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.

condition not appearing upon the face of the instrument introduced by parole evidence. 3. Because the evidence adduced was legally incapable of affecting the meaning and import of the writing. *Lang*, 10 S. 777; *Alexander*, 9 D. 524; *Brisbane*, M. 12,328; *Baptist Churches*, 3 D. 1030; *Pollok*, 7 S. 189; *Calder* v. *Aitchison and Co.*, 5 W.S. 410; *Smith* v. *Jeffreys*, 15 M. & W. 561.

Lord Advocate (Moncreiff), and *Sir F. Kelly*, for the appellant.—The course pursued by the learned Judge in this case was unauthorized and irregular. In the first place, the verdict recorded was not declared by the Chancellor in open Court, and taken down by the clerk before the jury were discharged, as it ought to have been, according to Statute 55 Geo. III. c. 42, § 33. On the contrary, the parties were not informed of the verdict till several days after, when the notes of the Judge were issued.

[LORD CHANCELLOR.—That is a formal objection which I think we cannot listen to. The verdict appears on the Judge's notes to be regularly entered, and we must assume the forms were duly complied with.]

As to the merits. The Judge improperly refused to direct the jury on the second issue, that the two contracts ought to be combined, in order to shew the quality of the iron, and that when so combined they shewed the quality of the iron sold to be Clyde or Dundyvan iron. Independently of that, we contend that the document of itself implies Clyde or Dundyvan iron, being dated Glasgow, and the words "f. o. b. here" being used. At all events, evidence was admissible to shew, that scrip written in these terms was known in the market as referring exclusively to that quality of iron, for no other iron of the same manufacturer was deliverable at Glasgow, and the Lugar iron was always expressed to be deliverable at an Ayrshire port. Good evidence of this usage was tendered by us, and there was none on the other side to contradict it. The jury should therefore have been directed to find for the plaintiff. The evidence was admissible, because it went to explain a latent ambiguity in the instrument, according to a well established principle of law. Thus, evidence has been admitted to explain what was meant by a "thousand" rabbits—*Smith* v. *Wilson*, 3 B. & Ad. 728; what a commission to a London corn-factor to sell oats implied—*Johnston* v. *Usborne*, 11 A. & E. 549. See also *Syers* v. *Jonas*, 2 Exch. 111; *Grant* v. *Maddox*, 15 M. & W. 737; *Brown* v *Byrne*, 3 E. & B. 714; *Daintree* v. *Hutchinson*, 10 M. & W. 85.

Rolt Q.C., and *C. Blackburn*, for the respondents.—Even if there was an irregularity in entering the verdict, this was made the subject of a motion for a new trial, and the new trial was refused. No appeal lay from such refusal.—55 Geo. III. c. 42, §§ 6, 7, 8. As to the merits. This is not a case where the previous dealings between the respondents and Thorburn and Trueman could be imported into the contract between the appellant and respondents. Nor was the document one in which there was any ambiguity whatever, and therefore there was nothing to be explained by any parole evidence. A manufacturer of iron who sold a quantity of iron, did not necessarily bind himself to deliver iron manufactured by himself, any more than a farmer selling oats or potatoes bound himself to deliver the oats or potatoes grown on his own farm.—See *Smith* v. *Jeffreys*, 15 M. & W. 561. The following cases were also referred to:—*Sieveright* v. *Archibald*, 17 Q. B. 103; *Blackett* v. *Royal Exchange Co.*, 2 Cr. & J. 244; Smith's Leading Cases, 468; *Bourne* v. *Gatcliffe*, 3 M. & Gr. 643.

LORD CHANCELLOR CRANWORTH.—This question arises on a jury trial in Scotland to try two issues, one of which is not now under consideration. The question now before the House relates solely to the second issue, whether by nine "documents, Nos. 13 to 21, both inclusive, the defenders undertook and agreed to deliver to the pursuer, as bearer of the documents, 900 tons of pig iron, being 700 tons of No. 1, and 200 tons of No. 3, manufactured by them at their works at Clyde and Dundyvan, or one or other of them, and whether the defenders wrongfully failed timeously to deliver to the pursuer the said iron or any part thereof," and so on.

