CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND,

1832.

[6th *March* 1832.]

JAMES ROBERTSON, Appellant.—*Campbell.* No. 1.

HARFORD, BROTHERS, and COMPANY, Respondents.—*Archbold.*

Sale—Acquiescence. In defence to an action by a seller, raised in the Burgh Court of Glasgow, for payment of a balance of an account for iron purchased from him, the purchaser pleaded, 1st, that the iron was not sent within the time ordered; 2dly, that it was deficient in weight; 3dly, that it was of different sizes from those specified in the order. The seller maintained that he had fulfilled the terms of the bargain, and that the purchaser was at any rate barred by his silence and acquiescence. The Burgh Court sustained the defences; but the Court of Session, on advocation by the pursuer, adhered to the Lord Ordinary's judgment, altering and decerning in terms of the libel, and found the advocator entitled to expences in the inferior court and in the Court of Session. The House of Lords reversed the judgment of the Court of Session, and found the defender properly assoilzied by the Burgh Court, and remitted to the Court of Session to proceed as might be necessary to give effect to this judgment.

No. 1.

5th March 1832.

ROBERTSON v. HARFORD and others.

Expences.—The Court of Session having, in the advocation, found the advocator entitled to the expences of the whole suit, including those incurred in the original action as well as in the advocation, the House of Lords altered, and found the appellant (the original defender) entitled to all the expences in the advocation, up to the date of and including the Lord Ordinary's judgment; but that the appellant and respondent ought respectively to bear their own expences in the advocation in the Inner House, and of the appeal.

2d DIVISION.

Ld. Fullerton.

ON the 7th February 1827, James Robertson, iron-monger in Glasgow, wrote to Harford, Brothers, and Company, iron-masters in Bristol, as follows:—"Sub-
" joined is a specification for seventy-three tons and
" sixty bars iron, which please order to be shipped
" in the course of two or three weeks at most, of a
" good quality, and charged at or under the prices I
" have within these few weeks been quoted by two
" different Welsh houses, viz.: — bars at 8*l.* 10*s.* and
" rods at 9*l.* 10*s.* I intend to pay you with a banker's
" draft at par, from the date of the iron arriving
" here, and will expect the discount I am quoted
" for prompt payment, viz. five per cent. Please give
" instructions the rods are all sent the exact sizes
" ordered. I hope you will be able to get a vessel to
" bring the iron for about 12*s.* per ton, as the days are
" now getting longer, and the weather better. Please
" write me as early as convenient when I may expect
" the present order shipped, being out of all the sizes
" of rods and part of the bars. If you cannot ship
" my order immediately, I will require to send it to
" another house. Expecting to hear from you in a few
" posts," &c.

No. 1.

6th March 1832.

ROBERTSON *v.* HARFORD and others.

On the 10th February, Harford, Brothers, and Company answered,—"We have duly received your favour "of the 7th, annexing order for bar iron and rods, "which you offer us at the price of 8*l.* 10*s.* for the "former, and 9*l.* 10*s.* for the latter, delivered at "Newport, less discount five per cent. for banker's "draft at par, from the arrival of the iron with you. "On these terms we must decline the order, but shall "be happy to execute it at the prices quoted, allowing "you five per cent. for banker's draft at par, to be "remitted us on receipt of invoice. We wait your "reply, and remain, &c."

On the 12th February, Robertson replied,—"In "reply to yours of the 10th instant, I will take the "iron at the prices and discount mentioned, viz. bars "at 8*l.* 10*s.* and rods at 9*l.* 10*s.*, five per cent. off for "a banker's draft at par, from receipt of invoice, which "I engage to send you, provided you send it off before "any general reduction, and warrant the iron all the "sizes ordered. Please ship the annexed jobbing iron "along with the last order.

"When your Mr. Davies was lately here, I men-"tioned to him I intended to visit the works before I "bought much iron. I find I require what I have "ordered from you in the meantime, to assort my "stock. My reasons for intending visiting the dif-"ferent works in Wales is, to endeavour to buy iron "as cheap as the Liverpool iron dealers, for they come "here and sell iron delivered in Glasgow to consumers, "&c. as cheap as it can be brought from Wales at the "common list prices. I am certain that they buy iron "at least 10*s.* per ton lower than the regular list prices. "In case you agree to supply me at 10*s.* per ton under

No. 1.

6th March 1832.

ROBERTSON v. HARFORD and others.

" the regular list prices, I would send all my orders for " Welsh iron to your house, and would engage to take " at the rate of 400 to 600 tons per annum, provided " the qualities were equal to any of your neighbours. " You may let me know regarding this so soon as " convenient. I hope you will allow me at least " Mr. Cowan's commission of the present order when " it is sent to you direct; however, I will leave this to " yourselves for the present order only, and in case you " do not give any extra allowance, same as I know the " Liverpool merchants get, I must apply to another " house for the next supply of iron I require; it is " probable, however, before then, I will be at most of " the works in Wales. Whatever you and I agree for, " I engage it will be for prompt payment, and the " terms will not be mentioned by me. Messrs. W. D. " and W. E. Acraman wrote on the 17th instant, " saying they could get iron shipped for Glasgow at " 12*s.* or from Bristol at 10*s.* per ton; but as I had " sent you an order before receiving their advice about " freight, I have not sent them an order, although they " have quoted me bars 8*l.* 10*s.*, and other kinds in pro- " portion. I hope you will be able to find out the " vessel that they could have shipped iron on board of " for me, and ship my order to you all on board of it. " If you had the iron at Bristol to answer my specifica- " tions, it would be a saving to me to get it all shipped " there. I have no objections you ship what part of it " you have at Bristol, and the remainder at Newport. " Please advise me as early as convenient (which I hope " will be in a few posts) when I may expect the iron " all shipped ordered from you; for if you do not ship " it in the course of ten or fourteen days at most, I will

" require to order some from Liverpool. Waiting
" your reply, I remain, &c."

