

that he would be quite prepared to adopt the course suggested by the Court, but the effect of that would be to leave standing against the prisoner the plea of guilty which he had tendered. He suggested that reading the 31st section of the statute along with the 41st, the accused might in the circumstances be permitted to withdraw the plea.

The Advocate-Depute then intimated that he desired to withdraw the libel in the case, which he did by the following minute:—"I hereby withdraw the libel. (Signed) J. CAMPBELL LORIMER, A.-D."

LORD JUSTICE-CLERK—In that view, the prisoner having wished to withdraw his plea, I shall allow the plea to be withdrawn from the record, and the diet will be deserted *simpliciter*.

The Court dismissed the panel from the bar, having in respect of the withdrawal of the libel allowed him to withdraw his plea.

Counsel for the Crown—Campbell Lorimer, A.-D. — Reid, A.-D. Agent—Crown Agent.

Counsel for the Panel—Guy. Agent—Dobie & Scott, S.S.C.

## COURT OF SESSION.

Wednesday, January 10.

### FIRST DIVISION.

[Sheriff of Ross, Cromarty, and Sutherland.

#### LANG v. CAMERON.

*Contract — Barter — Pactum illicitum — Weights and Measures Act 1878 (41 and 42 Vict. c. 49), sec. 19.*

Held that a contract of barter, wherein one party bargained for delivery of 600 stones of hay at 24 imperial pounds the stone, was not void under the provisions of the Weights and Measures Act 1878.

Major Lang brought an action in the Sheriff Court at Dornoch against Alexander Cameron, farmer, craving the Court to ordain the defender to deliver him 600 stones of hay, each stone to consist of 24 imperial standard pounds avordupois, or otherwise to pay him £32, 10s.

The pursuer averred that on 18th October 1892 the defender had sold him 600 stones of hay, each stone to consist of 24 imperial pounds, and 2½ quarters of oats, and that in exchange he had sold the defender a black pony.

The defender stated that what he had undertaken to give was 2½ quarters of oats and 600 stones of hay. He had delivered the oats, and was prepared to deliver 600 imperial stones of hay, but the pursuer declined to take the same.

The defender pleaded, *inter alia*—" (4) The bargain, as stated by pursuer, being

contrary to law, could not, even if admitted by defender, be enforced, and the action ought to be dismissed as irrelevant."

On 21st March 1873 the Sheriff-Substitute (MACKENZIE) repelled the defender's 4th plea, and allowed a proof.

The result of the proof was as follows:— The pursuer deponed—"I told the defender I had a pony for sale, and I asked if he would give me £40 for it. He replied that he had no money, and had no use for a pony. I then suggested that I would take hay instead of money for the pony. . . . He entertained this offer, and he further undertook to retain the hay for me until I should ask delivery of it. . . . While we were bargaining about the quantity of hay I was to get, Mr Mackintosh remarked, 'Gentlemen, you know the number of pounds to the stone for which you are dealing?' My reply was—'Of course I do, 24 pounds to the stone.' The defender made no objection, so I understood him to acquiesce. The defender took part in a discussion then started as to the number of pounds in the Ross-shire stone. After this discussion the defender agreed to give me 600 stones of hay and 2½ quarters of oats in exchange for the pony."

John Mackintosh deponed—"Before the parties fixed upon the number of stones of hay to be given, I intervened and said, 'I suppose, gentlemen, you know what a stone of hay in Sutherland implies—24 lbs. go to the stone of hay.' The pursuer then remarked, 'Certainly, 24 lbs.' I then discussed with the defender the number of pounds of hay which went to the stone in the counties of Caithness and of Ross. . . . The parties after this discussion agreed upon the quantity to be given the pursuer, and fixed it at 600 stone."

The defender deponed—"When the pursuer wanted me to buy his pony I offered him £25 in cash, but he refused this, and said he would not take less than £35. He then said he would take hay or corn, and wanted 700 stones of hay. At this stage the previous witness, John Mackintosh, made the remark, 'You know, gentlemen, what sort of bargain you are making?' to which the pursuer replied, 'Decidedly I do—24 pounds to the stone.' Mr Mackintosh and I then discussed the number of pounds in the stones of Caithness, Ross, and Inverness. The pursuer and I then agreed that he was to get 600 stones of hay and 2½ quarters of oats. There was nothing said between the pursuer and me that these 600 stones of hay were each to be of the weight of 24 lbs."

On 9th May 1893 the Sheriff-Substitute (MACKENZIE) found that the pursuer had failed to instruct (1) that in the bargain between him and defender each stone of hay was to consist of 24 pounds, or (2) that the defender ever undertook to deliver 600 stones of any other than the imperial weight; and found therefore that the defender's offer to deliver 600 pounds of hay imperial weight was in due implement of his bargain, and ordained him to give, and the pursuer to take, delivery of that amount.

