1856.
June 3rd, 5th, July 29th.

MACKENZIE, ... APPELLANT.
DUNLOP, ... RESPONDENTS.

Mercantile Usage is proveable by the multiplication or congregation of a great number of particular instances, showing a given course of business, and a general established understanding respecting it.

Iron Scrip Notes.—If A gives an iron scrip note to B, and B sells it to a third party, that third party may prove that the document has, in the usage of trade, an import not expressed on the face of it.

But such third party cannot put a special construction on the document, by proving that in the contract between A and B there was a specialty not actually appearing on the face of the document.

Jury Trial.—The Judge is to lay down the law to the jury; the jury are to find facts, but not to state what the Court is to do.

THE action was by the Appellant, a merchant in Glasgow, against the Respondents, ironmasters, also of Glasgow; and the summons concluded that the Respondents should deliver to the Pursuer 900 tons of a certain description of iron, or otherwise that they should pay back the price which they had received, and make good certain damages for breach of contract.

The ultimate judgment of the Court was to the effect that the ironmasters were not bound to deliver iron of the particular description claimed by the summons.

The *Lord Advocate* (*a*) and Sir *FitzRoy Kelly* appeared for the Appellant.

Mr. *Rolt* and Mr. *Blackburn* for the Respondents.

The material circumstances, and the reasoning applicable to them, being very fully discussed, first in the *Lord Chancellor's* "Observations," and, secondly, in his Lordship's definite "Opinion,"—both of which are given at length,—it is unnecessary and would be improper to report in detail the arguments of Counsel, the case, after all, being one of specialties.

On the 6th June 1856, his Lordship delivered the following

OBSERVATIONS.

Lord Chancellor's observations.

The LORD CHANCELLOR:

My Lords, this question arises upon a jury trial in Scotland to try two issues, one of which is not now under consideration. The question 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."

The question arose in an action which was instituted in the Court of Session by the present Appellant, Mr. Mackenzie, in which he sought that the Defenders, who are Messrs. Dunlop, Wilson, and Company, "should be decerned and ordained to deliver to the Pursuer, 'free on board' at Glasgow, 700

(*a*) Mr. Moncreiff.

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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 Ironworks or Dundyvan Ironworks, or one or other of them."

The title of Mr. Mackenzie arises under a contract for sale which he entered into with Messrs. Thorburn and Trueman, who are large brokers and middlemen at Glasgow, dated the 9th of October 1850, by which contract Messrs. Thorburn and Trueman "sold to Messrs. Robertson and Mackenzie" (Mr. Robertson being a partner of Mr. Mackenzie's, Mr. Mackenzie was the person really interested) "2,000 tons 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 Company, 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 Company 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 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 show that that is not so, the issue which I have mentioned having come for trial, evidence was tendered on the part of the Pursuer, Mr. Mackenzie, the object of which was to show that Messrs. Dunlop, Wilson, and Company would not discharge their obli-

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gation, which purports to be an obligation to deliver 100 tons of 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 show 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 Company, 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 Messrs. Dunlop, Wilson, and Company, Messrs. Dunlop, Wilson, and Company 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 Messrs. Dunlop, Wilson, and Company, 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 that in the discharge of that obligation, Messrs. Dunlop, Wilson, and Company came under contract to deliver something which did not, on the face of it, purport to be Clyde and Dundyvan iron, but merely

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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 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, delivered free on board here to the bearer of this document only, on presentation," dated Glasgow,—to offer evidence to show that, by the 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 (*a*) in which it was proved that a contract to deliver 1,000 rabbits always denoted 1,200; and, according to a vulgar notion, whether it is true or not I am not sure, a baker's dozen always means thirteen. 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

(*a*) *Smith* v. *Wilson*, 3 Barn. & Adol. 728; and see 9 Cla. & Finn. 543. See Pitt Taylor, Evid. 761.

therefore competent to the Pursuer to give evidence to show that under the terms "pig-iron delivered free on board at Glasgow," Clyde and Dundyvan iron was meant; and for the purpose of showing that, some witnesses were examined.

That which is relied upon 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 Company 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 remarks that it was admitted. Yes, and properly admitted; because though very weak evidence, it was some evidence to show 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 show 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 shown 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

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others of same kind they did, and I refused to take it. I never heard of these 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, my Lords, 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 or 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 evidence as admissible, the jury say, looking at this as a question for us to decide, the evidence does establish that which the Pursuer under-

took 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, my Lords, 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

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parties, viz., he left this question to the jury under those reservations.

