assuming there is nothing in either of these two previous objections, the sentence is illegal because it purports to be pronounced in pursuance of the Act 14 and 15 Vict. cap. 27? That Act is said to be repealed. I think it would be a strict interpretation of this sentence if, supposing there was good warrant for the punishment of whipping in the other statute specified — namely, 25 Vict. cap. 18—I was to hold it illegal because 14 and 15 Vict., which also specifies whipping, had been repealed. But still it is not necessary that I should even decide upon this, for the last point to be considered is after all the only ground of my judgment.

It appears to me that this purports to be, and can only be, regarded as a sentence in furtherance of the provisions of the statutes specified. So that if either of the Acts of Parliament, much more if both of these Acts of Parliament, do not warrant the imposition of the sentence of whipping, then it is not possible that it can be sustained. Now the Act 14 and 15 Vict. cap. 27 is repealed. The Act 25 Vict. cap. 18 is not repealed, but, according to my reading, that Act, while it seems inferentially to take for granted that whipping in certain cases is legal, gives no warrant for whipping except in the case of boys who are not above 14 years of age. There is a power to deal with them in the way specified; there is no power, as I think, given in that statute to whip boys whose age is greater than that I have mentioned. It was suggested by Mr Lang, the counsel for the respondent, that whipping is a punishment provided by the common law of Scotland, and that it was within the power of the magistrate, discarding the punishment authorised by the Glasgow Police Act, to have recourse to what the common law of Scotland had also put within his power. All I have to say in regard to this is, that even if in any case that could be found to be a successful contention, it certainly cannot be successfully maintained on this occasion, because the law of Scotland never was such as to authorise a sentence of whipping to be pronounced by any magistrate for what is described as a crime in this complaint. Baron Hume specifies cases in which there was whipping inflicted, but it is impossible to read these without contrasting them with this case. Whether the practice which was sometimes followed, as shown by Baron Hume, would be followed now even in cases the same as those he describes may well be doubted. Sheriffs in former times imposed even a capital sentence —2 Hume 61—but who shall say that this is a power which would still be exercised by an Inferior Judge? Be this, however, as it may, the fact remains that for such a thing as that of which the appellant was convicted whipping never was a punishment sanctioned by the law of Scotland; and this being so, and there being no warrant in the Act 25 Vict. cap. 18—the latest statute—for the sentence complained of, it appears to me that this sentence cannot be sustained.

The sentence was therefore quashed, with expenses.

Counsel for Suspender—Brand. Agents—J. M. & J. H. Robertson, Writers.

Counsel for Respondent — Lang. Agent——Paterson, Writer.

COURT OF SESSION.

* *Wednesday, October* 23.

SECOND DIVISION.

[Sheriff of Lanarkshire.

ADAMS & COMPANY *v.* ATHYA & COMPANY.

Agreements and Contracts—Factor's Power to Sell to Meet Advances made—Special Terms of Contract.

In February A consigned to B a cargo of wheat, on which B advanced 41s. per quarter. At the time of consignment A had written:—"We understand this cargo will not be sold under 42s., London terms, without our consent." The markets fell, and ultimately in August B demanded from A a remittance to cover depreciation, storage, &c., adding—"Unless this is done within seven days from this date we must sell it at best obtainable price, and claim on you for amount of loss." A refused consent, and B accordingly sold. *Held*, in an action by B for the balance, that the words "without our consent" could not cover more than a reasonable time, and that B was not bound to continue to hold so long as A chose, but after due notice might sell.

