previous occasions it had attacked, bitten, and severely injured those who were in charge of it. On the 6th of June, about a week after the accident above mentioned, it attacked the man in charge of it, and he was obliged to kill it in self-defence. The defender well knew of the vicious and dangerous character of the horse in question. The said horse was usually muzzled when out driving, and in the stall he was secured by two halters, the one a leather band round his neck, the other a halter with blinders. He was frequently in the habit of breaking loose from the last mentioned halter, and it was this halter which the pursuer was endeavouring to put on when the accident happened. The said halter had been frequently repaired, and it was not strong enough for the purpose." "The said personal injuries were caused to the pursuer by reason of defects in the plant connected with or used in the business of the defender, in respect that he so used the said vicious and dangerous horse and defective halter. The said accident was due to the defender's fault and negligence in so keeping, and using in his business said vicious and dangerous horse."

The defender pleaded—"The pursuer being in the knowledge of the character of the horse in question, and having continued to work and attend same without objection or complaint to the defender, the defender should be assoilzied with expenses."

The Sheriff-Substitute (ROBERTSON) on 27th October 1887 allowed a proof. The pursuer appealed to the Court of Session for jury trial, and lodged an issue.

The defender argued—The pursuer accepted the ordinary risks of his employment, and the accident was one of these. His employment as stableman included the charge of this horse. His averments showed his knowledge of the horse's character. This horse was not "plant" in the sense of 43 and 44 Vict. cap. 42, sec. 1, sub-sec. 1. This case was distinguished from *Haston* v. *Edinburgh Tramways Company*, March 11, 1887, 14 R. 621. In that case the horse was being used. Here the horse was standing in the stable. There was here no fault on the master's part—*Keir* v. *Crichton*, February 14, 1863, 1 Macph. 407. Knowledge of the defect barred the pursuer from recovering—*M'Gee* v. *Eglinton Iron Company*, June 9, 1883, 10 R. 955, 20 S.L.R. 649; *Thomas* v. *Quatermain*, 18 L.R., Q.B.D. 685.

Argued for the pursuer—Knowledge of risk barred action when the risk was ordinary, but here the risk was extraordinary—*M'Leod* v. *Caledonian Railway Company*, October 31, 1885, 23 S.L.R. 68. The case of *Haston* decided that a horse was "plant"—*Yarmouth* v. *France*, 19 L.R., Q.B.D. 647. A workman who was aware of the master's knowledge of the defect was not under an obligation to give notice of it.

At advising—

LORD PRESIDENT—This is an action of damages for injuries sustained from the bite of a horse. The defender is a carting contractor, and keeps a number of horses. The pursuer is a stableman in the defender's employment. The occurrence took place on Tuesday 31st May last, in the evening, and the *species facti* seems to have been this—One of the horses got loose, and the defender requested the pursuer to fasten him up again, and while doing so the accident occurred. The pursuer says—"The horse in question, which was an entire horse, was a vicious and dangerous animal, and on several previous occasions it had attacked, bitten, and severely injured those who were in charge of it." Now, as the pursuer had been in the defender's employment for some time, not indeed as stableman, but as carter, from which post he was promoted to be stableman, he must have been quite aware that this was a dangerous animal, which had on various occasions attacked, bitten, and severely injured those in charge of it. That shows he knew the risk he was encountering in going into the stall. He might have declined to touch the horse at all, but notwithstanding his knowledge of the animal he chose to undertake the duty. Whether he performed it carelessly and recklessly or not is of no consequence; he willingly encountered a known and obvious risk, and therefore cannot recover damages under this action.

I am unable to distinguish this case from the case of *M'Gee* and the two cases there cited. I am therefore for dismissing the action.

LORD MURE—I concur.

LORD ADAM—I concur. I only wish to add that I do not think the Employers Liability Act makes any difference in the law applicable to this case. Even assuming the horse was "plant," and the "defect in the plant" its vicious temper, the Act says the workman shall have no remedy against his employer on account of such defect, unless the defect had not been discovered or remedied owing to the negligence of the employer. Therefore I think in such cases as this the workman is in the same position as before the passing of the Act.

