a period of seven or eight years, and after seven or eight years they now come forward and raise this litigation.

LORD CHANCELLOR.—I think there should be no costs.

Interlocutor reversed with a declaration, and cause remitted.

Appellants' Agents, Jollie, Strong, and Henry, W.S.—*Respondents' Agents*, J. B. Douglas, W.S.

JULY 29, 1856.

WILLIAM DIXON and WILLIAM JOHNSTON, *Appellants*, *v.* GEORGE HINTON BOVILL (Trustee for Messrs. Balls), *Respondent.*

Obligation—Writ *in re Mercatoriâ*—Act 1696, c. 25—Iron Scrip—Assignation—Retention—Stamp—*D. a trader granted the following document to S. and Son, in London:—"Glasgow, 10th July 1849.—I will deliver 1000 tons No. 1 pig iron free on board here when required, after the 10th day of September next, to the party lodging this document with me. (B. 151.)" (Signed) "For* WILLIAM DIXON, JOHN CAMPBELL." *S. and Son sold to B. and Co., and received the price. S. and Son became insolvent after the period for delivery of the iron had elapsed, but before it actually was delivered, and their bills in payment of the price were dishonoured.*

HELD (affirming judgment), *That though the document was invalid, yet D., the original seller, had no claim of retention against the holder after the period specified for the delivery in the document had elapsed, because by a new engagement he had accepted B. and Co. as the party at whose order the iron would be delivered.*

Iron scrip is not, like a bill of exchange, a negotiable instrument.[1]

The defenders appealed, pleading, that, 1. The original vendor of a subject was not bound to deliver it to a sub-vendee where the price had not been paid by the original vendee. 2. The document being blank in the name of the party to whom it was originally granted, was null, in virtue of the Statute 1696, c. 25. 3. Even if the document were valid in favour of the party to whom it was originally granted, it was not a negotiable document, and any right which might be held to be constituted under it could not pass to a third party by mere delivery, but required to be transferred by a conveyance in his favour. 4. The original vendee not having paid the price to the appellant, but having merely granted a bill for it, the appellant was entitled to retain the subject on the original vendee becoming insolvent, notwithstanding that the bill which had been granted for the price was not then due. Ross's Leading Cases in Commercial Law, ii. 658, 591, 648, and 662; *Leslie* v. *Robertson*, M. 1397, *et seq.*; *Brand* v. *Anderson*, M. 1679; Ross's Leading Cases in Commercial Law, ii. 646.

The respondents maintained, that, 1. The cause having been remitted by the Court of Session to be tried by a jury, and having been withdrawn from the jury, and submitted for the decision of the Court, the interlocutors pronounced by the Court of Session cannot be made the subject of appeal to your Lordships' Most Honourable House. 2. The undertaking granted by the appellant being by its terms transmissible from hand to hand, so as to entitle the holder to delivery of the iron mentioned free from all claims at the instance of Dixon against the parties to whom he originally delivered it, the respondents, as the holders of the scrip for value, were entitled, on lodging the same, to demand and receive delivery of the iron from Mr. Dixon. 3. The undertaking having been, in point of fact, granted by Dixon and received by Smith and Son, on the distinct understanding that the right to demand delivery of the iron should pass to any person to whom the undertaking might be given, the appellant was barred from objecting to make delivery, and must be held to have undertaken, that delivery of the iron should be given to the party who lodged the undertaking with him, irrespective of his (Mr. Dixon's) claims against Smith and Son; and the respondents, as representing Balls and Son, who lodged the undertaking with Dixon, were therefore entitled to enforce delivery from him. 4. By the letter of 4th September 1849 Dixon entered into a new engagement with Balls and Son personally to ship the iron on their lodging the undertaking, and they having sent the undertaking, Dixon was bound to deliver the iron under such new engagement. 5. In any view, Balls and Son having intimated their right to the scrip, and lodged it with the appellant, and demanded delivery—before the date of payment of any debt due to him by Smith and Son, or before any claim of retention was competent to him against Smith and Son in respect of their insolvency—the

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[1] See previous report 13 D. 1029; 26 Sc. Jur. 284. S. C. 3 Macq. Ap. 1; 28 Sc. Jur. 684.

