THE ORIGINS OF THE FACTORS ACTS OF 1823 AND 1825

The Factors Act 1823 was the first major statutory exception to the rule nemo dat quod non habet in English law. The limited existing analysis of this Act suggests that it came about through the lobbying actions of merchants. This article demonstrates that the Factors Act 1823 was actually a compromise, and was considered a mere stepping-stone for further reform. The additional role of government policy in the development of the Factors Act 1825 is also demonstrated.

I. INTRODUCTION

In English law, the Sale of Goods Act 1979, section 21(1) provides the basic rule, encapsulated by the maxim nemo dat quod non habet: ‘no one can transfer a better title than he himself possesses’. The Factors Act 1889, which provides three major exceptions to the basic rule, is merely a consolidation of previous legislation, with Factors Acts in 1877, 1842, and 1825 all extending the initial Act of 1823. This article will examine the history of the Factors Acts 1823 and 1825. Although the ‘abundance’ of historical evidence on factors has been noted, this article concerns an aspect of legal history which has not been fully explored. It will be demonstrated that despite the tacit support of the Government, and the overt (and overwhelming) support of merchants, financiers, and other commercial actors, initial broad reform proposals produced only a stunted progeny. Yet even this limited success surprised and pleased the reformers. The reformers’ arguments had a strong impact on the

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1 Whistler v Forster (1863) 14 C.B. (N.S.) 248, 257; 143 E.R. 441, 445, per Willes J.
4 These extensions were often the result of conservative judicial interpretation: Johnson v Credit Lyonnais Co. (1877-78) L.R. 3 C.P.D. 32, 36; A. Cohen, ‘On the Amendment of the Law Relating to Factors’, 5 Law Quarterly Review (1889) 132.
5 4 Geo. IV, c. 83 and 6 Geo. IV, c. 94. Throughout this article the short-form names shall be used.
Government though, and the broader protection provided by the Factors Act 1825 can be seen as a product of the entrepôt policy at the heart of Lord Liverpool’s ministry.

II. REPRESENTATIONS OF HISTORY

Historical accounts of the law relating to factors can be divided into two broad groups: (1) analyses of the doctrinal development of the law relating to factors; and (2) analyses of the evolution of the commercial role of factors. Both areas of analysis demonstrate haphazard judicial and legislative reactions to developments in commercial practice. This is often suggested to be a root cause of the Factors Act 1823: ‘The legislature seem to have considered [the law prior to 1823] to be too narrow a view of the proper scope of the authority of an agent to sell; and they were no doubt induced to think so by reason of the altered mode of conducting mercantile transactions in modern times’. Whilst judicial intransigence in the face of commercial preferences for protecting good faith dispoonees is broadly acknowledged as the driving force behind the first Factors Act, there is little substantive analysis of the actual process of this initial reform or of the content of the arguments for (or against) reform.

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9 *Fuentes v Montis* (1867-68) L.R. 3 C.P. 268, 277, per Willes J.

the most substantial. It notes that Parliament took action based on the Report of the Select Committee of 1823 (which had been formed in light of commercial pressure for reform), and passed the Factors Act 1823. This limited statute was clearly the basis for future development of broader statutory exceptions to the nemo dat rule, but there was no explanation of why the 1823 Act was so limited. To baldly state then that ‘[t]he Legislature, therefore, took charge of this branch of the law’, is misleading, as the evidence clearly demonstrates the impetus for change did not come from the general body politic. Thus Steffen and Danziger were more accurate in stating that the ‘actual philosophy behind the first Factors Act … is not entirely clear’ and that the reform appeared to be focused on meeting the needs of commercial bankers; this broad conclusion is often reached by other commentators.

Lobban has recently provided a valuable overview of the tensions in the early 19th century law over the correct determination of title to goods, and he argues that ‘[t]he law’s enthusiasm to protect the rights of original proprietors, and the commercial inconvenience this could cause, can … be seen in the approach taken to factors who dealt with the goods of their principals.’ He notes that during a period of low prices on foreign (colonial) goods London factors took the opportunity to pledge the goods in order to obtain liquid funds and postpone the sale of goods until market conditions were more favourable; ‘an arrangement which was generally beneficial to

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‘Bills of Lading and Factors’, 281-282; Munday, ‘A Legal History of the Factor’, 246. The brevity of the analyses provided by Miller and Munday is understandable, as in both cases the authors’ focus was on different matters.

13 Ibid, 382.
15 See e.g. Paley, Principal and Agent, 221-222; Crump, Factors and Agents, 8; Miller, ‘Bills of Lading and Factors’, 282.
17 Ibid, 1122.
However, the failure of certain factors and the consequent recovery by principals from third parties of the goods pledged ‘was controversial … [and] [a]s traders became aware of the rule, they urged its reform.’ Lobban correctly notes that the 1823 Select Committee considered the contemporary legal position as rendering impossible any attempts to lend safely on the security of goods as well as unfairly placing the burden of loss on an innocent party, and that the Select Committee recommended legislative reform to protect innocent disponees. The result was a ‘cautious Act’. A reason for this caution can be deduced from a recent biographical sketch of William Huskisson: ‘the reform of the law of principal and factor … that he carried in the teeth of Scarlett’s objections … was largely the product of mercantile pressure from Liverpool and London, and was hurriedly executed …. [requiring] time-consuming remedial legislation’. The reference to James Scarlett, barrister and MP (and later, as Lord Abinger, Lord Chief Baron of the Exchequer), is key to this history: he was a constant objector to the proposed reforms and his role in this history has not been considered before.

Whilst it is uncontroversial that interest groups of commercial actors were accustomed to lobbying by the 19th century, and that the Factors Act 1823 was a product of such lobbying, the actual nature, extent and impact of this lobbying is unclear. In light of the duty to explore the content of ‘interest’ when praying in aid of

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18 Ibid.
19 Ibid. The rule preventing factors pledging their principal’s goods was given in Paterson v Tash (1742) 2 Strange 1179; 93 E.R. 1110. This law is discussed in depth below, text following n 145.
20 Ibid.
21 D.R. Fisher, ed., The House of Commons, 1820-1832, Cambridge, 2009, vol. V, 806, hereafter Fisher, House of Commons. Huskisson’s role in the initial reform process was perhaps more limited than this description suggests: see below, text following n 77.
‘interest groups’ as explanations for legal phenomena,\textsuperscript{24} this article will identify these commercial actors, explain the nature of their relationship with the Government, and analyse the extent of any conflict between reform-minded merchants and certain conservative lawyers (alluded to above).\textsuperscript{25} Furthermore, whilst the Factors Act 1825 is usually seen as a simple expansion of the ineffective provisions of the earlier statute,\textsuperscript{26} it will be argued the Factors Acts of 1823 and 1825 are more closely connected than is usually perceived and that the Factors Act 1825 was actually utilised as a tool of ministerial fiscal policy.

1. \textit{English Society and Economy}

The Factors Act 1823 was promulgated amidst a long period of significant national and international social and economic change.\textsuperscript{27} However, long term growth was often subject to short and medium term economic volatility.\textsuperscript{28} Thus whilst the 1820s


\textsuperscript{25} See n 21 and accompanying text. Contemporary lawyers acknowledged ‘the law was in dire need of reform’: Michael Lobban, The Common Law and English Jurisprudence: 1760 – 1850, Oxford, 1991, 189. However, the debate at hand revolved around a specific point: the extent to which a good faith disponee could be protected. The ‘conservatism’ and ‘reformism’ of participants in this debate merely refers the usual perception that protecting the disponee is the more ‘modern’ approach: see e.g. Bishopsgate Motor Finance Corp v Transport Brakes [1949] 1 K.B. 322, 336-337, per Denning LJ.

\textsuperscript{26} There is virtually no in-depth analysis of the Factors Act 1825 in the literature. For brief overviews, see e.g. Paley, \textit{Principal and Agent}, 222: ‘after an experience of two years, the main provisions of it were incorporated into the amended act of 6 Geo. IV. c. 94’. The text goes on to state, amusingly, that the matter is now ‘definitively settled.’ Ewart, \textit{Estoppel by Misrepresentation}, 355: ‘Its provisions were ineffective, and the act was amended (1825) two years afterwards.’ Miller, ‘Bills of Lading and Factors’, 282 simply notes ‘[t]he shortcomings of [the 1825 Act] were so obvious that two years later Parliament amended the Act.’ In Cole and Another v The North Western Bank (1874-75) L.R. 10 C.P. 354, 364-366, Blackburn J suggested that the drafters of the Factors Act 1825 were probably influenced by three decisions: Wilkinson v King (1809) 2 Camp. 335, 170 E.R. 1175; Pickering v Busk (1812) 15 East. 38; 104 E.R. 758; and Dyer v Pearson (1824) 3 B. & C. 38; 107 E.R. 648. Blackburn J (at 365) claimed, on the basis of the date of the decision, that Dyer’s case ‘[p]erhaps … throws most light on the intention of the legislature’. Although Lord Ellenborough’s opinion in Pickering’s case appears influential in the development of the 1823 Act (see below, n 80), the 1825 Act cannot as easily be rationalised as a direct consequence of contemporary cases. In particular, Dyer’s case is never mentioned during the 1823 reform process.


was generally a period of economic resurgence, there were still instances of short term market fluctuation such as major instabilities in commodity markets in the first half of 1823, and major financial crises in the winter of 1825-1826. Increases in the volume of trade and changes in commercial practice, particularly regarding factors, combined with contemporary market volatility, created excellent opportunities for fraudulent and otherwise inappropriate commercial practices.

In the 1820s, there was no universal acceptance or promulgation of free-trade ideology or laissez-faire philosophy. The post-Napoleonic period of legislative action is cluttered with statutory economic micro-management resulting from pragmatism rather than principle. Most merchants ‘remained obstinately

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30 In February 1823 rumours of war between France and Spain led to speculation of future price rises, causing an increase in warehousing of cotton. See e.g. The New Monthly Magazine and Literary Journal, vol. IX, London, 1823, 131: cotton ‘is at this moment in general request; every dealer is desirous of securing as large a portion of stock as he can; the holders feel their advantage, and obtain improved prices.’ By March the cotton market seemed to have calmed (ibid, 179-180), though in April the market for cotton (and sugar) was suffering a sudden glut (ibid, 227-228). In May the price of corn rose by over 20 per cent (ibid, 276, 322), and demand for sugar seemed to have eradicated the earlier glut (ibid, 276).
32 It would be foolhardy to attempt to provide an appropriate bibliography of relevant literature in a footnote. However, it is worth briefly noting the various factors responsible for such changes, such as the rapid increases in population and production, developments in general commercial practices (such as changes in payment and credit mechanisms), increases in capital for investment, more efficient transportation, increased development of export markets, and the rise of the middleman.
34 See e.g. Peter Mathias, The First Industrial Nation: The Economic History of Britain 1700-1914, 2nd ed., London, 2001, 213: ‘In the peak of a boom optimism led to a general lowering of critical standards by people offering credit and seeking outlets for capital.’ This was combined with substantial financial risks in situations of commercial failure, particularly where an agent was reposed with too much trust: see e.g. Atiyah, Rise and Fall, 229, 279-280.
35 See e.g. Atiyah, Rise and Fall, 231-237.
36 See e.g. Checkland, Industrial Society, 342: ‘the clue to action was the consideration of highly specific problems, with the discussion of general rights or principle kept to a minimum.’ Boyd Hilton, Corn, Cash, Commerce: The Economic Policies of the Tory Governments 1815 – 1830, Oxford, 1977, 173, hereafter Hilton, Corn, Cash, Commerce: ‘commercial policy was untheoretical, and the time of
protectionist', contemporary 'mercantile free trade … was sectarian’, and whilst ‘countless pressure groups existed’ there was ‘no unified commercial interest’ setting forth ideological justifications for commercial reform. Nevertheless, Hilton has argued that Lord Liverpool’s ministry followed what could be conceived of as a prototype of *laissez-faire* free trade policy: entrepôt. Entrepôt was the ideology that Britain should be ‘the mart of nations, the Venice of her age’. According to Thomas Wallace, a future member of the 1823 Select Committee who provided significant though tacit ministerial support for reform, the aim was to make Britain ‘the general dépôt, the great emporium of the commerce of the world’. There was thus considerable Government attention paid to the storage, distribution and sale of goods. The history of the Factors Acts of 1823 and 1825 demonstrates how major commercial actors, operating with the Government’s (covert and later overt) approval and in accordance with the entrepôt policy, dealt with the practical and legal problems of ownership and transfers of goods.

III. THE 1823 SELECT COMMITTEE

1. *The meeting of merchants and bankers at the London Tavern*

On 1 May 1823 a meeting took place at the London Tavern. Its purpose was to adopt ‘measures for the greater security of money advanced by [merchants], in the course of

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38 Ibid, 175.
41 See below, text following n 223.
their commercial transactions, upon the deposit of merchandise and goods, and for a more adequate protection than is at present afforded by the English law against the fraudulent conduct of foreign merchants.\textsuperscript{43} It was the first step towards the Factors Act 1823.