The question arose in an action which was instituted in the Court of Session by the present appellant Mr. Mackenzie, in which he sought to have it found, that the defenders, Messrs. Dunlop, Wilson and Co., "should be decerned and ordained to deliver to the pursuer free on board at Glasgow 700 tons of No. 1, and 200 tons of No. 3, pig iron, all of good merchantable brands, and all being iron manufactured at the Clyde Iron Works, or Dundyvan Iron Works, or one or other of them."

The title of Mr. Mackenzie arises under a contract of sale, which he entered into with Messrs. Thorburn and Trueman, who are large brokers and middlemen at Glasgow, dated 9th October 1850, by which contract Messrs. Thorburn and Trueman "sold to Messrs. Robertson and Mackenzie, (Mr. Robertson being a partner of Mr. Mackenzie, who was the person really interested,) 2000 tons of pig iron of good merchantable brands, three fifths No. 1, and two fifths No. 3, at 42*s.* 6*d.* per ton, payable in cash on or before the 23rd instant, against maker's engagements or Connal's warrants, f. o. b. here." In pursuance of that contract Messrs. Thorburn and Trueman delivered to Mr. Mackenzie nine scrip notes, as they are called, signed by Messrs. Dunlop, Wilson and Co. which are in this form:—"We hold 100 tons No. 1 pig iron, deliverable free on board here to the bearer of this document only on presentation."

Now the question arises in this way :—Messrs. Dunlop, Wilson and Co. contend that, upon these notes being presented to them, they are bound only to deliver what the notes purport, namely, 100 tons of No. 1 pig iron, and that they are not under any obligation to deliver iron of the Clyde and Dundyvan manufacture ; but that if they deliver what is called Lugar iron, which is an iron somewhat inferior in quality, they fulfil the terms of that engagement. In order to shew that that is not so, the issue which I have mentioned having come on for trial, evidence was tendered on the part of the pursuer Mr. Mackenzie, the object of which was to shew, that Messrs. Dunlop, Wilson and Co. would not discharge their obligation, which purports to be an obligation to deliver 100 tons No. 1 pig iron, unless they delivered 100 tons of No. 1 pig iron of a particular quality, namely, Clyde and Dundyvan iron. With a view to shew that, in the first place, this species of evidence, it was contended, was admissible, viz., evidence that Messrs. Thorburn and Trueman, from whom the pursuer purchased the iron, were entitled, when they purchased it, to insist upon Clyde and Dundyvan iron, for that by their contract with Messrs. Dunlop, Wilson and Co., they had stipulated that the iron supplied to them should be Clyde and Dundyvan iron ; and that, having entered into this stipulation many months before they sold the iron to the pursuer Mr. Mackenzie, and having in pursuance of that stipulation received these scrip notes for what is described only as No. 1 pig iron, it being admitted, that as between them and Dunlop, Wilson and Co., Messrs. Dunlop, Wilson and Co. were bound to give, and meant by that note to indicate, that they bound themselves to give, Clyde and Dundyvan iron, therefore it was said, that note indicated Clyde and Dundyvan iron.

Evidence tendered with that object was rejected, and I think quite properly rejected. It is totally immaterial what the obligation was between Dunlop, Wilson and Co. and Messrs. Thorburn and Trueman. Messrs. Thorburn and Trueman might be entitled to insist, and certainly upon this evidence were entitled to insist, that they should have Clyde and Dundyvan iron, which is a better sort of iron ; and in the discharge of that obligation Messrs. Dunlop, Wilson and Co. came under contract to deliver something which did not on the face of it purport to be Clyde and Dundyvan iron, but merely pig iron No. 1. But when Messrs. Thorburn and Trueman sold, as it were, that undertaking, it is quite impossible, upon any principle, that the person to whom they sold can say, that that paper indicates anything else than that which it indicates on the face of it. You cannot say, that because the holder of that paper might, by virtue of his contract by which he got the paper, have stipulated for Clyde and Dundyvan iron, therefore that paper indicates an obligation to deliver Clyde and Dundyvan iron. For that purpose any evidence was clearly inadmissible, and was properly rejected.

