COURT OF SESSION.

Thursday, July 2.

FIRST DIVISION.

MACKINNON *v.* MAX NANSON & COMPANY.

Pledge—Security—Delivery Order—Jus in re—*Obligation to deliver.* A. agreed, in return for an advance of money, to give the security of a quantity of copper rollers lying in the hands of a printing company. *Held,* in a question between the trustee on A.'s sequestrated estate and the creditor,—(1) that there was no valid pledge of the rollers, they never having been in the possession of the creditor; and (2) that the proprietory right was not transferred to the creditor, the documents showing that the custodier of the rollers was under no absolute obligation to deliver, and that the creditor had no absolute title to demand delivery.

In August 1865, Max Nanson & Company agreed, at the desire of Julius Liebert, to accept for his accommodation his draft on them for £3000 sterling, and he agreed to give them, in security thereof, certain copper rollers belonging to him, and which rollers were then lying in the printworks of the Blanefield Printing Company at Blanefield, Strathblane. It was also arranged between Max Nanson & Company, Liebert, and the Agra and Masterman's Bank (Limited) that the said draft, when accepted, should be discounted by the bank. In pursuance of the said arrangement, Liebert sent to Max Nanson & Company for acceptance his draft on them, dated 15th August 1865, payable six months after date, for £3000 sterling, and, along with said draft, Liebert & Company also transmitted to Max Nanson & Company an invoice or sale note, which bore that they had bought of Liebert, "486 copper rollers, weighing in all 49,650 lbs." stated to be lying at the disposal of Max Nanson & Company at the printworks of the Blanefield Printing Company. Before parting with the said draft accepted by them, Max Nanson & Company obtained from the Blanefield Printing Company a letter in the following terms:—

"*Glasgow, 17th August* 1865.

"Messrs Max Nanson & Co.,

"London.

"DEAR SIRS,—In consequence of an arrangement entered into between your firm and Mr Julius Liebert of Glasgow, through the Agra and Masterman's Bank (Limited), we beg to inform you that, following the instructions of Mr Julius Liebert of Glasgow, we hold at your disposal all copper rollers at present in our possession lying at our printworks, Blanefield, Strathblane, reserving the usual deduction for current accounts, and on the special understanding that Mr Julius Liebert is to be at liberty to add to that quantity, or remove therefrom, from time to time, for engraving or other purposes requisite to carry on his business.—We remain, dear Sirs, yours respectfully,

"BLANEFIELD PRINTING CO."

Liebert became bankrupt, and a competition arose between Mackinnon, the trustee on his sequestrated estate, on the one hand, and Max Nanson & Company and the Agra and Masterman's Bank, on the other, for the copper rollers. The Sheriff (H. G. BELL) held, by interlocutor of 25th March 1867, that the contract of pledge might be completed by either actual or constructive delivery, and that, though the reserved right to Liebert limited the absolute character of the pledge in the present case, it did not render the contract null; and that after Liebert's sequestration this limit flew off and left the security pure and simple, and therefore sustained Max Nanson & Company's claim. By a subsequent interlocutor he recalled the finding as to the nature of pledge, but adhered to the result of his previous interlocutor, on the ground that the proof and documents in process instructed that there was a transference of proprietary right in said rollers by the bankrupt Liebert to Max Nanson & Company, in virtue of which the said claimants were entitled to possession of the goods until the advance made by them in respect of such transference be repaid. In his note he relied on the case of *Hamilton* v. *Western Bank*, 13 December 1856, 19 D. 152."

The trustee advocated.

LANCASTER for advocator.

PATTISON for respondent.

At Advising—

LORD PRESIDENT—I must say that, notwithstanding the great trouble which the Sheriff has bestowed on this case, I think he has gone wrong. In his first interlocutor he found that [*reads from first interlocutor*]. But he became satisfied that that was not sound law, and he therefore recalled these findings, but justified his conclusion on the authority of the case of *Hamilton*. Now, I have always thought that case was one of great importance as establishing very clearly and satisfactorily a great principle of mercantile law, but I do not think it has any application to the present case. In that case the creditor obtained a written title to the moveables in question, which was *ex facie* absolute. There was a delivery-order addressed to the warehouse-keeper, and when that was intimated to the warehouse-keeper it made the holder of the order proprietor of the goods to the same effect as a disposition of a heritable subject followed by infeftment. But it is evident that to apply this principle it must be clear, in the first place, that the written title to the moveables is *ex facie* absolute — the consequence of which is, that the party to whom it is addressed is, by intimation of the delivery-order, under an absolute obligation of immediate delivery; and, correspondingly, the party holding the document is entitled to demand immediate delivery, there being no good answer to his demand by the warehouse-keeper, unless it be as to some warehouse dues. Accordingly, in *Hamilton* the delivery-order is in express terms, "Deliver to John Taylor, Esquire, manager, Western Bank, the undernoted 300 casks, *ex* 'Euphemia Fullarton,' charging us rent from date of storage." And then the marks are given of the particular casks. There can be no doubt that the intimation of that delivery-order to the warehouseman created a right of property in the creditor who got it. But what is the character of the document in the present case? It is a contrast to that in *Hamilton* in every respect. In the first place, it discloses *ex facie* that the right to be conferred is not a true right of property, but only of security. No doubt that cannot be done except by creating a right of property, but it is clear what was intended. In the next place, it is clear that neither was the custodier under any obligation to deliver, nor had the respondent any absolute title to demand delivery. It was inconsistent with the nature of the transaction, on the face of the documents, that Max Nanson & Co. should have a *jus in re* in

