bryant, Ridley, & Company, the pledgers, their agents. Other cases cited—*Duncanson* v. *Jefferis' Trustees*, March 4, 1881, 8 R. 563; *M'Bain* v. *Wallace & Company*, January 7, 1881, 8 R. 360—*aff.* 8 R. (H. of L.) 106; *Lindsay* v. *Adamson & Ronaldson*, July 2, 1880, 7 R. 1036; "*Barbara*," L.R., 3 H. of L. 317; *Lickburrow* v. *Mason*, 1 Smith's Leading Cases, 509; *Burnet* v. *Inveresk Paper Company*, June 19, 1891, 18 R. 975; *Young* v. *Aktiebolaget Ofverums Bruk*, November 27, 1890, 18 R. 163; *Craig* v. *Rose*, July 15, 1879, 6 R. 1269.

The respondents argued—The Sheriff-Substitute's interlocutor was right. The bills of lading were handed to the bank merely as security for the advance. The cargo represented by the bill of lading was no doubt pledged, but where the pledge was restored to the original owner all right of property was lost, and the bank's personal right against the pledgers alone remained. Page & Company were not independent agents employed by the bank to sell goods as their agents. They had already sold the goods to Cross & Sons by the sale-notes in the previous year, and the bank recognised that that was their position when they desired Page & Son to pay the proceeds of the sales from time to time to them "in order to be applied towards retirement of such bills of exchange." The bank was not in the position of an undisclosed principal, because it could not have vindicated its right to the whole sum realised by the sale, but only to so much as would have satisfied its advance. The original right to the goods in the pledgers revived when the bills of lading were handed back to them to sell the goods, which would not have been the case if they had been given to a third party to dispose of—*Sewell* v. *Birbeck*, December 5, 1884, L.R., 10 App. Cas. 74; Bell's Comm. ii. 19; Bell's Comm. i. 215.

At advising—

LORD JUSTICE-CLERK—Charles Page & Company in April 1892 obtained a loan from the North-Western Bank of Liverpool, giving by way of pledge two cargoes of phosphate rock then on the sea, one in a vessel the "Cyprus," which alone is in

question here. Page & Company handed the bill of lading blank endorsed to the bank. The bank stipulated for absolute power of sale, and authorised Page & Company to sell the pledged goods on behalf of the bank. About a fortnight after the transaction, the bank transferred the bill of lading for the "Cyprus" cargo back to Page & Company, "as trustees for us," in consideration of their undertaking to deal with the merchandise as stipulated, the stipulation being that Page & Company were to sell "on our behalf," and that the bank should have the same rights to price obtained as under the previous letter.

Page & Company forwarded the bill of lading to Poynter & Company, who were their regular agents in Glasgow. These gentlemen had, some months before, sold for Page & Company 1600 tons of phosphate rock, being just about the "Cyprus" cargo. On Page & Company receiving the bill of lading from the bank they forwarded it to Poynter & Company to be handed to Cross & Company on the arrival of the "Cyprus." Cross & Company took delivery of the cargo. Page & Company were largely indebted to Poynter & Company, and Poynter raised an action, and on the dependence arrested a sum due by Cross for the cargo of the "Cyprus." Both the companies of Poynter and Cross were ignorant of Page's transaction with the bank.

The competition here is between the bank and Poynter & Company. The bank maintains that the bill of lading being endorsed and delivered, constituted a depositation of the goods, and that is so. But it is so only to the effect contained in the contract between the parties. The bank did not become owners of the goods, but only pledgees, stipulating that they should have power of sale, and that Page & Company should in selling sell for them and pay them the proceeds. The bank's case is that they were in the ownership of the goods, and that Page & Company in selling were only their agents selling to Cross & Company. But this can only be maintained if the written contract is ignored. Its express words indicate that the bank receive the bill of lading on a security only for an advance. The property therefore remained with the pledger, and was only burdened with the bank's right under their contract. The real question is, what is the effect of the bank parting with the bill of lading, as the symbol of the goods afloat, to Page & Company the owners? Did they or did they not thereby part with the security they had received? I think they did, and I do not think it matters that they did so on the statement that Page & Company received "in trust." It was the bank's pledge that they parted with, and Page & Company, the owners, having sold to a third party, I hold that Page & Company sold their own property, and did not in doing so act as agents for the bank. The bank therefore cannot claim the fund *in medio* as being part of the price of their property sold to Cross & Company. They had a security only, and they parted with that security. They had ceased to have possession to validate their security. They therefore are not in a position to show that at the date of Poynter's arrestment Cross & Company, the buyers, were debtors to them and not to Page & Company. Not having possession, they are therefore just in the same position as other creditors of Page & Company, and Poynter & Company having secured a preferable right by arrestment of this balance of the price of Page's goods, are entitled to prevail. I consider it clear that this question has already been conclusively decided. I am quite unable to distinguish this case from that of *Tod*, and I am therefore in favour of sustaining the interlocutor of the Sheriff-Substitute.