At this meeting merchants, bankers and other commercial actors had expressed their concern with the contemporary law, of which they were informed prevented factors from disposing goods by pledge or barter.\textsuperscript{44} Robert Farrand, MP and noted corn merchant,\textsuperscript{45} was worried about frauds committed by foreign merchants,\textsuperscript{46} but the focal point for debate was the impact the law had on the availability of capital. John Smith, an MP and banker ‘whose expertise was widely acknowledged’\textsuperscript{47} and who would be the driving force behind the initial reform process, took the Chair and spoke about the issue of capital:

To encourage the employment of capital by means of such advances [i.e. pledges], by which the amount of capital actually engaged in commercial operations was increased, and the trade of the country was carried to a vast extent, was a sound principle of policy; but it was to be lamented that no adequate protection was afforded by our law to such transactions … To provide against such a hardship [as caused by the state of the law relating to advances on goods], it became the great body of capitalists of the nation to make every effort … the English law was unfair and absurd in the highest

\textsuperscript{43} The Times, 2 May 1823, 3 col. b.
\textsuperscript{44} It is not stated who provided the meeting with this information, but it is likely to have been the solicitor James Freshfield. See below, text following n 145, and n 225.
\textsuperscript{45} See e.g. Fisher, House of Commons, vol. V, 87-88.
\textsuperscript{46} The Times, 2 May 1823, 3 col. b.
\textsuperscript{47} Fisher, House of Commons, vol. VII, 121. Smith was a member of the family that owned the bank Smith, Payne and Smith, a notable bank in nineteenth century England. See H.T. Easton, History of a Banking House (Smith, Payne and Smiths), London, 1903.
degree; for it went to prevent the circulation of capital beyond any measure that, perhaps, had ever been brought before Parliament. 48

A contemporary opponent of reform, Roger Winter, 49 claimed the objectives of the merchants and bankers were to protect themselves as against frauds, to ‘do away with the necessity of the express authority of the principal’ when providing advances, and to make it easier to obtain advances themselves. 50 These objectives are evidenced by the resolutions passed at this meeting. 51 First, that domestic merchants were in the business of making advances to foreign merchants with less protection available to them compared to that available under continental jurisprudence. Second, that the law exposed those who advanced money against goods to risks they could not guard against. 52 Third, that the defrauded original owner should be bound by his agent’s acts, and that he would be adequately protected by a remedy against the agent. 53 Fourth, that petitions for an investigation into the law should be presented to Parliament, along with suggestions for reform that would ‘render the [law] comfortable to just principles.’ 54

The composition of this meeting is unclear. Winter’s pamphlet provides some evidence, in the form of a list of (presumably) those at the meeting who were to form

48 The Times, 2 May 1823, 3 col. b.
49 Winter appears to have been a barrister (Middle Temple). Very little evidence remains of his role in the development of the Factors Act 1823. His anti-reformist pamphlet (below, n 50) appears to have been his sole contribution to the debate. On 12 Nov. 1823 he was listed as sailing to India, as Secretary to the Lord Chief Justice of India (Sir Christopher Puller) with the privilege of practising at the Supreme Court at Calcutta: The Asiatic Journal and Monthly Register for British India and its Dependencies, vol. XVI, London, July-Dec. 1823, 622.
50 Roger Winter, Objections to the Proposed Alteration of the Law relating to Principal and Factor, London, 1823, 7, hereafter Winter, Objections. It is unclear when exactly this pamphlet was published, but it is recorded as being a new publication in July 1823: Blackwood’s Edinburgh Magazine, vol XIV, July-Dec. 1823, 110. Intriguingly, on the same page is a note of the publication of a second edition of the address given by Freshfield to the Select Committee on the law at hand, for which see below, text following n 146.
51 Winter, Objections, 4-7.
52 Ibid, 5.
53 Ibid, 6.
54 Ibid.
a committee to bring about the merchants’ objectives. All of the MPs on the list (Robert Farrand; John Martin; John Plummer; Samuel Scott; John Smith and Thomas Wilson) were later members of the Select Committee. The remaining nineteen other committee members contained a number of merchants who would testify before the Select Committee (James Cook; Lewis Doxat; John Henry Freese, jnr; John Hall; Edward B. Kemble; Maximilian R. Kymer; Joshua Lockwood; Andrew Loughnan; and Richard Ryland). The correlation between those at the meeting of merchants and those who were directly or indirectly (as witnesses) involved in the Select Committee’s process is substantial, and provides a strong indication of the extent to which the reformist movement was dominated by mercantile and commercial interests. The content of those interests and, where relevant, the various opposing interests, now needs exploration.

2. The House of Commons: the content of the petitions

On 12 May 1823 John Smith presented two petitions in the House of Commons, one from London ‘Merchants, Bankers, and others’, the other from Liverpool ‘Merchants, Bankers, Brokers, and others’. The combined London and Liverpool petitions stated

That the British Merchants, Bankers, and other capitalists, are in the habit of advancing Money, on the security of merchandise, to a considerable extent, as

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55 Ibid, 6.
56 See below, text following n 98.
57 The remaining members (presumably also merchants) included Richard Birkett; Peter Free; George Carr Glyn (a banker: Michael Reed, ‘Glyn, George Carr, first Baron Wolverton (1797–1873)’, ODNB, <http://www.oxforddnb.com/view/article/41283>; W. Alers Hankey; John Kymer (presumably a relation of Maximilian R. Kymer); R. H. Marten; Clement Ruding; Benjamin Shaw; and T. Wilkinson. 58 PD, NS, vol. IX, co. 211, 12 May 1823 (House of Commons); Journal of the House of Commons, hereafter JHC, vol. 78, 1823, 304-305. On 14 May there was a petition to the same effect from the Director and members of the Bristol Chamber of Commerce, Trade and Manufactures, and on 26 May the Dublin Chamber of Commerce presented another petition: JHC, vol. 78, 1823, 309, 341. 59 JHC, vol. 78, 1823, 304. He was apparently supported by Alderman Bridges (George Bridges, Lord Mayor of London and MP for the City of London 7 March 1820 – 9 June 1826): The Times, 13 May 1823, 3 col. A.
well on the deposit thereof, as in the payment of bills of exchange drawn by
the consignors from foreign countries, or from one port to another, within the
United Kingdom; and that it is a sound principle of national policy to
encourage the employment of capital by means of such advances, whereby the
amount of capital actually engaged in commercial operations is increased, and
the trade of this country is carried to a greater extent than would otherwise be
practicable; and that no adequate security or protection is afforded by the
*English* law to such transactions, but, on the contrary, the law of *England*
differs in this respect, from the laws of other commercial countries of *Europe*,
and leaves the capitalist to advance money at his peril, and to his own loss, in
the event of the goods being the property of any other person than the
individual borrowing or drawing upon the credit thereof, although such fact
was secret, and could not be discovered by the person making the advance.\(^{60}\)

The petitioners were concerned with transactions involving goods as security (i.e.
pledges), and transactions where the depositor of goods requests and receives
advances on the security of goods held under a warehouseman’s control. Both
transactions required a clear mechanism for enhancing (or utilising the potential of)
the inherent capital value of goods.\(^{61}\) According to the petitioners, the law prevented a
fair market by rendering such security illusory. The London and Liverpool petitions
were followed two days later by a petition from ‘several Directors and other Members
of the Chamber of Commerce, Trade and Manufactures’ of Bristol.\(^{62}\) It stated

\(^{60}\) JHC, vol. 78, 1823, 304-5.

\(^{61}\) For a good analysis of the importance of developments in financing, see e.g. Stephen Quinn,

\(^{62}\) *The Times*, 15 May 1823, 2 col. B. This petition was presented by Mr H Davis (presumably Richard
Hart Davis, a future member of the Select Committee).
That by virtue of the rules of law which now govern cases of mercantile lien and deposit, a protection is afforded to the Owners and Consignors of merchandize, which, in practice, militates strongly against the interests and fair security of Merchants, Bankers and others who may advance capital upon the credit of such consignments to person employed as factors, agents, &c. when clothed with the appearance of ownership; that cases of peculiar hardship, growing out of the state of law now applicable to the relations of owner, factor and persons advancing capital upon the commodities deposited, have occurred in that City, whereby some of the Petitioners have been aggrieved, and are still exposed to injury and loss; that the Petitioners are informed, and believe, that the same risks, inconveniences, and injuries are provided against by the state of the law in other countries of Europe, and also in Scotland, by which last mentioned circumstance, a discrepancy is created which is opposed to the fair equality of rights and interests of a commercial country: and that, by reference to the suggestions of legal authorities, of great estimations, and to a legislative enactment for a special object, the Petitioners presume, that a revision of the laws now referred to, will be a measure conducive to the principles of justice, and to a more enlightened view of the true interests of this commercial nation.\textsuperscript{63}

The alleged differences between the English law and other legal systems, and the references to specific individual cases along with the contemporary nature of the problem would be reiterated during the reform process. Of particular interest is the

\textsuperscript{63} JHC, vol. 78, 1823, 309. A petition from the Chamber of Commerce of Dublin was received on 26 May, after the Select Committee had been set up, thus it was passed on to the Select Committee: ibid, 341.
reference to ‘the suggestions of legal authorities’, as the reformers would present evidence as to the allegedly mistaken basis of the contemporary law, though it is clear that both sides of the debate would draw on broader considerations of justice in presenting their arguments. Both petitions were accepted, and the House of Commons would see considerable debate as to the state of the law and its appropriateness to contemporary commercial practices.  

3. The House of Commons: arguments on appropriate action

Immediately following the presentation of petitions James Scarlett voiced his opposition to reform. He said the rule that a factor cannot pledge goods without authority from his principal prevailed all over the continent, negating reform justifications based on commercial convenience, and ‘still less on the score of honesty and good policy. Nothing could be more just than that factors should be restricted from exceeding the authority of their principals, and nothing more likely to prevent frauds.’  

The reply came from Alexander Baring. Baring ‘made his early reputation as a staunch advocate of free trade principles’, and was ‘the representative voice in parliament for the businessmen of [the] day … the man who above anyone else

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64 The vast majority of debate was in the House of Commons. This is unsurprising, as the House of Lords sat for shorter periods and had a significantly smaller membership (who were generally uninterested in economic matters of this sort): see e.g. R. Harris, Industrializing English Law: Entrepreneurship & Business Organization, 1720-1844, Cambridge, 2000, 254.

65 PD, NS, vol. IX, col. 211, 12 May 1823 (House of Commons); The Times, 13 May 1823, 3 col. A. The Times also records Scarlett as making a reply to William Huskisson’s contribution (detailed below, text following n 76), which drew attention to the possible disparity in protection for foreign importers which would result from the proposed reforms.


commended the respect of the House on commercial affairs’. 68 His rhetoric, though
even-handed, 69 was notable for its tendency towards ‘bloodcurdling gloom’; 70
however, Scarlett’s reference to fraud gave Baring the opportunity for a witty retort:
‘British merchants were not generally thought more fond of encouraging frauds than
the members of this honourable and learned friend’s profession’. 71 More
substantively, Baring complained the law prevented ‘circulation of goods’ and ‘had
been a source of complaint from the earliest period that he could recollect any thing of
business.’ 72 Baring said Scarlett did not understand that ‘in commerce merchants were
factors, and factors were merchants, both purchasing goods upon commission.’ 73
Furthermore, merchants suffered ‘great inconvenience’ because the impossibility of
ascertaining title restricted the raising of funds on the security of goods. 74 So although
commerce necessitated ‘great risk and some inconvenience; … the question was,
whether greater benefit would not arise from a law which should leave merchants free
to deal with those persons in whom the possession of the goods should be.’ 75 The
object of such a change in the law would be to ‘establish the principle, that the same

68 Gordon, Political Economy, 2-3. See also Zeigler, The Sixth Great Power, 59, and The Times, 15
May 1848, 7 col. B (Baring’s obituary): ‘On commercial affairs, on manufactures, on matters of trade,
finance, and political economy, he was regarded as an oracle’.
69 The Times, 15 May 1848, 7 col. B: ‘His characteristics as an orator partook of his moral qualities as a
man, for one half of his speech usually answered the other.’
70 Zeigler, The Sixth Great Power, 90.
71 PD, NS, vol. IX, col. 211, 12 May 1823 (House of Commons).
72 Ibid.
73 Ibid. There are strong suggestions that factors and merchants were not mutually exclusive
commercial roles (see e.g. Ashton, Economic History of England, 65, 135; Munday, ‘A Legal History
of the Factor’, 225 et seq., esp. 229-232), though it has been suggested that there was a ‘quantitative
distinction’ between the roles (Miller, ‘Bills of Lading and Factors’, 257 n6 (1957) (citing Norman S.
Buck, The Development of the Organization of Anglo-American Trade 1800-1850, New Haven, 1925,
5-6). Moreover, it also seems there was a clear contemporary distinction made between factors (who
had possession of goods) and brokers (who had possession of a mere sample): see e.g. [A. Hayward],
‘Mercantile Law – No. II’ (1828-1829) 1 Law Magazine 242, 262; Baring v Corrie (1818) 2 B. & Ald.
137, 143; 106 E.R. 318, 320, per Lord Abbott CJ. In that case (which would be utilised by Scarlett in
the debate over what would be the Factors Act 1825: see below, text following n 290) Baring Brothers
benefited from this distinction. Baring’s apparent change of opinion is best explained as initial
opportunism (in Baring v Corrie) accompanied by awareness of the broader commercial reality.
74 PD, NS, vol. IX, col. 211, 12 May 1823 (House of Commons). A similar problem was noted by John
Martin: The Times, 13 May 1823, 3 col. A.
75 Ibid, 212. It is possible Baring foresaw personal opportunities, especially in light of his wide and
varied commercial interests: see e.g. Zeigler, The Sixth Great Power, 131.
care should be taken in confiding goods to agents, as prevailed in the remission of money.\footnote{PD, NS, vol. IX, col. 211-212, 12 May 1823 (House of Commons). The same material is reported in The Times, 13 May 1823, 3 col. A.} This argument, that a party should not be protected against a careless choice of agent, would be made explicit by David Ricardo: in a case of a dishonest disposition by an agent ‘[i]t was not desirable that either party should lose: but one must suffer, and the sufferer ought to be the individual who did not use proper caution’.\footnote{PD, NS, vol. IX, col 212, 12 May 1823(House of Commons); The Times, 13 May 1823, 3 col. A. For a fuller report of Ricardo’s contribution, recorded in the Morning Chronicle, see P. Sraffa, ed., The Works and Correspondence of David Ricardo, vol. V: Speeches and Evidence 1815-1823, first publ. Cambridge University Press, 1951, Indianapolis, 2005, at \url{http://oll.libertyfund.org/title/206/38855}, xxvi. For a critical examination of Ricardo’s Parliamentary career, see generally Gordon, Political Economy.}