respect of which they could demand delivery at any time. It is only requisite to read the document to make that clear. [*Reads letter of 17th August* 1865.] Is it possible, with this stipulation, that there was any obligation of immediate delivery on the one hand, or right to demand on the other? Suppose the document had been expressed thus, "We bind ourselves, immediately on demand, to deliver to you the copper rollers in question, but on the special understanding," &c. These two things would have been absolutely inconsistent, and therefore this is not such a document as creates in the party to whom it is given that *jus in re* which is essential to make a good security in a question of this kind. The evidence in the case is not satisfactory; and, if I had had any doubt as to the main question, I should have thought it desirable to have farther proof; but assuming everything in favour of the respondents, it is quite impossible to adhere to the interlocutor under review, and therefore I am against causing the parties to incur more expense.

Lord Curriehill absent.

Lord Deas—The state of matters is this. Julius Liebert wanted an advance of money from Max Nanson & Company, and proposed to give them a security over these copper rollers, which were in the hands of the Blanefield Printing Company—and the question is, has that been effectually done either by pledge or by absolute transfer of property? I think the Sheriff has come to a right conclusion in holding that there is no effectual pledge, because the articles said to be pledged were never in the possession of the creditor at all. They were in the hands of the Blanefield Printing Company, and, though the point was not expressly decided in *Hamilton*, there are opinions by all the Judges of this Division to the effect that a pledge cannot be constituted without actual possession, and these opinions were not merely incidental, but were stated after a full hearing. There is no doubt, therefore, that the Sheriff was right in holding that his first interlocutor could not be supported on the ground of pledge.

I think, farther, that the transaction cannot be regarded as a transfer of property. Assuming that the sale-note was transferred along with the letter of 14th of August, the document of 17th August, while it bears that the rollers were to be at the disposal of Max Nanson & Company, goes on to state distinctly to what extent they were to be so. Julius Liebert was to be entitled to remove a portion of the rollers, to add to their number, to take some away and replace them by others, and to have a full right to use them for engraving and for the purposes of his business. The effect was, that Liebert might at any time remove the greater part of the rollers from the custody of the Printing Company, and the custody would then be in him; and the argument would be that these rollers, though in the custody of Liebert, were nevertheless the property of Max Nanson & Company. Now, Max Nanson & Company might very well have possession through the Blanefield Printing Company, but they could not possess through Liebert. When they came into his possession they were in the position of undelivered goods; the property in law was presumed to be his and attachable for his debts. It may be quite true that some of these articles remained with the Printing Company all along, but that is not inconsistent with the property remaining with Liebert, and being acquired by the trustee in his sequestration. If this were not so, a man might have the full use of his moveable property, and yet that might all stand transferred in absolute property to some one else, so as to defeat the claims of his creditors by a stipulation that he was to have the custody of as much as he might require. Here there is neither a transfer by an absolute writing nor by delivery. The Sheriff no doubt has bestowed great attention on the case, but I think the considerations I have mentioned are quite conclusive against his judgment.

Lord Ardmillan concurred.

Agents for Advocator—G. & H. Cairns, S.S.C.

Agent for Respondents—T. Ranken, S.S.C.

Thursday, July 2.

SIMONS & COMPANY *v.* BURNS.

Reparation—Master and Servant—Machinery. A master held liable to a servant in damages for injury through insufficient machinery.

John Burns, labourer, brought an action of damages in the Sheriff-court of Renfrewshire, against William Simons & Company, engineers, founders, and shipbuilders, London Works, Renfrew, claiming compensation for injuries sustained through the culpable negligence of the defenders in failing to provide sufficient mooring apparatus at their building yard, where Burns was at the time employed. The Sheriff-substitute (Cowan) held that the accident was owing to the fault of the defenders, and assessed the damages at £200. The Sheriff (Fraser) adhered. The defenders advocated.

Lancaster for advocators.

Shand and R. V. Campbell for respondent.

The Court adhered.

Lord Deas thought this was a mere question of fact, and that the result of the whole proof was that it was the duty of the master to provide a proper post to which the rope might be attached, and that that duty had not been performed, there being either no post at all, or else such a remnant of a post as to be altogether insufficient for the purpose.

The Lord President and Lord Ardmillan concurred.

Lord Curriehill absent.

Agents for Advocators—Wilson, Burn, & Gloag, W.S.

Agent for Respondent—J. D. Bruce, S.S.C.

Thursday, July 2.

MILNE *v.* SOUTER.

Obligation—Guarantee—Railway—Relevancy. Certain parties bound themselves, in the event of the pursuer obtaining 400 shares in a certain railway and not being able to dispose of them at or above par within two years after the line was opened, to repay him his loss, rateably to the extent of the sums written opposite their respective names. In an action against one of these parties for the amount of deposit and calls on so many shares, objection to relevancy *repelled*, and case remitted to proof.

Robert Milne, with consent and concurrence of the Great North of Scotland Railway Company, brought this action against Alexander Souter, for "payment to the pursuer of the sum of £200 sterling, being the amount of deposit and calls on an