This was an appeal from the Sheriff Court of Lanarkshire in a petition presented to that Court by Henry Adams & Company, grain merchants, Gloucester, against John Athya & Company, grain merchants, Glasgow, seeking decree for £395, 6s. 1d., with interest from 25th August 1876 and expenses. In February 1876 Athya & Company had consigned to Adams & Company at Bristol a cargo of wheat to be sold by them on account of the consigners. After some negotiations it was arranged that Adams & Company should advance to the defenders 41s. per quarter on the cargo, holding it on the footing expressed by the defenders in a letter of date 28th February 1876, thus—"We ordered "J. Margaretha" to your port on Saturday evening, and wd. have preferred selling her outright to you at 42s.; however, as you feel certain you will be able to nett us 42s., London terms, we will act on your recommendation, and consign this cargo to you. We enclose proyl. invoice made up at 41s. Wire us when you wish docts. in London. Of course we understand this cargo will not be sold under 42s., London terms, without our consent; and we now authorise you to go on selling at a price, the whole or any portion thereof to nett us this price before arrival." On 2d March Adams & company wrote from Bristol—"We believe our Gloucestor people are remitting you to London to-day for the 'J. Margaretha'; and our only object in writing to you is to mention, in reply to yours of the 28th, copy of which has been sent to us, that our promise to you on the 26th inst., in wiring to you the terms of advance, was that we would not sell under 42s., C. J. F., London terms, without consulting you. We did not mean by this to hold the wheat under a lot of storage expenses to meet your price if on arrival of the ship the quality proved not up to the mark. Of course if you arrange for the expense of storing, we shall be happy to hold it as long in reason as you please. Messrs H. A. & Co. write us to-day to say that they are disappointed with

* Decided 16th October 1878.

the appearance of the box sample, as it is not as good as the small postal sample they had. The tone of the wheat trade was better to-day, so we hope to satisfy you well in the sale of the wheat." For the price of the cargo at 41s., less freight and commission, Athya & Company drew bills upon Adams & Company to the amount of £3780, 0s. 8d., and these bills, with interest amounting to £91, 13s. 1d., were duly retired by Adams & Company.

The pursuers averred that they anticipated obtaining an immediate sale of the cargo ex "Margaretha" without storing, but that owing to the depressed state of the market on the arrival of the vessel they were obliged to store it. They made sales from time to time, which they duly advised. The pursuers further stated —"As markets continued dull, considerable difficulty was experienced in obtaining the price agreed on. Ultimately on 28th June, and on 1st, 5th, and 15th July 1876, the pursuers wrote to the defenders informing them that there was no reasonable prospect of obtaining the stipulated price, viz., 42s. per quarter, and asking for instructions. To these communications no answer was made by the defenders, but on 20th July the pursuers received a circular from them announcing that they had stopped payment." At length "on 12th August 1876 the pursuers, having received no answer to their former letters regarding the wheat, wrote to the defenders offering to hold the same at their disposal for some time longer on receiving from the defenders a cheque for the sum of £478, 18s. 4d., being the amount then due by them to the pursuers for charges on, and for depreciation in value of, the wheat. At the same time the pursuers intimated that unless these terms were accepted they would sell the wheat at the best obtainable price, and charge the defenders with the loss. These terms the defenders did not accept, and subsequently the pursuers, having received the instructions of the trustee, in whose favour the defenders had executed a disposition *omnium bonorum* for behoof of their creditors, sold the remainder of the wheat at the best prices obtainable by them."

The letter of 12th August 1876 and the defenders' reply on the 19th August were in the following terms:—"We have valued balance at 38s., which is rather above market value to-day. If you will hand us cheque for the amount, £478, 18s. 4d., for the charges and depreciation in value already incurred, we will hold the wheat at your disposal for some time longer; but unless this is done within seven days from this date we must sell it at best obtainable price, and claim on you for amount of loss. If you wish to hand us cheque for full amount we are out of pocket we will deliver balance of wheat to any one you like to name." To this Athya & Company replied—"In reply we cannot alter the terms of the consignment to you of the cargo p. 'J. Margaretha.'"

The pursuers accordingly sold, and the nett proceeds of all these sales amounted to £3427, 7s. 2d. This sum was payable to the pursuers by bills, and the amount of interest thereon received by the pursuers was £28, 2s. 10d. The pursuers thus claimed a balance of £395, 6s. 1d. as due to them.