LORD YOUNG—The fund *in medio* consists of the unpaid balance of the price of certain quantities of phosphate rock sold by Page & Company of Liverpool to Cross & Sons of Glasgow, the real raisers of the multiplepoinding. The sales were made on 23rd September and 19th November 1891 before the goods were shipped from abroad to this country, and so were not at first sales of specific goods. They were eventually shipped per "Cyprus" and the bill of lading was sent by Page & Company to Cross & Company on 12th April 1892, and delivery thus made to the buyers, who thereafter paid the price except the balance of £1039, which is the fund *in medio* and the subject of competition.

The competitors are the North Western Bank, Liverpool, and Poynter & Company, Glasgow. The claim of the former (the bank) is based on a transaction between them and Page & Company on 1st and 4th April 1892 — before the arrival of the "Cyprus," but when the bill of lading was in Page & Company's hands—the terms of which are fully and distinctly stated in their condescendence and claim. The truth in point of fact of the statement is not disputed, nor I think disputable, on the documents which are produced and printed. The import of the transaction is twofold, viz., first, that the goods specified in the bill of lading were pledged to the bank for a present advance of £5000, by delivery of the bill of lading; and second, that the bank appointed Page & Company to be their agents for the sale of the goods and delivered the goods to them as such agents, by delivering to them (handing back) the bill of lading with instructions, which they undertook to execute, to sell on their account and pay them the price.

In pursuance of this second head of the transaction Page & Company sent the bill of lading to Cross & Company in implement of the general sales of September and November preceding which I have already noticed, of the same date writing to the bank the letter informing them of the fact. The price, except the balance now *in medio*, was paid by Cross & Company to Page & Company, and remitted by them to the bank according to their undertaking. They subsequently became embarrassed and made a settlement with their creditors—all we know of the settlement being that it does

not affect the competition for the fund now *in medio*.

The North Western Bank claim it as the price of goods pledged to them and sold on their account by their agents for sale.

Poynter & Company on the other hand claim it as assets of their debtors Page & Company, attached by them by the arrestment of 3rd May 1892, proceeding on a depending action in which they obtained decree on 21st June 1892.

There is no fact in dispute between the parties, the competition between them depending on the legal question whether the unpaid balance of price in the hands of Cross & Company is estate and assets of Page & Company, available for the payment of their general debts, and attachable by their creditors accordingly. If it is, then Poynter & Company, whose debt and arrestment are admitted facts, must prevail, and otherwise not.

This, the only question in the case, turns upon the legal validity of the contract between Page & Company and the North Western Bank. As to the original validity of the first part of it, viz., that by which the goods were pledged to the bank with delivery and power of sale, there is I understand no dispute, and certainly, in my opinion, no room for dispute. But it is maintained by Poynter & Company that this was destroyed, and the pledge thereby constituted annihilated, by the second head of the contract and what followed upon it, viz., the re-delivery of the goods to Page & Company as the bank's agents for sale. It is contended that Page & Company were thereby restored to their original position of owners in possession freed of the pledge, which could not survive after the pledgees parted with possession. The conclusion of course is that the second, the agency part of the contract, is invalid and inoperative, except only as effecting utter destruction of the first, and so leaving the parties exactly as if there had never been any contract between them regarding these goods.

The Sheriff adopts this view as sound in law. He says—"There is no pledge without possession. If a pledgee delivers up the goods and titles to the owner, his security ceases, and no written agreement validates such security without possession. If the owner being in possession of goods or titles, sells in his own name, then although he may be bound to account to the security holder, the price is due by the buyer to the owner, and not to the security holder. The latter cannot as in the case of a true principal and agent, disclose himself and claim the price in a question with the owner's creditors."