16 D 619

appellant was bound to deliver the iron to Balls and Son. 6. The appellant having required Balls and Son to lodge the undertaking with him, in order that delivery might be given to their order, and having thereafter agreed to give such delivery, was not now entitled to refuse delivery in respect of a claim against Smith and Son.

Sir F. Kelly Q.C., and *Rolt* Q.C., for the appellants.—The question is, whether, by the law of Scotland, the holder or indorsee of a document of this kind, called iron scrip, can maintain an action in his own name, on the document, against the original seller or granter? We contend that he cannot. The document is in terms a promissory note for the delivery of iron. The only case in which an assignee has power to sue in his own name for the benefit of the contract, and in which the right of action runs, as it were, with the paper on which the original contract is written, and passes from hand to hand, is a bill of exchange, and that is a document for the payment of money. A bill of exchange is the creature of mercantile usage and custom, and is a well-known exception to the general rule. A promissory note does not, at common law, confer the same privilege on the holder to sue in his own name; and it required the authority of a statute (3 and 4 Anne, c. 9) to extend the exception to notes. The law in Scotland is the same, and it required a statute to extend the privileges of a bill of exchange to promissory notes.—12 Geo. III. c. 72, § 36. If, therefore, a promissory note for the payment of money required a statute to enable the bearer to maintain an action against the maker, *multo fortiori* does it require a statute to enable the holder or indorsee of a promissory note for the delivery of goods. There is no allegation of any custom of merchants to support the action, and, indeed, such documents as iron scrip were quite unknown until railways came into use. The policy of the law has always been against extending the privileges of bills of exchange to other documents, as that would encourage the wildest speculation. Whatever, therefore, may be the effect of this document, it could at most give rise to a right of action on the part of the original grantees, viz., Smith and Son, and the pursuers Balls and Son can only stand in the shoes of Smith and Son. As, however, the latter became insolvent before the time when the iron became deliverable and the seller had not parted with the possession, and the price had not been paid, the seller was not bound to deliver.—*M'Ewan* v. *Smith*, 6 Bell's Ap. 340; *England* v. *Davidson*, 11 A. & E. 856; *Townley* v. *Crump*, 4 A. & E. 58; *Bloxham* v. *Sanders*, 4 B. & C. 941. It makes no difference in such a case, that a bill of exchange was given for the price.—*Graves* v. *Key*, 3 B. & Ad. 313; *Miles* v. *Gorton*, 4 Tyr. 295; 2 Cr. & M. 504. Even assuming the document valid, the appellant was not bound to deliver the iron in parcels, as he engaged to deliver only one thousand tons at a time. Independently of the argument on which we most rely, namely, the invalidity of the instrument at common law, it is also invalid under the Statute 1695, c. 25, which enacts, that "all deeds (*i. e.* including writings) subscribed blank" in the name of the grantee are null, except only bills of exchange or the notes of a trading company. This document ranks neither among bills of exchange nor notes of a trading company, which were well known instruments at the time of the statute; but the present document is of quite recent introduction. It is said that it may rank among bills of exchange and notes, for these used formerly in Scotland to be granted for delivery of commodities instead of money, but the following cases disprove that assertion:—*Leslie* v. *Robertson*, Mor. 1397; *Douglas* v. *Erskine*, M. 1397; *Bruce* v. *Maxwell*, M. 1399;—the document in such cases not being blank in the name of the original grantee. It cannot be said that the document is excepted from the statute on the ground that it is *in re mercatoriâ*, for the latter distinction refers merely to the probative quality of the document, and a document may be exempt from the strict rules of probation, and yet null under this statute. But this document cannot be considered as *in re mercatoriâ* at all, being quite unknown to commerce, and having no custom or usage to support it.

