

not attempted to be made until the year 1863. What, therefore, is attempted to be set up as the consideration for the deed of locality, or as something on which the widow may fall back if deprived of the deed of locality, turns out to have been evacuated entirely on different grounds, and therefore cannot be prayed in aid of the inefficient and ineffectual deed of locality.

Now these things are so well explained in the very excellent judgment given by Lord Curriehill, that I should have thought that judgment would have been satisfactory to every Scotch lawyer. I regret this appeal—and I am sorry that this is a case of a widow, but I am glad to say a widow by no means destitute of a living. On the contrary, I believe she is well provided for. And as to costs, we must abide by the ordinary rule. The appeal must be dismissed, and dismissed with costs.

LORD COLONSAY.—My Lords, I have really nothing to add to the observations which have just been made by my noble and learned friend. I think the flaw in the whole case of the appellant is assuming this to be a faculty, which it is not.

Interlocutors affirmed, and appeals dismissed, with costs.

Agents for Appellants—Hunter, Blair & Cowan, W.S., and Loch & Maclaurin, Westminster.

Agents for Respondent—James Dalgleish, W.S., and William Robertson, Westminster.

SPRING CIRCUIT.

A Y R.

Tuesday, April 5.

H. M. ADVOCATE *v.* M'CONNELL.

(Before Lords Justice-Clerk and Cowan.)

Indictment—Theft. A prisoner, charged under an indictment which libelled "theft," without any specification of the nature of the act, was proved to have feloniously appropriated four sheep which had been handed over to him by mistake, along with a number of others which he had been ordered to drive to his master's farm. *Opinion* of Lord Cowan, that the libel had sufficiently set forth the case proved by the evidence.

John M'Connell was charged with the crime of sheep-stealing under the following indictment, viz.:—"That albeit, by the laws of this and of every other well-governed realm, theft, particularly sheep-stealing, is a crime of an heinous nature, and severely punishable: Yet true it is and of verity, that you the said John M'Connell are guilty of the said crime, actor, or art and part: in so far as, on the 11th day of November 1869, or on one or other of the days of that month, or of October immediately preceding, from or near a field called or known by the name of 'Barlaugh Park,' forming part of the farm of Drumore, in the parish of Kirkmichael, and county of Ayr, then and now or lately occupied by Patrick Wyllie, farmer, then and now or lately residing at Drumore

aforsaid, or from some other part or parts of said farm, or from some part of the farm of Barlaugh, in the parish of Maybole, and county aforsaid, to the prosecutor-unknown, or at or near to the village of Dailly, in the parish of Dailly, and county aforsaid, you the said John M'Connell did, wickedly and feloniously, steal and theftuously away take four or thereby sheep, the property or in the lawful possession of the said Patrick Wyllie."

Evidence was led by the Crown to the following effect. M'Connell, who was a cattle-drover, was employed by his master to go to the farm of Barlaugh and drive from it 117 sheep, the property of his master, and which had been grazing there. He arrived at Barlaugh; and the sheep having been counted, were delivered over to him. The accused did not count the sheep at the time they were handed over to him; and it did not appear from the evidence at what time he discovered that instead of 117 sheep he had received 121. It was proved, however, that he had delivered to his master only 117 sheep, and that he had appropriated the other four to himself, and sold them.

At the conclusion of the evidence,

BUNTINE moved, on the authority of the case of *H.M. Adv. v. Douglas*, H. C., Jan. 23, 1865, 37 Jur. 354, that the case should be withdrawn from the Jury, on the ground that the prosecutor had not proved the species of crime which he had charged in the indictment. The prosecutor had libelled "theft" simply, while he had attempted to prove the prisoner guilty of a very peculiar kind of theft, viz., the felonious appropriation of strayed sheep, or the felonious appropriation of sheep which had been intrusted to him for a specific purpose, either by mistake or design. If the prosecutor had intended to prove that species of theft, it was his duty to have made more specific allegations in the indictment.

LORD COWAN thought that the case should go to the Jury.

LANCASTER, A.-D., argued that the crime proved against the prisoner was theft, not breach of trust, and claimed a verdict of guilty.

BUNTINE repeated his former arguments, and urged that the case of *Douglas* was a conclusive authority in his favour. In that case the prisoner was charged simply with theft of sheep, as in this case. The evidence showed that the prisoner had feloniously appropriated strayed sheep, and the Lord Justice-Clerk there remarked, that when that particular and peculiar kind of theft was intended to be charged the panel was entitled to have "the facts constituting it fully set forth" in the libel. Whatever the crime proved here was, it was not the simple kind of theft, viz., the feloniously taking the property of another out of his possession.

LORD COWAN, in his charge to the Jury, said—That, in his opinion, the case of *Douglas* was not analogous to the present case. Here by a mistake the prisoner had been given the custody of certain sheep, and he had feloniously appropriated them; and that by doing so he committed theft, and theft was properly libelled in the indictment.

The Jury found the prisoner guilty.

Agent for Defender—James Robertson, Girvan.