These observations assume, or rather perhaps assert, as a true proposition in law, that a pledgee cannot legally appoint the pledger his agent for the sale of the subject of the pledge, or at least not with the same effect and consequences as he may a stranger. Is this a true proposition? If it be, it is certainly important that it should be authoritatively announced, for the occasions must be of frequent occurrence in which it is expedient to select the pledger as such agent. What is the objection to it in principle or expediency? So far as the parties who agree to it, and so contract, are concerned, there is plainly none. Nor, so far as I see, can it possibly concern the purchaser whether the agent who sells to him and gives him delivery is the pledger or a stranger. He gets all he can claim equally in either case, and incurs no liability or risk in the one case more than the other. The only other parties who can be suggested as possibly interested are the pledger's general creditors. But it does not occur to me how they can be prejudiced by the pledgee selling the goods and making delivery to a purchaser through the pledger rather than through a third party acting as his agent. The goods immediately in question would have been sold and delivered to Cross & Company through a stranger agent employed by the North-Western Bank just as they were by Page & Company. How are the creditors prejudiced by the employment of Page & Company for this purpose so that the law should, from regard to their interests, deny (to the prejudice of the bank) the ordinary consequences and effects which would have attached to a similar employment of a stranger to do precisely the same thing, and doing precisely the same thing?

I must therefore reject the view that a pledgee with possession and power of sale is hindered by any rule of the common law from selecting and employing the pledger as his agent for sale, with the same safety to his own interests as if he so employed a stranger. The common law has on the one hand such regard for the legimitate interests of general creditors, that it will not sanction any contract or proceeding to their prejudice, but will not, I think, on the other, favour a subtle argument against a fair and reasonable transaction, only to give them an advantage by reason of its not being made in another form. Here the North Western Bank are seeking nothing which they might not admittedly have attained by employing a stranger agent, and as the creditors of the pledger to them suffered nothing and were exposed to no risk whatever, by their so employing the pledger, I can find no reason—none in the fair interest of the creditors—for denying the ordinary legal effect to that employment and what was done under it. I am therefore of opinion that the contract between the North Western Bank and Page & Company ought to have effect according to its terms, which are clear and, I think, reasonable, and involving no prejudice whatever to others.

The result of these views, if sound, is that the unpaid price of the goods in question is not estate or assets of Page & Company. It is of course true that an agent for sale entrusted with possession of the goods or document of title, whether so appointed and entrusted by the owner or by a pledgee, is thereby put in a position to dispose of the goods exactly as if he were himself the owner, and so to give a good title to a third party dealing with him onerously

and in *bona fide* as the owner, and such third party will not be prejudically affected by the fact or the terms of the agency of which he is ignorant. Such agent with possession may, and I rather think generally does, transact with third parties in his own name just as if he were owner and principal. But the notion that goods so delivered to an agent at once becomes estate and assets of his, which will as such pass to his trustee in bankruptcy for behoof of his creditors, or be subject as such to the diligence of individual creditors, is in my opinion unfounded. Again, if he sell and deliver to a purchaser, it follows, I think clearly, that the price is not estate and assets of his any more than the goods themselves were before the sale. The buyer is in safety to pay the price to him and he may possibly appropriate it unwarrantably to his own use to the prejudice of his principal. But with a written contract of agency under which he admittedly received and disposed of the goods, it is impossible to say that he had no principal and was not an agent. The case before us does not involve any question of the buyer's right to withhold payment of the price on a claim of retention, or otherwise on the footing that he had dealt with the seller as a principal holding the document of title, and was not to be prejudiced by the subsequently disclosed fact that he was only an agent. No question of that character can arise with a trustee in bankruptcy or an individual arresting creditor.

Here it is not doubtful that Page & Company meant to act under their contract of agency with the bank, and did so in fact and avowedly—remitting the price so far as paid to their principals. Suppose that the balance (now *in medio*) had been paid to them also, and that abstaining from the wicked and indeed criminal act of appropriating the money to their own use, and from the irregular and reprehensible act of mixing it with their own funds, they had paid it into an account in bank, opened by them for the reception of the price of goods sold by them as agents for the North Western Bank. In that case would the money in this account have been regarded as their estate and assets, and so open to the diligence of their general creditors? But in the hands of Cross & Company the money is as clearly ticketed and identified (indeed more so) as the piece of goods sold by them as agents for the North Western Bank.