But it was certainly competent to the pursuer upon a document worded thus :—"We hold 100 tons No. 1 pig iron, to be delivered free on board here to the bearer of this document on presentation," dated "Glasgow," to offer evidence to shew, that by mercantile usage at Glasgow, and the mode in which persons dealing in this commodity would construe that document, it meant something more than on the face of it it purported to mean—that it meant Clyde and Dundyvan iron. For that purpose evidence was clearly admissible upon principle ; cases in illustration of which are so very numerous, that it would be almost pedantry to refer to them. If not very numerous, they are acted upon so constantly that they are familiar to the minds of all lawyers. There was one case in which it was proved, that a contract to deliver 1000 rabbits always meant 1200 ; and, according to a vulgar notion—whether it is true or not I am not sure —a baker's dozen always means 13. There are many cases of that sort in which words that ordinarily have an obvious meaning in a particular trade mean something different. It was therefore competent to the pursuer to give evidence to shew that under the terms pig iron delivered free on board at Glasgow, "Clyde and Dundyvan iron" was meant ; and for the purpose of shewing that some witnesses were examined. That which is relied on chiefly is the testimony of Mr. Thorburn and the testimony of Mr. Connal, an extensive warehouseman in Glasgow. What Mr. Thorburn says is this, that the seven scrip engagements (which are these engagements in question) delivered to Mr. Mackenzie, were granted by Messrs. Dunlop, Wilson and Co. to him, in fulfilment of his contract for the delivery of Clyde and Dundyvan iron. Now for the direct purpose to which I have adverted that evidence was not admissible ; but the Lord Advocate truly remarked that it was admitted. Yes, and properly admitted, because, though very weak evidence, it was some evidence to shew the general usage. General usage can only be proved by the multiplication of particular usages ; and, if one single person receives such a document as indicating Clyde and Dundyvan iron, that is undoubtedly, though extremely weak evidence, some evidence to shew that that was the interpretation put upon the document ; therefore the evidence could not be excluded, but it was properly received. Then comes the evidence of Mr. Connal. He is shewn the scrips in question, and he says :—"I often got these —from documents themselves I took them for Clyde and Dundyvan iron"—he means that he so understood them. "I would have taken these, as fulfilment of engagements which I held for g. m. b., (that is, good merchantable brands), from any one, whether defender or any other—these passed current for g. m. b. Defenders never tendered Lugar iron under such till near end of 1850, when on these, and others of the same kind, they did, and I refused to take it. I never

heard of these as engagements for Lugar iron. On face of documents, what leads me to expect Clyde and Dundyvan." I suppose that was the question put to him, to which his answer is—"They are dated Glasgow, and say 'free on board here.' Now Lugar iron generally in scrip is said to be deliverable at Troon. I always acted on assumption that such scrip from defenders denoted Clyde and Dundyvan iron. I know that others did so too—all, so far as I know, acted on this." And there is a little more evidence to the same effect.

Now, that evidence having been tendered, the learned Judge sums up the case to the jury, and he states the point for their decision to be—"whether, from the evidence adduced, parties receiving the documents mentioned in the second issue, (those are the nine scrip notes in question,) by the practice and usage of the defenders, were entitled to rely on receiving Clyde and Dundyvan iron only." I am not prepared to say that that was wrongly put. But "the learned Judge left this question to the jury under a full reservation to the defenders of all their pleas in law, and on the condition, that if the Court should hold that the evidence given under the second issue ought not to have been received, or that it was insufficient in point of law to establish any obligation against the defenders, and if the Court further thought the question under the second issue turned wholly on a point of law for the Court, the Court should be entitled to give judgment at once on such point, without the case being again sent to a jury."

The jury found for the pursuer—that is to say, treating the case as admissible, the jury say, looking at this as a question for us to decide, the evidence does establish that which the pursuer undertook to establish. But then following the reservations that were made in the charge by the learned Judge, they say, or are made to say—If the Court is of opinion according to the suggestions of the learned Judge upon any of these points, they find for the defenders.