Robertson again wrote on the 8th March, — " Since
" I handed you an order, 7th ultimo, for iron, I am
" offered bars at 8*l.*, and nail-rod iron at 9*l.*, six
" months, or three per cent. off for prompt payment.
" As I expect you will supply me at such prices, as I
" will have iron as low from you for prompt payment
" as from the house above alluded to (which I am not
" at liberty at present to name), I herewith hand you a
" small addition to my last order, and request you will
" ship the whole at two or three weeks at most. In
" case any reduction takes place at quarter-day next
" month, the house alluded to agrees to give me the
" advantage of it, as an inducement to hand them an
" order; but this I do not at present intend to do,
" provided you supply me on as reasonable terms as I
" have been quoted. In these very unpropitious times,
" people run enough of risk in selling their goods on
" credit, without losing on the stock in hand.

" It would be very discouraging for me to have iron
" shipped by you so near quarter-day, and the invoice
" price reduced between the time shipped, and the
" time of its arrival here. No doubt Messrs. W. D.
" and W. E. Acraman, Bristol, must buy iron as low
" or lower than I have been quoted within these few
" days, otherwise they could not have afforded it to me
" at the prices they have recently done, viz. bars at
" 8*l.* 10*s.*, and rods, 9*l.* 10*s.*, six months, or five per
" cent off for prompt payment.

" Please acknowledge receipt of this in course, and
" say when you have prospects of shipping all the iron
" I have ordered. In case you guarantee no reduction

No. 1.

6th March 1832.

ROBERTSON v. HARFORD and others.

" at quarter-day (next month), I could wish it shipped " immediately. If you are not inclined to do this, I " wish none of it now shipped till after the result of " the first quarterly meeting. Waiting your reply, I " remain, &c."

Harford, Brothers, and Company replied, by letter without date, but having the Glasgow post-mark, 15th March, — " We have duly received your favour " of 8th instant, and note the price at which you have " been offered iron. We do not accept orders on " these terms. Previous to receipt of your favour, a " vessel (the Pembroke) was engaged to take your iron " at 12*s.* per ton. Our agent at Newport writes us " under date of the 13th instant, — 'The Pembroke is " engaged for Glasgow at 12*s.* per ton, and is this " morning only come into berth.'"

Robertson replied, on the 16th March,—" Yours of " the 13th instant is in my possession. In reply, as " you did not ship the iron in two or three weeks after " ordered, I was obliged to buy as much otherwise as " serve my customers for six or eight weeks to come. " Therefore, I trust you will guarantee no general " reduction in price next month in Wales. You will, " I hope, be as liberal as another house that offers me " iron at 10*s.* per ton under the prices you last quoted, " guaranteeing that in case a reduction takes place in " Wales next month I will have the benefit of it. " Provided you agree to this, I will remit you a " banker's draft on receiving invoice and bill of lading. " If any reduction takes place, I will not ask the money " from you, but take iron for the difference. Because " you have not shipped my order in the time I men- " tioned when I sent it (viz. in two or three weeks at

" most from the date sent), is the reason I have to
" propose the foregoing, having already been obliged to
" supply myself with most of the sizes and kinds of
" iron ordered from you. I trust you will see the
" propriety of guaranteeing no general reduction next
" month in Wales. However, in case you now invoice
" the bars at 8*l.* and rods at 9*l.*, same as I have already
" been quoted, and allow 5*l.* per cent. off for prompt
" payment, I will remit you, on receiving invoices and
" bill of lading, and consider the transaction settled,
" although most of the consumers and dealers in iron
" here expect 20*s.* per ton off all kinds of wrought iron
" next quarter-day in Staffordshire and Wales, if not
" sooner. In case you act liberally to me at this time,
" and send iron of good qualities, you may expect I
" will be a regular customer. Interim, I remain, &c."

On the 24th March, Harford, Brothers, and Company wrote,—" Annexed we have the pleasure of handing
" you invoice of iron shipped to your address, per
" Pembroke:

" Amount	-	-	£709 14 7
" From which deduct five per cent.	35	9	7
			£674 5 0

" for which be pleased to hand us banker's draft, in
" course of post, agreeably to letter of 12th ultimo,
" extract from which we hand you above. We think
" you must admit that we cannot, with propriety, be
" called upon to make the abatement required, when
" we assure you that we would not now take an order
" on the terms you quote. With regard to the time of
" shipping the order, we cannot command vessels at the

No. 1.

6th March 1832.

ROBERTSON v. HARFORD and others.

" moment they may be wanted, particularly when " limited as to freight."