LORD SHAND was absent from illness.

The Court pronounced this interlocutor:—

> "The Lords having heard counsel on the record and issue proposed by the pursuer, Disallow said issue, and dismiss the action and decern: Find the pursuer liable in expenses," &c.

Counsel for the Pursuer and Appellant—Fleming. Agent—Alfred Sutherland, W.S.

Counsel for the Defender and Respondent—James Reid. Agents—Macpherson & Mackay, W.S.

Friday, December 16.

SECOND DIVISION.

[Lord Fraser, Ordinary.

DARLING AND ANOTHER *v.* ROSS.

Right in Security—Sale—Pipes Underground—Delivery.

A written contract of sale was entered into, by which the proprietor of bleachworks, on the narrative that certain per-

sons had advanced to him the sum of £400, in consideration thereof sold to them absolutely the cast-iron pipes for the conveyance of water to his works. These pipes lay underground beneath a public road. The agreement declared that the seller should be entitled, so long as the purchasers thought proper, to the use of the pipes for his bleach-works upon payment of the yearly rent of £20. Upon the same date the purchasers became bound, along with the seller, in a cash-credit bond to a bank for £400, to be operated upon by the latter. The seller drew out the whole of this sum, which was repaid by the purchasers. The seller subsequently granted a trust-deed for behoof of his creditors. In a question between his trustee and the purchasers, the *bona fides* of the transaction was established. *Held* (following *M'Bain* v. *Wallace & Company*, January 7, 1881, 8 R. 360—*aff.* July 27, 1881, 8 R. (H. of L.) 106) that the sale was valid to the effect of enabling the purchasers to obtain repayment of their advances.

In February 1886 John Wilson, a bleacher at Touch, near Dunfermline, was in embarrassed circumstances. His bleach-works were fully burdened, and he was therefore unable to borrow further sums over them. He was the proprietor of certain pipes for carrying water to his works, which pipes were laid in the public road leading from Dunfermline. His brother-in-law Adam Darling, and his son-in-law William Wood Waddell, expressed their willingness to assist him if he could give them some security, and they applied to Mr William Beveridge, solicitor, Dunfermline, for advice as to whether the security of these pipes which he offered them was adequate. Mr Beveridge advised them that no security could, without possession, be effected over moveable property like the pipes in question, and that the only form in which security could be given was by a sale to them of the pipes. The form in which the transaction was carried through was that Darling and Waddell became bound, conjunctly and severally, along with Wilson, in a cash-credit bond for £400, dated 1st February 1886, to the National Bank, to be operated upon by Wilson. Of even date with this a minute of sale was entered into between Wilson of the first part, and Darling and Waddel of the second part, in the following terms:—"Whereas the second parties have advanced to and for my behoof the sum of £400 sterling, and in consideration thereof the first party has sold, and hereby sells and conveys and makes over, to the second parties and their respective heirs, executors, and assignees whomsoever, absolutely, All and whole the cast-iron pipes for the conveyance of water from the town of Dunfermline to the said Touch Bleach-works, laid by me in the public road at my own expense, with my whole right, title, and interest, present and future, in the said pipes, with full power to the second parties to use the said pipes, and sell and dispose of the same in such way and manner as they may think proper, and that as fully and freely in every respect as I could have done myself before the granting of these presents: Declaring that the first party shall be entitled to the use of the said pipes for his said bleach-works so long as the second parties may consider proper, upon payment to the second parties or their foresaids of the sum of £20 sterling yearly in name of rent or hire."

On 5th August 1886 Wilson executed a trust-deed for behoof of his creditors in favour of John Ross, solicitor, Dunfermline, who claimed the pipes as part of Wilson's estate.

Darling and Waddell raised this action against Ross to have it declared that they were absolute proprietors of the pipes, and to have him interdicted from interfering with them. They averred that they had bought and paid for the pipes in terms of the minute of sale, and that Wilson subsequently possessed the pipes solely under the provision in the agreement by which the pipes were to be leased to him for £20 a-year.