Now I must take leave to say, that this is an extremely erroneous way of dealing with a question of this sort. In the first place, the jury have no business at all to say what the Court is to do. The jury have to find facts. They may find *simpliciter* for the pursuer, they may find for the defender, or they may find a special verdict: but having found for the pursuer or for the defender, they can give no authority to the Court to enter up a verdict in any other way. That can only be done by an arrangement between the Judge at the trial and the parties. And the difficulty here is in understanding exactly what did pass at the trial, and what was the course really taken, because, unquestionably, except by the consent of the pursuer, the learned Judge had no right to do more than to state the law to the jury, and to tell them upon that statement of the law—find for the pursuer, or find for the defender. I confess that my interpretation of this would be, that this was done with the consent of the parties. But then the Lord Advocate says, that that was not the fact—there one is embarrassed. But at the same time I must treat the Judge's notes as being notes adequately and properly representing what passed, and I think I must therefore, in dealing with the case, assume that, by consent in some way or other, an arrangement which was the most rational that could be suggested, was come to, because it really saved the expense of another trial. I must assume that the learned Judge did that which he had a right to do, but which he could only do upon the assent of the parties, viz., he left this question to the jury under those reservations.

Now, acting upon that assumptton, we find that the jury have found for the pursuer, but the Judge says, (as we should say, "by consent,") "I reserve liberty to enter a verdict for the defender, if the Court shall hold that the evidence given under the second issue ought not to have been received," (I have already stated that I think it ought to have been received, and was properly received,) "or that it was insufficient in point of law to establish any obligation against the defenders." I do not think it was insufficient in point of law. I believe if I had been upon the jury, I should have said—It is quite insufficient in point of fact to satisfy me. But that was a question for the jury. The jury had evidence laid before them, (that, in my view of the case, was properly laid before them,) that it was insufficient in point of law. Indeed, I do not know what the meaning of that expression is. Whether it is evidence properly laid before the jury, that I can understand; and being laid before the jury, if the jury tell me, that in point of fact it is insufficient, that I can understand; but if it is competent evidence to be laid before them, what is the meaning of saying that it is "insufficient in point of law"? It is *primâ facie* evidence, and if properly laid before the jury, it is for the jury to draw their conclusion from it. Whether, therefore, consent was given or not, I think is immaterial, because I think that the evidence was properly laid before the jury, and that they were to judge of its value.

But now we come to another point, which is very material. "And if the Court further thought the question under the second issue turned wholly on a point of law for the Court, the Court should be entitled to give judgment at once on such a point, without the case being again sent to a jury." Now that I understand to mean this: There has been an issue directed, whether by these scrip documents the defenders undertook and agreed to deliver to the pursuer Clyde and Dundyvan iron. Suppose that the Court below was of opinion, or suppose your Lordships should be of opinion, that these scrip notes are not valid proceedings at all, that they bind nobody, that they are not documents that have any legal validity, then the learned Judge meant to say, what was quite rational, without any further trial, to put an end to it at once, the verdict

shall be entered for the defenders. That only could be, because by the documents in this case the defenders did not undertake to deliver.

Now, on that point I am not prepared at the present moment finally to express any opinion for the guidance of your Lordships. That is a question which is already in a great measure under consideration in the case which was argued immediately preceding this (*Dixon* v. *Bovill*, *ante*, p. 663). And, therefore, although I think, upon the other point, that the evidence was properly laid before the jury, and they alone were to judge of the weight of it, and therefore their conclusion upon the weight of it is what your Lordships cannot disturb, yet upon the other point, namely, whether, in point of law, independently of any finding of the jury, there could be any liability arising under these documents, by reason of their particular nature, I should wish for a little further time for consideration. I therefore move your Lordships that the further consideration of this question be postponed.

Lord Advocate.—Might I interfere for one moment. Your Lordship will see that the parties meant effect to be given to these documents, and not only is there no point of that kind raised upon this record or put to the jury, but there is an express admission of their validity.

LORD CHANCELLOR.—I am aware of the admission, but if the document is an invalid document in point of law, that cannot give it validity, so that the jury should be directed to find that the party was liable, when in truth he was not liable.

Lord Advocate.—This case was argued very ably in the Court below, but at the same time we had no opportunity of addressing ourselves to the point, how far the document was binding.

LORD CHANCELLOR.—I have not forgotten that.

Cur. adv. vult.

