Their Lordships adhered to the Lord Ordinary's interlocutor.

Counsel for Reclaimer—Asher—Millie. Agent—Adam Shiell, S.S.C.

Counsel for Respondent—Trayner—Mackintosh. Agents—Murray, Beith, & Murray, W.S.

Tuesday, January 25.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

JOHNSON & REAY *v.* NICOLL & SON.

Contract — Sale — Breach of Contract — Right of Manufacturer to Supply Goods not Made by Himself in Implement of Contract.

Where manufacturers who were under contract to supply goods of a certain stipulated quality, offered in implement of their contract goods of the stipulated quality, but not of their own manufacture, and the buyers declined to receive them — *held*, following *The West Stockton Iron Company* v. *Nielson & Maxwell* (July 3, 1880, *supra*, vol. xvii., p. 719, 7 R. 1055), that the tender of those goods was implement of the contract, and that the buyers were in breach of the contract in refusing to receive them.

On 13th June 1878, correspondence regarding the sale of iron plates having previously passed between the parties, Messrs Johnson & Reay, iron manufacturers, Stockton-on-Tees, sold to Nicoll & Son, iron merchants, Dundee, 750 tons iron ship-plates. The contract-note, which was written on paper having upon it the heading "J. & R. Brand, a Crown, Moor—Johnson & Reay, iron manufacturers," was in these terms:—

"The Moor Ironworks,

"Stockton-on-Tees, 13th June 1878.

"Sold to Messrs Nicoll & Son, Dundee, per Messrs John E. Swan & Brothers, Limited, ship-plates as under, viz.:—

"*Quantity.*—Seven hundred and fifty (750) tons.

"*Quality.*—'Crown,' to pass Lloyds' survey.

"*Price per ton of* 2240 *lbs.*—Six pounds (£6).

"Not less than a truck-load to be specified at a time.

"*Terms of payment.*—Cash, less 2½ per cent. on 10th of month following delivery.

"*Rate of delivery.*—Over next three or four months, in about equal monthly quantities.

"*Place of delivery.*—Free on trucks at our works. Buyers to have the option of taking delivery of the whole, or a portion of contract, f.o.b. Stockton or Middlesbro', we charging nett cost, in any case not exceeding 2s. 6d. per ton.

"*For* JOHNSON & REAY,

"F. W. STOKER.

"In the case of strikes or combinations of workmen, or accidents causing the stoppage of the works, the supplies of iron now contracted for may be suspended during their continuance. This clause applies to buyers and sellers."

The sale was confirmed by Nicoll & Son by letter of 19th June. On the same date there was another contract between the parties, who had been for sometime dealing with each other in iron. This contract, however, is of no importance to the present case.

On 9th July 1878 Johnson & Reay sold to Nicoll & Son 300 tons ship-plates, also "Crown," to pass Lloyds' survey, the delivery to be in equal monthly quantities to extend over three or four months. There was in this contract the same strike clause as that in the June contract, quoted *supra*.

Under neither contract were the deliveries made in the time contemplated by the contract-notes. The parties were at issue as to whether this was the fault of Nicoll & Son in not specifying for iron in due time, or of Johnson & Reay in not being in a position to supply sufficient quantities of iron as required under the contracts.

In May 1879 a portion of the iron under the June contract was still undelivered, and none of the iron under the July contract had been delivered. On 21st May Johnson & Reay wrote this letter to Nicoll & Son:—"We beg to inform you that in consequence of our inability to secure sufficient specifications to keep our works going, we have been compelled to close them for the present, and have therefore made arrangements with some of our friends to manufacture for us the iron which we are under contract to deliver to you. In deference to your wishes from time to time, by reason of your being unable to accede to our repeated requests for specifications, in accordance with the terms of your contracts with us, the delivery of the iron sold to you has been deferred, and it is now very considerably in arrear. Having regard, therefore, to the arrangements we have made with the firms who are manufacturing the iron for us, and to prevent complications with them, we must ask you to be good enough to let us have specifications for the quantity due, about 1000 tons plates and 298 tons angles, without delay, and continue to specify in accordance with the terms of your contracts."