The defender replied that the minute did not embody any *bona fide* transaction, no money being paid; that if the transaction was a sale it was a simulate one; that the pipes never became the property of the pursuers, the minute of sale being an attempt to obtain a security over moveables which still remained in the seller's possession; and that there was no delivery of the pipes.

The pursuers pleaded—"(1) The pursuers having validly acquired an absolute and exclusive right to the said water-pipes, are entitled to decree of declarator and interdict, with expenses as concluded for."

The defender pleaded—"(2) The said deed founded on by the pursuers being a simulate sale for the purpose of creating a security to the prejudice of prior creditors of the insolvent, the pursuers did not thereby acquire any right in the said pipes, and the defender is entitled to absolvitor. (3) The transaction contained in the said minute being an attempt to create a security over moveables remaining in the possession and under the control of the seller, the pursuers are not entitled to found thereon. (4) The said pipes being a part of the estate conveyed to and under the management of the defender, the defender is entitled to be assoilzied."

Proof was led, from which it appeared that Wilson drew out the whole sum of £400 from the bank, and that the pursuers ultimately repaid this sum. The import of the proof otherwise appears from the Lord Ordinary's note and the Judge's opinions.

The Lord Ordinary (Fraser) on 7th July 1887 found, decerned, and declared against Ross in terms of the conclusions of the summons and granted interdict as concluded for against him.

"*Opinion.*— . . . The question in the case is whether or not there was a valid sale. A minute of agreement of sale in writing was entered into between Wilson and the pursuers in February 1886, by which, upon the narrative that the pursuers had advanced to Wilson £400, he sold, 'and hereby sells, and conveys, and makes over,' to the pursuers 'the cast-iron pipes for the conveyance of water from the town of Dunfermline to the said Touch Bleach-works,' but it was declared that Wilson should be entitled to the use of the pipes for his bleach-works so long as the pursuers might consider proper on payment to them of '£20 sterling yearly in name of rent or hire.'

"Now this is declared by the defender to be 'a

simulate sale for the purpose of attempting to create a security,' and that it was no sale at all. The Lord Ordinary is of opinion that this position taken up by the defender is not well founded. The difficulties in the way of creating a security over moveable property were clearly foreseen and explained by Mr Beveridge, and with the view of avoiding these difficulties it was agreed that there should be an absolute sale. There was nothing at all illegal or improper in this, even although Wilson had been insolvent. He was perfectly entitled to sell for an adequate price the moveable property which belonged to him. He wanted to get money to carry on his business, which was a very legitimate thing to do, and his brother-in-law and son-in-law were perfectly willing to help him. They paid no doubt what according to the evidence appears to be more than what the pipes were worth, or at least what they cost to lay down. They were willing to make this sacrifice on behalf of their relative. They did not wish to drive a hard bargain, and the fact that they paid more for the pipes (if these were considered as simply old iron) than they were worth does not in any way detract from the fact that there was here a *bona fide* sale. As to the good faith of the transaction the Lord Ordinary has no doubt whatever. All the persons who were examined — Beveridge, Wilson, Darling, and Waddell—state that it was intended to make a *bona fide* sale, that being the only mode in which the transaction could be carried out with the view of giving to Darling and Waddell some kind of return for the money they advanced.

The case falls within the decision of *Taylor (Orr's Trustee)* v. *Tullis*, July 2, 1870, 8 Macph. 936."

The defenders reclaimed, and argued—The transaction embodied in the minute of agreement was in no sense a *bona fide* sale. (1) The pipes which were said to have been delivered in respect of the advance of £400 were only worth £200. (2) The £400 was not paid down at once. (3) There was in point of fact no delivery. The only possible constructive delivery was by the document containing the minute of agreement, and it did not set forth what actually took place. The transaction was nothing more than a simulate sale in order to attempt to create a security. The case of *Orr's Trustee* v. *Tullis*, July 2, 1870, 8 Macph. 936, relied on by the Lord Ordinary was not applicable, for in it, first, the person disputing the validity of the sale had previously acted in a manner inconsistent with the contention that the sale was invalid; second, *bona fides* was established on the proof; and third, payment of the money took place at once. This case fell under the same category as the cases of *The Heritable Security Investment Association (Limited)* v. *Wingate & Company*, July 8, 1880, 7 R. 1094, and *Seath & Company* v. *Campbell's Trustees*, December 9, 1884, 12 R. 260. The case of *M'Bain* v. *Wallace & Company*, January 7, 1881, 8 R. 360—*aff.* July 27, 1881, 8 R. (H. of L.) 106, was distinguishable from this case, because here *bona fides* was not established.