Solicitor-General (Bethell), *Anderson* Q.C., and *Bovill* Q.C., for the respondent.—1. We object to the competency of this appeal. By the minute of agreement drawn up at the trial, the parties consented to withdraw the case from a jury, and to refer it to the Court as arbitrators. This result necessarily follows from the cases of *Craig* v. *Duffus*, 6 Bell's Ap. 309, and *Dudgeon* v. *Thomson*, *ante*, p. 403; 1 Macq. Ap. 714; 26 Sc. Jur. 626. The moment an interlocutor was pronounced sending the cause to a jury trial, the case was put on the same footing as the cases enumerated by the statute; *Montgomery* v. *Boswell*, 1 M'L. & Rob. 136; and the only mode then left, if any, of getting rid of a jury trial, was to get that interlocutor discharged. That not being done and the cause going to a jury trial, and then being withdrawn from the jury, and submitted to the Court, the parties thereby deprived themselves of the power of appealing against their decision. It is impossible to draw any line between this case and *Dudgeon* v. *Thomson*. 2. As to the merits. It is said this is a contract only with Smith, but the engagement is one to deliver iron to whoever produces the document. It was well known that in Scotland no consideration was necessary to support a simple contract, in which respect the law differs from that of England.—Bell's Prin. § 8. This is not in terms, therefore, a contract with Smith in particular, but with the holder of the document, from whom it was not necessary that any consideration should flow. It is a self-subsisting document, and is complete evidence of a promise to the holder. It is said this kind of document is against the policy of the law, and leads to gambling,

but it seemed rather to promote the convenience of commerce, and was in harmony with general principles.—Ersk. v. 3, 5. Even in England it is by no means clear that an action could not be maintained on such a document. Thus, if one offer a reward by advertisement, the person answering to the requirements may sue for it, for in that case it is a sort of contract *cum omnibus*.—See *Haigh* v. *Brookes*, 10 A. & E. 309. It would be strange if the party signing such an engagement could escape the obvious consequence of it. So the holder of railway scrip has been held entitled to the benefit of the document.—See *Shaw* v. *Fisher*, 2 De G. & Sm. 11; *Wynne* v. *Price*, 3 De G. & Sm. 310; *Young* v. *Smith*, 4 Rail. C. 135; *Midland Great Western R. Co.* v. *Gordon*, 5 Rail. C. 76. In *Georgier* v. *Melville*, 3 B. & C. 45, whoever was the holder of a certain bond, was found entitled to a certain sum of money named therein. There has been no authority cited from the law of Scotland to shew, this is not a valid engagement in the hands of the holder. It is useless to resort to vague notions about the policy of the law being hostile to this kind of instrument. It was once thought in England illegal, and against public policy, for a person to sell goods not *in esse*, but it is now settled otherwise; and it required an express statute to render stockjobbing transactions illegal, thereby shewing, that, but for such statute, they would be legal.—See *Hebblethwaite* v. *M'Morine*, 5 M. & W. 462; *Mortimer* v. *M'Millan*, 6 M. & W. 58. In a recent case in Scotland, the great majority of the Judges have decided that there is no illegality whatever, but that the holder of this kind of document is entitled to sue for delivery of the iron.—*Dimmack's case*, 28 Sc. Jur. 362. The very terms of the delivery order were quite independent of any contract with Smith, and it is no answer to the holder asking for delivery, that Smith had not paid the price, for payment was not made a condition precedent. The cases cited by the other side as to the right of retention are inapplicable. In *Macewan* v. *Campbell*, it was not a delivery order addressed to the individual having possession of it. The nearest approach to the present document is a bill of lading, and if addressed to the bearer it would entitle him to delivery.—*Lickborough* v. *Mason*, 1 Smith L.C. 431; *Howard* v. *Tucker*, 1 B. & Ad. 712; *Alsager* v. *St. Katherine Dock Co.*, 14 M. & W. 794. But apart from general principles, there is sufficient ground in the correspondence which passed between the parties here to sustain this action whether in England or in Scotland. The appellant, by letter, specially acknowledged a transfer of the iron to the respondents Balls and Son, and thereafter accordingly held the iron as agents of Balls.—*Hawes* v. *Watson*, 2 B. & Cr. 540; *Harman* v. *Anderson*, 2 Camp. 243; *Stonard* v. *Dunkin*, 2 Camp. 344. As to the Statute 1695, c. 25, it does not apply to this case.—See *Ogilvy* v. *Ross*, 28th June 1804, F.C.; *Macdonald's Trustees* v. *Rankin*, 13th June 1817, F.C.; *Dimmack's case*, 28 Sc. Jur. 362.