On the 29th the solicitors of Johnson & Reay wrote on their behalf requiring immediate specifications. The answer was this letter from Nicoll & Son:—"2d June 1879.—We enclose specifications of plates, which you will please be very particular in rolling exact to size, both in length, breadth, and thickness and quality, so that there be none rejected, each plate to be distinctly [J. & R., a crown, Moor] branded. Please have all ready by end of the week, when we will advise you where to ship them. Also say approximate weight."

Thereafter Johnson & Reay took up the position that they were entitled to supply iron of crown quality to pass Lloyds' survey, whether made by themselves or other firms; Nicoll & Son, on the other hand, contending that they were entitled to iron made by Johnson & Reay at their "Moor" ironworks.

In November 1879 Johnson & Reay raised this action concluding for £104, 17s. 4d. damages for breach by Nicoll & Son on the June contract, and £375 on the July contract. The amount of damage claimed was, as they alleged, the difference between the contract prices and the market prices, so far as undelivered as at the date when the pursuers declined to allow the defenders the further indulgence in point of time for the due implement of the contracts which the defenders were desirous of obtaining.

They pleaded—"(1) The defenders having wrongfully, and in breach of said contracts, failed to supply said specifications, and having thus prevented the completion by the pursuers of said contracts, are liable in damages as concluded for, with expenses."

The defenders denied that the contract had been broken through their fault, and pleaded—"(2) There having been no undue delay on the part of the defenders in ordering the iron under the contracts of June and July 1878, and any delay that did take place having been caused through the pursuers' fault and breach of faith with the defenders, the latter are not responsible therefor. (3) The defenders being ready in June 1879 to take delivery of the whole iron under said two contracts, and being still ready and willing to do so, are entitled to absolvitor."

There was a further question between the parties relating to a contract alleged by the pursuers and denied by the defenders to have been completed between the parties in October 1878. This question turned on a matter of fact, and need not be further referred to.

The Lord Ordinary allowed a proof, in which the defenders produced letters written in 1878 stating that they objected to take under their contracts any iron of the West Stockton Iron Company's manufacture, which was that offered by the pursuers, on the ground that it was of inferior quality to that produced by the pursuers at their own works. They also led evidence, reference to which is made in the opinion of Lord Craighill, tending to show that the iron of the West Stockton Company, though of crown quality, and capable of passing Lloyds' survey, was inferior to that supplied from pursuers' own works.

The Lord Ordinary on 12th November 1880 issued this interlocutor—"Decerns and ordains the defenders to pay to the pursuers the sum of £400, being the damages caused to the pursuers by the defenders' breach of the contracts of 13th June and 19th July 1878." . . . He added this note:—

"*Note.—The contracts of June and July* 1878.—These contracts were open in May 1879. On the 21st of that month the pursuers intimated to the defenders that they had closed their works, and that they would supply the iron from other manufacturers. The defenders on 2d June insisted that the pursuers should deliver iron of their own manufacture, and refused to take any other. The question thus comes to be, which of the parties took the just view of the contracts.

"The decision of the Court in the case of the *West Stockton Company*, 7th July 1880, seems to the Lord Ordinary to rule the question. He cannot distinguish it from the present case, and he is therefore of opinion that the defenders are in the wrong.

"It seems to the Lord Ordinary that the damages should be settled by reference to the market prices which obtained at the date of the breach. On this footing they may, he thinks, be fairly estimated at £400." . . . .