LORD CHANCELLOR.—This is a case arising out of iron scrip notes, as they are called. The question here is not the same as in *Dixon* v. *Bovill* (*supra*, p. 663), but one arising out of transactions of the same description. It arises out of a contract that was entered into on 9th October 1850, whereby certain persons of the name of Thorburn and Trueman, who were iron brokers at Glasgow, agreed to sell to the pursuer, the present appellant, 2000 tons of pig iron. The original contract is as follows:—"*Glasgow, 9th October* 1850.—Sold to Messrs. Robertson and Mackenzie 2000 tons of pig iron of good merchantable brands, 3/5ths No. 1 and 2/5ths No. 3, at 42/6 per ton, payable in cash on or before the 23rd inst. against makers' engagements or Connal's warrants, f. o. b. here, say per our letter of this date. Dixon's Monkland and Summerlee engagements excepted." Under that contract to deliver 2000 tons, 1100 tons were duly delivered, and they never formed a subject of dispute in the case. Scrip notes of the defenders, like those I have adverted to in the preceding case of *Dixon* v. *Bovill*, that is, scrip notes of Dunlop, Wilson and Co., were delivered for the other 900 tons. There were 9 notes for 100 tons each. They were all delivered in this form:—"*Glasgow, 25th April* 1850.—We hold 100 tons No. 1 pig iron, deliverable free on board here to the bearer of this document only on presentation. DUNLOP, WILSON & CO."

This note, and other notes to the same effect, nine in number, having been delivered by Dunlop, Wilson and Co. to Mackenzie and Robertson, for Mr. Mackenzie, the question, independently of the question as to the validity of the scrip notes, is, what rights passed as to the sort of iron they were entitled to require. The defenders, Dunlop, Wilson and Co., offer to deliver iron according to the terms of the scrip notes. But they say that the scrip notes do not import that which the pursuer claims, viz., Clyde and Dundyvan iron, and they are willing to deliver pig iron not Clyde and Dundyvan iron.

The action was brought not before the Sheriff but in the Court of Session, and the conclusion of the summons is, that the defenders ought to be decerned and ordained to deliver to the pursuer free on board at Glasgow harbour, and so on, 700 tons of No. 1, and 200 tons of No. 3 pig iron, all of good merchantable brands, and all being iron manufactured at the Clyde and Dundyvan Iron Works, or one or other of them, at least of good merchantable brands, as aforesaid. That having been the summons, there was then a condescendence and answers; and ultimately the Court of Session directed two issues.

It is to be observed that the pursuer rests his claim upon two grounds. First of all, he says, that in the contract to deliver, which I have already read, and which was a contract to deliver 900 tons of good merchantable brands, No. 1 and No. 3, at a certain price, Thorburn and Trueman, who are brokers, were acting as agents for the defenders, Dunlop, Wilson and Co., and that consequently Dunlop, Wilson and Co. are bound to deliver 900 tons of good merchantable brands, of a particular make. And, secondly, that the scrip notes bound the defenders to deliver to the pursuer Clyde and Dundyvan iron. Therefore, he seeks to charge the defenders either as being bound to deliver through their agents good merchantable brands, as it is called, or under the scrip notes to deliver Clyde and Dundyvan iron. Two issues were directed:—1. Whether, on or about 9th October 1850, Thorburn and Trueman, metal brokers in Glasgow, acting, and duly authorized to act, on behalf of the defenders, agreed and undertook to deliver to the pursuer, or to Robertson and Mackenzie, on his behalf, 900 tons pig iron of good merchantable brands,

being 700 tons of No. 1, and 200 tons of No. 3; and whether the defenders wrongfully failed timeously to deliver to the pursuer the said iron? 2. Whether by these documents, the scrip notes, "the defenders undertook and agreed to deliver to the pursuer, as bearer of the said documents, 900 tons of pig iron, being 700 tons of No. 1, and 200 tons of No. 3, manufactured by them at their works at Clyde and Dundyvan, or one or other of them;" and whether the defenders failed to perform that contract? Those two issues came on to be tried in May 1853 before the Lord Justice Clerk. Upon the first issue the jury found against the pursuer. They said that no agency was established. That, therefore, was clearly a verdict for the defenders upon that issue, and that has never been called in question.