The pursuers replied—This case was on all fours with the case of *M'Bain* v. *Wallace & Company*, *vide* Lord Selborne, 8 R. p. 167. It had all the elements of a *bona fide* sale, except that the pipes were never lifted up from the ground and delivered into the hands of the buyer. Such an absurdity was not necessary according to the law of Scotland.

At advising—

Lord Justice-Clerk—This case might in other circumstances have raised difficult questions, but I am satisfied with the interlocutor of the Lord Ordinary. The real question of nicety in the case is, how far the pipes have been or could be delivered so as to be the subject of a contract of sale. I think the authorities point to this—that where all the possession of which the subject is capable has been given, and the contract is clear and unreserved, it will not be a sufficient ground for setting aside a concluded contract that the thing delivered is in a position inconsistent with delivery. There is here no doubt as to what the contract was. The object was to give Wilson a certain sum on the security of the pipes, and it was necessary in order to do that, that there should be an out and-out-sale of the pipes. The purpose was to get complete power over them, with the exception that it was understood that if the seller repaid the price he was to be allowed to re-vindicate the property. That was the only distinction between an out-and-out sale and this transaction. There is no ground for saying that in any respect the transaction was in bad faith. It was a sale, except that it rested not on the written agreement, but on the good faith of parties, that if the price were repaid the seller should have back the pipes. The way in which the seller preferred to take payment of the price was that of getting his friends who were assisting him, to unite with him in being bound to the bank under a cash-credit bond for £400. On that credit he drew out the whole £400, and it was ultimately paid up by the purchasers. It does not signify that that payment was not made at the time but sometime after. The important matter is that the purchasers put their names to the cash-credit. I think the case is on all fours with *M'Bain* v. *Wallace*, and that the Lord Ordinary is right.

Lord Young—I am of the same opinion, and I must say I think this a clear case, although questions altogether distinct from each other have been mixed up in the argument. The first point is about delivery, and stands thus—There is here an *ex facie* contract of sale as distinct as could possibly be expressed in language, written and signed by parties *sui juris*. By the law of Scotland a contract of sale does not pass the property unless there is delivery. Well, here there is a contract of sale, and the question about delivery is, whether there has been such delivery as to pass the property, or whether there has been constructive delivery? The subject sold consisted of pipes buried under the ground. These were good subjects of property, and therefore of a contract of sale. Delivery under these circumstances, which would involve digging the pipes up and handing them to the buyer, would be undesirable and ridiculous, and therefore it was reasonable to do something else. What was done was to change the title on which the previous owner was using them, for previous to the contract of sale he used them on his own title of property, and subsequently on the title of a hirer from the person to whom he sold them. Now, it has always hitherto been held to be perfectly

good constructive delivery, where a new contract has been made between the seller and the buyer, under which the seller possesses on a new and lawful contract. Here the seller had the use of the pipes buried under the ground as the buyer's lessee. That is, *ex facie*, the state of matters. It might be simulate of course, in which case it could be set aside; but on the contract that is its nature, and I am of opinion that it is sufficient to pass the property.