The pursuers having reclaimed against the part of the Lord Ordinary's interlocutor dealing with the alleged contract of October, in which he assoilzied the defenders, the defenders took advantage of the reclaiming-note to contend that they ought to be assoilzied from the whole conclusions of the summons, inasmuch as the iron offered by the pursuers was not that stipulated for, albeit iron of crown quality fit to pass Lloyds' survey. They relied, in distinguishing the case from that of the *West Stockton Iron Company* v. *Nielson & Maxwell* (July 3, 1880, 7 R. 1055, 17 Scot. Law Rep. 719), on the evidence led by them as to the superior quality of pursuers' iron, whereas in the *Stockton* case the parties admitted that the iron offered was as good as that supplied by the sellers from their own works; on the fact that the iron referred to in the contract-notes was to be "J. & R., crown brand, Moor," as shown by the heading of the contract-note; on the fact that it appeared from the *West Stockton* case that the sellers there were both manufacturers and dealers, while the pursuers here were manufacturers only; and on the fact that while everything tended to show in that case that iron of a certain quality only was wished, and the parties had been brought together by brokers, the circumstance that the defenders here had ordered their iron from the sole agents of the pursuers, and the terms of their letter, showed that they had selected the pursuers for their superior make of iron. In any view the Lord Ordinary had allowed excessive damages.

At advising—

Lord Craighill— . . . . Passing now from the questions connected with the alleged contract of 31st October 1878, we come to the pursuers' claim for damages for the alleged breaches of the contract of 13th June and 9th July. The original validity of these contracts is not disputed, and the case as to them, so far as the facts are concerned, may be thus presented. The 750 tons of ship-plates contracted for under the first of these contracts ought to have been specified for by the defenders, and delivered by the pursuers, within three or four months from the date of the contract; and the 300 tons contracted for under the second ought to have been specified for and delivered within three or four months from the date of that contract. But delays were incurred, the pursuers say through fault on the defenders' part, and the defenders say through fault on the part of the pursuers. And so it happened that in May 1879, months after both contracts should have been fulfilled, only 666 of the 750 tons contracted for by the first, and no part of the 300 tons contracted for by the second, of these contracts had been specified for by the defenders. The balance, amounting to something like 400 tons, consequently remained undelivered. In this situation of affairs the pursuers on the 21st of that month wrote to the defenders intimating that for want of specifications from the defenders and others who had given orders they had been compelled to close their works for the present, and therefore had made arrangements with some of their friends to manufacture for them the iron which they were under contract to deliver to the defenders. They added, that "having regard to the arrangements we have made with the friends who are manufacturing the iron for us, and to prevent complications with them, we must ask you to be good enough to let us have specifications for the quantity due without delay." To this letter no answer was returned by the defenders; but Messrs Crosbie & Archer, the law-

agents of the pursuers, having written in similar terms on the 29th May to the defenders, the latter on 2d June wrote to the pursuers as follows:—"We enclose specifications of plates, which you will please be very particular in rolling exact to size, both in length, breadth, and thickness, and quality, so that there may be none rejected. Each plate to be distinctly branded J. & R., Crown, Moor," which are the several parts of the pursuers' trade-mark. The demand for this brand was neither more or less than an intimation that plates the manufacture of another house would not be accepted by the defenders. And as such a refusal would, in the pursuers' view, amount to a breach of the contract, and as this refusal was persisted in, the result was the institution of the present action.

That the point in controversy may be the more clearly presented, the statement given by the defenders in their answer to the condescendence should be brought into view. The defenders there explain that "in June 1879, at the request of the pursuers, they sent four new specifications for the plates still undelivered, but the pursuers returned these, and declined to give further implement of the contracts. The pursuers at this time wished to substitute the iron of another company for the iron contracted for; but the defenders declined to consent to this, and stated that they were ready to take delivery of the brand of iron contracted for. The pursuers, however, wrongously declined to supply their own iron in terms of the contract."

Thus, there is sharply raised the question, whether the articles contracted for were as matter of contract to be articles of the pursuers' manufacture? The quality of what was offered by the pursuers was not in June 1879, when the parties came into controversy on this subject, and is not on the record, the subject of objection. The fact that the plates and angles were to be manufactured by another company, and nothing else, was the cause of rejection. The defenders, no doubt, at the proof, took up the question of comparative quality, and tried to show that iron of the pursuers' manufacture was better than that of other makers; but this obviously was an afterthought, and at anyrate it has not, I think, been established.