Robertson, in answer, wrote on the 27th March,—

" You have herewith enclosed two drafts on London, " viz. one for 200*l.* at sixty days from 1st ultimo, and " another for 435*l.* 18*s.* 4*d.* at thirty-five days from this " date — amount of both, 635*l.* 18*s.* 4*d.*, which, with " 10*s.* per ton off your invoice, and five per cent. off " the gross amount, is the amount of same. This is a " mistake, for the five per cent. should have been off the " net amount, after the 10*s.* per ton was taken off, but " this I did not observe till the banks were shut to-day. " However, when you agree to let me have the iron at " the prices I have been offered, ' viz. bars at 8*l.* and " rods at 9*l.*, five per cent. off for bankers' drafts,' I " will immediately thereafter remit you the 1*l.* 18*s.* 3*d.* " of difference, overlooked this forenoon. If you had " shipped the iron in two or three weeks at most after " ordered, I would not have expected it under the " prices iron was generally selling at, at the date " ordered, for the reasons mentioned in my letters to " you of the 8th and 16th current. I trust you will " not hesitate to allow me the 10*s.* per ton off your " invoice prices, and in case you act liberally to me, I " will get my father-in-law, Mr. James Henderson, " Stirling, soon to send you an order for iron, and will " engage to take 100 tons from you, first I require, if " you supply as cheap for prompt payment as I can " buy otherways."

In reply, Harford, Brothers, and Company wrote, on the 31st March,—" We duly received your favour of " 27th, enclosing bills, value 635*l.* 18*s.* 4*d.* to your

" credit, and leaving a balance of 38*l.* 6*s.* 8*d.* due to
" us, which we beg may be remitted to us in course of
" post. You never made the shipment of your order
" in two or three weeks the condition on which you
" gave it, nor did we ever engage to execute it in that
" time; on the other hand, you confirmed your offer,
" under date of 12th February, on the terms quoted in
" our letter of the 10th same month, provided it was
" shipped before any general reduction. The terms
" of our agreement being so perfectly plain, and the
" conditions of it being fulfilled on our part, we cannot
" think of any abatement, and beg the balance may be
" immediately remitted. We confirm what we stated
" in our last, that now we should decline an order on
" terms lower than there charged."

And on the 30th April, Harford, Brothers, and Company wrote, — " Annexed we have the pleasure of " handing you our prices of bars. We are surprised " we have not received a remittance for balance due on " our last transaction, 38*l.* 6*s.* 8*d.* If it is your intention " to resist the payment of it, be good enough to inform " us, as we cannot abandon the claim."

In answer, Robertson wrote to Harford, Brothers, and Company, on the 4th May, — " Your letter of the " 31st March and 30th ultimo is in my possession. In " reply, you know I ordered, on the 7th February, " seventy-three tons and sixty bars iron, to be shipped " in two or three weeks at most from that date, and it " was not shipped till the 21st March, being six weeks " from the date ordered. On the 10th February you " advised me it would be shipped, without craving " longer time than mentioned in my order. In con- " sequence of you not shipping it within the time I

No. 1.

6th March 1832.

ROBERTSON v. HARFORD and others.

" wanted it, I was obliged to get a supply of iron from " Liverpool, and therefore, on the 8th March, wrote " you not to send off the iron till it was known what " were to be the prices fixed in Wales for April, my " customers having in the interim got a supply of iron " otherwise. You wrote me on the 13th March (not in " course of post), saying you had engaged a vessel to " take the iron, after it was believed iron would generally " be 10*s.* or 20*s.* per ton lower in Wales in April. " After you think of the foregoing circumstances, I " trust you will not hesitate to allow the deduction " claimed; however, in case you are not inclined to do " this, I have no objections to refer the difference to two " respectable people here in the iron trade, you to " choose one, and me the other. Expecting you will " act liberally in this case (for the reasons now and " formerly wrote you), I herewith hand you an addition " of fifty-three tons and fifty bolts iron to my order of " the 8th March, all of which I hope you will be able " to ship in the course of two or three weeks at most, " exact the sizes ordered. Please see the qualities are " good, and the nail-rods weight. You will observe " from the annexed statement of my warehousemen, " that the last was not weight. Your weights have got " light with using. When you now are informed of " this, it is expected you will get them adjusted. It was " a mistake in me saying, in my letter of the " 27th March, the balance due you was 1*l.* 18*s.* 3*d.* after " deducting 10*s.* per ton, and five per cent. off the iron " invoiced 21st March, as it is only 10*s.* 2*d.* The short " weight on rod iron comes to much more than 10*s.* 2*d.* " On receiving invoice and bill of lading of the iron " ordered 8th March and to-day I will remit you a

" banker's draft, deducting five per cent. Please agree " the freight at lowest rates. Expecting invoice and " bill of lading in the course of two or three weeks, I " remain, &c."

" We, the subscribers, have examined all the rod-iron, " &c. invoiced by Messrs. Harford, Brothers, and " Company, 21st March last, and find none of the " nail-rods smaller than No. 7, by thirteen wire-gage, " although there is five tons invoiced No. 8. by four- " teen. On account of the smallest size not being sent, " it renders most of the sizes sent unsaleable till the " smallest size is got to sell along with them, as the " consumers will not generally buy the thickest sizes " sent without a proportion of the smallest size (No. 8. " by fourteen wire-gage) along with them at the same " price. We have farther to mention, not one bundle " of the nail-rods in forty will stand the weight (60lb.) " An allowance will have to be made for the short " weight when sold. — (Signed) *John Craw, Robt. Gardner.*"

And the same warehousemen afterwards reported, —

" We, the subscribers, have examined the nail-rod iron " invoiced by Harford, Brothers, and Company, " 21st March last, and find, on an average, each of the " 1,220 bundles nail-rods, one and one-half pound " short of sixty pounds, some of them more, and some " of them a few ounces less."

The deficiency in weight of nail-rod iron was stated at 15 cwt. 1 qr., which at 9*s.* 6*d.* amounted to 7*l.* 4*s.* 10*d.*

Harford, Brothers, and Company raised an action, before the Bailies of the burgh of Glasgow, against

No. 1.