Now, acting upon that assumption, 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, and it is impossible to say, if it 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 proper to be 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 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, my Lords, 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 (*a*) which was argued immediately preceding this; 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.

The *Lord Advocate:* Your Lordship will see that they meant effect to be given to these documents, and not only is there no point of that kind raised upon this

(*a*) *Dixon* v. *Bovill, suprà*, p. 1.

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record or put to the jury, but there is an express admission of their validity.

Lord Chancellor's observations.

The *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.

The *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.

The *Lord Chancellor :* I have not forgotten that.

Consideration adjourned sine Die.

On the 29th July the *Lord Chancellor* pronounced his final opinion in these terms :—

Lord Chancellor's opinion.

The LORD CHANCELLOR :

My Lords, the question here arises out of a contract that was entered into on the 9th of 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, 2,000 tons of pig-iron.

The original contract is as follows :—" Glasgow, 9th October 1850.—Sold to Messrs. Robertson and Mackenzie 2,000 tons 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, say per our letter of this date, Dixon's, Monkland and Summerlee engagements excepted."

Under that contract to deliver 2,000 tons, 1,100 tons were duly delivered, and they never formed a subject of dispute in the case. Scrip notes of the Defenders,

(like those which I have adverted to in the preceding case (*a*)), scrip notes, that is, of Dunlop, Wilson, and Company were delivered for the other 900 tons. There were nine 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, and Company."

This note and other notes to the same effect, nine in number, having been delivered by Dunlop, Wilson, and Company to Mackenzie and Robertson (Robertson is a mere name, Mackenzie is the real party,) 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 Company, 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, namely, Clyde and Dundyvan iron, and they are willing to deliver pig-iron, not Clyde and Dundyvan iron.

This 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 Ironworks or Dundyvan Ironworks, or one or other of them at least, all of good merchantable brands as aforesaid.

My Lords, 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

(*a*) *Dixon* v. *Bovill, suprà,* p. 1.

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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 Company, and that consequently Dunlop, Wilson, and Company 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. The first was "Whether, on or about the 9th of October 1850, Messrs. 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 Messrs. 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." The second issue was 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.

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The question turns upon the second issue. At the trial the Pursuer produced evidence, the object of which was to show 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 Company, did or did not import that the iron was to be Clyde and Dundyvan iron.

To prove this, Mackenzie tried to connect the scrip notes with the contract under which they were given to Thorburn and Trueman. Thorburn and Trueman had bought under contracts which, or almost all of which, imported that the iron sold to them was Clyde and Dundyvan iron. I should observe that it is called "Clyde and Dundyvan iron," but it means Clyde *or* Dundyvan iron, they 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 parol 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 23rd January 1850, and the contracts of 30th November 1848, and 28th November 1849, and relative documents, with the scrip notes granted by the Defenders in implement of these contracts, in order to show from these contracts what was the quality of iron thereby contracted for."

The *Dean of Faculty* objected to the competency of this line of evidence, and the Court very properly, I

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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 las case (*a*). 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 parol evidence can be admitted to put a construction upon the notes, by proving that the person 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 gentleman of the name of 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 shown 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. Clyde and Dundyvan only? —Only Clyde and Dundyvan. 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 cus-

(*a*) *Dixon* v. *Bovill, suprà*, p. 1.

tomer 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 shown 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 as fulfilment of engagement which I held for g. m. b. from any one, whether Defender 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 engagements for Lugar iron." Then he is asked, "On the face of

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the documents, what leads me to expect Clyde and Dundyvan?" That must be, "What leads you to expect Clyde and Dundyvan?" "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 whenever 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 Mr. Connal adds, what is not immaterial I think in reference to what passed in the last case (*a*): "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

(*a*) *Dixon* v. *Bovill, suprà*, p. 13.

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."

My Lords, after this trial we learn from the *Lord Advocate* that a motion was made in the Court below to set aside the whole proceeding 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

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in what they did, namely, entering a verdict for the Defender. My Lords, 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 of f. o. b. at Glasgow in the usage of the trade could only be established by a multiplication of instances showing 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. My Lords, 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 (*a*), namely, that Dunlop, Wilson, and Company 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

(*a*) *Suprà*, p. 1.

expressed in the documents; 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.

My Lords, 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 were, therefore, ready to deliver. That was all that they were bound to do. Consequently, I think the

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Lord Chancellor's opinion,

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, and Appeal dismissed with Costs.

TATHAM, UPTON, UPTON, AND JOHNSON—CONNELL AND HOPE.