Now, the party against whom a right of property is sought to be declared is Wilson, the owner. His voluntary trustee—for he has executed a trust-deed for behoof of creditors—is called too, and he defends the action. He can only do so on grounds competent to Wilson, and I think Wilson has no ground for a defence. The trustee urges that this, which would otherwise be good, is bad, because it is only a security. But that is quite a legitimate purpose for such a transaction, and that is where the case is undistinguishable from *M'Bain* v. *Wallace.* It has always been esteemed by us a perfectly competent way of giving a security for debt that the seller should execute an *ex facie* absolute disposition by which the money-lender becomes the proprietor. I remember in my early days at the bar arguing a case of the kind against a money-lender who took such a title, and against whom declarator was sought that the title was only a security title, that the disponee who was made absolute proprietor had only lent money, and that the pursuer was entitled to have the property back on paying the amount of the loan. It was admitted by him that it was only a security, but he defended himself on the ground that the declarator sought would prejudice the title for which he had bargained, and the Court refused the declarator on that ground, but intimated that they would interfere to give the declarator if the borrower tendered the money and the defender then were to refuse to give up the property. That same doctrine was applied to the case of moveable property in the case of *M'Bain* v. *Wallace.* There delivery was dispensed with on the authority of the case of *Duncanson*, M. 14,204. It was acknowledged that the transaction was a security, and it was held that the parties had lawfully contracted to accomplish their object by way of sale. We intimated in our judgment in the passage I read from my own opinion during the argument in this case—and I think the House of Lords also intimated—that if any attempt were made to use the property title to any other effect than to pay the debt and interest we should interpose to prevent that, and the lender then accordingly undertook that his title should only be good to the effect of obtaining his debt and interest.

Lord Craighill concurred.

Lord Rutherfurd Clark—It was acknowledged by the reclaimer here that the case of *M'Bain* v. *Wallace* was conclusive against him unless he could distinguish it from the present in matters of fact. He failed to do this on the facts, and therefore he acknowledges that the decision of the House of Lords is against him. That makes the ground of judgment simple. I was the Lord Ordinary in that case, and I must say that when I decided it I thought that I had pronounced a very sound judgment. I feel bound to confess I was entirely wrong. As, however, I am not yet able clearly to see wherein I was wrong, I prefer to follow the authority of the case than to give any reasons for pronouncing a decision contrary to it in this case.

The Court adhered.

Counsel for the Defenders and Reclaimers—Guthrie—Baxter. Agents—Wallace & Begg, W.S.

Counsel for the Pursuers and Respondents—M'Kechnie—Shaw. Agent—T. Carmichael, S.S.C.

Friday, December 16.

SECOND DIVISION.

[Lord Lee, Ordinary.

FORSYTH AND OTHERS *v.* TURNBULL AND OTHERS.

Succession—Whether "Means and Effects" includes Heritage—Titles to Land Consolidation (Scotland) Act 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 20.

A holograph will in these terms, viz.—"In order to prevent all dispute after my death regarding the disposal of my property, I hereby leave and bequeath to my beloved wife the whole of the means and effects in my possession, or belonging to me at the time of my decease, to be absolutely at her disposal"—*held* to convey heritage.

Peter Cameron, dentist, 30 Barony Street, Edinburgh, died on 26th November 1882, leaving a widow but no children. He left a holograph will, dated 10th April 1871, in the following terms:—"In order to prevent all dispute after my death regarding the disposal of my property, I hereby leave and bequeath to my beloved wife the whole of the means and effects in my possession or belonging to me at the time of my decease, to be absolutely at her disposal. Signed in presence of Mr and Mrs Dingwal," &c.

By feu-charter dated 10th February 1879 the testator had acquired from the Magistrates and Town Council of the royal burgh of Kinghorn a piece of ground in Kinghorn on which he built a house, the feu-right being taken "to the said Peter Cameron, and his heirs and successors whomsoever." He completed no feudal title to it, and his widow died without making up a title, but continued to occupy the house upon the personal right, to the date of her death on 12th September 1886. She died intestate, and after her death her heirs-at-law entered upon possession of the house.

This action was raised against Mrs Cameron's heirs-at-law by the heirs-at-law of Peter Cameron to have it found and declared that the defenders had no right to the house in Kinghorn, and should be ordered to remove, in order that the pursuers might enter thereto and possess the subjects as their property.

The pursuers pleaded—"(3) The holograph will founded on by the defenders does not carry the said heritable subjects, and the defenders have no right thereto under the said will."