6th March 1832.

ROBERTSON v. HARFORD and others.

Robertson, for payment of the balance of 38*l.* 6*s.* 8*d.*:—The defender stated in defence the substance of the foregoing correspondence, and maintained that up to the 8th of March there had been no concluded contract; that he had distinctly stated the prices and conditions on which he would purchase; that by the failure of the pursuers to forward the iron at the terms and within the time stipulated, they forced him to supply himself, on disadvantageous terms, elsewhere, whereby he sustained damages, by the interruption of his trade and actual loss of profit, to an extent equal to at least 10*s.* per ton, being 38*l.* 6*s.* 8*d.*, besides the loss which he suffered from the deficiency in weight and size of the iron sent.

Nov. 20, 1829. After various steps of procedure the Bailies found,

" That the terms of the original purchase, and sale of the " quantities of iron in question, were fixed by the de- " fender's letters of the 7th and 12th February 1827 and " the pursuers' letter of the 10th February 1827: Finds, " that from their failure to object, and tacit acquiescence, " the pursuers must be presumed to have consented to " the limitation, with regard to the time of shipment, ex- " pressed in the said letters, viz. immediately, or in " the course of two or three weeks at most from the " date of the pursuers' first letter, or before any ge- " neral reduction of price, and in the course of ten or " fourteen days at most from the date of the defender's " said second letter: Finds it not proved that the pur- " suers gave the defender any intimation of their not " being able to furnish the quantities and descriptions " of iron ordered by him until they were manufactured: " And finds the delay on the part of the pursuers, in not " completing the shipment of the said iron till the 19th

" and 20th March 1827, relevant to liberate the de-
" fender from his obligation to pay for the said iron at
" the stipulated price: Finds, that by his letter of the
" 8th March 1827 the defender, of new, bound himself
" still to take the iron formerly ordered by him, if
" shipped immediately or in the course of two or three
" weeks at most, in case the pursuers guaranteed no
" reduction at quarter-day next month, but that other-
" wise he wished none of the iron now shipped: Finds,
" that, having liberated the defender from the terms of
" the original bargain by their delay in shipping the
" said iron, the pursuers, by making the shipment after
" receipt of the defender's said letter of the 8th March
" 1827, tacitly acquiesced in the terms of the new
" bargain in point of price therein proposed, and sub-
" sequently confirmed that bargain by transmitting the
" bill of lading, and by retaining and using the remit-
" tances made by the defender upon the footing thereof:
" Finds, that, agreeable to this new bargain, the defender
" has received, retained, and disposed of the iron so
" shipped by the pursuers, and the pursuers have re-
" ceived payment of the price remitted by the defender:
" Finds, that, in these circumstances, it is unnecessary
" to inquire, in this process, whether the defender's
" counter claim of damages from alleged deficiency in
" the quantity of iron shipped or otherwise be well
" founded or not; assoilzies the defender, and decerns,
" reserving to the defender any claim of damages com-
" petent to him, and to the pursuers their defence
" against the same: Finds the defender entitled to
" expenses of process, and remits to the auditor to
" tax the same, dispensing with petitions."

No. 1.

6th March 1832.

ROBERTSON *v.* HARFORD and others.

10th July 1830.

The pursuers brought this interlocutor, by advocation, under the consideration of the Court of Session, and the record having been there closed, the Lord Ordinary found, " That, by the correspondence terminating in " the respondent's letter of the 12th February 1827, " the respondent ordered from the advocators a " quantity of iron, mentioned in that letter: Finds, " that although the respondent subsequently com- " plained of the delay of executing the order, and " did, in his letters of the 8th, 16th, and 27th March " 1827, found upon that circumstance a demand " of some abatement of price, such demand was " not complied with on the part of the advo- " cators: Finds, that the advocators, in their letter " of the 24th March 1827, inclosing the invoice of " the iron, and in their letter of 31st March 1827, " explicitly intimated to the respondent that no " abatement was to be allowed, and that the iron was " sent in terms of and at the prices specified in the " respondent's letter of the 12th February: Finds, " therefore, that there was no new agreement between " the parties, altering the prices of the iron originally " fixed, and that the respondent was bound, either to " take the iron at those prices, or to reject it, if he " considered himself set free from the contract in con- " sequence of the alleged delay in its execution on the " part of the advocators: Finds, that he did not so " reject the iron; but, on the contrary, having, some " time before the arrival, received the advocators' letter " of 31st March, stating that it was sent at the prices " originally fixed, and no other, he took possession of " the iron, without making any answer, or stating any

" objection to the contents of that letter, until the
" 4th of May, at which time a second demand had
" been made upon him by the advocators for payment
" according to the prices originally fixed: Finds, that
" in these circumstances the respondent, by his ac-
" ceptance of the iron, and his failure to answer the
" letter of the 31st March, must be held to have
" departed from any objections on the ground of the
" alleged delay on the part of the advocators in exe-
" cuting the contract, and to have accepted the iron on
" the terms on which it was sent by the advocators:
" Finds also, that the respondent's objections, in regard
" to the alleged deficiency of weight of the iron fur-
" nished, were neither made at the time nor in the
" terms requisite to enable him to state them as a com-
" petent defence in the present action; and in respect
" of the reasons above set forth advocates the cause,
" alters the interlocutor complained of, and decerns in
" terms of the libel: Finds the advocators entitled to
" expences, allows an account thereof to be given in,
" and remits the same to the auditor to tax and
" report."