The case for reform gained the lukewarm support of William Huskisson, who presented a petition ‘similar’ to that presented by John Smith,\footnote{The content of this petition is unrecorded, though it could not have been substantively different to the earlier Liverpool petition.} from the merchants ‘and nearly all the persons of capital in [Liverpool] … They were unanimous in their wish that the existing law should be altered.\footnote{PD, NS, vol. IX, col. 212, 12 May 1823 (House of Commons).} Huskisson acknowledged problems with the law,\footnote{Ibid. Huskisson said that judges ‘had alluded to the injustice which was connected with [the law].’ This is probably a reference to opinions expressed by Lord Ellenborough in cases such as Pickering v Busk (1812) 15 East. 38, 44, 104 E.R. 758, 761, and Martini v Coles (1813) 1 M. & S. 140, 146-147, 105 E.R. 53, 55.} but he ‘did not wish that the principle of the law should be altered; because he felt, that whatever good a change of that kind would bring with it, would be greatly overbalanced by the evil which it would create.\footnote{PD, NS, vol. IX, col 212, 12 May 1823 (House of Commons).} He did propose setting up a committee though, as ‘there were, in fact, other considerations which a committee might with proprietary inquire into.’\footnote{Ibid.} However, Huskisson’s wish that Scarlett would not oppose such an inquiry did not extend to full support for Smith’s plans: ‘it would be only necessary to inquire whether the law might not be so altered,
as to prevent the frauds which … prevailed under it." Huskisson’s initial reticence persisted for some time; he would justify this as allowing him the time to consider the proposals in depth. Nevertheless, Huskisson eventually became an evangelical reformer whose support was crucial to the passing of the Factors Act 1825.

4. *The House of Commons: the creation of the Select Committee*

Three days after the initial debate, on 15 May 1823, John Smith moved for a committee to be set up. The committee would ‘inquire into the state of the Law relating to Goods, Wares, and Merchandize, intrusted to Merchants, Agents, or Factors, and the effect of the Law upon the Interests of Commerce’. After being thanked by Arthur Onslow (later a member of the Select Committee) for raising this issue, there was some opposition from the merchant Joseph Marryat, arguing that ‘the truth was, that neither merchants nor factors were materially interested in the question. Those who stirred in this matter were the brokers, who were in the habit of advancing large sums of money on goods, without inquiring of those from whom they obtained them, whether they were their own property or not.’ He did not object to the appointment of the committee, ‘as he was convinced that his hon. friend would

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83 Ibid. See also *The Times*, 13 May 1823, 3 col. A.
84 See below, n 204.
85 See below, n 237.
86 It would appear he was converted following meetings with Smith, Lord Liverpool and Thomas Wallace: see below, n 224 and accompanying text. Huskisson would go on to present the 1825 Act to the Commons: see below n 232. For an argument that Huskisson pragmatically ‘exaggerated the doctrinaire elements of his economic policy’ to antagonise High Tories such as Eldon and Sidmouth, see e.g. Boyd Hilton, ‘The Political Arts of Lord Liverpool’ *Transactions of the Royal Historical Society, Fifth Series*, 1988, 147, 164-165.
87 *PD*, NS, vol. IX, col. 256, 15 May 1823 (House of Commons); *The Times*, 16 May 1823, 1 col. C.
88 *The Times*, 16 May 1823, 1 col. C.
90 *PD*, NS, vol. IX, col. 256, 15 May 1823 (House of Commons). See also Fisher, *House of Commons*, vol. VI, 352: ‘He had doubts about putative changes in the Law Merchant to protect brokers from the consequences of their own folly … but acquiesced in the motion for a select committee, to which he was named.’
take every care that the investigation should embrace every part of the question.”

There was support from Daniel Sykes (later a member of the Select Committee), and eventually the motion for the appointment of the Committee passed without division. However The Times reports an interesting remark made by an opponent of the Committee, Alexander Robertson. ‘The precipitancy which marked the present proceeding ought not to pass unnoticed. The petition was presented on Monday, and notice was given that the committee would be moved for on Tuesday. Such haste prevented the attendance of those who were interested in opposing the progress of the contemplated measure.’ To this Smith replied that ‘[i]t was necessary to bring forward the question this session; and if much time were lost, that object could not be effected. … All that was called for was inquiry.’ But if Smith was merely after an inquiry, his next words indicated a clear reformist attitude: ‘The existing state of the law was known to have produced the greatest frauds and evils; and it was proper that some means should be devised to improve the situation.’ The speed of the reform was not a flanking manoeuvre against any opposition (as Robertson seemed to suggest); it was, rather, a necessary aspect of urgently needed reform.

On 15 May the Select Committee was appointed, to meet the next day. Although the quorum remained five, the Select Committee would eventually have twenty eight members (there was a further round of appointments made on 22 May).

Those in the first group of members were persons already mentioned: Thomas

91 The Times, 16 May 1823, 1 col. C. This report does not represent Marryat’s objections in the same tone as Hansard.
92 PD, NS, vol. IX, col. 256, 15 May 1823; The Times, 16 May 1823, 1 col. C.
93 MP for Grampound, a ship-owner with Chinese interests and member of the Select Committee on Foreign Trade for the years 1820-1824. He was a ‘regular attender who gave general support to Lord Liverpool’s ministry, but he opposed them on specific issues and expressed strong views on commercial and financial questions’: Fisher, House of Commons, vol. VI, 981.
94 Ibid.
95 Ibid.
96 Ibid.
98 Ibid, 332.
Wallace, John Smith, William Huskisson, Alexander Baring, Robert Farrand, David Ricardo, James Scarlett, and Joseph Marryat. The remainder of this group were the Solicitor-General Sir John Copely, Dr Joseph Phillimore, John Gladstone, Henry Brougham, Ralph Bernal, Richard Hart Davis, John Martin, Sir John Newport, Thomas Wilson, John Wells, Charles Grant, Daniel Sykes, and a Mr. Courtenay. The later additions were William Haldimand, Arthur

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99 Ibid, 315.
102 Liverpool merchant with West Indian interests, who ‘was valued for his commercial experience and expertise by Lord Liverpool’s ministry.’ Fisher, *House of Commons*, vol. V, 282-287, 282.
105 MP for Bristol and merchant (though badly affected by the 1821 resumption of cash payments). He was a prodigious presenter of commercial petitions: Fisher, *House of Commons*, vol. IV, 868-871.
107 Member of a banking family (whose bank had actually collapsed in 1820), who on 18 March 1823 announced his ‘conversion’ to free trade: Fisher, *House of Commons*, vol. VI, 482.
110 Vice-President of the Board of Trade immediately following Thomas Wallace, and later President of the Board of Trade. See e.g. G. Martin, ‘Grant, Charles, Baron Glenelg (1778–1866)’, *ODNB* <http://www.oxforddnb.com/view/article/11249>.; Fisher, *House of Commons*, vol. V, 366-376. In spite of his position, Grant was not regarded as someone who understood trade.
112 The identity of this person is utterly unclear: he is only ever referred to as Mr Courtenay. It may have been Thomas Peregrine Courtenay, Secretary of the Board of Control from 1812 until 1828, and Vice-President of the Board of Trade under Grant. He was generally a free trade supporter who apparently was one of few economic ministers who ‘appeared in command of their subjects’: P. Jupp, *British Politics on the Eve of Reform: the Duke of Wellington’s Administration, 1828–1830*, London, 1998, 137. See further Fisher, *House of Commons*, vol. IV, 757-762. However, it may also have been his brother William Courtenay, MP for Exeter until January 1826, when he was appointed a Clerk Assistant to Parliament. In 1835 he succeeded a distant relative as the 10th Earl of Devon. He was a Master in Chancery, who ‘often spoke on legal matters and served on relevant committees’: See further Fisher, *House of Commons*, vol. IV, 762-765.
Onslow, William Smith, William Williams, John Irving, John Plummer, and Samuel Scott. One key role in the Select Committee was not taken by an MP, but by the influential solicitor James William Freshfield. Freshfield was already well known in commercial and legal circles, and had helped formulate the petition that was submitted to the House of Commons. He would make a key submission on the state of the law, as well as being the lead examiner of witnesses.

It is not easy to explain the Committee’s membership. It is possible that certain members self-selected by demonstrating interest, especially as a large number of participants were supporters of ‘free trade’. Other members may have been chosen because of their commercial or professional interests. However, it must be recognised that membership of select committees at this time was often merely nominal, and the lack of evidence of any contribution to matter at hand from many members of the Select Committee suggests it was essentially run as a coterie. Furthermore, the presence on the Committee of a number of MPs who were connected to the influential

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114 MP for Guildford and barrister. See Fisher, *House of Commons*, vol. VI, 576-579, noting that his legal skills (he was appointed King’s Serjeant in 1816, and was Recorder of Guildford between 1819-30) were respectable, but not brilliant. His primary political interest seemed to be reform of the Usury Laws.


117 A wealthy London merchant and financier, partner in Reid, Irving and Co, ‘a concern of second-ranking importance whose dealings, originally concentrated in the West Indies, were increasingly extended worldwide ... [collaborators] with the better known merchant houses of Gurney, Montefiore, Baring and Rothschild’: Fisher, *House of Commons*, vol. V, 836-839, 837.

118 MP for Hindon and a merchant with West India interests. ‘[H]is Parliamentary activities were, indeed, largely concerned with the protection of his mercantile affairs’: Fisher, *House of Commons*, vol. VI, 797-799, 797.


120 For a brief biography of Freshfield, who would become MP for Penryn in 1830, see Fisher, *House of Commons*, vol. V, 247-249. Freshfield had been solicitor to the Bank of England since 1812, and was the legal advisor to the West India Dock Company (of which John Smith was a director between 1807 and 1824).


Select Committee on Foreign Trade may go some way to supporting a claim of possible ministerial influence.\textsuperscript{123} This argument is based on Hilton's analysis of Lord Liverpool's ministry, which contends that Lord Liverpool manipulated the membership of select committees for broader political reasons.\textsuperscript{124} This is a justifiable suggestion in light of the clear evidence of ministerial support for reform.

Whilst it is noticeable that a number of members were legally qualified, some such members were primarily commercial actors and very few legally qualified members actually practised. Furthermore, whilst a clear majority of members were primarily commercial actors not all favoured reform,\textsuperscript{125} and there were also reformist lawyers.\textsuperscript{126} However, the evidence suggests the members of the Select Committee were virtually unanimous in their findings. It is thus difficult to determine a clear commercial/legal split on this matter. Yet the reformists did feel that they had to defend their suggestions against lawyers,\textsuperscript{127} and the leading opponent of reform was a lawyer. Thus the Select Committee not only proposed reforms on the grounds of commercial expediency, but also on the grounds the prior legal doctrine was misunderstood, in order to deal with both objections to reform.

\textsuperscript{123} In 1820 Baring moved for the creation of a Select Committee on Foreign Trade, and he served on it each year it was reconstituted (every session from 1820 to 1824). He was joined for the entirety of this period by Thomas Courtenay, Gladstone, Irving, Plummer, Wallace (who was the Chair of the Committee), and Wilson. Sir John Newport was a member in 1822 and 1823, as was Marryat (JHC, vol. 77, 1822, 60; vol. 78, 1823, 19). Huskisson joined in 1823 (JHC, vol. 78, 1823, 43). John Smith was also a member in 1823 and 1824 (JHC, vol. 78, 1823, 80), and John Plummer a member between 1821 and 1823.

