solves into *locatio operarum*." This is the nature of the contract we are dealing with here. In the ordinary case there can be no doubt that it is for the interest of the warehouseman that the goods should lie in his warehouse as long as possible, that he may thereby get as large a rent as possible; on the other hand, it is for the interest of the owner of the goods to turn over his goods as rapidly as possible, and to make his money out of them, and therefore to pay as little rent as he can. Accordingly, such a case as the present is very unlikely to arise.

But when a warehouseman has received goods for custody it must be obvious that very important legal consequences follow bearing on the rights of third parties, and not merely of the parties to the contract. The goods by being deposited become liable to certain diligences to which they are not open when they are in the hands of their owner. They may be the subject of sale without actual delivery. That contract may in such circumstances be made real by constructive delivery, which would not have been the case if the goods had continued in possession of the owner. Now, to say that the warehouseman may thrust the goods out at once and without any reason, so as to defeat all the legal consequences which flow from the deposit would be a very strong thing. I should be very slow to give any sanction to such a doctrine. But in the present case the pursuer has been unable to show any justification for the course he proposes to follow. There is no ground for it upon the record. In the cases suggested by Mr Lang, I can very easily understand that the defender may be entitled to be relieved of his contract. If his title to the warehouse comes to an end he may no longer be bound to perform the contract, because it has become impossible for him to do so. And there may be other cases in which there may be a reasonable and therefore a valid ground for the contract coming to an end, but there is no such case here. The goods are yarns. One sees their nature. They may be inflammable, and may create risks and damages, but the pursuer knew that when he received them. There is nothing which he did not know then which he has since come to know. There was no reason in October for removing the goods which did not exist in August. I am very clear, therefore, that the view taken in the Inferior Court is unsound, and that the Sheriff's interlocutor ought to be reversed.

Lord Mure—The statements in this record are of the most meagre description. The ground on which the Sheriffs have given effect to this application is that the pursuer is not bound to keep the goods any longer than he pleases. I cannot say this is a good ground in law. I cannot say that the goods can be so removed unless there has been a stipulation as to time. Neither can I concur in the view of the law laid down by Mr Jameson—that the defender is bound to keep the goods as long as the owner pays the hire and thinks fit to leave them there.

Here diligence has been used upon the goods within a month of the time when they were deposited. I do not very well see how the pursuer is to get rid of them. The Sheriff-Substitute proceeds on the ground that they are of an inflammable nature. This is not averred on the record, but if it had been averred, and were distinctly proved, I am not prepared to say that it would not have affected my view of the case.

Lord Curriehill—I entirely concur in the judgment proposed. I think it would be dangerous in a commercial community to sanction any such doctrine as the Sheriffs have laid down.

Lord Deas and Lord Shand were absent.

The Court recalled the interlocutors of the Sheriff and Sheriff-Substitute respectively, and refused the prayer of the petition

Counsel for Appellants (Defenders)—Jameson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondents (Pursuers)—Lang. Agents—Hamilton, Kinnear, & Beatson, W.S.

Saturday, January 22.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

M'LARTY *v.* STEELE.

Foreign—Process—Lex fori—*Verbal Slander.*

In an action raised by a Scotchman, resident in Glasgow, in the Court of Session for alleged verbal slander uttered at Penang by another Scotchman who had subsequently returned to this country, the defender proposed an issue as to whether, according to the law of that place, reparation was due unless special damage was averred by the pursuer. The Court *refused* the issue, on the ground that the rights of parties must be determined as if the slander had been uttered in Scotland.

This was an action of damages in respect of verbal slander raised by Farquhar Matheson M'Larty, an engineer residing at Greenock, against David Scott Steele, also an engineer residing in that place, and it arose under the following circumstances:—In 1877 the pursuer and John Leith Wemyss, both at that time residing at Penang, in the Straits Settlements, and John Young Fox, residing at Hong-Kong, constituted the firm which carried on business at Penang under the name of the Penang Foundry Company. In July of that year they assumed the defender into the partnership. In May 1879 the said partnership was dissolved, and after an agreement had been signed by the parties with regard to the division of the profits made on the dissolution, the pursuer and Fox left Penang and returned to Scotland, the defender remaining at Penang. Soon after his arrival in Scotland the pursuer ascertained that the defender had on repeated occasions and in various companies made false and calumnious charges against the pursuer to the effect that the pursuer had been guilty of dishonest conduct in connection with the transfer of the business and the distribution of the price thereof among the partners. The defender soon returned to Greenock, but declined either to retract the above statements or to make any suitable reparation. As the pursuer had made arrangements since his return home for

beginning business as a consulting engineer, and relied largely for his success upon the connection he formed in the East, and the character and reputation which he there acquired, he was compelled to bring the present action against the defender for the purpose of clearing his character.

He pleaded—"(1) The defender having slandered the pursuer as condescended on, to the pursuer's loss, injury, and damage, the pursuer is entitled to reparation as concluded for. (2) The defender's averment of foreign law is irrelevant."