" *Note.*—The Lord Ordinary has not found it ne-
" cessary to determine the question, whether or not,
" according to the terms of the original contract, there
" was any undue delay in its execution by the advo-
" cators. That circumstance, though it might warrant
" the rejection of the iron by the respondent, evidently
" did not authorize him to take it at a lower price.
" The question merely at issue, then, between the
" parties, is, whether, at the time when the iron was
" sent by the advocators, and received by the respon-
" dent, the terms of the original contract had, in that

No. 1.

6th March 1832.

ROBERTSON v. HARFORD and others.

" particular, been altered. If, therefore, the Lord " Ordinary had been satisfied, as the magistrates were, " that the pursuers, by making the shipment after " receipt of the defender's said letter of 8th March " 1827, tacitly acquiesced in the terms of the new " bargain in point of price therein proposed, and sub- " sequently confirmed that bargain by transmitting the " bill of lading, and by retaining and using the re- " mittances made by the defender upon the footing " thereof, he must have concurred in the judgment. " But it appears to him, that finding is directly at " variance with the facts of the case. The advocators, " so far from acquiescing in the proposal in the letter " of 8th March 1827, and confirming it, by trans- " mitting the bill of lading, &c., expressly and re- " peatedly rejected that proposal. 1st, in their letter " of 13th March; 2d, in their letter of 24th, 1827, " inclosing the invoice, and demanding a remittance in " terms of their letter of 12th February; and, lastly, " when the respondent, in answer to the letter of the " 24th, inclosed a remittance to a certain amount, and " claimed a deduction from the price originally fixed, " in terms rather resembling the request of a favour " than the assertion of a right, he was definitively in- " formed in the letter of the 31st March that no abate- " ment of the price would be allowed. It is clearly " proved that there was no new bargain in regard to " price. The advocators made the shipment exclu- " sively on the terms of the original bargain, and " intimated that they accepted the remittances merely " as a partial payment; and therefore, although the " respondent might have rejected the iron if he con- " sidered himself set free by the delay of the shipment,

" or might even have held it in security of the remit-
" tances he had previously made, he clearly could not
" do so without giving due notice; and having taken
" possession of the iron without giving such notice,
" and having left unanswered the advocators' letter of
" 31st March for five weeks, he must be held, accord-
" ing to the ordinary rules, to have accepted it on the
" terms mentioned in that letter. The objection of the
" deficiency of weight stands pretty nearly, though not
" quite, in the same situation. The iron arrived in
" Glasgow about the middle of April, and the wit-
" nesses, called by the respondents to prove the de-
" ficiency of weight, establish, that it was weighed within
" three or four days after its arrival; but no objection
" on that score was communicated to the advocators
" until the 4th May, when the respondent was dis-
" puting his liability for the price as originally fixed;
" and even in that letter the circumstance is not stated
" in terms sufficient to apprise the advocators that it
" was seriously intended to be made the ground of a
" specific claim of deduction."

Against this judgment both parties reclaimed to the Inner House, the defender on the merits of the cause, and the pursuers on certain points of expences, when their Lordships adhered " to the interlocutor submitted Jan. 29, 1831.
" to review on the merits: Find expences of this note,
" discussion in the inferior Court as well as in the Outer
" House due; remit to the Lord Ordinary to ascertain
" the amount, and proceed as to him shall seem
" fit, and decern." And of same date, found
" the advocators (pursuers) entitled to their expences Jan. 29, 1831.
" in the inferior Court, and in so far alter the inter-
" locutor submitted to review; remit to the Lord

No. 1.

6th March 1832.

ROBERTSON v. HARFORD and others. Oct. 14, 1831.

" Ordinary to ascertain the amount, and proceed as " to him shall seem fit, and decern."*

Against these judgments the defender appealed.

Appellant.—As the respondents, before completing the shipping of the iron, were in possession of the appellant's letters of the 8th and 16th March, distinctly informing them that he would become a purchaser only if they sold to him at the rate of 8*l.* and 9*l.* per ton, and as, when, notwithstanding these letters, they dispatched an invoice of that iron at the higher rate of 8*l.* 10*s.* and 9*l.* 10*s.* per ton, the appellant adhered to his former terms, by remitting to them, not the amount of the higher rate which they demanded, but of the lower rate which he had offered, they have no title to demand the higher rate, unless they can show that he was already bound to pay it by some previous existing contract, or agreed to pay it by some subsequent engagement, express or implied.

If there was such a previous binding contract, it must be sought only in the letters of 7th, 10th, and 12th February. But it is a general rule, that where there is a proposal as to matters of contract, the party making the proposal has a right to withdraw his offer, or to vary the terms, any time between the making of the proposal and the absolute unqualified acceptance of it by the other party. Now, the respondents, instead of accepting by their letter of the 10th the appellant's original offer of the 7th, expressly declined it, and stated new terms of their own. The appellant's letter of the 12th, again, was not an acceptance of the re-

* 9 Shaw and Dunlop, 352.

spondents' offer of the 10th, but stated new terms on his part for their acceptance or rejection. These terms had not been accepted by the respondents in any shape when the appellant wrote his letter of the 8th March, varying his proposal, and offering only a lower price, to which terms he adhered to the end. There was therefore no concluded contract contained in the previous letters.

The same consequence would have followed even if the letter of the 8th March had not been written, because the original proposals had ceased to be binding by the long silence of the respondents concerning them. On the 8th of March the respondents could not have compelled the appellant to receive the iron: by that time all former proposals were at an end, and his letter of that date was the commencement of a new series of negotiations, by which alone his obligations are to be ascertained; and the result is the same, whether the original letters did or did not constitute in themselves a concluded bargain, as he was freed by the respondents' culpable delay in shipping the iron.

