Session. I can grant no order for producing them to the arbiter.

HOULDSWORTH v. WALKER.

PRESENT,

LORD CHIEF COMMISSIONER.

CLARK *v.* CALLENDER.

1819. February 1.

AN action to compel implement of an alleged agreement; and for damages.

A finding for a defender, as the pursuer adduced no legal evidence.

DEFENCE.—A denial of the agreement. Writing was essential to such an agreement.

ISSUES.

"Whether the defender did, in or about "the month of February 1806, enter into "an agreement with the pursuer, to relieve "him, the said pursuer, from, and take upon "himself, the said defender, a certain bargain "set forth in the summons, bearing date the "8th day of December 1805, between Mr "George Aitken of Cupar in Fife, and "others, and Mr James Gibson, writer to "the signet, respecting wheat, or the price

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" of wheat; from which bargain the said pur-
" suer had, before the said month of February,
" relieved the said Mr George Aitken?

" Whether the defender did not, at the
" same time, agree to pay the sum of L.40
" sterling, to the said pursuer, or to the said
" George Aitken, on condition of the bargain
" being made over to him the defender?"

Mr Aitken and others agreed to deliver to Mr Gibson, 1000 bolls of wheat each year, for 10 years, for which Mr Gibson was to pay 30s. per boll, or the difference between that and the highest Fife fiars, if the fiars were below 30s. Clark the pursuer had agreed to relieve Aitken of his part of the agreement, and to pay him the sum of L.40. The present action was brought, on an allegation that the defender had agreed to relieve the pursuer of this obligation to Aitken.

Parol evidence of an agreement received.

The case came originally for trial, on the 16th July 1818. An objection was then taken, that it was incompetent to prove an agreement of this nature by parol evidence. The objection was overruled, and the evidence admitted, on the ground that, if the evidence of the agreement could only rest upon a written document, the Court of Session

would not have sent the case to be tried by a Jury, but would have decided it, either upon the view of the document, if there was one, or upon the insufficiency of the bargain for want of writing.

An application being made for a new trial, because the parol evidence was improperly admitted, it was resisted, on the ground of an implied, if not a direct finding, by the Court of Session, that writing was not essential. The Court of Session, however, set aside the verdict, and granted a new trial, on the ground that the parol evidence should have been rejected.

Parol evidence of an agreement rejected.

When the first witness was called on the second trial.

Cockburn, for the defender.—We formerly objected to parol evidence in this case, and do so again, upon the same grounds. The Court, in granting the new trial, were unanimously of opinion that it is incompetent.

Jeffrey.—I do not deny that the Judges were ultimately of opinion that parol evidence was incompetent. But I am entitled to a decision of the point here, to enable me to bring it under review.

1*st*, I hold it *res judicata* that parol evi-

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dence is competent. The question of its competency was discussed in written pleadings before the Lord Ordinary, and with these before him, the Issues were directed.

2d, A contract for the sale of moveables, may be proved by parol.

LORD CHIEF COMMISSIONER.—This application appears to be for the purpose of putting the question in shape for more solemn discussion. I shall therefore state the reason why I reject the evidence now, which I admitted formerly.

The case originally came here, as stated by the pursuer, after the question had undergone full consideration before the Lord Ordinary. The Court here, thinking the Court of Session must have had good reasons for sending the Issue, and that there might be circumstances which took the case out of the rule of law, by which writing is required to prove such an agreement, admitted the parol evidence. The case went back under peculiar circumstances. The motion for a new trial did not rest merely on the statement of counsel, but also on a note by this Court, reserving the present question.

It is unnecessary to state the manner in

which the case might have been brought before the Court of Session. It was brought before that Court on a motion for a new trial; and it is returned by an interlocutor granting the new trial, in a perfectly general form; but though the order is general, there is clear evidence that the note of the former trial was under consideration of the Court; and they have granted the trial, on the ground that the parol evidence was improperly admitted.

I cannot enter here into a discussion of what I may think the law is; for in this case, from what passed in the Court of Session, and knowing the grounds of that Court's decision, I find it incompetent now to receive the evidence tendered.

His Lordship then stated to the Jury, that as the pursuer had brought no legal evidence, they would of course find for the defender.

"Verdict for the defender on both Issues."

Jeffrey for the Pursuer.
Cockburn for the Defender.

(Agents, *Macritchie* and *Murray*, w. s. and *John Kerr*, w. s.)

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The question of the competency of parol evidence was again carried to the Court of Session, on a Bill of Exceptions; and on the 9th March 1819, that Court disallowed the exception, on the ground that the pursuer merely repeated, at the second trial, his offer of the same sort of parol evidence which had been tendered and received on the first trial; and that it had no reference to a proof of homologation, and that there was no *rei interventus.*

The case was then appealed to the House of Lords; and on the 16th June 1819, the appeal was dismissed, and the interlocutors affirmed, with L.80 costs. It is understood that the Lord Chancellor, in the course of the argument at the Bar, at first expressed a doubt, whether the Bill of Exceptions sufficiently specified the evidence tendered; and stated, that a Bill of Exceptions ought to state what the evidence was which was tendered, as well as the nature of it: That it was not enough to say that the party was ready to call witnesses to prove his case; but that the Bill of Exceptions ought also to state the facts he was ready to prove.