The pursuer appealed, and on 5th June the Sheriff (JOHNSTON) pronounced this interlocutor—"Recalls the interlocutor of the Sheriff-Substitute appealed against: Finds that on 18th October 1892 the pursuer and defender entered into a verbal bargain of exchange or barter, whereby the pursuer undertook to give his horse, and the defender undertook to deliver in exchange 2½ quarters of oats, and 600 stones, each stone to weigh 24 imperial lbs., of hay from a stack on his farm of Drummie, Golspie: Finds that the defender thereby undertook to deliver 600 times 24 imperial lbs., or 14,400 imperial lbs. of hay, and that said bargain *quoad* the defender's part was therefore for a multiple of an imperial weight, as ascertained by the Weights and Measures Act 1878: Finds that the pursuer has implemented his part of the bargain by delivery of his horse, but that the defender has failed to implement his part of the bargain by delivering said quantity of hay: Therefore repels the second and fourth pleas-in-law for the defender: Ordains him to deliver to the pursuer within fourteen days from intimation hereof 600 times 24 or 14,400 imperial lbs. of hay from his stack situated on the farm of Drummie foresaid, &c.

"*Note.*—The first question in the case is, what was the contract of parties? I have no doubt that they bargained for a stone of 24 lbs. weight.

"The evidence does not accurately tally, but I take the defender's own version. He says that Mr Mackintosh interposed with 'You know, gentlemen, what sort of bargain you are making,' and the pursuer replied, 'Certainly I do; 24 lbs. to the stone.' This, then, on the defender's admission was, from the pursuer's point of view, the preliminary to or basis of a 'bargain.' The defender did not, on his own showing, contradict this, and I believe Mackintosh, when he says—'The pursuer addressed himself to the defender and me, but for the defender's benefit, as I thought, so that there might be no misunderstanding.' The defender cannot, in my opinion, ride off on the idea that he kept silence. There are occasions in which silence imports consent, and I think this was one. If he meant to proceed to a bargain on a different basis, he ought to have contradicted the pursuer.

"I will do the defender the justice to say that I do not believe that he contracted at the time for anything but 24 lbs. to the stone, or intentionally kept silence in order that he might have this card up his sleeve to play when necessary. If he did so, he was simply dishonest, and I do not wish to impute such dishonesty to him. I think he has been put up to the idea since.

"I say so because (1) £25 to £27 was the sum the defender offered in cash for the horse; (2) he offered at one time to pay £27, 10s. in lieu of delivery. Both these figures fairly correspond to the value of the hay at a 24 lb., but not a 14 lb. stone; and (3) his letter of 8th February is only intelligible if it means, 'As I find the horse unsound I won't pay in full of our bargain, but I will take shelter behind the technical

plea which I have learnt that the law enables me to take.' The law may enable him to commit an act of dishonesty. But this letter satisfies me of what was the honesty of the bargain.

"The next question is, does the law make the bargain illegal? This depends upon the 19th section of the Weights and Measures Act 1878. If the bargain had been in so many words by the 'Sutherland stone,' I should have had no doubt that it would have been struck at by the statute, but when I find that the bargain was truly and expressly for a multiple of imperial lbs., I cannot think that the fact that the parties conventionally term that multiple a 'stone' is enough to void the contract. They might just as well have said 24 stones of 600 lbs. each, in which case, as no local stone happens to weigh 600 lbs., there would, I imagine, have been no question. I find no authority on the effect of the Act of 1878, but may refer to *Alexander v. M'Gregor*, June 24, 1845, 7 D. 915, decided under the previous statutes."

The defender appealed, and argued—The evidence did not establish that the bargain was for delivery of 600 "Sutherland" stones of hay at 24 lbs. the stone. But if it did the contract was void under sec. 19 of the Weights and Measures Act, for then it was a sale by the "Sutherland" stone, and local weights were struck at by the Act—*Robertson v. Gows*, June 25, 1858, 20 D. 1170.

The pursuer was not called on.

At advising—

LORD PRESIDENT—I think the Sheriff is right. He proceeds on findings in fact which give rise to no difficulty as regards the Weights and Measures Act 1878. He holds that the bargain was that the defender should deliver 600 stones of hay, each stone to weigh 24 imperial lbs. In my opinion that view is well founded in the evidence. The defender himself says that in the course of the negotiations the witness John Mackintosh said—"You know, gentlemen, what sort of bargain you are making?" to which the pursuer replied—"Decidedly I do; 24 lbs. to the stone." It is true that these words were uttered, not by the parties, but by an intermediary; but it is shown conclusively that the statement was consented to by both the parties, and formed not only an integral part of the bargain but the bargain itself. Was the bargain illegal? Nothing was said at all about a local stone forming the basis or standard of the transaction, and in my opinion it was nothing but a sale by an imperial measure, namely, the pound.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer—Dundas—P. J. Blair. Agent—Andrew Urquhart, S.S.C.

Counsel for the Defender W. Campbell—Salvesen. Agents—Macpherson & Mackay, W.S.