The appellant being thus entitled to make the new proposals contained in his letter of 8th March, it was no longer in the power of the respondents to insist upon the terms of the 12th February; and their letter of the 15th March being merely a rejection of the new terms of the 8th of March, the matter remained open on both sides. Then came the appellant's letter of 16th March, presenting to the respondents a distinct proposal. This proposal it was incumbent on the respondents to accept or reject. The iron was still under their control, as no part of it had been shipped when they received the letter of 8th March, and the shipping

No. 1.

6th March 1832.

ROBERTSON *v.* HARFORD and others.

had not been finished when they received that of the 16th. If, notwithstanding, they allowed the vessel to sail with the iron, they could not, by their own act, alter the relative situation of the parties, or create new obligations against the appellant.

After the iron had been thus dispatched the appellant did no act imputing acquiescence in the terms on which the respondents pretended to have shipped it. His first information was derived from the invoice, and he immediately rejected it by his letter of 27th March, and by remitting the amount of the iron at the lower price which he had tendered. Neither was his receiving and retaining the iron an act of acquiescence. As the respondents, instead of returning his drafts, had retained them, and afterwards completed the delivery of the goods by transmitting the bill of lading, they thereby accepted his terms; and at all events the relation into which the parties were brought was merely this, that the respondents, by qualifying that retention of the drafts by their letter of 31st March, reserved to themselves the right of still insisting for the balance, as under a former contract, if they could establish that contract, a right which, without such a qualification, they would have lost. The utmost effect of that letter, coupled with the retention of the money, is, that they were to be bound to acquiesce in the terms of the appellant, and not attempt to void the sale, if they failed in making out the other contract, in which they have failed.

At all events, the appellant was entitled to deduction on account of the deficiency in quantity. He stated this deficiency timeously; but, even if he had not, the principle, that a purchaser must notice defects immediately, applies only where he makes these defects a ground

for voiding the sale. Where he pleads it only to the effect of not paying for more than he receives, the respondents must perform their part of the contract. They were bound to deliver all the iron for which the appellant was bound to pay; till they have done so they have not fulfilled their contract; and that they were not called on to fulfil it completely till a fortnight after they might have been called on to do so, is no reason that they should not be called on to do it at all.

Respondents.—The early correspondence between the parties constituted a concluded contract of sale with the appellant; and of this contract the respondents duly fulfilled all the conditions.

The appellant was not entitled to resile from his contract, completed by his letter of 12th February 1827, so long as no general reduction took place in the price of iron. As to shipping, there was no delay of which the appellant has any reasonable cause of complaint.

Although the respondents had not duly fulfilled the conditions of the contract, closed by the letter of 12th February, the appellant is barred from objecting to pay the invoice-price, in respect of his taciturnity and acquiescence, and of his taking possession and disposing of the iron. The objection as to want of quantity is manifestly untenable. The objection, if any did exist, which is denied, should have been made tempestive.—Whitsun and Trustees, 22 Feb. 1828, (6 S. & D. 579); 1 Bell, 440; 3 Ersk. 3, 10; 1 Bell, 439; Rennoch, 27 Jan. 1820, (F. C.); Jaffrey, 7 Dec. 1824, (3 S. & D. 375); Cossar, 8 June 1826, (4 S. & D. 685); Sharratt, 15 Feb. 1827, (5 S. & D. 361); Watt, 6 Feb. 1829,

No. 1.

6th March 1832.

ROBERTSON v. HARFORD and others.

(7 S. & D. 372); Rowe, 1 Starkie, 140; Groning, 1 Starkie, 257; Lombe, 17 Nov. 1779, (Mor. 5,627); Ralston, 16 June 1761, (Mor. 14,238); Baird, 14 Dec. 1765, (Mor. 14,240); Baird, 13 Feb. 1788, (Mor. 14,243); Stevenson, 28 June 1808, (Mor. voce Sale, No. 5. App.); Hall and Co., 3 June 1823, (2 S. & D. 358); Fisher, 1 Camp. 193; Hopkins, 1 Starkie, 477.

LORD CHANCELLOR:—My Lords, when I entertain no doubt, it is my usual practice to advise your Lordships, at the close of the argument, either to affirm, to reverse, or to vary the decree of the Court below; for it is expedient to do it while the circumstances are recent in the recollection, and whilst counsel are at the bar, so that any slip in matter of fact or of practice may at once be set right. I shall have rather more occasion than usual, in the present case, to request the assistance of the learned counsel; for the course which I am disposed to recommend to your Lordships, in the reversal of the decision in the Court below, will set up the decision of the Bailies, though I do not think that decision (in the result of which I concur) can in all its parts stand, any more than the decision of the Court. Now, my Lords, in the first place, it is quite clear this decision cannot stand. The Court of Session, which reversed the decision of the Bailies Court upon advocation, have per incuriam, and per incuriam only, given the advocator (that is the respondent) the costs, not of the Bailies Court, which they had a right to do, for they put themselves as a court of appeal in the place of the Bailies Court, but they give him also the costs of the advocation; that is to say, they have punished the appellant for having the judgment of the Bailies, and visit him with costs,