The Sheriff has decided the case upon the footing that there is nothing in the position of Poynter & Company to distinguish them from any other general creditor of Page & Company, and giving them an interest in the fund in question, and right to arrest it, not possessed by the others, and in this I entirely concur with him. The case was, I think, properly argued on that footing. Poynter & Company had no contract or dealing with Page & Company regarding the goods sold, except only acting as their brokers in the sales and delivery to Cross & Company. As regards their debt, for which they used arrestment, these goods have no other part in it than this—that their charge for brokerage or commission for the sale of them is an item, and a trifling one, in the general account on which it stands.

I appreciate the difficulty which the Sheriff expresses of distinguishing this case from that of *Tod & Son* (10 R. 1009)—although the circumstances in *Tod's* case are more involved, and not so clear and simple as those here, where the contract is strikingly distinct and simple. But I am unable to regard that decision as a conclusive authority, either for the general proposition that a pledgee cannot deliver the subject of the pledge to the pledger on any lawful special contract without the destruction of the pledge—or for the more limited proposition that such delivery on a special contract of agency for sale will operate such destruction. A contract of agency for sale is in itself as lawful as any other—as lawful for example as a contract for use such as hire or lease, or the execution of repairs or other work, or a contract for carriage. There are settled rules of law founded on sound principles for the protection of third parties dealing onerously, and in *bona fide*, as to property, with the party in possession of it, although he may be only an agent or trustee, and to these I have sufficiently adverted. A pledgee will be exposed, just as an owner will, to all the risks which these rules may bring upon him, but I see no ground for thinking that the risks are greater in his case, and indeed no reason for thinking so has been suggested except the assumption that he cannot give possession to the owner upon any contract however lawful, without the destruction of the pledge, and this, holding the opinion which I have expressed, I must reject.

LORD TRAYNER—This is an action of multiplepoinding raised by Cross & Sons, the fund *in medio* in which consists of a sum slightly exceeding £1000. There are two claimants for this fund—The North-Western Bank, Limited, Liverpool, and John Poynter, Son, & Macdonalds of Glasgow. The question debated before us, and the only question to be now determined, is, which of the claimants is entitled to be preferred to the the fund *in medio*. The material facts out of which the question arises are not in dispute.

On 1st April 1892 Charles Page & Company of Liverpool applied to the Western Bank for an advance of £5000 "upon security by way of pledge" of two cargoes of phosphate rock belonging to them, and then afloat, represented to be of the nett value of £6700. One of these cargoes was on board the ship "Cyprus," and it is with it only we are here concerned. The bank agreed by letter, dated 4th April 1892, to make the advance required on these conditions, that the advance was to be repayable on or before 1st June; that it was made "on the security" of, *inter alia*, the cargo on board the "Cyprus" "which you pledge to us," and that the bank should have immediate and absolute power of sale. In re-

spect of that power, the bank, by the same letter, authorised Page & Company to enter into contract for the sale of the pledged goods "on our behalf," and directed them "to pay to us from time to time the proceeds of all such sales immediately and specifically as received by you to be applied towards payment of the said advance," &c. The bank further stipulated that Page & Company should at any time on being required give the bank full authority to receive all sums due or to become due from any person in respect of any such sale. No such request was ever made.

In pursuance of the arrangement thus made between the bank and Page & Company, the latter delivered to the former the bill of lading blank endorsed for the cargo on board the "Cyprus."