Sir F. Kelly replied.—If this appeal be not competent, it will be a complete surprise on the parties, and the mistake, if any, was that of the Judge. The Judge ought no doubt to have directed, in point of form, a verdict either way, no matter which way, reserving the points of law for the Court, and in substance he did so. In *Craig* v. *Duffus*, and *Dudgeon* v. *Thomson*, the parties left both the law and the facts to the Court; here they left the law only, there being no question of fact in dispute. Therefore those cases do not govern this. As to the merits, Smith could no doubt have assigned this contract to Balls by a regular assignation, but then the latter could only stand in the shoes of the former. The respondent, however, contends that he can sue in his own name on the mere paper in his hand, independently of any relations between the original parties. The document is unknown to the law as one giving these rights, and the incidents of a bill of exchange are not to be extended without statutory authority. It is said, a person even in England may sue on a contract though not named in it, as for a reward offered by advertisement. But even if, for the sake of justice and the convenience of mankind, this may be so, it supplies no authority for the broad proposition, that the benefit of the contract can pass by the mere delivery of the paper. At the most, Balls can only stand in the shoes of Smith, and whatever defence is competent against the one is competent against the other.

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—This is an appeal arising out of an action brought by a certain firm, Balls and Son, who were merchants in London, against the defender Dixon, an ironmaster in Glasgow. The summons states that the pursuers (that is, Balls and Son) on or about the 14th July 1849, through Mr. C. Robert Moate, broker, London, purchased from Messrs. Benjamin Smith and Son, of the Stainton Iron Works, 1000 tons of Scotch pig iron No. 1, and received from the broker a document, of which the following is a copy:—"*London*, 14*th July* 1849.—Bought for Thomas Balls and Son, of Messrs. Benjamin Smith and Son, one thousand tons of Scotch pig iron No. 1, as per Dixon's undertaking (copy at foot), at forty-four shillings per ton, payment by buyer's acceptance of seller's draft, at four months date from to-day." That, reckoned from the 14th July, would be the middle of November. They also received "copy of undertaking," viz.:—"*Glasgow*, 10*th July* 1849.—I will deliver one thousand tons No. 1 pig iron free on board here when required, after the tenth September next, to the party lodging this document with me, f. o. b. in Glasgow. (Signed). For William Dixon, John Campbell." The question arises upon the validity of that instrument.

The summons goes on to state, "that the pursuers duly paid the price of the iron, which, at the rate of 44*s.* per ton, amounts to the sum of £2200, and received the undertaking or delivery order above copied." It then goes on to state, "that such documents are, in the practice of the trade, granted by the ironmasters, or holders and dealers in iron, and upon presentation of such scrip or order without indorsation or intimation, the party presenting is entitled to receive delivery of the iron, and in virtue of which undertaking the pursuers were entitled on presentation to receive delivery of said 1000 tons of pig iron from the defender. With the view of accommodating parties in the practice of purchasing from the pursuers, they made application to the defender, to divide the said 1000 tons undertaking or delivery order, and received in reply the answer, of which the following is a copy,"—the answer in truth saying, that they declined to divide the undertaking or delivery order. Afterwards, a further correspondence took place, and this letter was, on the 4th September 1849, addressed by the defender to Balls and Son, the plaintiffs:—"Your favour of the 30th ultimo was duly received, but owing to the absence of the writer was not replied to at the time. Messrs. Smith and Son purchased the 1000 tons pig iron, as I understood, for their own use, and on the undertaking being lodged with me, I will ship the iron as required in the usual way.—I am, &c.—For W. Dixon, J. Campbell." Then the summons states, in substance, that afterwards Dixon refused to deliver the iron, although these undertakings were duly presented.