for doing no more than every party is entitled if not bound to do, at all events, namely, supporting the judgment of which he was in possession. That part cannot stand; for though it would not have been of itself a ground of appeal, being only matter of costs, yet, even if the judgment had been affirmed in all its other parts, and if costs were incidental to the question, and there was nothing to show that it was brought colourably, being in reality an appeal for costs, this must have been altered. Now, my Lords, the question is, as we must alter it in one part, what are we to do with the rest of it? I cannot give the costs of this appeal to the appellant, for the reason which ought to have operated on the Court below, because the respondents are in possession of the judgment of the Court in Scotland. The bulk of the question is as to the costs of the advocation, which I have disposed of, and the costs of the judgment of the Bailie Court, which will ultimately follow the event of the whole suit. These must be given to the party who originally had them, by the decision setting up and restoring the original judgment. Then comes the question which is not usually inferior in importance, — the question in the cause, which is the subject-matter of all this litigation. The costs in this case, as in many other cases, (though I never saw it more strongly exemplified than in this,) are of superior importance. Sometimes it is said in Westminster Hall, that causes of the least matter fill the Lord Chief Justice's paper; but here is a matter of 38*l.* 6*s.* 8*d.*, and the costs which have been already given will amount to a great deal more. The party whom I am about to let free from the charge of paying the demand of 38*l.* 6*s.* 8*d.*, it is true, gets rid of that, but he gets rid of it by coming

No. 1.

6th *March* 1832.

ROBERTSON v. HARFORD and others.

here and paying 300*l.*, for aught I know, not one farthing of which I have the power of giving him; and the other party, who has his judgment for 38*l.* below, has no longer that 38*l.*, and he is saddled with his costs. If I had been to advise the party appealing, I should have said, Take care not to appeal, unless you find the costs below are over and above the 38*l.* 6*s.* 8*d.* so much as to make it worth while: and if I had been to counsel the other party, I should have given the same advice. I should have said, If Harford, Brothers, and Company have been so wrong-headed as to come to the House of Lords, do not you, Mr. Robertson, do so; let them have their way; do not come up here; for it is not very likely that the House of Lords will give you the costs of the appeal, where there was a judgment one way, by a learned judge in Glasgow, and another way by learned judges in Edinburgh. But upon the whole, though it has been an ill-advised proceeding, we must deal with it as well as we can, now it is here.

The question, my Lords, which has led to this expence and litigation is not a very complicated one in itself. It is, first, at what rate these gentlemen are to be allowed to charge, — whether at 8*l.* 10*s.* and 9*l.* 10*s.* or 8*l.* and 9*l.*; and this is the chief question, setting out of view that respecting the quantity. I have no doubt there is an error in the judgment of the Lord Ordinary, which finds that Robertson's objections, in regard to the alleged deficiency of weight of the iron furnished, were neither made at the time nor in the terms requisite (but we do not know what they are, and there is no form of taking objections), to enable him to state them as a competent defence in the present action. Is it no defence to the action, that there was a

shortcoming in the amount? If he has got ten, and is charged for twelve, whether it be bottles of wine or tons of iron, if he is called on to pay for twelve, and has actually paid for ten, is it not a complete defence to the whole action? and if he has got ten, and is called upon to pay for twelve, and he has paid only for nine, though it is not a defence to the whole action, is it not a defence to so many parts of it? So that I cannot understand the Lord Ordinary saying, that by taking the goods, and by not rejecting them, you waive all objection to the weight, and you treat them as one and indivisible, and as not capable of apportionment. You do not waive the objection to the shortcoming of the quantity, though that is apportioned; that objection may be taken, not at the time when you used the goods, but at the time you are called upon to pay for them. In the case put, if I buy a dozen of wine, and I only get ten, — if I drink the ten bottles, and am called upon to pay for twelve, it is absurd to say, in the language of this interlocutor, You must pay for twelve, — you ought to have taken the objection when the ten bottles came, and said, this is not a dozen, — here are only ten. That applies, if I had bought wine, expecting it of one vintage, and it turned out to be of another, and expecting it was good, though it turned out to be bad, even if it were as sour as vinegar, if I had taken the trouble to swallow it, I am bound to pay for it, and it is too late to take the objection: even keeping it would be sufficient, without drinking it. Nor do I in every point agree with the view taken by Mr. Reddie. There is not a more learned man at the Scotch bar, or upon any bench in any country, than Mr. Reddie. He is one of the most learned civilians, and, which might not be expected in one content to fill

No. 1.

6th March 1832.

ROBERTSON *v.* HARFORD and others.

no higher place, one of the most learned general lawyers, and well acquainted also with the law of nations, he having once intended to devote himself to that study. I have known him all his life. I have known him in his scientific pursuits as well as his legal studies, and at the bar, of which he was one of the greatest ornaments during the years he remained there. I speak of his judgment then with all respect; but I am not satisfied with the findings of the Bailies under his direction. When a man shifts his ground of defence, it is always awkward, and more so before a jury. If a man sets up a falsehood before a jury, he is gone, in nine cases out of ten. But I have often thought that learned judges did not quite lean enough against the effect which counsel try to give to that shifting of the ground of defence,—it may be improper to be moving and shifting, yet the party may have a good case at the bottom, after all. I cannot help thinking that there was not sufficient shifting in the letter of the 16th, as compared with that of the 8th, to lead to the presumption that there had been a contract. I should have said it was quite decisive against Robertson, if it had rested in parole; but when I have written documents to refer to, I must look to these letters, and I do not think that it is decisive to overcome the effect of those letters. Now, before the letter of the 8th of March, it is perfectly clear that there was not a binding contract. The letters of the 7th, 10th, and 12th of February, all taken together, are not sufficient to make a binding contract. From the expression, "Previous to the receipt of your favour, a vessel (the "Pembroke) was engaged to take your iron at 12*s.* "per ton," it has been ingeniously argued, that there had been a contract; but I cannot help thinking, that the