\textsuperscript{124} Boyd Hilton, ‘The Political Arts of Lord Liverpool’ 38 Transactions of the Royal Historical Society, Fifth Series, 1988, 147, 157-159: Liverpool ‘inserted’ Huskisson and Ricardo into a select committee on agricultural distress ‘because he knew full well that they were clever enough to bamboozle the bumpkins and draft a [pro-free-trade] report’. See also Stuart Anderson, ‘Part Two: Public Law; Chapter I: Parliament’ in Sir John Baker (general editor), The Oxford History of Laws of England Volume XI, 1820-1914: English Legal System, Oxford, 2010, 301-341, 304-305, noting that ministers were often active supporters to bills that were notionally not Government propositions, for which see generally P. Jupp, British Politics on the Eve of Reform: the Duke of Wellington’s Administration, 1828–1830, London, 1998.

\textsuperscript{125} Such as Joseph Marryat: see text following n 89.

\textsuperscript{126} Such as Arthur Onslow: see text accompanying n 88.

\textsuperscript{127} See below, text following n 221.
IV. The Report of the Select Committee

The Select Committee began taking oral evidence on 27 May 1823; John Smith put the Report before the Commons on 13 June 1823. The Select Committee was granted the power to report the Minutes of Evidence, which provide valuable illustrations of the (mainly) mercantile perceptions of the law and commercial practice. What follows is an analysis of that Report and the Minutes of Evidence.

The Committee’s attention was ‘engaged’ by (a) bona fide advances made to factors, on the security of goods, where there is no knowledge that the factor is not the owner of the goods, and (b) the purchase of goods from factors who do not have a power to sell the goods, and the purchaser does not know that. The introduction to the Report noted the ‘strong feeling of the importance of the subject, as affecting the commerce of the Country … an unusual degree of unanimity, upon the proprietary and necessity of an immediate alteration of the law for the protection of commerce.’ There was ‘a deep and growing conviction of the expediency and urgent necessity, that some remedial measure should be submitted to Parliament before the close of the present session’. This conviction was carried through: the recommendations of the Select Committee formed the basis for the Factors Act 1823, which became law on 18th July 1823. The speed of the legislative process can be attributed to the concerns of businessmen. It was thought that the Report’s revelations about the ease with which fraud could be conducted would in turn restrict the

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128 JHC, vol. 78, 1823, 392.
129 Ibid.
130 The Times published a version of the official Report in September 1823 (The Times, 10 Sept. 1823, 3 col. A), which will also be referred to where appropriate. This report appears to have been a companion piece to two articles, published over the preceding two weeks, on meetings of merchants in reaction to the Factors Act 1823 (discussed below, text following n 216).
131 Ibid. Committee Report, 267.
132 Ibid.
133 Ibid.
advancement of moneys on security: such warnings were repeated three times in the Report.  

The Report of the Select Committee provided two main justifications for reform. On one hand it was thought ‘that no benefit has ever accrued to commerce from the rule of law in question’. The Report presented evidence that the law as it stood imposed significant risks for those advancing money on the security of goods. Furthermore, the complexity and volume of such transactions made it essentially impossible to fully investigate title. On the other hand, it was argued that the relevant doctrine’s esotericism and obscurity meant ‘the mischievous effects of that law [had] not yet been experienced beyond a limited extent’, and thus the Committee were concerned about the ‘probable future effects of the present state of the law which must be the most serious and important consideration, as it relates to the interest of the nation.’ It was also alleged that the leading case, Paterson v Tash, had been misunderstood.

The domination of the Select Committee by an interest group made up of merchants, financiers and other commercial actors is partially demonstrated by the Committee’s reliance on ‘some gentlemen well acquainted with the different interests of trade, and the sentiments of the merchants and others’, who were thought ‘most likely to be affected by the state of the law’. Their opinion was sought as to whether ‘alteration of the law appeared in any degree objectionable.’ Fifty two witnesses provided evidence. Only two non-merchants gave evidence. First was James Freshfield, who before taking up his role as the main examiner of witnesses presented a legal analysis of the contemporary doctrine that clearly supported reform. James

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135 Ibid, 274.  
136 Ibid.  
137 (1742) 2 Strange 1179; 93 E.R. 1110; Select Committee Report, 270-271.  
138 Select Committee Report, 268.
Manning, a barrister to whom the Committee were ‘under considerable obligation’,\textsuperscript{139} also presented evidence on the law which supported reform. The fifty other witnesses were English merchants based in England or abroad, foreign (i.e. European) merchants (based either in England or Europe), or merchants acting as Consul for foreign states.

The Committee also questioned various Consuls as to the state of foreign law, and found that, except for Prussia and The Hanse Towns, English law was the exception. Furthermore, even the Prussian Vice-Consul and the Consul of The Hanse Towns agreed that their law should change with England’s, to mirror the rest of Europe.\textsuperscript{140} Claims that foreign merchants were induced to trade with England because of the protections afforded them by the law were found to be misleading:\textsuperscript{141} foreign merchants had such ‘confidence ... in the character of British agents’ that the benefits of reform would outweigh any costs.\textsuperscript{142} The Committee thus recommended a change in the English law to mirror that found in Europe (and Scotland) for the benefit of transnational commerce.\textsuperscript{143} The Select Committee acknowledged that there were ‘some gentlemen who were understood to entertain doubts about the subject’. They were ‘summoned accordingly’, yet their opinions were dismissed, because ‘their sentiments [presumably referring to their alleged doubts] had been misunderstood, and that they entertained no opinion adverse to the measure.’\textsuperscript{144}

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\textsuperscript{140} Select Committee Report, 268.
\textsuperscript{141} Ibid, 283.
\textsuperscript{142} Ibid.
\textsuperscript{143} Ibid, 268.
\textsuperscript{144} Ibid. See also \textit{The Times}, 10 Sept. 1823, 3 col. A stating ‘[t]he witnesses who oppose an alteration in the law are few in number. None of them show \textit{how} an original owner is to be more damnified by a fraudulent pledging, than he may be already by a fraudulent sale of his property; and their chief objection seems to be an apprehension lest, by having the power to pledge, men who are not themselves large capitalists may be enabled to engage in trade.’ The identities of the doubters are, unfortunately, unrecorded.
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1. **Legal discussions**

At the outset of the Report, the Committee stated that whilst the principle that an agent was confined by his authority was ‘self evident’, they could not find evidence that the consequence of a breach of authority extended beyond the agent’s personal liability, and they regarded the liability of an innocent third party as to his title to be an invention of ‘comparatively modern times’. The Committee explored this issue in a section of the Report entitled ‘The State of the Law’, which was based on evidence submitted to the Committee by Freshfield and Manning.

Freshfield’s submission, the first record in the Minutes of Evidence, was an expository analysis of cases dealing with the entrustment of goods to factors. He stated that although there was ancient authority that a factor was liable to his principal, there was no ‘direct authority’ for liability on bona fide third parties. Then in 1742, in *Paterson v Tash* ‘[i]t was held by C.J. Lee, that though a factor has power to sell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a security for his own debt, though there is the formality of a bill of parcels and a receipt. And the jury found accordingly.’

The Select Committee noted ‘that there is a considerable degree of obscurity in the manner in which that case is recorded’. This is perhaps unsurprising. The reporter, John Strange, though regarded as ‘a faithful reporter’, was reputed to sacrifice comprehension for brevity in his reports. The Select Committee reported

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145 Select Committee Report, 268-269.
146 Ibid, 289.
147 Ibid, 290.
148 (1742) 2 Strange 1179; 93 E.R. 1110, 1110-1111.
149 Select Committee Report, 340 (this was stated in a question by the Committee to James Manning).
150 *Lynall v Longbothom* (1756) 2 Wills K.B. 36, 38; 95 E.R. 671, 674, *per* Willes CJ.
as fact Freshfield’s submission,\textsuperscript{152} that ‘no other note of this case was to be found in the books of authority in the law, and therefore the facts of the transaction no where appeared’.\textsuperscript{153} He further argued that the reference to the formality of a bill of parcels and receipt in the report indicated that the case was most likely one of ‘collusion’ or knowledge on the part of the pledgee.\textsuperscript{154} The Committee thus stated that it ‘entertain[s] a confident opinion, as well upon evidence adduced before them, as upon the internal proof which the case furnishes, that the pledgee was aware that the agent or factor was not the proprietor of the goods’.\textsuperscript{155} In addition, Manning stated that in 1816 he had an extra-judicial conversation with Gibbs LCJ, who had ‘stated, that the case [\textit{Paterson v Tash}] now turned out to be mis-reported, but that it had been so long acted upon that the doctrine could not now be shaken.’\textsuperscript{156} Upon prompting by the Select Committee, Manning stated ‘I am not aware of any other report [of \textit{Paterson v Tash}], nor did the lord chief justice state the grounds on which he came to the conclusion.’\textsuperscript{157}

During his questioning by the Select Committee, Manning agreed that it was anomalous that the law allowed a factor to pledge a bill of exchange but not a bill of lading, and he thought both types of bill should be governed by the same principle. He suggested the difference that existed was because the custom of pledging negotiable

\textsuperscript{152} Select Committee Report, 269.
\textsuperscript{153} Ibid, 290.
\textsuperscript{154} Ibid. See also \textit{The Times}, 10 Sept. 1823, 3 col. A: ‘This needless “formality” looks a little like a juggl[ee between the parties; and it is worth while to observe, that there is no account of any motion to set aside the verdict.’
\textsuperscript{155} Select Committee Report, 269.
\textsuperscript{157} Select Committee Report, 340. The answer may lie in the ‘mass’ (see below, n 158) of Lee CJ’s private writings, which are held in the Osborn Collection of English Manuscripts at the Beinecke Rare Book and Manuscript Library at Yale University. During his evidence Manning was asked the following: ‘You have stated you are not aware there is any other report of Paterson \textit{v} Tash than that in Strange; are you aware that it is the practice of judges and other learned men in the law, to endeavour to get possession of the papers of deceased judges and other learned persons who have collected great information on the subject of legal decisions?’ Manning’s reply to this, the last question put to him, is telling in its implication: ‘That frequently occurs.’ See Select Committee Report, 343.
instruments, though present by the time of Paterson v Tash, was not as common as pledging goods, and ‘the law being more vague, the Lord Chief Justices were more likely to fall into an error in directing juries upon that point than upon the other.’  

Freshfield also suggested that commercial and judicial developments had rendered the rationale of Paterson v Tash outdated, demonstrating the different approach taken to securities for money evident in cases following Paterson v Tash. For the merchants and businessmen, the distinction drawn between the effect of a pledge of instruments and a pledge of goods was difficult to justify. Thus the Select Committee indicated a strong preference for the decision in Pultney v Keymer in 1800, where Lord Eldon held that the defendant brokers could retain as against the owner sugar taken in pledge from the owner’s agents. Whilst that case was acknowledged as highly


159 The cases presented (see Select Committee Report, 291) were Ford v Hopkins (1700) 1 Salk. 283; 91 E.R. 250; Maclish v Ekins (1753) Sayer. 73; 96 E.R. 807; Miller v Race (1758) 1 Burr. 452; 97 E.R. 398; Collins v Martin (1797) 1 B. & P. 648; 126 E.R. 1113; Wookey v Pole (1820) 4 B. & A. 1; 106 E.R. 839.

160 Another argument about the flawed value of Paterson v Tash is suggested in Steffan and Danziger, ‘The Rebirth of the Commercial Factor’. They argued (at 749) that the antiquity of Paterson v Tash meant the Court ‘had perhaps not fully appreciated the factor’s commercial importance.’ This is can be tentatively supported by Holdsworth, History of English Law, vol. XII, 445-446, arguing that, between the death of Holt CJ and the rise of Lord Mansfield, the common law and equity judges were not competent to deal with the increase in volume and complexity of mercantile cases. In decisions following Paterson v Tash, such as Kruger v Wilcox (1755) Amb. 252; 27 E.R. 168; Godin v London Assurance Co. (1758) 1 Burr. 489; 97 E.R. 419; Drinkwater v Goodwin (1775) 1 Cowp. 251; 98 E.R. 1070; Houghton v Mathews (1803) 3 Bos. & P. 485; 127 E.R. 263, courts clearly acknowledged the growing importance of factors, and this is evidenced by judicial acceptance of the factor’s general lien over goods. However, Steffan and Danziger argue (at 750) that the curious affirmation of Paterson v Tash in Dauibiny v Duval (1794) 5 T.R. 604; 101 E.R. 338, along with the limited interpretation of apparent authority in Pickering v Busk (1812) 15 East. 38; 104 E.R. 758, resulted in the retention of a decision which ‘would have become untenable in time’.

161 3 Esp. 182; 170 E.R. 581.
exceptional,\textsuperscript{162} the Committee determined that alternative decisions merely illustrated the inability of the person making advances to effectively ascertain the ownership of the goods;\textsuperscript{163} such cases were also subject to ‘considerable doubt’ because of their shaky foundation (i.e. \textit{Paterson v Tash}).\textsuperscript{164} So although the law seemed settled by 1816 at the latest, the Committee considered the rule in \textit{Paterson v Tash} at best doubtful, at worst wrong.

Thus there are two options regarding the true meaning of \textit{Paterson v Tash}. First, it was misreported. Second, the judge got the law wrong, or at least, fell into error due to the novelty of the case. However, such options may be misplaced. There is a report of a Chancery decision, \textit{Patterson v Tash},\textsuperscript{165} given prior to the decision of Lee CJ, which provides further context and explanation for Lee CJ’s decision at law. Why this report was not mentioned is unclear; the difference in spelling of ‘Paterson’ surely cannot be the reason; and the legal expertise available to the Committee would seem to negate claims of ignorance.