The question turns upon the second issue. At the trial the pursuer produced evidence, the object of which was to shew, that, by the general usage of trade, the scrip in question imported an obligation to deliver Clyde and Dundyvan iron. The question was not in this case whether these were valid instruments, but whether this undertaking "to deliver pig iron free on board here," that is, at Glasgow, signed by Dunlop, Wilson and Co., did or did not import that the iron was to be Clyde and Dundyvan iron. To prove this, Mackenzie tried to connect the contract under which they were given to Thorburn and Trueman. Thorburn and Trueman bought under contracts which, or almost all of which, imported that the iron sold to them was Clyde or Dundyvan iron, those being two famous iron works close to Glasgow.

The first endeavour on the part of the Lord Advocate at the trial, was to connect the scrip notes with the contracts under which they were given to Thorburn and Trueman. After some previous parole evidence, the Lord Advocate said that, under the second issue, he meant to contend, "that even if the authority stated under the first issue shall not be proved, the pursuer was entitled under the second issue to combine the contracts of 23d Jan. 1850, and those of 30th Nov. 1848 and 28th Nov. 1849, and relative documents, with the scrip notes granted by the defenders in implement of these contracts, in order to shew from these contracts what was the quality of iron thereby contracted for." The Dean of Faculty objected to the competency of this line of defence, and the Court, very properly, I think, sustained the objection. The notes must speak for themselves; and, in truth, this is one of the legal objections which influenced me very much in the last case. If, according to the true construction of the notes, the iron can, according to the usage of the trade, be said *ex facie* to mean Clyde and Dundyvan iron, well; if not, no parole evidence can be admitted to put a construction upon the notes by proving that the persons who had purchased the notes had agreed to receive from the person who sold the notes a particular species of iron.

Failing this, the Lord Advocate called two witnesses to prove that scrip notes in the form of these would be understood in the trade as meaning Clyde and Dundyvan iron. First of all, he called Mr. Thorburn, one of these brokers, and then a Mr. Connal, who appeared to have been a large warehouseman at Glasgow. Thorburn's evidence is this.—I must observe that the evidence is given in a very loose way, and it is exceedingly difficult to follow it. It is merely the loose notes of the Judge at the trial.—He is shewn one of these scrip notes. The defenders, he says, were in the habit of issuing scrip notes in these terms to their customers. To a great extent they were very current in the market. Many thousand tons were delivered under scrip notes in this form. Then in answer to the question—What quality of iron were they in use to deliver under scrip notes? he says, "Clyde and Dundyvan only. I do not remember any Lugar iron being delivered under such scrip notes." Then he says, "According to understanding and usage of their trade, if scrip bore delivery at Troon, they delivered Lugar iron, and customer only demanded Lugar iron. I do not know any case in which customer ever asked for other than Lugar iron. When Lugar iron sold, did note generally bear that it was Lugar iron? Yes, but in some cases they have given delivery notes for pig iron deliverable at Troon, without specifying Lugar iron or Muirkirk iron, and I cannot remember whether under these they delivered Lugar or Muirkirk iron. At that time there was a great scarcity of good brand iron in market. The defenders were tardy of delivering g. m. b. to customers at that time. More tardy than usual. I do not remember any refusal to deliver Clyde and Dundyvan, under such scrip, before this dispute." Then he says, "The introduction of the words Clyde and Dundyvan iron is not very common, but some dealers wished to have that specially put in. I cannot state reason; possibly it might be to make sure of the iron being Clyde and Dundyvan." He says afterwards, "I may have had iron to deliver at a high price, and to prevent buyer from me objecting, I have asked defenders to put in Clyde and Dundyvan, to avoid contract being cancelled—that is, to prevent the party raising objection to take the defenders' scrip expressed in general terms—this where I had contracted to give my party g. m. b.," which in mercantile language means "good merchantable brands."

