PRESENT,

LORD CHIEF COMMISSIONER.

1822.
Nov. 18.

WILSON *v.* KIRKWOOD.

Found that an offer to execute the wood work of a certain house for L.450 was not the offer accepted of by the proprietor.

THIS was an action, by Kirkwood, to recover the sum of L.64, 13s. 8d. as the balance of L. 550, for work executed by him.

DEFENCE.—The agreement was for L. 450, and there is an over-payment of L. 35, 6s. 4d.

ISSUES.

"Whether the letter in process, dated Glas-
"gow, April 6, 1819, addressed to Mr An-
"drew Wilson, and subscribed John Kirkwood
"junior, containing an offer to the said Andrew
"Wilson, to execute the wright-work of a
"house for the sum of L. 450, was the offer
"given to, and read by Mr Brash, architect, at
"a meeting of tradesmen in the house of the
"said Andrew Wilson, at Glasgow, on or about
"the 6th day of April 1819, and was the offer
"accepted and agreed to by the said Andrew

" Wilson, for executing the wood-work of the " said house?—Or,

" Whether there was an offer by the said " John Kirkwood to the said Andrew Wilson, " to execute the aforesaid wright-work for the " sum of L. 550?—And, Whether this was " the offer given to, and read by Mr Brash at " the meeting aforesaid, and was the offer ac- " cepted and agreed to by the said Andrew " Wilson?"

It was alleged, that the offer of L. 450 was given for the purpose of preventing another person from getting the contract, but that it was not the offer read at the meeting of tradesmen, and accepted of and acted on by the parties.

Incompetent to prove by parol evidence, or a note taken by a witness, the contents of a document read at a meeting.

A witness called for Kirkwood was desired to read to the Jury, from a pencil note made by him at the meeting at which the offers were read.

Jeffrey objects.—It is not competent by this note, or the oath of a witness, to prove the offer read by Brash. This is an attempt indirectly to prove the tenor of a writing by parol evidence.

Moncreiff.—The evidence is clearly compe-

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tent, under the first issue, to show that the offer mentioned there was not the one read by Brash.

Jeffrey.—The offer in process may be shown to the witness, and he may be asked if that was the offer read.

LORD CHIEF COMMISSIONER.—If this had been made to rest on the ground that it was necessary to prove the tenor of the writing, I should have had difficulty in holding that this was a paper of the description requiring that formal mode of proceeding. But, to entitle a party to give parol evidence of the contents of a written document, he must show that he has taken such steps as are necessary to get production of the writing.

In the present instance, I think the course suggested by Mr Jeffrey the best; my object is to see that the rules of evidence are not violated in proving the case.

An offer is produced for L. 450—this is to be rebutted by proof of fraud on the part of Kirkwood and the witness, and, in such a case, the rules must be strictly applied.

There are two courses Mr Moncreiff may follow, but he must stand by the consequences.

It is clear that the offer mentioned in the second issue was a writing; and if it is wished to go into that issue, it does not appear to me that Mr Moncreiff has so prepared his case as to entitle him to prove it by witnesses.

An objection was next taken to the question, whether the pencil note was taken by the witness at the time?

Evidence admitted of the time at which a note was made, though the note may not be evidence to the Jury.

LORD CHIEF COMMISSIONER.—It is clearly competent to prove that the pencil note in process is that which was taken by the witness at the time; but it does not, on that account, go to the Jury.

It was afterwards proposed that the note should be read, as the witness stated it to be the ground of his opinion that the offer shown to him was not the one read. Lord Alloway having found this to be a verbal bargain, it would have been competent even if there had not been writing.

A note made by a witness is not evidence, though he states it to be the ground of an opinion given by him upon oath.

LORD CHIEF COMMISSIONER.—The argument offered rests on a mistake of the rules of procedure here, and I should be deviating from these rules, were I to allow this memorandum

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or proof of its contents to go to the Jury. I think the evidence may be legally taken to this extent, that, according to the recollection of the witness, as assisted by this memorandum, the offer now shown to him is not the one given in, and read at the meeting. The argument would go the length that every memorandum would be receivable in evidence, though it is only good to refresh the memory of the witness. The question then is, If the contents can be proved? I think not, as you have not taken the necessary steps to entitle you to this.—All you can prove is, that the offer at L. 450 is not the one read at the meeting. I cannot violate the rule, that a memorandum, taken at the time, is good to refresh the memory of a witness, but that it does not, on that account, go to the Jury.

Circumstances in which parol evidence of the contents of a written document was rejected.