\textit{Paterson/Patterson} was an Irish linen merchant. He employed Ewys and Wilcox of London as factors to sell his goods, to which end he shipped goods worth £900 to them. He also sent them an invoice, which they indorsed to one ‘Kilsara Tingie’ for the benefit of Tash. This was to secure a debt of around £800 owed by Ewys and Wilcox to Tash. However, Kilsara Tingie did not deliver the invoice to Tash (who had no idea of the transaction) until a month after the indorsment.

\textsuperscript{162} Select Committee Report, 269-271. See also Crump, \textit{Factors and Agents}, 5 fn (b); William W. Story, \textit{A Treatise on the Law of Contracts}, Boston, 1856, § 365, 419 fn 3.
\textsuperscript{163} The cases presented by Freshfield to the Committee (see Select Committee Report, 290) were \textit{Martini v Coles} (1813) 1 M. & S. 140; 105 E.R. 53; \textit{Newsom v Thornton} (1805) 6 East. 17; 102 E.R. 1189; \textit{M’Combie v Davies} (1805) 6 East. 538; 102 E.R. 1393; 7 East. 5; 103 E.R. 3; \textit{Solly v Rathbone} (1814) 2 M. & S. 298; 105 E.R. 392; \textit{Guichard v Morgan} (1810) 4 Moore, Rep. 36; \textit{Guerriero v Peile} (1820) 3 B. & A. 616; 106 E.R. 786; \textit{Fielding v Kymer} (1821) 2 Bro. & Bing. 639; 129 E.R. 1112 (this case is also reported as \textit{Gill v Kymer} (1821) 5 Moore. Rep. 503, where there are distinctions, but they do not alter the substance of the judgement). See also \textit{Warner v Martin} (1850) 51 U.S. 209, 224 (citing these cases).
\textsuperscript{164} Select Committee Report, 271.
\textsuperscript{165} (1742) 9 Mod 397; 88 E.R. 531. I am most grateful to the Editor for pointing this out.
Furthermore, later on the same day after the indorsement of the invoice, the factors Ewys and Wilcox disappeared and were declared bankrupt. Paterson brought the action in Chancery to be relieved as against Tash’s claim under the indorsement.

Lord Hardwicke held that a factor can sell goods entrusted to him, and he can do so in order to secure a debt ‘if there is no fraud or collusion in the person to whom the goods are sold, and he is a creditor for a valuable consideration really and bona fide; which seems to be the case of Mr. Tash.’ Lord Hardwicke also held that factors can assign their principal’s goods to an unknowing creditor, even if the factor’s finances are failing. However, the case was to be determined at law in an action for trover, where the question would be whether such an assignment by the factor will affect the principal’s property in the goods, and whether the factors were bankrupts at the time of the assignment. If the factors were bankrupts, then ‘it will impeach the assignment that way’ i.e. the assignment would not pass property and the principal would have his goods returned.

Thus the doubts about the good faith of the purchaser seem based on no more than supposition. Although there is still no conclusive evidence of Lee CJ’s reasoning, the key issue about Paterson v Tash was not whether Tash was bona fide, but whether the factors were bankrupt, and it is arguable that Lee CJ reached his conclusion on the basis of what seems to be the factor’s de facto bankruptcy at the time of the assignment. There is a nice irony that the denunciation of Paterson v Tash as incorrectly decided appears to be itself incorrect. But the correctness of Paterson v

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166 Ibid.
167 Ibid, 398; 531.
168 This seems to be in accordance with the later view of Lord Mansfield in Worsely v Demattos (1758) 2 Keyn 218; 96 E.R. 1160, where the decision of Jacob v Shepheard (or Shephard) (1726) 2 Eq. Abr. 122 was discussed at length. Jacob’s case being relied on by Lord Hardwicke as justification for sending the case in Patterson v Tash to be determined at law. Lord Mansfield noted (at 233; 1167) that in Jacob’s case, on appeal to Lord King LC from the decision of Sir Joseph Jekyll MR, it was held that a ‘deed might be fraudulent, but that the Court of Chancery could not decree it fraudulent, but it must be void at law’. Thus it would appear that in Paterson v Tash the decision could be justified because the assignment by the factor was deemed an act of bankruptcy.
Tash was not the sole basis for reform. The Select Committee would also demonstrate that contemporary commercial practices were put under severe strain from this law. It would be this focus on commerce that would allow the reformers to obtain the necessary ministerial support for their plans to succeed.

2. Commercial practice

The Committee considered the impact of the law on commercial practice. It was stated that advances on security of goods were common place and formed ‘by far the greater part’ of commercial transactions, yet advances were being refused because of developing awareness of the actual state of the law amongst merchants and financiers. Britain’s position at the centre of global trade meant that mercantile practice should dictate the state of the law concerning commercial transactions. If the law was not changed ‘the most serious injury must follow’ from the increased unwillingness of lenders to advance money on security of goods. For The Times, reporting on the Select Committee’s findings, ‘[t]he strongest proof of the necessity of protecting advances made by capitalists, is to be found in the declarations of men, who are themselves consignees and first owners. Merchants receive goods from correspondents, which are drawn against to three-fourths of their value, before they arrive; without these advances, the trade could not possibly go on’.

The risk of taking goods as security from factors was a prominent element in evidence from merchants before the Committee. According to the merchant William Jameson considerable volumes of advances were made on consignments but such advances were made ‘[u]nder considerable apprehension, because we have every

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169 Select Committee Report, 271-272.
170 Ibid, 272, 274-283.
171 Ibid, 275.
172 Ibid, 274.
173 The Times, 10 Sept. 1823, 3 col. A.
reason to believe, though we do not actually know the fact, that some of the consignments do not belong to the houses making them.\textsuperscript{174} There was a ‘great danger’ in such cases, but when asked by Freshfield whether the ‘extreme caution’ necessary to avoid this danger would ‘cramp [their] trade’, Jameson replied:

‘Unquestionably.’\textsuperscript{175} \textit{The Times’} report on the Select Committee’s findings considered this issue to be worth leading with, and it was noted that ‘[a]n immense number of persons, particularly within about 20 years, have exposed themselves, unawares, to the risk of heavy pecuniary loss’.\textsuperscript{176} Parties only ‘escaped’ this risk because their transactions were successful, ‘or because those with whom they dealt were as ignorant of the law as they were themselves.’ ‘Some instances of unexpected suffering’ where a party would happen across his ‘strict legal rights’, combined with ‘an extension, as it seems, or at least more free application by our courts [of the law] ... at length showed our capitalists the danger which they were running.’\textsuperscript{177}

A number of witnesses gave evidence of this danger. Richard Ryland, a corn factor who lost out following the decision in \textit{Duclos v Ryland},\textsuperscript{178} said that had he known of the relevant law, he would not have made the relevant transaction.\textsuperscript{179} Another merchant, Joshua Lockwood, had also been involved in litigation on this matter,\textsuperscript{180} as had been Maximilian R. Kymer, a partner in the brokerage house which in Kymer’s own words had been subject to ‘[s]everal cases … where we have suffered

\textsuperscript{174} Select Committee Report, 303.
\textsuperscript{175} Ibid.
\textsuperscript{176} \textit{The Times}, 10 Sept. 1823, 3 col. A.
\textsuperscript{177} Ibid.
\textsuperscript{178} (1820) 5 Moore. Rep. 518. The report of this case appears as a note to \textit{Gill v Kymer} (1821) 5 Moore. 503 (it is not in the report of \textit{Fielding v Kymer}). A copy of the report of \textit{Duclos v Ryland} was laid before the Select Committee in the course of Richard Ryland’s evidence, and is set out in the Select Committee Report, 323-326. The decision of the Court of King’s Bench in \textit{Duclos v Ryland} is particularly demonstrative of judicial opposition to the policy arguments put forward by the merchants.\textsuperscript{179} Select Committee Report, 327.
\textsuperscript{179} Ibid, 310. It appears that this was the case of \textit{Martin v Morgan and Lockwood} (1819) Gow. 123; 171 E.R. 859.
severely in having to refund money … as the law now stands.’\footnote{181} Kymer reiterated Jameson’s point: without reform ‘gentlemen will be very nice about advancing money hereafter, insomuch so that it will shackle trade greatly’. He said he could not know whether the pledgor was the true owner, and ‘a person so situated as I’ could not ask for the truth: ‘it is an awkward question to put at any time, but it cannot be put to a house of any respectability, whether the goods they offer to pledge are their own or not’.\footnote{182} These concerns run through the evidence of all of the witnesses called by the Select Committee.\footnote{183} A substantial number of the witnesses also adverted to the fact that the particular economic circumstances would have made it more worthwhile (or, less costly) for person to pledge goods rather than merely selling them. For example, Robert Farrand, following up on his comments about the dangers to trade made at the initial meeting of merchants at the London Tavern,\footnote{184} said that the corn trade could not carry on without pledging.\footnote{185} Furthermore, the evidence of Joseph Trueman demonstrated the problem faced by trans-Atlantic traders:\footnote{186} growers and shippers in the USA were often short of money and thus required advances; without allowing the consignee of goods shipped from America to reimburse himself as to the amount

\footnote{181} Select Committee Report, 368.
\footnote{182} Ibid, 369. See further Checkland, Industrial Society, 211: ‘In discharging their functions most of the men of the City were honest, but in a strict and limited way. The precise and full discharge of bargains was, in spite of outbursts of fraud from time to time, the practice of the city; indeed this was a sine qua non for success. There was also a strict code about rumour and the passing of information. But beyond these rather narrow rules, the City had no moral conscience. Each dealer had to rely upon his own commercial judgement; if it failed him he must fail.’
\footnote{183} See also The Times, 10 Sept. 1823, 3 col. A: ‘the great body of witnesses examined, declare, some of them, that their advances have already been narrowed; and all, that as soon as the law becomes well known, their advances must be confined to persons upon whose personal honour they can rely.’
\footnote{184} See above text accompanying n 45.
\footnote{185} Select Committee Report, 308.
\footnote{186} Trueman, like many of the other witnesses, was the subject of legal action; his case was noted (at Select Committee Report, 318) as proceeding slowly through the courts at that very point. The case is Queiroz v Trueman (1824) 3 Barn. & Cress. 342; 107 E.R. 760. Trueman, like Richard Ryland, appeared to have been the subject of the same rogue, one Caumont (Ryland had suffered from Caumont’s roguery in Duclos v Ryland, and in Raba and Robles v Ryland (1819) Gow. 132; 171 E.R. 861).
advanced ‘might have a tendency to limit the exportation of cotton from America.’\textsuperscript{187}

Also found throughout the evidence of the witnesses is a considerable level of surprise and concern on the part of foreign merchants that the English law, whilst allowing a factor the power of sale, did not allow him the power to pledge the goods. The potential for fraud and the worry this caused was particularly apparent in the evidence of David Terni, a silk merchant based in Ancona and Trieste.\textsuperscript{188}

Merchants had suffered in the past, and they could foresee the potential for future suffering (particularly in light of greater knowledge of the law). Changes in commercial practices, along with what the merchants saw as an incomprehensible inconsistency between the protection for those who took by sale and for those who took by pledge,\textsuperscript{189} necessitated reform.

3. **Legislative proposals**

The Select Committee advised the House of Commons to adopt legislation that would combat the problems that they discovered in the law relating to merchants and factors. The Committee initially proposed that ‘if no easy mode suggested itself for the alteration of the law, so as to remove the present inconveniences consistently with other principles of our jurisprudence, it would not be unwise to adopt the principle of foreign laws, that “possession constitutes title,”’ on the grounds that any costs that would arise because of frauds that could be constituted under such a rule would be ‘enormously’ less than ‘the great and almost universal benefit to be derived by trade from the removal of injurious restrictions’.\textsuperscript{190} This proposition mirrored the opinion of the Committee’s final witness, Alexander Baring, who was ‘most certainly’ of the opinion that ‘the more sound principle is to protect an innocent third party, than to

\textsuperscript{187} Select Committee Report, 319.
\textsuperscript{188} Ibid, 345-346.
\textsuperscript{189} Ibid, 271.
\textsuperscript{190} Ibid, 285.
make any alteration of the law for the express purpose of authorizing the factor to pledge’. 191 This would have been a radical change, and the Committee, mindful of the distinction between possession and property, decided to avoid ‘any greater change than is essential to the object to be attained.’ 192 The Committee concluded that ‘the general interest may be secured by addressing the remedy to those apparent symbols of property, which may be fairly regarded as the evidence of title’, and recommended that the possessor of ‘a bill of lading, or other apparent symbol of property, not importing that such property belongs to others, shall be considered as the true owner, so far as respects any person, under an ignorance of his real character.’ 193

This change would not affect the owner’s right to follow the goods if they were in the middleman’s hands, and the owner could obtain the goods from an innocent pawnee, provided advances were repaid. The dishonest middleman would be liable to his principal for breach of duty, and would commit a misdemeanour. 194 The extent of ‘other apparent symbol of property’ was not explained, though the Committee’s ‘hope’ for ‘a very liberal interpretation’ from Parliament of this term so as to ‘embrace every species of document which can failure be considered as representing the property’ strongly suggests any commercial document that indicated some sort of ownership or control over the goods. 195 This hope would not be immediately fulfilled. 196

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191 Ibid, 439.
193 Ibid.
196 The Factors Act 1825 would provide for coverage of wide range of commercial documents: see below, text following n 310.
4. The Factors Act 1823

The process from the Select Committee recommendations to the Factors Act 1823 is perhaps one of the murkier episodes in the development of that legislation. On 18 June the House of Commons resolved itself into a committee of the whole House to consider the Select Committee’s Report. Later the same day John Smith and Robert Farrand were given leave to bring a Bill ‘for the better protection of the property of Merchants and others, who may hereafter enter into Contracts or Agreements in relation to Goods, Wares, or Merchandize, intrusted to Factors or Agents’, which in spite of a late suggestion by Alexander Robertson to postpone, was presented later that night. This bill had a variety of provisions: Factors or agents with possession of goods and apparent symbols of property would be deemed the true owners for the purpose of validating contracts made with bona fide purchasers and persons could contract with known factors and agents entrusted with goods, provided it was in the ‘usual and ordinary course of business’ (if not, then it would be possible to contract if such agreement was within the factor’s authority). Nothing would prevent the owner’s right to follow the goods if still in the agent’s hands, or if with a third party, by paying off the third party. If the goods were accepted by a third party as security for or in payment of an antecedent debt owed by the factor, then the third party would only gain an interest in the goods equal to that held by the factor, thus abrogating the common law prohibition on factors pledging their principal’s goods without authority (though the factor would in such a case be guilty of a misdemeanor).