The answer of Dixon was to this effect. He states first, that the document in question of 10th July was unstamped, improbative, and not binding on the defender; and, secondly, that "as the defender transacted solely with Messrs. Smith and Son, and never came under any legal obligation to deliver the iron in question to the pursuers, or any third party, the pursuers are not entitled to insist in the conclusions of this action, to any extent, and, indeed, have not averred or set forth any relevant or legal title to pursue." Then he states that the document of 10th July 1849, even supposing it were probative, "is not negotiable or legally transferable from hand to hand, like a bank-note or bag of money, without assignation or indorsation, and the rights competent to Messrs. Smith and Son under the contract or agreement entered into between them and the defender, whatever these may be, have not been legally or validly assigned or made over by them to the pursuers. In any view, the pursuers are liable to all the exceptions pleadable against their cedents, Smith and Son." The defence here rests on two grounds—*first*, the invalidity of the document of 10th July 1849; and, *secondly*, that the holder can only stand in the place of Smith and Son.

The action was brought in the Sheriff Court, and the Sheriff decided in favour of the defender upon the latter ground, that Smith and Son not having paid for the iron, the holders of this document, Balls and Son, could not enforce the terms of that contract against Dixon; that Dixon, in truth, had what we should call a lien, or what in Scotland they call a right of retention, until the price was paid. The Sheriff made this interlocutor:—"Sustains the defence of retention pleaded for the defender Dixon and his trustee, and assoilzies them from the conclusions of the action." The cause was then taken by advocation to the Court of Session, and the Lord Ordinary took a different view of the case. Now, I may observe that the decision of the Sheriff in the first instance was clearly unsustainable. It is quite clear that that document, if it gives any right, gives a right totally independent of any question between Dixon and Smith and Son. The very object of the document is to give to the holder of it something which puts him in a different situation from the person from whom he takes it. I think, therefore, that the Sheriff was clearly altogether wrong. And that was the view taken of it by the Lord Ordinary, Lord Rutherford, who, by his interlocutor, "finds that the document libelled is not struck at by the Statute 1696, c. 25," which statute was referred to in the argument here, but I shall not have occasion to advert to it at any length. He "finds that the document was intimated and transmitted to the defender by the pursuers, and acknowledged and acted on by the defender, as giving the pursuers right to delivery before any right of retention had arisen in favour of the defender as against Smith and Son, the original holders." And upon that ground he reversed the interlocutor of the Sheriff, and decerned in favour of the pursuers.

The parties, being dissatisfied with the decision of the Lord Ordinary, brought the case before the Second Division of the Court of Session by a reclaiming note. And the question seems to have been fully discussed there, and finally an issue was directed in these terms:—"It being admitted, that the defender W. Dixon granted and delivered to Benjamin Smith and Son the following document:—'*Glasgow, 10th July* 1849.—I will deliver 1000 tons No. 1 pig iron free on board here when required, after the 10th September next, to the party lodging this document with me;' and it being admitted that the original pursuers Balls and Son paid to the said B. Smith and Son the sum of £2200 for the iron represented in the said document," the question was—"whether the defenders wrongfully refused to deliver the iron to the pursuers?" I notice the words "original pursuers," and I ought to state, that in the progress of the cause Balls and Son, the original pursuers, became substantially insolvent, and they are now represented by the respondent Bovill.

That issue having been directed at the trial, no evidence whatever was offered except docu-

mentary evidence, consisting of the documents in question, and the letters that passed between the parties, to some of which I shall advert presently. Upon that evidence having been produced, and no parole evidence having been offered, the case was by arrangement left for the Court to decide upon the law. The note of that was as follows:—"In respect that the parties concur in holding, that there is no question of fact on which the opinion of the jury could be taken, and that the case on the facts, as now proved, turns wholly on questions of law for the Court, the Lord Justice Clerk discharged the jury, in order that the parties may bring the whole case before the Court for judgment, each party being entitled to state any questions of law which the facts raise."