Moncreiff.—We beg to tender a Bill of Exceptions on this point. On the second point, we maintain that we are not bound to prove the tenor of such a writing, and that such a proceeding is excluded by the nature of the issue. In the Court of Session, we were at issue on the fact, that there was an offer for L. 550.

It was intimated by your Lordship, that

Phillipps, 444, 5th edit.

notice should have been given, but that does not apply where the document has been traced, as in this case, to the party.

Jeffrey.—With much submission, this is a document requiring a proof of the tenor, as much as any solemn document. There is nothing in the issue to exclude the idea of his producing the writing.

Even in proving the tenor, this parol evidence would not be competent; and reference to the law of England only tends to mislead, as by that law proof is allowed of the contents of bonds, and other important writs, which would certainly be incompetent in Scotland.

LORD CHIEF COMMISSIONER.—There is no situation in which the Court feels more anxiety than the present; but it is one of its most prominent duties to decide questions of this sort, and to see that no irregularity is committed.

If the decision is wrong, it is expensive to the party to have the judgment corrected; and even if it is right, it may be right in such strictness as to lead to injustice in the particular case; but the general rule must not therefore be violated. It has been the tendency of the law of England, since the time of Lord Hardwicke,

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to admit rather than reject evidence, but this tendency has not extended to questions of this nature; there has been no disposition to admit evidence of the contents of a written document, without strict proof that the proper means have been used to get production of the writing;—the principle of this is clear—it is that the best evidence ought to be produced.

What Mr Phillipps says does not apply here, as he is treating of what will form the ground of an action, and not of the evidence of a contract.

I have intimated my opinion as to the necessity of proving the tenor; but we ought to be doubly cautious in allowing proof of the contents of a written document, as it may appear more contrary to the principle of the law of Scotland than it is even to that of England. We must be very cautious of relaxing the rule, as we should every day find the attempt made to supply, by parol evidence, the want of a written document. It is said that, by going through the whole proceedings in the Court of Session, we shall find, that sufficient notice was given —but the diligence ought to have been used here, if not in the Court of Session.

As to the terms of the issues, they cannot mean that they are not to be proved by regu-

lar legal evidence, and it would not be legal or regular to allow them to be proved in this manner. My mind is relieved by the consideration that it will go to the Jury, on the question, Whether the paper in process is the one given in and read?

Circumstances in which evidence of the handwriting of a person since dead was rejected.

A witness was called to prove a note by his brother (now dead) of the offers made at the meeting of tradesmen.

Jeffrey.—There is no proof that this note is correct, or that it was taken down at the time.

Moncreiff.—We merely mean to ask the same questions which have been allowed to be put to the other witnesses.

LORD CHIEF COMMISSIONER.—At first it appeared to me that this was the same as proving what the dead man had said.—But I am now satisfied that, if I am bound to decide, I must reject the note.

(To the Jury.)—This is a mere question of fact, which comes from the Court of Session, to assist them in deciding the case; and as it is sent without instructions, as to admitting any particular evidence, which might, perhaps, be

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given in some cases, this Court was left to decide according to the general rules of evidence.

You are not to consider any sum as proved under the second issue, as I have decided that the evidence offered was incompetent. If my decision was wrong, there is the means of correcting it; and, on reflection, I am still satisfied that it is a very delicate matter to admit such evidence as was offered. Parol evidence is only competent in a solemn proceeding, such as an action for proving the tenor of the writing, or when the party has taken the proper steps to entitle him to give secondary evidence.

The consideration then is on the first issue, which appears a simple question, and that it would be easily decided; but if you credit the witness Clydesdale, there is something like manœuvring, which it is not easy to explain. The question is, Whether this is the offer which was given in and read? It is distinctly written, and you will not presume that it was wrong read, but must consider whether it was read or not.

His Lordship then read and commented on several parts of the evidence, and said,

The question then comes to, Whether Mr

Brash read right? as four witnesses prove that he read a different sum from that contained in this paper. It will be better to make the return in terms of the issue, than to find for the pursuer or defender.

Verdict.—On the first issue the Jury found, that the offer, at L.450, was not the offer read at the meeting, nor the one accepted by Wilson; and they found the second issue not proven.

Jeffrey and *Jameson*, for the Pursuer.
J. Macfarlane and *Moncreiff*, for the Defender.
(Agents, *Gavin Macdowall*, and *Tod & Wright*.)

In January 1824, Mr Moncreiff, for the defender, moved for expences, which was opposed, on the ground that there were mutual averments, and that neither party had gained.

LORD CHIEF COMMISSIONER.—It is clear that the defender has succeeded in his cause, and that the account must go to the auditor.