Some months prior to the date of the arrangement with the bank for the advance of £5000, Page & Company had sold to Cross & Company of Glasgow, about 1600 tons of phosphate rock, which was as nearly as possible the quantity of the cargo on board the "Cyprus." This sale was effected through Poynter, Son, & Macdonalds, who were then, as for years previously they had been, the agents in Glasgow for Page & Company, and the sale-notes bore that the sale to Cross & Company was a sale by Page & Company "per Messrs John Poynter, Son, & Macdonalds." The "Cyprus" was destined for Glasgow as her port of delivery, and was expected to arrive there on or about 12th April 1892. On that date the bank wrote to Page & Son in the following terms:—"In consideration of your undertaking to deal with the merchandise in the manner after specified, we transfer to you as trustees for us the bill of lading, &c., for 1629 tons phosphate rock per "Cyprus," which we now hold as security for payment of the advance specified at foot," *i.e.*, the advance of £5000. The letter goes on to authorise Page & Company to sell the cargo "on our behalf," and makes the same stipulations as to their right to the price, &c., as expressed in the letter of 4th April to which I have already referred. The bill of lading thus returned by the bank to Page & Company, was immediately forwarded by them to Poynter & Company, with instructions to hand it "to Cross on arrival of the vessel." Poynter & Company did so, and on that bill of lading and their contract of sale before mentioned, Cross & Company took delivery of the cargo. They paid part of the price by cheque dated 13th April 1892 drawn in favour of Page & Company. The balance of the price forms the fund *in medio*.

Page & Company being largely indebted to Poynter & Company, the latter (having reason to doubt the pecuniary position of Page & Company) raised an action against Page & Company, and obtained decree against them for a debt of over £2000. On the dependence of this action they arrested the balance of the price of the "Cyprus" cargo in the hands of Cross & Company on 3rd May 1892. It only remains to be noted that at no time prior to the date of the arrestment had Poynter & Company or Cross & Company any knowledge of the transaction between Page & Company and the bank, or of the pledging of the cargo to the latter in security of their advances to Page & Company. The bill of lading sent by Page & Company and delivered through Poynter & Company to Cross, bore no indication of the bank having interest therein.

In this state of the facts the legal question arises, whether the bank as pledgee of the cargo, or the arresting creditor of the pledger, is to be preferred in competition to the balance of the price of the cargo still in the buyer's hands. The answer to this question seems to me to depend in a great measure upon the view which is taken of the bank's rights in or to the cargo of the "Cyprus." If the property in that cargo was vested in the bank, and that cargo was sold for them by their agent to Cross, the bank must prevail. The fund *in medio* is in that case part of the price of the bank's property. If the property of the cargo was not in the bank, it was in Page & Company (it could only be in one or other of them), and the fund *in medio* due to Page & Company was well attached by the arrestment of their creditors. Accordingly, the first thing to be considered is, what right in the cargo in question was conferred on the bank by the transaction between it and Page & Company? Now, there is no room for doubt as to what the contract between the bank and Page & Company was. It was an advance of money on the security of a pledge. "We advance to you," wrote the bank on 4th April 1892 to Page & Company, "the sum of £5000 repayable by you on or before 1st June on the security of the under-mentioned merchandise which you pledge to us." To make the right of the bank effectual "the merchandise" had to be delivered to them, which could not actually be done, the merchandise being then afloat. But the bill of lading for the goods was indorsed and delivered, and that was equivalent to the delivery or depositation of the goods which it represented. It was maintained in argument before us that the indorsation and delivery of a bill of lading, transferred in all cases the property in the goods to the indorsee. But this is clearly not so. The delivery of an indorsed bill of lading is in all cases equivalent to delivery of the cargo or goods to which it refers, but the right conferred by such delivery depends upon the contract under which it is delivered. Accordingly, if one buys a cargo afloat, the indorsation and delivery of the bill of lading is equivalent to delivery of the goods sold, and passes the property therein to the buyer. If the contract, however, be pledge, not sale, then the delivery of the indorsed bill of lading completes the contract just as if the goods themselves had been deposited with the pledgee, but gives the pledgee no greater or higher right to the goods than delivery of the subject of pledge to the pledgee gives him. That being so, the right which the bank acquired by the indorsation and delivery of the bill of lading in question was the right of a pledgee

and nothing more. According to the law of England, as I read the authorities, the delivery of goods in pledge confers on the pledgee what is called a special property therein, while the general property remains in the pledger. We have no such distinction in Scotland, at least in terms, but the rights of a pledgee in the subject of the pledge seem to be very much the same in the two countries. In both the contract of pledge can only be completed by delivery of the subject of the pledge to the pledgee; the pledgee's right is to hold that subject against all concerned until the advance or debt, of which it is the security, shall have been paid, but the property of the thing pledged (in the proper sense) remains in the pledger. That the property of the pledge remains vested in the pledger is clear from this fact, among others which might be mentioned, that he may sell the pledge to anyone he pleases, and on any terms, subject to the burden of the pledgee's right. The pledgee cannot prevent or object to such a sale. Nor can the pledgee sell the pledge (at least in Scotland) at his own hand. The subject is not his; it is the pledger's, and therefore the pledgee cannot exercise the right of an owner by selling; to sell the pledge he must have judicial authority. The right of the bank therefore was not a right of ownership. It was only a burden on the owner's right. It follows that the bank cannot claim to be preferred to the fund *in medio* on the ground that it is the price of the bank's property.