Then the only other witness, Connal, is shewn one of the scrip notes, and he says, "Often got these—from documents themselves I took them for Clyde and Dundyvan iron. I would have taken these in fulfilment of engagement which I held for g. m. b. from any one, whether defenders or any other. These passed current for g. m. b. Defenders never tendered Lugar iron under such till near the end of 1850." Then he says, "I never heard of these as engage-

ments for Lugar iron." Then he is asked, "On the face of the documents, what leads you to expect Clyde and Dundyvan?" He answers, "They are dated Glasgow, and say 'f. o. b. here.' Now Lugar iron generally in scrip is said to be deliverable at Troon. I always acted on assumption that such scrip from defenders denoted Clyde and Dundyvan iron. I know that others did so too. All, so far as I know, acted on this." "Lugar iron did not pass current in the market, and wherever intended was expressed in scrip. I have not sold or bought it. Sold in 50 or 100 tons. I have had it occasionally. I know from delivery at Ayrshire port, that it was Lugar or Muirkirk, but I cannot say from recollection that it really was so named in scrip." Then he adds, what is not immaterial, I think, in reference to what passed in the last case, "Iron scrip was introduced in 1846 or 1847. It would be 1847 before it came into much general use. It was attended with some evils. Doubtful if proper transferences. Effect of them not very well understood. Scrip chiefly limited to Glasgow. English correspondents did not like it."

That evidence having been tendered, the Judge summed up thus:—"He declined to withdraw the consideration of the evidence applicable to the second issue from the jury, on the ground of being insufficient in law." "He left to the jury the question, whether, from the evidence adduced, parties receiving the documents mentioned in the second issue, by the practice and usage of the defenders, were entitled to rely on receiving Clyde or Dundyvan iron only? But he left this question to the jury under a full reservation to the defenders of all their pleas in law, and on the condition, that if the Court should hold, that the evidence given under the second issue ought not to have been received, or that it was insufficient in point of law to establish any obligation against the defenders, and if the Court further thought the question under the second issue turned wholly on a point of law for the Court, the Court should be entitled to give judgment at once on such point, without the case being again sent to a jury."

The jury found for the pursuer on the second issue, but with liberty to the Court "to enter up the verdict for the defenders, and to give judgment in the cause, if the Court shall be of opinion that the evidence received in support of the second issue ought not to have been received as incompetent evidence to support the same; or if the Court shall think that the matter proposed to be proved under the second issue was not put in issue by the terms of the issue; or if the Court shall hold that the evidence so received was, although admissible, insufficient in point of law to constitute any obligation against the defenders which was not expressed in or proved by the terms of the documents referred to in the second issue."

After the trial, we learn from the Lord Advocate that a motion was made in the Court below to set aside the whole proceedings, on the ground that the verdict had been taken irregularly after the jury had left the Court, and that it therefore was not really a verdict. I heard the Lord Advocate very attentively upon that subject, and I came to the conclusion which I expressed at the time, that your Lordships could not at all enter into that question—that we must take the record as we find it—and therefore that matter is entirely out of the case.

Then the question came to be decided, whether, upon all or any of these grounds, the Court was warranted in what they did, namely, entering a verdict for the defenders. At the hearing I intimated a very strong opinion, that, if the question had only been, whether that evidence ought to have been rejected, I should have thought it ought not to have been rejected, because a usage of the trade is only to be proved by a multiplication of instances. What was the meaning of g. m. b. and f. o. b. at Glasgow, in the usage of the trade, could only be established by a multiplication of instances, shewing that all mercantile men so construed those marks. I thought that it could not be said that the Judge ought to have rejected such evidence altogether. If the evidence had been coupled with that of other persons saying, that that was what everybody else understood as the usage of the trade, that would have been very sufficient evidence. Therefore I thought that the evidence was properly laid before the jury, and that it could not be held upon that ground that the Court was right in entering a verdict for the defenders.

I reserved the further question for consideration, whether or not, upon the ground of the invalidity of the notes altogether, or upon any other grounds, the Court did right in directing a verdict to be entered for the defenders. With respect to the invalidity of the scrip notes upon the pleadings, it appears that no objection was raised. On the contrary, there was just the same circumstance with regard to these scrip notes as there was in the former case, namely, that Dunlop, Wilson and Co. had recognized Mackenzie as the person to whom they were to deliver. But the contest was this: They said, We are ready to deliver, but we are not bound to deliver Clyde and Dundyvan iron It is not so expressed in the document. And there is no usage in the trade to justify your contention that we are bound to deliver anything else but that which is in terms expressed upon the face of the document.

