The Lord Ordinary (JERVISWOODE) allowed parties a proof before answer of their respective averments, the defender to lead.

The pursuer reclaimed.

WATSON and MACLEAN, for him, argued that the averments of the defender ought not to be admitted to probation either before answer or otherwise. The defender cannot found upon any alleged understandings of parties before the minute. These are entirely out of the field. It is not disputed that the minute is a binding and concluded agreement. The statement might be relevant in an action for setting aside the contract of sale on the ground of error or fraud; but they have no relevancy in this action. The pursuer is entitled to a disposition in terms of the minute; and when he has got his disposition there is nothing to prevent him selling, subject, of course, to the conditions. The interlocutor of the Lord Ordinary should be recalled, and a draft disposition ordered to be lodged.

SOLICITOR-GENERAL and ASHER, for the defender —The pursuer has got the ground subject to an obligation to put it to a certain use. He has disclosed on record that it is not his intention to put it to that use. He has shown this by selling the ground as unrestricted ground to the Clyde Navigation Trustees, who have no power by their statute to erect workmen's houses.

The Court pronounced the following interlocutor: —"Recal the interlocutor of the Lord Ordinary, and, before answer, appoint pursuer to lodge a draft of the disposition which he proposes that the defender should execute, reserving all questions of expenses.

Agents for Pursuer—Maconochie & Hare, W.S.
Agents for Defender—J. & R. Macandrew, W.S.

Saturday, July 8.

HENDERSON *v.* DAVIDSON.

Sale—Contract—Nullity—Weights and Measures—Statutes 5 Geo. IV. c. 74, and 5 and 6 Will. IV. c. 63. Orders were given for meal by the boll. The meal was delivered and accounts rendered at so much per stone. *Held* that the contract was not null under the Weights and Measures Acts.

This was an appeal under the Debts Recovery (Scotland) Act 1867, from the Sheriff-court of Caithness, &c.

James Henderson, Pulteneytown Mills, Wick, sued David Davidson junior, fishmonger, for £45, 5s. 6d., being the balance of an account for meal.

The defender admitted that he gave orders to the pursuer to furnish meal to sundry fishermen, and that the account was rendered, but claimed credit for £30, 1s., alleged to have been paid to account.

At the proof the pursuer produced the orders. The defender requested time to examine them, and craved a continuation for that purpose. He led no evidence in support of his statements. The Sheriff-Substitute continued the case till next Court-day, and then, the defender failing to appear, circumduced the term of proof, and pronounced an interlocutor decerning against the defender for the sum concluded for.

"*Note*—It is very seldom that furnishings made in the course of trade, in addition to being duly entered in duly-kept books, are so verified as by the productions and proof furnished by the pursuer in this case. An opportunity was given to the defender to examine and redargue the evidence thus supplied, but he has been confessedly unable to impugn the same."

The defender appealed.

The Sheriff (THOMS) altered, and found the defender only liable in payment of £14, 2s. 3d.

The grounds of the Sheriff's judgment were—(1) that all the orders were not proved to have been signed by the defenders; (2) that none of the orders refer to stones, while the entries in the account refer mostly to stones, and the rest to sacks; (3) that 22 of the orders refer to bolls, which is not an imperial measure, and the contracts thereby evidenced are null under 5 Geo. IV. c. 74.

The pursuer appealed.

MACKINTOSH for him.

BURNET and M'KECHNIE for the defender.

At advising—

LORD PRESIDENT—The judgment of the Sheriff cannot be supported. I see no justice in it, nor good law either. The objection that the contract was illegal under the Weights and Measures Act is quite untenable. The contract was completed by delivery of the meal, rendering of the accounts by the pursuer, and acceptance of the accounts by the defender without objection. In the accounts the meal is charged at so much the sack or stone. The Sheriff seems to think that the pursuer was not justified, or at least that he has not proved that he was justified, in sending the quantities of meal which he did, because it is not proved that the quantities sent corresponded with the quantities ordered. The answer to this is, that the account was several times rendered, and no objection taken. He had a very good opportunity in the proceedings before the Sheriff-Substitute. He takes time to look through the orders, and never appears again; a practical confession that he had no good defence. The same answer applies to the objection that it is not proved that the orders were signed by the defender. He was in the witness box, and he never denies his signature. The Sheriff-Substitute is quite right.

LORD DEAS—I concur, both as to the question under the Weights and Measures Acts and as to the merits. The defences are stated by the defender himself, and that makes them all the more valuable in ascertaining the facts. He admits that the account was rendered as far back as September 1866, and twice subsequently; that during the whole of that time he never made any objection, except one which strengthens the pursuer's case. He sends back the account on one occasion, not to make objections to it, but in order that credit might be given for alleged payments; which payments he has failed to prove.

LORDS ARDMILLAN and KINLOCH concurred.

The Court recalled the interlocutor of the Sheriff, and found the defender liable in expenses in both Courts.

Agents for Pursuer—Horne, Horne & Lyell, W.S.
Agent for Defender—John A. Gillespie, S.S.C.

Saturday, July 8.