The question was mainly this:—whether or not the parties had agreed to leave this, according to several cases which have been recently decided in your Lordships' House, to the Court to arbitrate, so that, in truth, a right of appeal was excluded. It will be unnecessary for me to give to your Lordships any opinion, whether or not that would be correctly founded in this case. At the same time I may observe, that I think it is of extreme importance for the learned Judges, in trying issues, to proceed strictly in accordance with the form pointed out by the statute which establishes jury trial in Scotland. For, unquestionably, very great embarrassment has been, upon more than one occasion, caused by their not adhering strictly to the rules which must necessarily govern all jury trials, by not requiring the jury to find either for the plaintiff or for the defendant, or to find a special verdict, upon which exception may be taken, if necessary, to the ruling of the Judge. But I do not think that appears to be important in the present case.

When the case came back, the Court of Session held that the document in question was valid, and that the defender was bound to deliver the iron. Against this decision the defender has appealed. The ground of his appeal is, that the document in question is invalid, and that, consequently, the pursuers had no *locus standi*.

If the question had turned exclusively upon the validity or invalidity of this document, I am bound to say that I should not have concurred with the Court of Session. I think that the document is invalid. The effect of such a document, if valid, is to give a floating right of action to any person who may become possessed of the document. Now I am prepared to say, that this cannot be tolerated by the law, either of Scotland or of England. The only cases in which such an action can be sustained, are those of bills of exchange and promissory notes. That depends on the law merchant in the case of bills of exchange, and on the Statute 12 Geo. III. c. 72, § 36, in the case of promissory notes. No evidence was given to shew any general mercantile usage affecting such instruments as that now in question. Indeed it was impliedly admitted at the trial, that no such usage could be established by evidence. And I must therefore assume that no such usage exists, that is, that there is nothing in the law merchant to warrant what is now contended for. Bills of lading, I may observe, afford no analogy whatever. A bill of lading is a mere symbol of property. No right of action passed by indorsement previously to the act of last Session, (18 and 19 Vict. c. 3,) which caused a right of action to pass as well as a right of property. No authority for such transferable right of action has been adduced in argument before your Lordships; and all the principle is against its validity.

I must observe that the rule preventing such actions is by no means one of a technical nature. It is a rule founded on extremely good sense. In England, a plaintiff suing on a contract, unless it be a contract under seal, must prove a consideration. That is not the case in Scotland. But in Scotland, as well as in England, it is a perfectly good defence to shew illegality of consideration, *turpis causâ*, for instance, or that the instrument in question was given to induce a violation of the law, or that it was an instrument tending to restrain freedom of action in cases where, on grounds of public policy, every one ought to be free, and the like. I give these merely as instances. Where an action is brought by one of the contracting parties, illegality of consideration can always be pleaded as a defence. So also, where an action is brought by the assignee of the original contract, which may be done directly in Scotland, and indirectly by means of a court of equity in England, the illegality of the original contract affords a good defence. It is the policy of the law to preserve this principle intact, in order to prevent courts being made ancillary to violations of the law. Now, this principle is entirely defeated if a contracting party can make a floating contract enforceable by bearer, for the bearer does not sue as assignee of the original contracting party. He may be, and probably is, a stranger to the original contract. His right, if any, is under an independent contract with himself, against which no illegality, as between the original parties, can be set up. Bills of exchange have been made an exception for the convenience of trade, but it is an exception not to be extended. The drawer of the bill gives to the indorsee a better title than his own; and this leads, or may lead, to many ill consequences, but mercantile convenience has sanctioned it. No such necessity exists in the case of other contracts, and there is no authority to warrant it. Indeed, I may observe, that the Statute of 12 Geo. III. c. 72, § 36, affords statutable authority by analogy against the present claim; for, if a promissory note could have been made transferable by indorsation at common law, there would have been no necessity for that statute.

The policy of such a rule may be illustrated by considering, in the present case, how the

matter would have stood, if there had been (which there is no doubt there was not) illegal considerations between Dixon and Smith. Suppose, for instance, the consideration had been, that Smith should aid Dixon in some way in committing a fraud on the revenue laws. That would have afforded a good defence against Smith, and against those who claimed by progress from him. The policy of the law requires that such defence should be pleadable. But these notes, if they are valid, would make such a defence impossible, for it is clear that, if they have any effect, they give a title independent of that of the original contractor.