197 The absence of evidence prevents anything more substantial than a speculation that relevant documentation could have been lost in the fire of 16 Oct. 1834.
198 JHC, vol. 78, 1823, 392.
199 Ibid, 404.
200 The Times, 19 June 1823, 2 col. C.
201 JHC, vol. 78, 1823, 406.
202 Parliamentary Papers 465, 1823, vol II, 413.
On 23 June the Second Reading was deferred;\(^{203}\) it occurred on 26 and 27 June followed by committal to a Committee of the whole House.\(^{204}\) The bill was in Committee on 1 and 2 July,\(^{205}\) where it was subject to a number of amendments.\(^{206}\) Significantly, the amended bill had a different preamble, focusing on the specific issue of shipped goods as opposed to the general issue of the factor’s power to pledge. This change in focus was representative of the amended provisions. Persons in whose names goods are shipped would be deemed true owners, and that this would entitle consignees of said goods to a lien over them in respect of any advances made, provided the consignees were bona fide. A further provision stated that acceptance of goods (or bills of lading – this was an extension from the original bill) from a consignee for pledge or deposit along with knowledge that the deposit or pledge was made by a factor, would transfer only that interest in the goods (or bills) which the factor had. There was a new clause added at this point, which stated that where goods (or bills) were shipped on the joint account of the consignor and consignee, an agreement by the consignee to use the goods as security shall be ‘binding and effectual to all intents and purposes as if such consignee … had been expressly authorized by all persons interested in such goods … to make such contract’ provided the person taking the goods was bona fide. The clauses dealing with transactions in the ordinary course of business and the rights to follow the goods remained unchanged; but the provisions from the original bill concerning criminal punishment

\(^{203}\) JHC, vol. 78, 1823, 416.  
\(^{204}\) Ibid, 432, 436. *The Times*, 28 June 1823, 5 col. A: John Smith said, in moving for the second reading, that ‘Great inconvenience and much serious injury had arisen to many individuals from the want of fixed regulations on this subject.’ Huskisson, still reticent, stated he would not object ‘but he trusted that while the interests of one party concerned in this important subject was attended to, that of the others might not be compromised or lost sight of.’ The Attorney-General (Sir Robert Gifford, later Lord Chief Justice of the Common Pleas and Master of the Rolls) and the Lord Mayor (presumably Robert Bridges (see above, n 59) both worried about the lack of Parliamentary time.  
\(^{205}\) JHC, vol. 78, 1823, 445.  
\(^{206}\) For a copy of the amended bill, see Parliamentary Papers 510, 1823, vol II, 419.
had disappeared. On 3 July the amendments were read. The Third Reading was postponed from 5 July to 8 July, whereupon a further amendment was made (the content of which does not appear to be recorded) and the bill was passed. On 16 July the bill passed through the House of Lords, with further (non-substantive) amendments.

The Factors Act 1823, entitled ‘An Act for the better Protection of the Property of Merchants and others, who may hereafter enter into Contracts or Agreements in relation to Goods, Wares, or Merchandizes intrusted to Factors or Agents’, was promulgated on 18 July 1823. The initial words of the first section of this Act clearly demonstrates the rationale for the legislation: ‘Whereas it has been found that the Law, as it now stands, relating to Goods shipped in the Names of Persons who are not the actual Proprietors thereof, and to the Deposit or Pledge of Goods, afford great Facility to Fraud, produces frequent Litigation and proves, in its Effects, highly injurious to the Interests of Commerce in general’. This clearly mirrored the opinions of the various supporters of reform. Yet whilst the general rationale remained broadly unaffected, it is clear that the final statutory provisions are considerably different to the Select Committee’s original proposals.

The Factors Act 1823 is opaque and complex, ‘a model of the art of saying few things in many words [and a treasure] of perplexing verbosity.’ Section one provided that persons who had been entrusted with goods for the purposes of sale and

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208 Ibid, 456, 463.
209 Ibid, 478-9. The process of the bill in the House of Lords is reported at JHC, vol. LV, 1822-23, 853 (8 July, first reading), 860 (9 July, committal to the whole House), 866 (10 July, Committee), 870 (11 July, amendments made and second reading), 878 (15 July, third reading).
210 JHC, vol. 78, 1823, 479.
211 Factors Act 1823, section 1.
212 A.R. Butterworth, Bankers’ Advances and Mercantile Securities, 1902, London, 43; cited in Munday, ‘A Legal History of the Factor’, 246. Similarly, when commenting on the bill that would become the Factors Act 1825, Scarlett stated that ‘[t]he whole affords a very happy example of circumlocution and obscurity that distinguish the style of modern legislation’: PD, NS, vol. XIII, col. 1435, 28 June 1825 (House of Commons).
in whose name goods shall be shipped, shall be deemed to be the true owners, so as to entitle consignees to a lien over such goods, in respect of any money or negotiable securities advanced or given by the consignees to the entrustees, as if the entrustees were the true owners. The consignees had to be without notice that the entrustees were not the true owners. In addition, there was a rebuttable presumption that the person in whose name the goods were shipped shall be taken as being entrusted with the goods.\(^{213}\)

The amendments made the Factors Act 1823 clearly narrower than the Select Committee’s recommendations in some important respects. First, the Act, unlike the original recommendations and initial bill, focuses on shipped goods only. Second, the provisions of the Act focus on a different aspect of the transaction. Instead of focusing on the nature of the commercial document, and providing a rule which enabled a broad range of commercial documents to be considered sufficiently symbolic of property, the Act was concerned with the relationship between middleman and owner: there had to be an entrustment for sale. What would have been a substantial departure from the recommendation of the Select Committee is rescued somewhat by the provision of a rebuttable presumption that there would be entrustment to the person in whose name the goods were shipped. The remaining two sections of the Act provided first that if any person took the goods or a bill of lading for the delivery of the goods in the form of a deposit or pledge from the consignee, they would have only such title as the consignee had,\(^{214}\) and second that the Act would not deprive the true owner of the right to follow the goods into his agent’s hands or the right to reclaim the goods upon repayment of advances made.\(^{215}\) These sections were effectively identical to

\(^{213}\) Factors Act 1823, section 1.
\(^{214}\) Ibid, section 2.
\(^{215}\) Ibid, section 3.
those found in the preceding Bills and the relevant recommendations of the Select Committee. No criminal sanctions were imposed by this Act.

V. THE AFTERMATH OF THE FACTORS ACT 1823

The Factors Act 1823 was a stunted version of the original proposals, yet the reformers were relieved that even the limited changes had occurred and they saw the 1823 Act as a foundation for further reform. The limited changes and the relief expressed by reformers suggest that the opponents of reform had put up a determined fight, and this continued as attempts to extend the 1823 reforms suffered a number of setbacks. However, a shift in ministerial policy from covert to overt support, justified on entrepôt policy grounds, enabled the promulgation of the Factors Act 1825.

On Friday 29 August 1823 The Times reported on a meeting of merchants held the previous day, which discussed the Select Committee Report.216 The resolutions agreed to at that meeting were also reported in The Times, on Friday 5 September 1823.217 The particular reasoning behind the holding of such a meeting after the Act itself had been promulgated is not recorded, but the report provides such useful insights it cannot be ignored. John Smith began with a lengthy discussion of the process of reform, and in a clear reference to the speed with which the matter was dealt with, he noted that the Select Committee’s exposition of the law ‘must be held to have rather a disastrous effect’, but ‘it was essential to the welfare of commerce, that the whole subject should be examined to the bottom’ and ‘he could, without flattery, say that the committee had conducted their labours with a high degree of intelligence and ability.’218 He thought that the original bill ‘did embrace … a complete and

216 The Times, 29 Aug. 1823, 3 col. A.
217 The Times, 5 Sept. 1823, 2 col. A.
218 The Times, 29 Aug. 1823, 3 col. A.
adequate remedy, or nearly so’,219 though the Act, even in its limited form, meant ‘many important transactions in commerce will be protected’.220 However, purchasers were still at risk of factors acting beyond their authority, even though this fact may be unknowable, and this had serious consequences for sub-purchases. This exposed ‘the common and ordinary transactions of trade ... to the most serious risks, and that as long as the law shall so continue, the capital of the United Kingdom will be restrained in its natural beneficial operation.’221

In analysing the failure of their initial recommendations, Smith touched on the matter of unanimity, and his views are especially intriguing. He said that the bill ‘was framed with the unanimous assent of the committee. He was ready to admit that one hon. friend of his, whom he had in his eye, did not agree in all the views taken by the committee. But, during his experience of Parliamentary proceedings, he had hardly ever seen more unanimity displayed.’222 It is unclear which person Smith was referring to, but it is likely to have been a lawyer:

there were strong feelings [against the Committee’s proposals] in the minds of several gentlemen eminent in the profession of the law; and those gentlemen expressed their opposition in terms of such warmth, that the committee found themselves opposed by the most powerful of those persons who might be said to govern the proceedings of the legislature. Perhaps the [reform] might be

219 Ibid.
220 The Times, 5 Sept. 1823, 2 col. A.
221 Ibid. More specific examples of cases not protected by the Factors Act 1823 are stated in the earlier report of this meeting, at The Times, 29 Aug. 1823, 3 col. A. See also, Sylvanus Urban (ed), The Gentleman’s Magazine: and Historical Chronicle, July – December 1823, vol. XCIII, London, 77, noting the limitation of the Factors Act 1823 to foreign trade: ‘There might be more delicacy in applying the same principle in its full extent to our Home trade. Besides, in many branches of the latter, the custom of the trade affords sufficient notice to the deal that the person in possession of the goods is a mere factor or agent, and it is to be remembered that the evil justly complained of exists only in cases of “ostensible ownership.”’
222 The Times, 29 Aug. 1823, 3 col. A.
contrary to their received notions, and without considering the cases of abuse and oppression, they looked only to the preservation of the old principle of law.\footnote{Ibid.}

Scarlett’s opposition to the proposals, as well as his continued opposition to the remedial action required as a result of the limited nature of the Factors Act 1823, make it likely he was the target of Smith’s gentle chiding. Although Smith expressed surprise at achieving reform, this was because ‘[a] meeting had been obtained with some of the leading persons in the Government’: Lord Liverpool, Thomas Wallace and William Huskisson were named. ‘[T]he result was, that the committee had succeeded in convincing them of the propriety of their views … After the third conference those Ministers were brought to contemplate the subject with the same views and feelings as the committee, and became equally anxious for [reform].’\footnote{Ibid.}

However, whilst the original proposals were considered ‘a fair and sufficient remedy’, Parliamentary opposition caused their rejection and ‘it became quite evident that by insisting unconditionally upon the whole, they could not succeed in regard to any part of the measure’.\footnote{The Times, 29 Aug. 1823, 3 col. A. The implication of this report is that Freshfield was the true author of the original proposals.} Although the Factors Act 1823 was limited, ‘it went much beyond that which he hoped, inasmuch as an hour before the passing of the bill’ Smith was
convinced it would fall; it was saved when those ‘who had most vehemently opposed it withdrew’.  

Smith denied the potential for further reform was harmed, as the ‘general principle’ against reform ‘had not only been met, but was completely overthrown’ and Smith ‘knew not on what grounds their opponents would continue to strive with them in any remaining contest.’  

Furthermore, he thought there was ‘little doubt that they could obtain the cordial co-operation of Ministers in the furtherance of their views [in the next session of Parliament].’  

To this end the merchants are reported as having opined that the ‘commercial community … owe it to themselves, and to the interests of the nation at large, to spare no exertion until the whole measure, recommended by the Select Committee … shall be adopted’.  