Does the bank's right as pledgee entitle them to be preferred? is the next question. I have already pointed out the character and extent of the pledgee's right, and have now to consider how that right is preserved, or lost. On this question the Sheriff-Substitute in the judgment under review, says—"There is no pledge without possession. If a pledgee delivers up the goods and titles to the owner his security ceases, and no written agreement validates such a security without possession." I agree with that statement of the law. It is in strict accordance, I think, both with the law laid down in our text writers and in our decisions. Of the former I may cite Erskine, iii. 1, 33, and Bell's Comm. (7th ed.) ii. 22, and of the latter the case of *Tod & Son*, 10 R. 1009. The question was raised in the course of the debate before us, whether the pledgee could not part with the subject of the pledge temporarily for any necessary purpose, or put it into the hands of some other person for safe custody, without the loss of his right, and if so, whether the pledgee in this case had lost his right by handing over the pledge to the owners, in order to its realisation, and consequent repayment of the advance due to the pledgee. I do not find this question attended with any difficulty. That a pledgee may part with the pledge temporarily, for a necessary purpose, or for safe custody, without the loss of his right may be admitted, provided he has not so parted with it to the owner. If he parts with it to a third party, the temporary possession of the latter is possession for the pledgee—he has no right in or to the subject except that which the pledgee gave him and which the pledgee may at any time take away. But if the pledgee parts with the pledge to the owner, the result is that the owner resumes possession of his own property freed from the security burden; the owner acquires no new right, but the pledgee's right as a real right flies off, leaving him only his personal right against his debtor. This distinction between the delivery of the subject of pledge to a third party and to the owner is recognised in the passage in Bell's Commentaries which I have already cited.

I do not think it really affects the case to say that the bank gave back the subject of pledge to Page & Company "in trust" for the bank. The bank could only give in trust what it had to give. It had no right of property or ownership to give "in trust." It could only make Page & Company its trustees for the security right. But when Page & Company sold the cargo they sold their own property, under an obligation no doubt—a personal obligation—to account to the bank for the security right or its value in cash. But having sold what was their own, the price was theirs, and if theirs, then subject to the diligence of all their creditors, the bank included. In like manner I can see no ground for recognising Page & Company as the mere agents of the bank in the sale of the cargo. An agent sells for his principal the property of the principal. But here the alleged principal had no property to sell. His only right, after parting with his real right, was a personal claim for debt. The supposed agent did not sell either the one right or the other. To support the claim of the bank in this case would really be to recognise a security over moveables, the possession of which was with the debtor. Such a mode of security our law does not recognise as effectual.

The case therefore comes to this—the bank had no right of ownership or property in the cargo in question and therefore cannot claim the fund *in medio* as the price of their property; they lost their real right of pledge by giving up the subject of the pledge to the owner of it; by surrendering their real security they retained only their personal right to demand payment of their advances from their debtor or his estate, but other personal creditors (namely Poynter & Company) of the same debtor have secured a preferable right to that part of the debtor's estate, which is *in medio*, by arrestment.

For these reasons I am of opinion that the judgment appealed against should be affirmed,

LORD RUTHERFURD CLARK was absent.