If the convenience of those engaged in trade and commerce requires that scrip notes of this description should be made legal and valid, that must be effected, if at all, by the legislature; and, on any measure being introduced for such an object, it will be for your Lordships and the other House of parliament to consider and weigh well the social benefit and evils likely to result from the sanctioning of the proposed change. It may be, that the general adoption and use of these scrip notes would afford safe facility to commercial enterprise. It may be on the other hand, that such a practice would tend to produce and keep alive a restless spirit of inordinate speculation, and so be injurious to those engaged in wholesome commerce. But these are all questions for your Lordships in your legislative, not in your judicial, capacity. Looking at the matter merely as advising your Lordships as a court of appeal, I have no hesitation in saying, that, independently of the law merchant, and of positive statute, within neither of which classes do these scrip notes range themselves, the law does not, either in Scotland or in England, enable any man, by a written engagement, to give a floating right of action at the suit of any one into whose hands the writing may come, and who may thus acquire a right of action better than the right of him under whom he derives title.

I have thought it right to state this general principle, though I do not think it applicable to the present case. I think the conclusion at which the Court arrived in favour of the respondent was correct, but I think so by reason of the special dealing which took place between Balls and Son and Dixon.

This appears in the correspondence. Balls and Son, it seems, sold a portion of the iron which they thought they were entitled to receive under this scrip note to different persons, some of whom were Messrs. Nash, Cole, and Elton, of Bristol. According to the terms of the note, the iron was deliverable on the 10th September, although it was not to be paid for till some time afterwards in the month of October. Shortly before the time when the iron became deliverable, Balls and Son having thus sold or agreed to sell a portion of it to these gentlemen at Bristol, a correspondence takes place between them and Dixon. I cannot help suspecting, from the correspondence, that Dixon felt himself likely to be unable to effect the contract which he had entered into, or was supposed to have entered into by this note.

The correspondence, as far as I need advert to it, may be stated to have begun by a letter from Balls and Son to Dixon on 27th August. They write—"We requested our friend Mr. W. Short to ask you to divide a 1000 ton order of yours, as we had so sold it, and required to hand our friends' delivery orders. He informs us that you object to this, which we consider very hard, as we bought it without any knowledge of any specific arrangement, and know not how to complete our sales if you still refuse us that which is usual, and which cannot affect you in any way, and the day of delivery, 10th September, being so near at hand." To which he answers, on the 29th August—"In reply to your favour of the 27th curt., the sale was made for the express purpose of avoiding the issue of scrip undertakings, such as you want; and I am not disposed to make any alteration on the original obligation." On the next day (30th August) Balls and Son write to Dixon—"We are favoured with your letter of the 29th. We clearly understand the 1000 tons was unfettered in any way, or we most assuredly should not have bought your order; for how is it possible for any merchant to take away or you to deliver 1000 tons at once? Our idea was, that as we had only sold 500 tons—300 and 200—for immediate shipment, it would be an accommodation to you in the result. However, it wants but a few days, if we send you the order for 1000 tons, will you at once reply to our orders on you, that you will ship the 300 and 200 tons when required? Your reply will oblige," &c. A few days afterwards, viz., on 4th September, Mr. Dixon writes thus to Balls and Son—"Your favour of the 30th ulto. was duly received, but, owing to the absence of the writer, was not replied to at the time. Messrs. Smith and Son purchased the 1000 tons pig iron, as I understood, for their own use, and on the undertaking being lodged with me, I will ship the iron as required in the usual way." Then a little further correspondence takes place, which is not necessary for me to go into—an angry correspondence rather; but the result was, that although they repeated, upon several occasions, that they had been ready to deliver, and now were ready to deliver 80 tons or 100 tons, or something of that sort, in point of fact, in the result, they did not deliver the iron. I ought to state, that though the quantity was called 1000 tons, it was reduced afterwards to 500 tons, for as to the other 500 tons, some arrangement was made to abstract that from the consideration of the Court below.