Assuming, then, that the iron which was to be supplied while the pursuers' works were closed was of the stipulated quality, were the defenders entitled to reject what was offered merely because it was to be manufactured at the works of another maker? I do not lose sight of the consideration that the articles sold by the pursuers to the defenders were articles to be manufactured after the defenders' specifications had been sent in, and so could not be supplied after the close of the pursuers' works from surplus stock; nor of the consideration that presumably it was intended on the one side, and expected on the other, that as the pursuers were manufacturers, what had been sold could be made at their works. The supplies to be furnished would, if the thing could be accomplished, naturally be turned out from those works. But neither intention nor expectation, but the terms of the concluded contract, must be taken to furnish the rule by which the question in dispute is to be determined.

Turning, then, to the contract, I find, in the first place, that nothing is said as to the place of manufacture. "Ship plates as under" is the thing sold. And this is the more noticeable because there is a specification of quality which does not refer, and has no relation, to the place where, or the persons by whom, the goods were to be manufactured. All that is said is "Quality crown, to pass Lloyds' surveyor." Now, the plates which were rejected were to be of crown quality. They were to have the crown upon them, and the makers' initials, as required by Lloyds' rules, were also to be a part of the brand. What more could be required so far as the terms of the contract were concerned, there being no specialty in the manufacture of the pursuers distinguishing their products from those of other makers. To read the contract as the defenders desire, I may add, would be not to further but to impede the execution. An article of the stipulated quality was the thing to be delivered and received, and to introduce as an implied condition that even though the quality was unexceptionable it might be rejected because made at other works than those of the sellers, is to put in the power of the buyer an unstipulated option of rejecting the very article which according to description had been purchased. This result, no doubt, must have been allowed if the subject of contract had been said to be an article to be made by the pursuers. A bargain is a bargain, and a specified condition, reasonable or unreasonable, expedient or inexpedient in itself, must, if insisted on, be observed. But there is here, as I read the contract, no such condition. The description of the article contains neither directly nor by implication any reference to the maker.

But negative evidence is not all that is furnished by the contract. For, in the second place, there is in the "strike clause" of the contract what appears to me to be almost positive proof that the article manufactured by another maker might be supplied. By that clause it is provided that "in the case of strikes, or combinations of workmen, or accidents causing the stoppage of the works, the supplies of iron now contracted for may be suspended during their continuance. This clause applies to buyers and sellers." Here we have, as I think, two things made clear. The one is that the works of the pursuers are to be looked upon as the place at which in ordinary circumstances the iron is to be manufactured. The other is that when these works were stopped supplies manufactured at another place might be furnished; for the clause does not say that on this occurrence there must be a suspension of delivery. The option to suspend is given, but suspension is not made obligatory. The defenders, indeed, read the concluding words—"this clause applies to buyers and sellers"—as if it conferred an option not merely on the sellers to suspend, but on the buyer to refuse, delivery. This, however, is a misreading of this provision. What is meant by the declaration is, that when there is a stoppage in the works of the seller, he shall have the option to suspend delivery; and when there is a stoppage in the works of the buyer, the latter is to have the option to refuse delivery. Thus the two parties are made equal.

All this being so, the true result appears to me to be, that the pursuers were entitled to offer, and the defenders were bound to accept, iron of

the stipulated quality, though not manufactured at the works of the pursuers.

The decision in the *West Stockton* case (July 3, 1880, 7 R. 1055) appears to me to be an authority on the present occasion. The circumstances are all but identical; and I adopt the grounds of judgment presented in the opinions of the Lord Justice-Clerk and Lord Gifford.

There is left for consideration only the amount of damage, and as to this I think that cause has not been shown why the sum awarded by the Lord Ordinary should be reduced. The principle on which he assessed the damage has not been objected to by the defenders. Their case upon this point, as presented at the discussion upon the reclaiming-note, is, that even assuming that they were bound to accept iron manufactured elsewhere than at the pursuers' works, they ought to have been allowed from June 1879, when the final demand for specifications was made, the three or four months provided by the contracts for specification and delivery. But this contention is excluded by their previous delay, and besides is inconsistent with their pleading upon the record. In their third plea-in-law they set forth that in June 1879, the date taken by the Lord Ordinary to be the date of the breach, they were ready to take delivery of the whole iron under the said two contracts, and in so saying they cut away the ground on which the argument for reduction of damage has been maintained.