fair construction of this letter of the 8th of March 1827 is, that there was no contract. If there had been a binding contract before that, which the Lord Ordinary always seems to assume, and that is what I chiefly complain of, I admit that letter, whether answered by Harford and Company or no, is insufficient. If you bind yourself, you cannot either enlarge your own stipulation, if complete, nor diminish your own obligation, if complete, by a subsequent letter or a subsequent bargain, unless the other party choose to make himself a party to the charge, in which case there is a new bargain, the former being departed from. Robertson, in that letter, says, " Since I handed you an order of the 7th ultimo for " iron, I have been offered bars at 8*l.* and nail-rod iron " at 9*l.*—six months, or three per cent. off for prompt " payment." For the reasons I have given, I am of opinion he was then substantially free. Observe what he says: " As I expect you will supply me at such " prices—as I will have iron as low from you, for " prompt payment, as from the house above alluded to, " which I am not at liberty at present to name—I " herewith hand you a small addition to my last order, " and request you will ship the whole in the course of " two or three weeks at most. In case any reduction " take place at quarter day next month," &c. That looks like saying, I have ordered, but I have not got your answer; I do not know whether it is a concluded bargain; therefore, I now tell you, that it is with express condition of that bargain as to a fall, which had actually taken place. He says, " I expect you will supply me " at such prices;" for why should I pay more to you than to others? and upon that understanding I hand you another order, " and request you will ship the

No. 1.

6th March 1832.

ROBERTSON v. HARFORD and others.

" whole in the course of two or three weeks at most." I also incline to the opinion — not that I think it a clear case that this was a binding offer, or that it was meant to be accepted — but still, upon the whole, I am of opinion that, sending the iron after that letter, it was too late for the sellers to say, we will go back to the first contract, because I think that there is no such contract. They would have been quite right if they had said, Remember, we send, not upon your letter of the 8th of March,—we will not deal with you on that letter,—but on the others. They would have been quite entitled to say that; and there would have been no answer to it, if they had had a contract whereon to place their foot, and stand steady; but I am of opinion that there was not a contract. No doubt that offer was, in words, rejected, but, in acts and deeds, accepted by the party;—for they send the goods, though they had no other contract antecedent to the letter of the 8th of March, whereon they could firmly rest the sale. In the letter of the 27th of March, Robertson says, " I trust you will not hesitate to allow " me 10*s.* per ton off your invoice prices; and in case " you act liberally towards me I will get my father-in-" law, Mr. James Henderson, of Stirling, soon to send " you an order for iron." Now this, my Lords, a little startled me at first, as well as the discrepancy between the letters of the 16th and the 8th. It does look like a person conscious that he had no legal right to have that 10*s.* taken off; and if all rested on parole communication, it would have been strong; but when I come to the letters, I must construe them, and in fixing a construction on them, guide my opinion as to what the contract between the parties was. It often happens a person has made a contract in writing which the law is

to construe. He is not aware of his equities under that writing; still the Court will give to him according to the sense and equity of that writing. At Nisi Prius, it often happens that they try to prove that a conversation took place between one party and another, after he had written something, and he, not being aware of the force of what he had written, or the rights which he had stipulated for, may have said something quite inconsistent with the legal effect of the writing; but the Court immediately say, that the question is, what right he has under it. This being the ground of my opinion, I think your Lordships cannot adhere to the decision of the Lord Ordinary. If I entertained a doubt on the question, as having an inclination rather than a very strongly-formed opinion, — if I thought this case had undergone a thorough discussion in the Court below,— if I found that the Lord Ordinary had applied his mind fruitfully to it, so as to produce an accurate judgment,— I should have been slow to reverse his judgment. I should not have thought it a case to advise judgment of reversal, having a leaning, as is fitting, rather to affirm than to reverse. But when I look to the judgment of the Lord Ordinary, it does not appear to me that he has fruitfully applied his mind to it, for he all along goes on the supposition that there was a completed agreement at first, and that the objection as to the deficiency of weight was neither made in time, nor in terms to raise a competent defence. The effect of the judgment I have to propose will be against the advocation, and to set up the judgment of the Bailie Court in substance. I therefore now move your Lordships, that the interlocutor complained of be reversed, and that it be declared that the appellant was properly

No. 1.

6th March 1832.

ROBERTSON v. HARFORD and others.

assoilzied by the interlocutor of the Burgh Court. The appellant must have the expences in the Burgh Court and in the advocation, until and including the judgment of the Lord Ordinary; and the appellant and respondent must bear their own expences on the advocation in the Inner House and of this appeal.

The House of Lords ordered and adjudged, "That the "several interlocutors complained of in the said appeal be, "and the same are hereby reversed: And it is declared, "That the appellant was properly assoilzied by the interlo- "cutor of the Burgh Court, and was entitled to the expences "of process there: And it is further declared, That the said "appellant is entitled to have the expences of all proceed- "ings upon the advocation up to and including the said "interlocutor of the Lord Ordinary dated the 10th of July "1830; but that the appellant and respondent ought re- "spectively to bear their own expences of the proceedings "upon the said advocation in the Inner House, and also "the expences of this appeal: And it is further ordered, "That the cause be remitted back to the Lords of Session "in Scotland, of the Second Division, to give such direc- "tions, and to proceed in the said matter as may be neces- "sary to give effect to this judgment."

MACQUEEN—EVANS, STEVENS, and FLOWER,—Solicitors.