Now that being what passed between the parties, it appears to me, that the Court was perfectly right in adopting the view which had evidently been the view, and, as far as I can collect, the

only view of Lord Rutherfurd, that there had been a clear adoption by Dixon of Balls and Son as the parties to whom he undertook to deliver the iron, and to whom he did deliver some. Because being informed as he was by the holders of this scrip note, that they held it, which though it did not in any view of the case give them a legal right, yet gave them a plausible right, Dixon, if not liable to deliver to them, certainly was liable to deliver upon his original contract with Smith. Smith being at that time solvent, and it being unimportant to him whether he delivered to one or the other, Dixon enters into a distinct engagement, (for so I cannot but consider it, looking to his letter of the 4th September,) that he will hold the iron disposable to the order of the pursuers. It appears to me that that is a very rational view of the case which was taken by Lord Rutherfurd; and although not the ground upon which the majority of the Court decided, was the ground adverted to by Lord Wood as being in his view of the case a sufficient ground. For these reasons, although the conclusion at which the learned Judges arrived is not, I think, founded upon a correct view of the legal effect of the instrument, I am of opinion that the conclusion itself is correct. I therefore move your Lordships to dismiss this appeal. And as I cannot but think that this is not quite an honest proceeding on the part of Mr. Dixon, I move that it be dismissed with costs.

Interlocutors affirmed with costs.

Appellants' Agents, Walker and Melville, W.S.—*Respondent's Agents*, Campbell and Smith.

JULY 29, 1856.

JAMES MACKENZIE, *Appellant*, *v.* Messrs. DUNLOP, WILSON and Co., and Others, *Respondents.*

Jury Trial—Foreman declaring Verdict—Irregularity—*After a jury trial, one of the parties moved the Court for a new trial, as the verdict appeared from the notes of the Judge, which had been furnished to the parties, not to have been declared by the foreman of the jury in open Court and taken down by the clerk before the jury were discharged.*

HELD (affirming judgment), *That as the Judge's notes shewed a verdict entered for pursuer, it must be assumed to have been regularly entered.*

Contract—Iron Scrip—Construction—Evidence of usage—*A party having issued obligations for the delivery of pig iron, called iron scrip, of the following tenor:—"No. Glasgow, 28th March 1850.—We hold one hundred tons of No. pig iron, deliverable free on board to the bearer of this document only on presentation."* (*Signed*) "DUNLOP, WILSON & CO."

HELD (affirming judgment), *That a purchaser of the scrip was not entitled by parole evidence to shew, that, as between the grantor and the grantee of the scrip, a particular kind of iron was meant; though he may shew that by mercantile usage the words, "Glasgow, free on board," meant that kind of iron only.*[1]

The pursuer appealed, maintaining that, 1. The proceedings and verdict in the Court below were so irregular that no judgment could competently pass. 2. The verdict laboured under an essential nullity in not having been delivered by the jury at the time, and recorded by the clerk before the jury was discharged, as required by statute. 3. The evidence tendered and received in order to prove that scrip notes, issued by the respondents in the terms of those in question, were invariably so expressed in order to designate Clyde and Dundyvan iron, was competent and admissible evidence, and the Court below erred in holding it inadmissible, and pronouncing judgment on that ground. 4. The evidence, tendered to shew that the scrip notes in question were issued by the respondents in fulfilment of a contract for delivery of Clyde and Dundyvan iron, and as importing an obligation to that effect, was also competent and admissible evidence, and the Court below erred in rejecting it.

Taylor on Evidence, p. 761; *Carricks* v. *Saunders*, 12 D. 812; *Trueman* v. *Loder*, 11 Ad. & E. 589; *Lewis* v. *Marshall*, 7 M. & G. 729; *Smith* v. *Jeffreys*, 15 M. & W. 561; *Neilson* v. *Harford*, 8 M. & W. 806; *Shore* v. *Wilson*, 9 Cl. & F. 355.

The *respondents* in their *printed case* argued thus—1. Because the appellant utterly failed to prove his first issue. 2. Because the action being laid upon written documents purporting to contain the agreement of parties, the terms of the written instrument cannot be varied on a

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[1] See previous report 16 D. 129; 25 Sc. Jur. 558; 26 Sc. Jur. 64. S. C. 3 Macq. Ap. 22: 28 Sc. Jur. 688.