The defenders in their statement of facts alleged that, induced by Adams & Company's representations, and by the assurance that the wheat would realise prices of at least 42s. per quarter, London terms, and probably much more, they had consigned the cargo in question to them on the conditions of the letter already quoted. London terms, it was explained, was an expression used and well understood in the grain trade, and meant and was used by the parties in the said transaction to denote that the sums above mentioned were to be subject to a deduction of 2½ per cent. commission and of two months' interest at 5 per cent. They further stated that they had repeatedly expressed disappointment at the results of the sales advised. Further, Athya & Company averred that between the dates of the sales and the raising of the present action the remaining wheat could have been readily sold at prices which would not only have secured the fulfilment of the contract but would have yielded a considerable profit.

In answer to the pursuers' plea of due and resting-owing, the defenders pleaded—"(1) The alleged deficiency sued for being the direct result of the pursuers' breach of contract and breach of duty as consignees or factors foresaid, the defenders are entitled to absolvitor, with expenses."

The pursuers, by minute lodged June 5, 1877, restricted their claim to £378, 10s. 1d., with interest and costs as concluded for in the prayer of the petition.

On 12th June 1877 the Sheriff-Substitute (LEES) pronounced an interlocutor finding—"(1) That the defenders on 28th February 1876 consigned to the pursuers the cargo of wheat on board the ship 'Margaretha' on the condition that against consignment the latter should advance to them 41s. per quarter of the wheat, and that they should hold the cargo for 42s. per quarter, London terms, and consult the defenders before selling it at a lower rate: (2) that in implement of this agreement the pursuers made the stipulated advance, and not having succeeded in selling the cargo before the arrival of the vessel, had it stored, and thereby incurred the expenses for unloading, storage, insurance, and the like, specified in the accounts annexed to the summons; (3) that in further implement of said agreement they tried to sell the wheat at a price to yield 42s. per quarter, London terms, on the cargo, and duly consulted the defenders before selling it at a lower rate; (4) that they did not give to the defenders any guarantee that the sum of 42s., London terms, would be realised by the sale of the cargo; (5) that so far as in their power they duly implemented the agreement they made with the defenders, but in the manner set forth on record suffered loss to the extent of £378, 10s. 1d.; and (6) that the defenders are in law bound to reimburse them for this loss," &c.; and accordingly granting decree as craved.

On appeal the Sheriff (CLARK) adhered.

The defenders appealed to the Court of Session.

In the argument submitted an important question of law was raised as to whether a factor or consignee when he has made advances to the consigners to account of goods is entitled to sell the goods, or has merely a right of lien.

Authorities referred to—Bell's Commentaries (M'Laren), ii. 91; *Broughton* v. *Stewart, Primerose, & Company*, December 17, 1814, F.C.; Story on Agency, sec. 361; *Smart* v. *Sanders*, 16 L.J., C.P. 39, 5 Man. & G. 907, *De Comas* v. *Prost*, 2 Moore P.C. Cases, N.S. 158, 11 Jur. N.S. 417, 12 L.T., N.S., 682.

In the event the Court found it unnecessary to decide that point, as will be seen from the subjoined opinions.

At advising—

Lord Justice-Clerk—I am of opinion that the advance which the factor undertook to make, and did make, was made and accepted under the conditions in the letter of the 2d March, and that letter clearly reserved power to sell even under 42s. after consulting the Glasgow firm. The Glasgow firm by accepting the advance did so on the conditions expressed in that letter. The pursuer did consult the defenders repeatedly before selling; and therefore I think they were entitled to sell as they did. Moreover, it being proved that the advance was on London terms, *i.e.*, two months and a certain amount of discount, it became a debt thereafter, and bore interest from the expiration of that date.