Entertaining those views, my opinion is that the interlocutor of the Lord Ordinary ought to be affirmed, and judgment accordingly be pronounced.

LORD YOUNG— . . . With respect to the contracts of June and July the Lord Ordinary refers to the *West Stockton* case, decided in July last on the general question raised, in which I expressed an opinion differing from that of your Lordship in the chair and that of Lord Gifford. I do not enter on that question now, but content myself with saying that I agree with the Lord Ordinary that this case is ruled by the decision then pronounced. I therefore agree with the Lord Ordinary on the grounds which he has shortly stated in his note.

LORD JUSTICE-CLERK—I have nothing to add to the very full opinion of Lord Gifford in the case of *Stockton*, and to what I said in that case. I concur in the opinion of Lord Craighill that there is nothing to distinguish this case from that. I therefore think we should adhere to the interlocutor of the Lord Ordinary.

The Court adhered.

Counsel for Pursuers—Macdonald, Q.C.—J. A. Reid. Agents—Finlay & Wilson, S.S.C.

Counsel for Defenders—Dean of Faculty (Fraser, Q.C.)—Asher—W. C. Smith. Agent—J. Smith Clark, S.S.C.

Wednesday, January 26.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

RUSSELL (INSPECTOR OF POOR OF COLINTON PARISH) *v.* GREIG (INSPECTOR OF CITY PARISH OF EDINBURGH) AND CRAIG (INSPECTOR OF ST CUTHBERT'S PARISH).

Poor—Settlement of Birth—Liability of Parish of Birth of Pauper Born in a Poorhouse situated there, but belonging to another Parish.

The parish of E. had no poorhouse within its own bounds, but had erected and maintained a poorhouse exclusively belonging to it in the adjoining parish of C. *Held* that the birth settlement of a pauper born in this poorhouse was in the parish of C., and not in the parish of E., to which the poorhouse belonged.

This was an action by the inspector of poor of the parish of Colinton for declarator that John Cunningham, a pauper in the St Cuthbert's Combination Poorhouse, did not possess a settlement of birth in the parish of Colinton, and that his settlement was in the City parish of Edinburgh, and for relief from the City parish of claims made or to be made in Colinton for the pauper, on the ground that he was born in Colinton. The defenders called were the inspector of the City parish of Edinburgh and the inspector of St Cuthbert's. The circumstances in which the action was brought were as follows:—In 1870 the City parish sold the old poorhouse of that parish and built a new poorhouse at Craiglockhart, in the adjoining parish of Colinton. The new poorhouse paid rates in the parish of Colinton. It contained a lying-in ward, and it was the practice of the City parish to send out to that ward paupers about to be confined. The mother of the pauper, who was born on 16th March 1872, was one of the persons so sent out to Craiglockhart by the City parish. He became chargeable to St Cuthbert's in March 1878, and the inspector of that parish raised an action in the Small-Debt Court for repayment of sums expended on his relief against Colinton as the parish of his birth. The inspector of Colinton then raised this declarator to try the question of the liability of that parish to support paupers born in the poorhouse belonging to the City parish though situated in the parish of Colinton.

He pleaded—"(1) The pauper having no settlement by birth or otherwise in the parish of Colinton, the pursuer is entitled to decree in terms of the first declaratory conclusion of the summons. (2) The birth settlement of the pauper being in the City parish of Edinburgh, the pursuer should have decree of declarator to that effect."

The City parish pleaded—"(2) The said pauper having his birth settlement in the parish of Colinton, this defender is entitled to absolvitor, with expenses. (3) The said pauper having no settlement in the City parish of Edinburgh by birth or otherwise, that parish is not liable in repayment of the advances made by the pursuer."

The Lord Ordinary found that the settlement of the pauper was in Colinton, and assoilzied the defenders—adding this note:—