The defender, on the other hand, denied the pursuer's averments, and averred that "the alleged statements, even though they had been made, would form no competent ground of action against the defender according to the laws of Penang and Singapore, the places where they are alleged to have been uttered, in respect that no special damage is alleged to have been sustained by or through said utterances. According to the law of Penang and Singapore, as according to the law of England, no reparation is due for verbal slander unless where special damage is alleged and proved to have been sustained."

He pleaded—"(1) The action being for alleged oral slander in Penang, is incompetent. (2) The statements in the condescendence are not relevant or sufficient to support the conclusions of the summons. (3) The whole material statements of the pursuer being unfounded in fact, the defender is entitled to absolvitor, with expenses."

In the Procedure Roll the Lord Ordinary (CURRIEHILL) ordered the adjustment of issues, and appended the following note to his interlocutor —"This is an action of damages in respect of verbal slander alleged to have been uttered by the defender of and concerning the pursuer in Penang. Damages are claimed as solatium for injured feelings, and in respect of injury to the pursuer's character and reputation as a merchant and to his business. The defence is that by the law of Penang verbal slander is not actionable unless it is alleged and proved that it has caused special damage. The law of Penang is merely one of the facts in the case which must be proved at the trial, and it will then be soon enough to determine whether or not damages can competently be allowed for anything beyond the special damage which may be proved. The proper course seems to be at present simply to order issues to be adjusted."

The pursuer proposed four issues, while the defender proposed the following counter-issue:—"Whether according to the law of Penang and Singapore no reparation is due for verbal slander unless special damage is proved to have been sustained through said verbal slander?"

The Lord Ordinary disallowed the defender's issue, approving of those proposed by the pursuer.

The defender reclaimed, and argued—The alleged slander had been uttered at Penang. By the law of that place it was necessary, if any penalty was to attach to the utterance of verbal slander, that the pursuer should prove that special damage had been suffered in consequence thereof. In these circumstances the defender was entitled to have the question put to the jury whether such special damage had in this case been sustained by the pursuer, and therefore the defender's proposed issue should be allowed. *Horne's* case was distinguishable from the present, for in it a cause of action arose in both countries, and further the contract for breach of which the remedy was sought had been made in Scotland. Besides, in that case and the others cited, the question was as to how the remedy was to be given, redress in some shape or other being competent both by the *lex loci* and the *lex fori*.

Authorities—*Scott* v. *Lord Seymour*, 32 L.J. Exch. 61; *Horne* v. *North British Railway Co.*, 5 R. 1057; *Phillips* v. *Eyre*, L.R. 4 Q.B. 225, and 6 Q.B. 1; *Mostyn* v. *Fabriquas*, 1 Smith's L.C. 652.

At advising—

LORD JUSTICE-CLERK—My opinion of this matter is that the proposed issue is entirely outside this case.

Verbal slander is said to have been uttered in Penang of the pursuer, who was resident in Glasgow; and an action is now brought against the defender, who has returned to Scotland, and is in this country. He says that when in Penang he was living under the law of England, by which he was entitled to utter verbal slander without incurring a civil penalty. It is assumed that by the law of England—which is also the law of Penang—it is not an offence to utter verbal slander unless there is averment and proof of special damage. It may be the case that the law of England will not give redress unless particular injury be proved; but it is certainly not the case that in England verbal slander is lawful. It is because it is not lawful that in certain circumstances redress is given. Here, then, there is an admitted wrong—the wrong is a wrong in both countries—and I am clearly of opinion that the jury should have an opportunity of saying whether damage has been suffered or not, and if it has, to what extent.

LORD YOUNG—I am entirely of the same opinion, and have really nothing to add, unless that I am not, as at present advised, prepared to hold that evidence of the law of Penang is admissible as at all pertinent to the case. I think that if it be proved that the slander complained of has been uttered, and that the pursuer suffered damage, although there may not be proof of special damage, it would not be pertinent in this case, which arises in Scotland, and is tried in the Scotch Courts, to prove that by the law of Penang such an action would not be competent. I think it is necessary to say this, because the Lord Ordinary indicates that the question would be open at the trial. I would rather be disposed to say now that in my opinion such evidence would not be admissible. There is an injury by the law of Scotland, and the case must be tried by the law of Scotland. If there is sufficient evidence to entitle to damages by the law of Scotland, that is enough; and it is not pertinent to prove that something more is necessary by the law of Penang.

LORD RUTHERFURD CLARK—I am of the same opinion. The question should be determined just as if the slander had been uttered in Scotland.

LORD JUSTICE-CLERK—I intended to say in my opinion what Lord Young has very properly added.

Their Lordships adhered to the Lord Ordinary's interlocutor.

Counsel for Reclaimer—Asher—Millie. Agent—Adam Shiell, S.S.C.

Counsel for Respondent—Trayner—Mackintosh. Agents—Murray, Beith, & Murray, W.S.