Lord Ormidale—In this case a question might be raised as to whether the law of England or that of Scotland applied, supposing that there be a difference between them. But we are relieved of any difficulty of that nature by the fact that there is no averment on record with regard to that, and accordingly the *lex fori* will apply. Assuming that law to be the law of Scotland, and that it is the law embodied in *Broughton* v. *Stewart*, December 17, 1814, F.C., the English house had an interest in this cargo sufficient to give them control over it.

But I agree with the Lord Justice-Clerk that this case must be taken on its own special lines, and must be decided according to the views which emerge on a careful consideration of the correspondence between the pursuers and defenders. Throughout I have been unable to adopt any other opinion of the case than that it turned upon the nature of this contract. Was the contract or was it not such as to entitle Adams & Company to sell the wheat at the time at which they did so, and in the way in which they did?

I do not think that it by any means follows that a case involving the construction of many written documents, the meaning of which is to be made clear, necessarily is a case for a jury, but here there is no suggestion of any technical matter, and the whole point turns upon the correspondence. It seems to me that a jury would have been the best tribunal to decide upon its import. Now, looking at the correspondence, what did Adams & Company mean by the words "without consulting you?" No doubt the words are ambiguous, but still we must answer the question by making an inference drawn from the facts. The words are very different from "without your authority." Nothing can be fairer in tone and manner than the whole correspondence on the part of Adams & Company. I think that they were only obliged to hold this wheat for a reasonable time, and that they amply fulfilled that obligation.

Lord Gifford—I am of the same opinion, and much upon the same grounds. Very difficult questions of law were raised as to the rights of the consignee to sell, he having made advances to the consigner, but I feel very much relieved, along with your Lordships, that we are saved from having to go into those legal questions.

The action is one by a factor (who has made advances on security of a consignment) for the unpaid balance of his advance. Is this, then, a debt, or is it not? I think that the very meaning of the word "advance" is that it is a loan to be repaid. It is made usually upon double security, for, in the first place, there is the personal security of the debtor, and secondly, there is the additional security of the goods consigned. The next question we have to consider is, When is this advance, being a loan, to be repaid? I think that in the present case the advance was to be repaid out of the price brought by the goods themselves, or else within two months, for "London terms" means sixty days. The realisation would, it was thought, be effected within sixty days, and I am of opinion that after those sixty days had expired there would be good ground of action.

What, then, is the defence? Practically that there is no loan, and no obligation to repay. The defenders here have failed to establish any premature or unwarrantable sale of the wheat; even the words "without your consent" would have only borne the meaning that so long as the transaction was running they would not sell; but those are not the words used, and still less could a meaning such as contended for by the defenders be attached to the words "without consulting you." We find letter after letter from Adams & Company pressing Athya & Company to sell at a slight loss. I concur entirely in your Lordship's views.

The Court dismissed the appeal, with expenses.

Counsel for Pursuers (Respondents)—Balfour—Mackintosh. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Defenders (Appellants)—Trayner—Asher. Agents—Frasers, Stoddart, & Mackenzie, W.S.

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* *Wednesday, October 23.*

SECOND DIVISION.

[Lord Young, Ordinary.

PERTH SCHOOL BOARD *v.* MAGISTRATES AND TOWN COUNCIL OF PERTH.

School—Education (Scotland) Act 1872, *sec.* 46—*Burgh—Customary Contribution.*

The 46th section of the Education (Scotland) Act 1872, provided *inter alia*, that the town council of every burgh should pay each year to the School Board whatever sum it had been its "custom" prior to the passing of the Act to contribute to the burgh school out of the common good of the burgh to be administered for the promotion of higher instruction. *Held* that that section of the Act applied to all cases where a contribution had been in use to be made, and not only to those where a sum had been by custom contributed of an invariable amount or for the prescriptive period, and that the sum to be fixed in future was the average annual expenditure taken for a period, say of ten years, immediately preceding 1872.

Observed that the object of the Education (Scotland) Act 1872 was to leave the funds of the burghs neither better nor worse than before, so far as they were applied to educa-

* Decided October 19, 1878.