The Court pronounced this interlocutor—

"Find in fact (1) that by sale-notes dated 23rd September and 19th November 1891 Charles Page & Company, Liverpool, sold to Alexander Cross & Sons, Glasgow, a cargo of phosphate

rock on the terms therein mentioned; (2) that the said cargo or part thereof was shipped on board the s.s. 'Cyprus,' and that a bill of lading was granted by the master of said steamer therefor, and that the same was held by the said Charles Page & Company; (3) that on 1st April 1892 Charles Page & Company applied for an advance of £5000 from the North-Western Bank, Limited, on the security by way of pledge of, *inter alia*, the cargo *per* the 'Cyprus,' and that on 4th April the said bank agreed to give, and did give, the advance asked for in the terms contained in the letter; (4) that the said Charles Page & Company delivered said bill of lading to the North-Western Bank, Limited, blank endorsed, and thereby pledged the said cargo to the said bank; (5) that on 12th April 1892 the said bank re-delivered the said bill of lading to Charles Page & Company without any endorsation by the bank by the letter No. 13/5 of process, and that on same date Charles Page & Company forwarded said bill of lading to the claimants John Poynter Son, & Macdonalds for delivery to the buyers Alexander Cross & Sons on arrival of the 'Cyprus'; (6) that the said Alexander Cross & Son duly received said bill of lading and took delivery of said cargo, and made payments to account thereof, and that the balance of the price due by them amounted, as at 3rd May 1892, to £1039, 7s. 5d., being the fund *in medio;* (7) that on 3rd May 1892 the said sum of £1039, 7s. 5d. was validly arrested in the hands of the said Alexander Cross & Sons by the claimants John Poynter, Son, & Macdonalds, who were lawful creditors of the said Charles Page & Company to the amount of £2011, 10s., with interest and expenses conform to decree in their favour; and (8) that at the date of said arrestment John Poynter, Son, & Macdonalds were ignorant of the transaction between Page & Company and the bank above mentioned: Find in law that at the date of said arrestment the said sum of £1039, 7s. 5d was a debt due by Alexander Cross & Son to the said Charles Page & Company, and was therefore liable to the diligence of the lawful creditors of the latter, and that the claimants, the North-Western Bank, Limited, by delivery of said bill of lading on said 12th April 1892, lost their rights as pledgees of said cargo, and had no preferable right of property therein entitling them to payment of said sum as in competition with the arresting creditors the said John Poynter, Son, & Macdonalds: Therefore dismiss the appeal and affirm the interlocutor appealed against," &c.

Counsel for the Appellants—C. S. Dickson — Ure. Agents — Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondents—H. Johnston—Salvesen. Agent—Campbell Faill, S.S.C.

Thursday, February 1.

SECOND DIVISION.

(With Three Consulted Judges of the First Division).

[Lord Wellwood, Ordinary.

GIBSON *v.* GIBSON.

Husband and Wife—Divorce—Desertion—Cruelty without Object no Ground for Divorce for Desertion—Act 1573, *cap.* 55—*Conjugal Rights Act* 1861 (24 *and* 25 *Vict. cap.* 86).

In an action of divorce for desertion, brought by a wife against her husband, evidence on which *held* (Lord Young expressing no opinion, and *diss.* Lord Trayner) that the parties had been living apart with consent of the pursuer, and that therefore she was not entitled to decree.

Opinion per (Lord Rutherfurd Clark, concurred in by Lord President and Lord Kinnear) that cruelty or threats of cruelty by a husband to a wife, which rendered the husband's house intolerable to the wife and led to a separation between the parties, but which were the outcome of the husband's intemperate habits, and were not used by him with the intention of producing and maintaining a separation, were not equivalent to a desertion of the wife by the husband, even although the wife was willing to return if the husband promised to amend his mode of life.

Opinion (*per* Lord Trayner) that a deserted spouse is not bound to do anything to bring the desertion to an end in order to entitle her to decree of divorce for desertion.

Mrs Grace Gibson raised an action of divorce for desertion against her husband George Gibson.

The pursuer averred—"In or about the month of June 1882 defender put pursuer and her child out of doors, threatened to kill her if she returned, locked and secured the premises, and then proceeded to his father's house at New Cumnock and remained there for some time. Immediately before this occasion the defender announced to the pursuer his intention of commencing business as a butcher at New Cumnock. The first intimation of any intention on the part of the defender to commence business as a flesher, and to remove to New Cumnock, was made to the pursuer on the morning of the day on which the landlord of his new premises came to Craigbank to conclude a lease. These premises were taken without any regard to the wishes of the pursuer, and she made no objection to their being taken out of terror of the defender, who only a day or two before had put her and her child out of his house and threatened to kill her if she returned. The defender insisted that the pursuer would have to keep the butcher's shop at New Cumnock. The