That was the view taken of the case by the learned Judges in the Court of Session. They thought that, although the defenders were bound to deliver iron, and they treated the scrip notes as valid notes, yet that the iron which they were to deliver was not Clyde and Dundyvan iron only, but such iron as answered to the description on the face of the note; and although the jury found a verdict for the pursuer, they found that verdict subject to this:—"If the Court shall

hold that the evidence so received was, although admissible, insufficient in point of law to constitute any obligation against the defenders, which was not expressed in or proved by the terms of the documents referred to in the second issue," then the verdict shall be entered for the defenders.

Now, supposing it were doubtful, whether the evidence could be received or not, (I rather think I am right in saying that it ought to have been received,) still I am clearly of opinion, that this is a case in which it should have been left to the Court to say, whether there was evidence sufficient in point of law to constitute an obligation against the defenders not expressed in the terms of the document. I am clearly of opinion that there was no such evidence—that there was nothing to entitle the pursuer to more than what is expressed in the terms of his note. It is not disputed that they were ready to deliver. But they contended that they were not bound to deliver any other iron than that which is described as pig iron on the face of the document, and which they are therefore ready to deliver. That was all that they were bound to do. Consequently, I think the interlocutor was properly given against the pursuer, and in favour of the defenders. I shall therefore move your Lordships that this appeal be dismissed with costs.

Interlocutors affirmed, with costs.

Gibson Craig, Dalziel, and Brodie, W.S. *Appellant's Agents.*—Walker and Melville, W.S. *Respondents' Agents.*

FEBRUARY 19, 1857.

WILLIAM M'EWAN, *Appellant, v.* SIR JAMES CAMPBELL and Others, *Respondents.*

Railway—Copartnery—Provisional Committee—Obligation, Presumed—Summons—Relevancy HELD (affirming judgment), *in an action brought against members of a provisional committee of the projectors of a railway, which was never carried into effect, by the secretary who was also law agent, for payment of his accounts, that, in order to render a committee man liable, it is not enough that he acted as such, but it is necessary to aver and prove a separate and special contract of employment on his part, in regard to the pieces of business sued for.*[1]

This was an action brought against the members of a Provisional Committee appointed for promoting an undertaking called the Lanark, Stirling, and Clackmannan Counties Junction Railway, to recover payment of advances and of accounts incurred by the appellant as secretary and law agent.

The revised condescendence merely alleged, that the pursuer was appointed by the defenders, who were the members of the provisional committee, to be secretary and law agents, and that he acted as law agent with the knowledge and consent of the defenders as members of the said committee.

The Lord Ordinary and the First Division held the averments not relevant, and dismissed the action.

The pursuer appealed, pleading, that the judgment ought to be reversed—Because, having reference to the nature of the appellant's claim, the summons and record contained statements relevant and sufficient to support the conclusions of the action.

The respondents maintained that the judgment ought to be adhered to—1. Because the condescendence annexed to, and forming part of, the summons, did not contain any statements of facts relevant or sufficient to support the conclusions of the summons. *Hutton* v. *Bright*, 3 H. L. C. 341; *Campbell* v. *Dick Lauder*, 15 D. 117; 6 Geo. IV. c. 120, § 2. 2. Even the revised condescendence for the appellant, on which the record was closed, did not relevantly, and with sufficient specification, aver either employment of the appellant by the respondents, or any agreement on their part with him, whereby they individually, or conjunctly and severally, became bound or liable, as libelled.

Rolt Q.C., and *Roxburgh*, for the appellant.—It is admitted that the law is now settled on the subject of the liability of provisional committee men, and that there is no partnership between them; but that in order to fix an individual with liability, he must be shewn to have entered into some special contract to pay—in other words, each is liable only on his own contract, and binds himself only.—*Bright* v. *Hutton*, 3 H. L. C. 341; *Upfill's Case*, 2 H. L. C. 674. Here, however,

[1] See previous report 16 D. 117; 26 Sc. Jur. 87. S. C. 2 Macq. Ap. 499; 29 Sc. Jur. 222.