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

allotment of twenty shares, of £10 each, of the said Banff, Macduff, and Turriff Extension Railway Company, for which the defender is liable to relieve the pursuer in terms of the letter of guarantee after mentioned, and interest thereon, at the rate of £4 per cent. per annum on the said deposit and calls on the said shares, from and after the 4th day of June 1860 to the 4th day of June 1862, and from that date till the date of citation hereon at the rate of £5 per cent., and from and after the date of citation at the rate of £6 per cent. till payment."

The pursuer alleged that, in order to enable the "Banff, Macduff, and Turriff Extension Railway Company,"—now merged in the Great North of Scotland Railway Company—to raise funds for the purpose of extending the line to the present terminus, the defender and others addressed to the pursuer a letter of guarantee in the following terms:—"Sir,—Provided you obtain from the Directors of the Banff, Macduff, and Turriff Extension Railway an allotment of four hundred shares, of ten pounds each, in the said undertaking, and provided you pay the calls thereon, already made or to be made, we, the parties subscribing . . . do hereby severally become bound to guarantee you against any loss on such shares by your not being able to dispose of them at or above par within two years after the line shall have been opened for traffic, it being hereby agreed that we shall only be bound to guarantee you as aforesaid rateably to the extent of the sums written opposite to our subscriptions hereto, and provided that the whole amounts of which we are to relieve you shall be expended on that portion of the line extending from the Macduff cross-roads to the terminus; it being provided that no claim shall be made upon us for payment of any portion of the advances which may be made by you in virtue of said allotment until the line shall have been opened for traffic for two years, and farther, that we or any of us shall have it in our power at any time to relieve ourselves of this guarantee by offering to pay and paying you the amount you may have advanced on the said shares at the time, or the proportion thereof effeiring to the said respective subscriptions, together with interest at four per cent. thereon from the date of opening the line for traffic as aforesaid, in which event you shall be bound to assign or transfer to us or such of us as shall have made the said repayment, the shares or share in respect whereof such repayments have been so made to you, and providing that you are not to be at liberty to dispose of said allotted shares at a discount without first offering them to us severally in proportion to our said subsciptions, and, failing our acceptance, to the trustees of the Right Honourable James Earl of Fife, and farther, providing that you may hold the said shares, or dispose of the same for your own behoof on your relieving us of this guarantee, and also that you shall have power to assign the said shares in whole or in part along with this guarantee, or a relative proportion thereof, such assignee or assignees being bound in every respect by the conditions hereof. In witness whereof, &c."

The pursuer alleged that, in fulfillment of the condition in the letter of guarantee, he applied for and obtained an allotment of 400 shares, and paid calls thereon, and farther alleged, "the pursuer has not been able to dispose of the said shares guaranteed as aforesaid at or above par, either within two years after the line was open for traffic or since, the same not having been saleable at or above par in the share-market. The pursuer has sustained loss on the said shares to the extent of the calls paid thereon by him, with interest; and the defender is liable, under the letter of guarantee, in relief of so much of said loss as is concluded for."

The defender pleaded, *inter alia*, (1) The pursuer's averments are not relevant or sufficient in law to support the conclusions of the action; and, *separatim*, the pursuer's averments being insufficient in specification, the action ought to be dismissed. (2) The action, as laid, cannot be maintained, having regard to the terms of the letter of guarantee libelled. In particular, the action cannot be maintained against the defender as an individual obligant therein for the whole loss upon twenty of the 400 shares alleged to have been allotted to the pursuer.

The Lord Ordinary (KINLOCH) repelled these pleas by the defender, adding in his note:—"The defender maintains that the action is wrong laid, inasmuch as the letter of guarantee does not, as he alleges, connect the subscribers with any particular shares, but merely with certain money amounts; and so does not connect the defender with a liability with any amount of shares, but generally for a sum of £200. It appears to the Lord Ordinary that this is a misconstruction of the guarantee. The liability is indeed stated generally to be proportional to the sums subscribed; and cases may be figured in which a proportion so stated might come to be important. But in the actual case which has happened, in which the whole shares remain on hand, the Lord Ordinary cannot doubt that each subscriber was to relieve the pursuer to the extent of the shares in the Company represented by the subscribed sum, and not otherwise. This, to the Lord Ordinary's apprehension, is made clear by the circumstance that by the guarantee each subscriber is, on payment, to have his allotted number of shares assigned to him. It is declared 'that we or any of us shall have it in our power, at any time, to relieve ourselves of this guarantee by offering to pay and paying you the amount you have advanced on the said shares at the time, or the proportion thereof effeiring to the said respective subscriptions, together with interest at four per cent. thereon from the date of opening the line for traffic as aforesaid; in which event you shall be bound to assign or transfer to us, or such of us as shall have made the said repayment, the shares or share in respect whereof such repayments have been so made to you, and providing that you are not to be at liberty to dispose of said allotted shares at a discount, without first offering them to us severally, in proportion to our said subscriptions.' The Lord Ordinary is satisfied that the action embodies the substance of the guarantee, when laid against the defender as for loss on twenty shares *to be transferred to the defender on payment.*

"With regard to the sufficiency of the statements on record, which was also objected to, the Lord Ordinary is satisfied that the pursuer says enough when he says that he paid the whole price of the shares, both original deposit and calls, and has not been able within the specified time to dispose of the shares at or above par; in consequence of which his whole outlay has been a loss."

The defender reclaimed.

YOUNG and SHAND for reclaimer.

CLARK and J. M'LAREN for respondent.

The Court adhered.

Agent for Reclaimer—Alexander Morison, S.S.C.

Agents for Respondent—Henry & Shiress, S.S.C.