A motion of thanks proposed by Thomas Wilson requested the Select Committee ‘continue their labours’ in order to bring about the complete adoption of their initial recommendations, so that ‘the just claims of commerce may be preferred to Parliament with due weight in the ensuing session.’  

As will be seen, Smith was correct in assuming he would have ministerial co-operation, but firm opposition in the form of James Scarlett remained ahead.

1. *Aborted attempts at reform*

In 1824 the reformers began the process of expanding the protection provided by the 1823 Act. On 14 April 1824 Huskisson, John Smith and the Attorney-General (Sir

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226 *The Times*, 29 Aug. 1823, 3 col. A.
227 Ibid.
228 Ibid.
229 *The Times*, 5 Sept. 1823, 2 col. A.
230 Ibid. See also *The Times*, 29 Aug. 1823, 3 col. B, reporting further resolutions thanking other participants in the process, notably James Freshfield, who was said to have ‘not only enlightened the merchants’ but had ‘obliged’ the lawyers ‘by imparting to them information which they did not before possess’ (though it was amusing stated by a Mr Hall that whilst Freshfield had enlightened the lawyers he could not have obliged because to have done so ‘would cause all litigation upon the points to cease’). Freshfield was reported to have spoken of ‘the alterations still projected by the committee’, though these were not recorded.
John Copely) were given leave to prepare an amending bill,\(^{231}\) which was presented by Huskisson and given its first reading on 3 May.\(^{232}\) The second reading was delayed until 14 May, where it was committed to a Committee of the whole House;\(^{233}\) the bill went before Committee on 17 May, where it was amended.\(^{234}\) During Committee Alexander Robertson argued that ‘the principal supporters of the bill’, financiers who advanced money on goods, ‘had always the means’ to determine the true ownership of goods pledged, whilst foreign merchants were not so fortunate. In his view the bill ‘was calculated to destroy the warehousing trade of the country.’\(^{235}\) Huskisson replied that if he had thought the bill would harm commerce or the warehouse trade he would not have supported it.\(^{236}\) He said he had decided to consider the issues during the preceding recess, following the publication of the Select Committee Report, rather than rushing to judgement.\(^{237}\) Huskisson’s conversion from his earlier reticence was complete;\(^{238}\) the issue was ‘in reality a great question of commercial policy’ which neither legal technicalities nor trade practices alone could determine.\(^{239}\) His view was that if money was advanced on the security of possession ‘accompanied by all the symbols of property’ it was ‘not fit’ that the person advancing money should be the one to suffer; it should be the party who had selected the rogue agent.\(^{240}\) This was

\(^{231}\) JHC, vol. 79, 1824, 299. In The Times, 15 April 1824, 2 col. D Huskisson is reported as ‘promising to open his views upon the second reading.’ In The Times, 15 May 1824, 2 col. B-C, he was reported as saying that in spite of his intention to speak, ‘in the absence of an hon. gent. who he understood had some objections to the measures in its present shape’ he would postpone his commentary.

\(^{232}\) JHC, vol. 79, 1824, 315; The Times, 4 May 1824, 3 col. A.

\(^{233}\) Ibid, 377.

\(^{234}\) Ibid. See also The Times, 18 May 1824, 2 col. C: ‘The breach of trust on the part of the agent was a matter between him and his principal, and ought not to affect the innocent third party.’
justifiable because the shift from commerce involving ‘few, open, and conclusive’ transactions which rested on possession to credit-based transactions placed the owner of goods under obligation to limit his agent. He dismissed Robertson’s worries about foreign merchants, arguing that ‘when important changes were taking place in the commercial world, it was incumbent on us to avail ourselves of all the advantages which our wealth and position presented to us.’ This expression of entrepôt policy is replicated in a different report of Huskisson’s closing remarks: ‘he considered the present bill as holding forth a temptation to the rising states of the new world to make England the depository of their commerce.’ Further general support for the bill came from Sir John Newport, Daniel Sykes, the Solicitor General (Sir Charles Wetherell), and John Smith.

On 18 May the amendments were agreed to and a third reading was set, though deferred, and it finally occurred on 31 May whereupon further amendments were made before the bill was sent to the House of Lords. The only report of the third reading is in *The Times*, whose reporter appears to have temporarily left the chamber only to return to find the debate in progress. What is reported is that the bill had the support of John Smith and Robert Farrand, and it appears that Alexander Robertson had reversed his previous position and was now supporting the bill. The sole recorded opponent was James Scarlett. On 1 June the bill was read in the House of Lords. The second reading occurred on 19 June. There was an objection at this

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242 Ibid, col. 759.
243 *The Times*, 18 May 1824, 2 col. C.
245 *JHC*, vol. 79, 1824, 382.
247 Ibid, 441.
248 *The Times*, 1 June 1824, 2 col. C.
point, and it was ordered that the second reading would take place in six months time. This did not occur, and it would be almost a year before a new bill was brought before the House of Lords.

2. The Factors Act 1825

In 1825 there were again petitions from various merchant groups demanding amendments to the 1823 Act. John Smith submitted a petition of London merchants on 2 June 1825, which complained of the subjection of ‘Commerce to artificial restrictions, upon the supposition of it being necessary to regulate trade’. The merchants thought it ‘particularly unwise’ to restrict transactions where parties were able to protect themselves, and there was no ‘more injurious regulation’ than that which required bona fide purchasers and lenders ‘to investigate title with as much strictness as [they] would the right to a freehold estate’. They also complained of the inconsistency between exporters, who had to rely on the ‘honour and integrity of the agent they select’ and bear ‘the consequence of any error in judgement in selection’, and importers who were ‘protected from the consequence of [their] own want of caution, frequently at the expense of those whom no caution could save from loss.’

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250 The Times, 21 June 1824, 2 Col. B states ‘The merchants’ law amendment bill was, on the suggestion of the LORD CHANCELLOR [Lord Eldon], who though the subject required more consideration that it had yet received, postponed to next session.’ In 1825 John Smith is reported to have said ’It had fallen to him, sometime since, to introduce a bill on this subject; but, from circumstances which occurred in another House, his object was defeated. Another measure was then introduced, applying to the same question; but it was imperfect, and wholly inefficient to remedy the evil.’ See PD, NS, vol. XIII, col. 1014, 2 June 1825 (House of Commons).

251 JHL, vol. 56, 1824, 443.

252 PD, NS, vol. XIII, col. 1014, 2 June 1825 (House of Commons).

253 JHC, vol. 80, 1825, 481. Another petition, from the Chamber of Commerce of Dublin, was received by the House of Commons on 13 June, when the bill to amend the 1823 Act was before the House of Lords. See JHC, vol. 80, 1825, 528. It is highly likely this petition was the same as one put before the House of Lords on 16 June: JHL, vol. 57, 1825, 1046. The Dublin petition complained that even under the 1823 Act the law was inconsistent with justice by protecting a principal who ‘voluntarily employed’ an agent as opposed to a third party ‘whose dealings have been founded, not on personal confidence, but on the supposed security of an actual deposit’ and who was devoid of ‘adequate means of ascertaining the true circumstances of property’. Furthermore, it was argued the law was inconsistent with commercial policy ‘because it obstructs both the free circulation of capital and the profitable management of merchandize’ by discouraging advances on such goods which would otherwise benefit
This petition was supported by Serjeant Onslow, and Thomas Wilson said ‘the subject was most important to the commerce of the country’, and that the petition represented ‘the opinions of the merchants of every town in England’.

Huskisson said ‘he was not at all indifferent to its importance’ and that he was ‘disposed’ to give any measure introduced on the issue ‘his best consideration.’ Scarlett complained that ‘he did not understand’ the 1824 bill, and that ‘if any measure should be introduced, it would be so intelligible as to be understood by all’; if there was reform ‘for the general benefit of the commercial body’ he would not object ‘but he hoped it would not embrace that objectionable clause, which took the entire control of a man’s property from him, and gave to another the power of raising money on it.’

On 3 June 1825 Lord Liverpool presented a bill to amend the 1823 Act, and it received its first reading. This was a significant moment: the highest members of the government were actively supporting the reforms. The second reading was on 7 June, following which the bill was committed to the whole House. During the second reading Lord Liverpool argued for reform and set out four reasons for reform. First, it was unfair that a purchaser or lender would lose out to an owner in circumstances where the owner had greater knowledge; second, the distinction in treatment between goods and bills could not be justified; third, the doctrine set out in Paterson v Tash was contrary to recent judicial opinion; and fourth, English law

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256 Ibid.
257 JHL, vol. 57, 1825, 976. Lord Liverpool referred to the London petition (see above, n 252) and stated that ‘there never had been among merchants a more general concurrence in favour of any measure.’ PD, NS, vol. XIII, col. 1058, 7 June 1825 (House of Lords).
258 JHL, vol. 57, 1825, 988.
259 PD, NS, vol. XIII, col. 1058-61, 7 June 1825 (House of Lords); The Times, 6 June 1825, 1 col. D-E
260 Unfortunately, in light of the difficulties surrounding that case (see above, text following n 148), both reports of Lord Liverpool’s speech merely state ‘the noble earl entered into the history this case’.

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differed from that of all foreign countries (including Scotland). These arguments were essentially the same as those put forward in 1823. The underlying policy of entrepôt is clear: there was a need to reform ‘laws which, however proper and politic in their origin, had become totally incompatible with the present complicated state of commerce and society.’

‘Almost the whole commerce of the world was now carried on by commission’ yet English law restricted foreign merchants to making no more than ‘a general consignment of merchandise’. Lord Liverpool ‘did not see how it was possible for trade to be carried on’ without accepting possession as prima facie title, even in light of the distinction between possession and title, particularly if ‘the greater part of the commerce of London, and two-thirds of the foreign trade of the country’ relied on operations contrary to law.

The House of Lords went into Committee on 10 June, but deferrals meant the Committee stage was not until 16 June, whereupon amendments were made; they were accepted on 17 June. The third reading was on 20 June and the bill was sent to the House of Commons for its first reading on 21 June. The second reading was on 23 June, and on 24 June the Commons went into Committee and amended the bill. The third reading, ordered for 27 June, occurred the next day, where further amendments were made.

During the third reading in the Commons, Huskisson would repeat the entrepôt mantra, claiming that ‘England, under the warehousing system, was now becoming the dépôt of the merchandise passing between the two worlds; and unless

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261 PD, NS, vol. XIII, col. 1058, 7 June 1825 (House of Lords).
263 Ibid, col. 1060.
264 JHL, vol. 57, 1825, 1021.
265 Ibid, 1046.
266 Ibid, 1054.
267 JHC, vol. 80, 1825, 579.
268 Ibid, 595.
269 Ibid, 601-2.
270 Ibid, 608.
271 Ibid, 613.
they were prepared to renounce all the advantages of that system. Every security ought to be given to advances made on the goods so warehoused. Huskisson’s statement was a reply to a lengthy diatribe by James Scarlett, whose opposition to reform remained implacable. Regardless of the powerful combination of government and commercial will, Scarlett ‘ranted at length’ on the new provisions. Although Scarlett began by ‘endeavour[ing] … to state my objections … with as much brevity as possible’, his speech ran to almost 24 columns of Hansard. That Scarlett did not divide the House following his speech is intriguing, though he probably just felt obliged to explain his opposition whilst acknowledging ‘the vain hope that any opposition from me can prevail against a measure supported … by the powerful protection of [Huskisson and Lord Liverpool].