Tuesday, January 25.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

JOHNSON & REAY *v.* NICOLL & SON.

Contract — Sale — Breach of Contract — Right of Manufacturer to Supply Goods not Made by Himself in Implement of Contract.

Where manufacturers who were under contract to supply goods of a certain stipulated quality, offered in implement of their contract goods of the stipulated quality, but not of their own manufacture, and the buyers declined to receive them — *held*, following *The West Stockton Iron Company* v. *Nielson & Maxwell* (July 3, 1880, *supra*, vol. xvii., p. 719, 7 R. 1055), that the tender of those goods was implement of the contract, and that the buyers were in breach of the contract in refusing to receive them.

On 13th June 1878, correspondence regarding the sale of iron plates having previously passed between the parties, Messrs Johnson & Reay, iron manufacturers, Stockton-on-Tees, sold to Nicoll & Son, iron merchants, Dundee, 750 tons iron ship-plates. The contract-note, which was written on paper having upon it the heading "J. & R. Brand, a Crown, Moor—Johnson & Reay, iron manufacturers," was in these terms:—

"The Moor Ironworks,

"Stockton-on-Tees, 13th June 1878.

"Sold to Messrs Nicoll & Son, Dundee, per Messrs John E. Swan & Brothers, Limited, ship-plates as under, viz.:—

"*Quantity.*—Seven hundred and fifty (750) tons.

"*Quality.*—'Crown,' to pass Lloyds' survey.

"*Price per ton of* 2240 *lbs.*—Six pounds (£6).

"Not less than a truck-load to be specified at a time.

"*Terms of payment.*—Cash, less 2½ per cent. on 10th of month following delivery.

"*Rate of delivery.*—Over next three or four months, in about equal monthly quantities.

"*Place of delivery.*—Free on trucks at our works. Buyers to have the option of taking delivery of the whole, or a portion of contract, f.o.b. Stockton or Middlesbro', we charging nett cost, in any case not exceeding 2s. 6d. per ton.

"*For* JOHNSON & REAY,

"F. W. STOKER.

"In the case of strikes or combinations of workmen, or accidents causing the stoppage of the works, the supplies of iron now contracted for may be suspended during their continuance. This clause applies to buyers and sellers."

The sale was confirmed by Nicoll & Son by letter of 19th June. On the same date there was another contract between the parties, who had been for sometime dealing with each other in iron. This contract, however, is of no importance to the present case.

On 9th July 1878 Johnson & Reay sold to Nicoll & Son 300 tons ship-plates, also "Crown," to pass Lloyds' survey, the delivery to be in equal monthly quantities to extend over three or four months. There was in this contract the same strike clause as that in the June contract, quoted *supra*.

Under neither contract were the deliveries made in the time contemplated by the contract-notes. The parties were at issue as to whether this was the fault of Nicoll & Son in not specifying for iron in due time, or of Johnson & Reay in not being in a position to supply sufficient quantities of iron as required under the contracts.

In May 1879 a portion of the iron under the June contract was still undelivered, and none of the iron under the July contract had been delivered. On 21st May Johnson & Reay wrote this letter to Nicoll & Son:—"We beg to inform you that in consequence of our inability to secure sufficient specifications to keep our works going, we have been compelled to close them for the present, and have therefore made arrangements with some of our friends to manufacture for us the iron which we are under contract to deliver to you. In deference to your wishes from time to time, by reason of your being unable to accede to our repeated requests for specifications, in accordance with the terms of your contracts with us, the delivery of the iron sold to you has been deferred, and it is now very considerably in arrear. Having regard, therefore, to the arrangements we have made with the firms who are manufacturing the iron for us, and to prevent complications with them, we must ask you to be good enough to let us have specifications for the quantity due, about 1000 tons plates and 298 tons angles, without delay, and continue to specify in accordance with the terms of your contracts."

On the 29th the solicitors of Johnson & Reay wrote on their behalf requiring immediate specifications. The answer was this letter from Nicoll & Son:—"2d June 1879.—We enclose specifications of plates, which you will please be very particular in rolling exact to size, both in length, breadth, and thickness and quality, so that there be none rejected, each plate to be distinctly [J. & R., a crown, Moor] branded. Please have all ready by end of the week, when we will advise you where to ship them. Also say approximate weight."

Thereafter Johnson & Reay took up the position that they were entitled to supply iron of crown quality to pass Lloyds' survey, whether made by themselves or other firms; Nicoll & Son, on the other hand, contending that they were entitled to iron made by Johnson & Reay at their "Moor" ironworks.

In November 1879 Johnson & Reay raised this action concluding for £104, 17s. 4d. damages for breach by Nicoll & Son on the June contract, and £375 on the July contract. The amount of damage claimed was, as they alleged, the difference between the contract prices and the market prices, so far as undelivered as at the date when the pursuers declined to allow the defenders the further indulgence in point of time for the due implement of the contracts which the defenders were desirous of obtaining.