GREENOCK AND WEMYSS BAY RAILWAY COMPANY *v.* CALEDONIAN RAILWAY COMPANY, *et e contra.*

Railway — Administration — Tolls — Rates — Joint Committee. The Wemyss Bay line commences at a point on the Caledonian line near Port-Glasgow, and terminates at Wemyss Bay, and is worked by the Caledonian Co. *Held*, on a sound construction of the Greenock and Wemyss Bay Railway Act 1862, and agreement between the Wemyss Bay Co. and the Caledonian Co., confirmed by the Act, that the powers of a joint committee of the two companies therein provided do not extend to the regulation of the tolls and rates to be charged on through traffic from Glasgow to stations on the Wemyss Bay line, but only to those to be charged on the Wemyss Bay Railway.

The Greenock and Wemyss Bay Railway Company were incorporated by the "Greenock and Wemyss Bay Railway Act, 1862." By that Act they were authorised to make a railway from a point on the Greenock section of the Caledonian line, about half a mile west of the Port-Glasgow station to Wemyss Bay, and a pier and roads in connection therewith. By the Act the Caledonian Railway Co. were authorised to contribute to the undertaking to the extent of one-fourth part of the whole capital of the Greenock and Wemyss Bay Railway Co. The preamble sets out that the said "railway and other works may be beneficially worked in connection with the railways of the Caledonian Railway Co., and that company are willing to work the same; and it is expedient that provision should be made for that purpose, and also with regard to the interchange of traffic on the said respective lines of railway." Prior to the passing of the Act, an agreement was entered into between the promoters and the Caledonian Railway Co. in relation to the construction and maintenance of the railway and works, the working and management of the traffic thereon, the fixing and apportionment between the companies of tolls, rates and charges, and other matters in connection therewith. This agreement was sanctioned and confirmed by the Act, and is printed in a schedule attached thereto. By this agreement it was provided that as soon as the railway pier, road, and other works had been completed by the complainers to the satisfaction of the Caledonian Railway Co., approved of by the Government Inspector, and opened to the public for traffic, the Caledonian Railway Co. should take possession of the said railway, pier, and roads for the purpose of working the same in perpetuity, and should provide the necessary rolling stock and plant of every kind for the purpose of effectually working the traffic on the same. Article 11 of the agreement provides, "that the traffic on the Greenock and Wemyss Bay Railway and pier, including the fixing of the tolls, duties, rates, and charges to be levied or taken in respect of the said traffic, shall be managed and fixed by a joint committee consisting of six persons, three of whom shall be named by the board of directors of the Caledonian Railway Co., and three by the directors of the Greenock and Wemyss Bay Railway Co.; the Caledonian Railway Co. having the appointment of the chairman of said company, but who shall have no casting vote, and all differences of opinion where the committee shall be equally divided, shall be referred to arbitration; declaring that, during the first year of the subsistence of the said agreement, three passenger trains and one goods train each way per diem between Glasgow and Wemyss Bay, at least, shall be placed upon the said railway, and should it afterwards be found by the joint working committee that the traffic warranted and required it, an additional number of trains should thereafter be placed upon the line, but the Caledonian Railway Co. should be the sole judges of the proper times for starting the said trains." It is farther, by article 18, provided that all differences which might arise between the parties respecting the true meaning or effect of the agreement, or the mode of carrying the same into operation, should be referred to arbitration in terms of "the Railway Clauses Consolidation (Scotland) Act, 1845."

A joint committee was appointed in 1865 in terms of the Act. The Caledonian Railway Co. have, since the opening of the Wemyss Bay Railway in 1865, worked the traffic on that line under the agreement, charging from their line between Glasgow and Port-Glasgow to the stations of the Wemyss Bay Railway certain through rates and charges. The Caledonian Co. informed the joint committee on 14th April, and the Wemyss Bay Co. on 19th April 1871, that they had resolved to terminate the existing through rates and division thereof as to passengers from 1st May 1871, and that it would therefore be for the joint committee to enter into new arrangements with the Caledonian Co. for these purposes, and particularly to fix what rates are to be applicable to the Wemyss Bay line, which, being added to the Caledonian rates, may enable that company to fix through rates, in case other through rates are not agreed to between the two companies. At a meeting of the joint committee, held on 26th April 1871, the Wemyss Bay Co.'s representative denied the right of the Caledonian Co. to alter the through rates without the consent of the joint committee. It was thereupon moved by two of the Caledonian Co.'s representatives that it was proper for the joint committee 'to fix the amount of new rates or fares to be exacted as on and from 1st May in respect of the Wemyss Bay Railway,' and that certain rates stated should be fixed for that month, and should continue until altered. For the Wemyss Bay Co. it was stated that the Caledonian Co. had no right to alter the existing through rates between their railway and the Wemyss Bay Railway and the division thereof, and it was moved as an amendment 'that the present through rates and division thereof shall continue until altered by the joint committee.' The representatives of the Caledonian Co. on the committee protested that this amendment raised a question not within the jurisdiction of the joint committee, and that it was incompetent. On a vote being taken, the joint committee, which consists of an equal number of directors of each company, was equally divided. Thereupon arbitration was claimed, on the motion for the Caledonian Railway Co., in terms of the 11th article of the agreement.

Each company proceeded to nominate an arbiter on their own construction of the agreement, and to call upon the other company to appoint an arbiter on their part. The Caledonian Railway Co. maintained that the joint committee had only