Scarlett initially dealt with the attribution by reformers of ‘the difference which appears to exist between me and the bankers and merchants … to the prejudices derived from the profession of which I am a member.’ He denied lawyers were opposed to ‘every liberal view of policy’, claiming he was as ‘competent to exercise an enlightened and a liberal judgement upon any proposed rule of commercial law’ as those who had a mercantile background; indeed, he argued that the interests of merchants and bankers were so tied up with the reform he ‘should be inclined to pay little deference’ to them. His main substantive objection was to the second clause of the bill (later section two of the Factors Act 1825), which would

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272 PD, NS, vol. XIII, col. 1457, 28 June 1825 (House of Commons). The final sentence is clearly part of the preceding clause.
275 Ibid, col. 1433-57. The report in The Times is considerably shorter: The Times, 29 June 1825, 6 col. C.
276 Ibid, col. 1457: ‘I shall not take advantage of the state of the House by dividing it upon the question, but content myself with giving it my decided negative.’
277 Ibid, col. 1434.
278 Ibid.
279 Ibid.
280 Ibid, col. 1435.
allow factors to pledge their principal’s goods without consent, for their own purposes.\textsuperscript{281} He argued this would ‘give an express legislative sanction to the fraud of every species of agent or servant … [entrusted] with the receipts of goods for any purpose …. without any necessity or adequate advantage’, which would expose ‘the whole commercial property of the empire to become the prey of dishonest servants and crafty usurers.’\textsuperscript{282} Scarlett dismissed rejection of \textit{Paterson v Tash} as being based on ‘very fallacious’ reasoning which relied on merely presenting those ‘particular and extreme cases’ where application of the rule caused hardship.\textsuperscript{283} The ‘utility’ of rules should be measured ‘by their influence on … ordinary transactions’, and Scarlett claimed that the vast majority of (unreported) cases actually involved a pledgee who had knowledge of the provenance of the goods.\textsuperscript{284} Scarlett then went further, claiming that ‘[d]ecided cases serve to illustrate the law; they do not make it’, and that the rule illustrated by \textit{Paterson v Tash} was merely ‘the necessary consequence of the right of property.’\textsuperscript{285} Expanding this theme Scarlett argued that the distinction between possession and property created substantial doubt over any claim that possession should be treated as property.\textsuperscript{286} This, combined with the rule that an agent cannot bind his principal beyond the extent of his authority, necessitated rejection of the proposal of the bill ‘[f]or otherwise it would be in [the factor’s] power to change the property by a fraud’.\textsuperscript{287}

\begin{footnotesize}
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\item\textsuperscript{281} Ibid, col. 1435, 1437.
\item\textsuperscript{282} Ibid, col. 1437-8. Scarlett repeats this point at col. 1453. Fears of servants disposing their master’s goods remained at the front of judicial thought into the 20th century: see e.g. \textit{Farquharson Brothers & Co. v C. King & Co.} [1902] A.C. 325, 329, \textit{per} Lord Halsbury L.C.
\item\textsuperscript{283} \textit{PD}, NS, vol. XIII, col. 1438, 28 June 1825 (House of Commons).
\item\textsuperscript{284} Ibid, col. 1439.
\item\textsuperscript{285} Ibid.
\item\textsuperscript{286} Ibid, col. 1439-1441.
\item\textsuperscript{287} Ibid, col. 1442.
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Scarlett dismissed evidence about the state of foreign law, and presented the supposed opinion of a ‘very learned and sagacious judge of the Cour Royale of Paris’, concerning the case of *Baring v Corrie*. According to Scarlett the judge expressed surprise that there was any doubt in that case, as it would have been decided in France as falling simply on the rule that a principal cannot be bound by an agent acting beyond his authority. In *Baring v Corrie*, decided in 1818, Scarlett had represented the defendants who had purchased sugar from Coles and Co., merchants and brokers, believing them to be acting on their own account. When Coles went bankrupt Baring Brothers (for whom Coles had been acting) wanted Corrie to pay a third party to set off a debt owed by Barings. Corrie refused on the grounds they would only pay Coles. Following a retrial on directed facts, Barings succeeded because ‘[t]he principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name.’ Scarlett argued that the proposed reform would have given an opposite result; that Coles could have bound Baring by a sale, a result he would disagree with. It is arguable though that Scarlett’s worry was unfounded. The transaction between Barings and Coles had been recorded in their brokerage book, which Corrie could (and should) have checked; Corrie’s failure to check the provenance of their seller stood heavily against them, in comparison to the relative

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288 Ibid. In doing so he seemed to contradict what he had said about the value of cases: ‘I require much better evidence than the opinions of [foreign] advocates … Certainly nothing short of judicial decision, upon cases well understood and defined, will satisfy me that the law [is different].’


290 (1818) 2 B. & Ald. 137; 106 E.R. 318.


292 Although Scarlett said that if he was incorrect in his recollection of the case, Baring would ‘set me right’ (*PD*, NS, vol. XIII, col. 1443, 28 June 1825 (House of Commons)), it is unlikely that Baring would have been intimately involved with the particular events of that case: see e.g. Hidy, *House of Baring*, 48; Zeigler, *The Sixth Great Power*, 86 (both noting that Baring concentrated on policy and strategy, and left the detail of particular commercial transactions to others).

293 At the first trial a special jury of merchants held in Barings’ favour in spite of some apparent reluctance from Lord Ellenborough: *PD*, NS, vol. XIII, col. 1444, 28 June 1825 (House of Commons).

294 *Baring v Corrie* (1818) 2 B. & Ald. 137, 143; 106 E.R. 318, 320, per Lord Abbott CJ. This rationale was adopted by Holroyd J, at 148-149; 322.

blamelessness of Barings.\footnote{Baring v Corrie (1818) 2 B. & Ald. 137, 144-145; 106 E.R. 318, 320-321, \textit{per} Lord Abbott CJ. This analysis was adopted by Bayley J, at 146-147; 321-322.} That decision really turned on notice, and this was intended to also be the case with the proposed reform whereby only an innocent purchaser would succeed. Furthermore, Scarlett was also worried that the proposed reform would have enabled Coles (who had documents relating to the goods) to pledge the goods.\footnote{PD, NS, vol. XIII, col. 1445, 28 June 1825 (House of Commons).} Here Scarlett was again arguing against the weight of commercial opinion: pledging of documents was a form of financing, as well as avoiding potentially liquid capital solidifying in temporarily stored goods,\footnote{See above, text following n 181.} and supporting this was the whole purpose of the reforms.\footnote{Ibid, col. 1448.}

Scarlett argued that only lenders would benefit from the proposed reform: principals would see their security diminished,\footnote{Ibid, col. 1446, 28 June 1825 (House of Commons).} and factors would be penalised (in Scarlett’s eyes, honest factors would not pledge another’s goods).\footnote{Ibid, col. 1451.} Determining which of two innocent persons should bear the loss caused by a third was merely an example of ‘sophistry’, because lenders was presented with ambiguous documents would be obliged to undertake a more detailed assessment of the factor’s right to goods, at which point honest factors would by their very nature attempt to prove clear title. The supposed ease of this task was contrasted with the difficulties faced by foreign principals in checking the bona fides of their agents.\footnote{Ibid, col. 1452.} That a principal could protect himself by making a note on the bill of lading was dismissed as engendering uncertainty as well as being insufficient for all situations involving all those commercial documents covered by the proposed statute.\footnote{For Scarlett the ‘chief
cause’ of British commercial superiority was that English law provided security for property, and to alter the law and impinge on that security would be ‘to throw the foreign consignments into the hands of a few of the most eminent and affluent houses, such as the house of … the member for Taunton [i.e. Barings] … whose known affluence and resources places them above the possibility of any breach of trust.’

Whilst John Grant, MP for Tavistock, joined Scarlett’s opposition, there was support for the proposal from Baring, Thomas Wilson, Huskisson and John Smith. Huskisson and Smith noted that the current legal protection of property meant that there was effectively ‘an entire bar … placed to the raising money on any goods whatever; as no one could ascertain the owner,’ and that there were problems with long chains of transactions, or transactions involving only one factor and pledgee, but multiple original owners. In response to opposition from Smith, Huskisson justified a delaying clause in the bill (postponing the implementation until October 1826) as means to allow for affected parties to acquaint themselves of the new law. The absence of any other opposition, and Scarlett’s refusal to push for a division, meant the bill eventually passed into law. On 29 June the amended bill was received and read by the House of Lords. On 5 July it received Royal Assent. The Factors Act 1825 went some way to expanding the range of nemo dat exceptions. The key provision was the second section, which provided that

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304 Ibid, col. 1456.
306 PD, NS, vol. XIII, col. 1457, 28 June 1825 (House of Commons) (Huskisson).
307 Ibid, col. 1457-8 (Smith).
308 Ibid, col. 1458.
309 JHL, vol. 57, 1825, 1194, 1196.
310 Ibid, 1280.
any Person … intrusted with and in possession of any Bill of Lading, India
Warrant, Dock Warrant, Warehouse Keeper’s Certificate, Wharfinger’s
Certificate, Warrant or Order for Delivery of Goods, shall be deemed and
taken to be the true Owner … of the Goods … described and mentioned [in
such documents] … so far as to give Validity to any Contract … for the Sale
or Disposition of the said Goods … or for the Deposit or Pledge thereof …
provided such Persons … shall not have Notice.

This section’s implementation was delayed until 1 October 1826,311 but towards the
end of 1825 the country entered into a period of extreme commercial distress,312
resulting in large numbers of merchants holding goods that they could neither sell nor
pledge. One measure proposed was to revive a practice, utilised in the crisis of
1811,313 allowing the Bank of England to provide advances on security. Thus on 27
February 1826 the Bank’s Charter was amended to allow the Bank to extend money
on the security of pledges and pawns.314 Huskisson explained that this change was a
Government request, but the Bank made the change conditional on the immediate
extension to it of the protection provided by the Factors Act 1825,315 which Huskisson
thus proposed.316 John Smith supported this, though he regretted the fact that bill
would not bring forward the full implementation of the 1825 Act.317 Baring was
critical, not of the Factors Act 1825 itself, which he saw ‘as an important

311 Factors Act 1825, section 2.
312 See above, n 31.
313 PD, NS, vol. XIV, col. 1198-99, 8 March 1826; The Times, 9 March 1826, 2 col. B. The crisis of
1811 was referred to the Select Committee Report by the following witnesses: Select Committee
Report, 337 (John Bannatyne); 347 (Robert Holden); 368 (Maximilian R. Kymer); 369 (Edward B.
Kemble).
315 The Times, 9 March 1826, 2 col. B.
316 PD, NS, vol. XIV, col. 1198-1200, 8 March 1826; The Times, 9 March 1826, 2 col. B.
317 Ibid, col. 1199. On this point Smith was seemingly joined by a Mr. Robertson (who may have the
same Robertson who suggested delaying the implementation of the 1823 Act: see above, n 200).
improvement in our commercial code … [which] ought to [have been] carried into execution *instanter*, but because he disagreed with the shift from ‘general into partial measures’; the Bank should be reimbursed by the Government should it lose out because of the lack of protection.\(^\text{318}\) There were other voices in favour of the bill, grounding their support on the apparent success of the measures the Bank had already taken.\(^\text{319}\) The sole recorded dissent was from Ralph Bernal, who suggested pledgees would find their interest overridden by that of the Bank: Huskisson dismissed this as such pledgees could prevent a second pledge to the Bank by retaining those symbols of property which give the pledgor the right to pledge in the first place.\(^\text{320}\) The bill was swiftly passed, and ‘An Act to facilitate the advancing of Money by the Governor and Company of the Bank of England upon Deposits or Pledges’, applying the provisions of the Factors Act 1825 immediately to the Bank of England, was promulgated on 22 March 1826.\(^\text{321}\) The Factors Acts had become a part of ministerial fiscal policy.

**VI. CONCLUSION**

The history of the Factors Acts 1823 and 1825 is a complex and revealing story. The initial proposals for reform were the result of merchants and financiers realising the dangers of the common commercial practice of advancing money on the security of goods. Their arguments were two-pronged: that commercial practice required the change, and that the law itself was incorrect. On both points they faced some spirited opposition, often led by James Scarlett. Although it is difficult to draw a precise demarcation between reformist merchants and financiers and conservative lawyers,

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\(^{318}\) *The Times*, 9 March 1826, 2 col. B.

\(^{319}\) These supporters include Mr Pearse (apparently a director of the Bank of England), Mr Grenfell, Mr Abercomby, Mr W. Smith, and Sir Henry Parnell: *The Times*, 9 March 1826, 2 col. B-C.

\(^{320}\) *The Times*, 9 March 1826, 2 col. B.

\(^{321}\) 7 Geo. IV c7.
not least because there were merchants and lawyers on both sides of the argument, there is strength in such an analysis. Certainly the parties at the time saw the proposers as merchants, and the opponents as lawyers, and it appears that legal opposition to the reformed law continued for some time.\footnote{\textsuperscript{322}}

The opposition had a definitive impact: proposals were altered, reforms were delayed. More importantly, the reformers appeared willing to limit their proposals as a means of ensuring some element of reform actually occurred: even the limited reform of 1823 was considered a success. The 1823 Act was the foundation for further attempts at reform, and the aborted 1824 proposal was merely a temporary setback, as indicated by the successes of 1825. The success in 1825 is all the more interesting in light of Scarlett’s rearguard action. Why Scarlett did not push for a division is unclear, though he acknowledged he was opposing proposals that had the overt support of Lord Liverpool’s ministry. The connection between the Factors Act 1825 and contemporary entrepôt policy, something with only the barest suggestion in the literature,\footnote{\textsuperscript{324}} becomes clear.

\footnote{\textsuperscript{322} For judicial support for reform, see e.g. \textit{Williams v Barton} (1825) 3 Bing. 139, 145; 130 E.R. 466, 469, \textit{per} Best CJ.}
\footnote{\textsuperscript{323} See e.g. \textit{Wilson v Moore} (1834) 1 M. & K. 337, 360-361; 39 E.R. 709, 719, \textit{per} Lord Brougham LC: a ‘favour towards commerce … influenced our Legislature a few years ago, as is well known, to alter the law in this respect … I believe the act, even so restrained, has been, generally speaking, a greater favourite with the city than with the profession.’}
\footnote{\textsuperscript{324} See e.g. Hilton, \textit{Corn, Cash, Commerce}, 306: ‘Ministers liked to conciliate interested opinions, if it was possible to do so without disrupting policies’, adding at fn 6 ‘Canning and Huskisson worked assiduously for Liverpool town on such issues as the Law of Merchant and Factor’. The reference to ‘Law of Merchant and Factor’ appears to be a reference to the Factors Act 1825, which went by that title in parliamentary debates. Although Canning had shifted constituencies in 1823 from Liverpool to Harwich and is not recorded as having been involved at any point with the Factors Acts, Hilton’s general point is without doubt.}