plain it. So far as at present advised, I am of opinion, that there is nothing in the institution of this Court which alters the law of Scotland in respect to the oath of a party.

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The pursuer afterwards appeared at Chambers and deponed; and, on the 21st January 1822, when the case was called on for trial, mutual apologies being made, and read in Court, the case was settled extrajudicially.

Jeffrey and *Cockburn*, for the Pursuer.
Clerk and , for the Defender.
(Agents, *Wm. Robertson*, w. s. and *Campbell & Arnott*, w. s.)

PRESENT,

LORD CHIEF COMMISSIONER.

HAY v. BOYD.

1822. Feb. 13.

SUSPENSION of a charge on a bill of exchange, on the ground of forgery. To which the charger answered, That the defender had promised to pay the bill.

Found that a person had acknowledged that he had accepted a bill of exchange.

ISSUE.

" Whether at Perth, in the house or shop of

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" Andrew Miller, on or about the 3d day of " August 1820, the suspender Boyd acknow- " ledged his having accepted the bill in pro- " cess, purporting to be drawn by William " Boyd, and accepted by the said Thomas " Boyd, for L. 100, bearing date the 24th Ja- " nuary 1820; or whether the said suspender " agreed to pay the said bill to the charger?"

Circumstances in which parol evidence was admitted, to prove a promise to pay a bill for L.100.

When the case was called for trial,

Fullerton, for the defender, objected, That there was a question of law which rendered the proceeding to the trial unnecessary; that, on the authority of Halliday and Rule, this issue was incompetent in the present shape of the case.

Halliday *v.* Rule, July 16, 1822, *post.*

LORD CHIEF COMMISSIONER.—This is in a different form from that case, for in the present instance, we proceed not merely on the condescendence and answers, but on a finding and remit by the Lord Ordinary; and we must presume that his Lordship had made up his mind on the competency of the proceeding. If this had been the same as Halliday and Rule, I think my attention would have been called to it. As the case is here, and the Jury and witnesses are summoned, I think it better to go on to trial of the matter of fact,

without prejudice to any question of law you may have.

If the case turns upon a question of law, you will have an opportunity of taking a Bill of Exceptions. Or, you may have it reserved to you, and in that case, when you move for a new trial, you will, as matter of course, get a rule on the other party to show cause, and you may then take your exception if the Court decide against you.

A document, though in the possession of the opposite party, must be called for and produced eight days before a trial.

The trial proceeded, and the defender was called on to produce a letter written to him by the pursuer.

Fullerton objects, This ought to have been produced eight days ago.

Hope.—It would be absurd to call on a party to produce before the trial a document in his own possession. The terms of the act only apply to the deposition, not to the production of papers.

Kitchen *v.* Fisher, Vol. II. p. 587.

LORD CHIEF COMMISSIONER.—This was discussed in Fisher's case, and the Court held it within the discretion granted by the act, to admit the document at the trial, provided sufficient notice had been given. If this party had eight days notice that he was to be called

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to produce the letter, then he should be aware, that if not produced, secondary evidence may be admitted to prove the contents of it.

This may be an unhandsome objection, and there may be reason in what is said, that the purpose of the act of sederunt was to enable a party to see written documents not in his possession. But unless notice was given eight days ago, I must decide according to the act, and reject the document. I am very unwilling to turn a party round on a point of form; but I am more averse to decide against a written rule.

Russel's Form of Pro. App. p. 78.

The rule is laid down in Mr Russel's book; and the spirit of both acts of sederunt, 1815 and 1817, is the same. I cannot draw a distinction between a party and any other person; and if called upon to decide, must hold this not competent. If I am mistaken, the party has his remedy.

A witness must be examined to facts, not the conclusion he draws from them.

The first witness was asked, Whether the defender led him to understand that the bill in dispute was his bill? to which an objection was taken.

LORD CHIEF COMMISSIONER.—The Jury cannot go by the understanding of the witness;

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but must draw their inference from the facts stated by him.

The witness was afterwards asked as to statements made by the defender.

Incompetent for a party to prove declarations by himself, unless the opposite party was present.

Hope.—This is incompetent, as the pursuer was not present.

Fullerton.—There is no doubt that this proof is competent under the terms of the issue, which are general. It is most material for us to explain the circumstances from which they wish to subject us.

LORD CHIEF COMMISSIONER.—I must decide this according to the admissibility of the evidence, and not according to the effect it may have in the cause. It is objected to, first, as not competent under the issue; and next, as not tending to sift the cause according to the truth of it.

As to the first, perhaps it would have been better if the issue had expressed that the acknowledgment was in presence of the party; but, coupled with the evidence already given, I think the issue, though in general terms, must be held to mean acknowledgment in presence of the party.

Up to this day, the case has been treated as

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a question of acknowledgment in presence of the party, and no objection stated to the question being so confined. But the point is now raised, whether proof of an acknowledgment in a shop in Perth, or any other place, or going about the world acknowledging, would have been within the issue? It is said, that it must be allowable to prove these declarations by the defender, to show that it is impossible he could have made the acknowledgment. But can this be competent, when there is no question of forgery? Would it not be allowing declarations made, out of the presence of the party, to affect him?

Competent to prove against a party declarations by him on the subject in dispute.

The witness was then asked, Whether he had any conversation with the pursuer relative to this bill?

Hope objects.—It is incompetent to inquire into the pursuer's opinion of the bill prior to the promise by the defender, as that must have removed any doubts he might have had of it being genuine.

LORD CHIEF COMMISSIONER.—The distinction between this and the former point is quite obvious. In that case, the proof of the declaration was rejected, as it was not in presence of

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the pursuer; but now it is quite proper to give the declarations of the pursuer in evidence, as that shows the meaning he put upon the promise. The objection is, that it leads to the investigation of a subject excluded by the issue, which is a question of acknowledgment. There is here no written acknowledgment, otherwise this question could not occur; but the acknowledgment is a verbal one. It is a question of verbal acceptance which is to go to the Jury; and how can they judge of that, without inquiry into the probability of the conversation which is said to constitute the acceptance? It is clear that it is competent to prove conversations both before and after, in so far as they throw light upon the one in question.

When the case was closed on the part of the pursuer,

LORD CHIEF COMMISSIONER.—There have been bills mentioned, and I suppose it is admitted that one of them is the bill in question. But we do not take them as evidence, from being mentioned in this way; the party must give them in, and they must be read to the Jury.

Documents mentioned in opening a case ought afterwards to be given in evidence and read.

It also appears to me, that there would be a more complete case to go to the Jury, if the

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articles in the condescendence and answers were read, instead of being merely referred to.

Hope opened the case, and stated the facts, and contended, That the question of forgery was not before the Jury, but the simple question, Whether the defender promised to pay the bill —whether he acted in such a manner as to lead the pursuer to believe it genuine?—for by this he was liable to pay it, whether genuine or not.

Fullerton.—In trying this question, you must hold this bill to be forged, as the pursuer would not go to issue with us upon that question. It is a suspicious-looking document, and we deny its onerosity.

Parol evidence competent, of a promise to pay a bill for L. 100.

If the bill is forged, this becomes a simple promise to pay a sum of money; and we deny the competency of parol evidence of a promise to pay so large a sum.

Hope.—This objection ought to have been taken at an earlier stage of the proceedings.

LORD CHIEF COMMISSIONER.—The objection ought to have been taken at the time the evidence was tendered.

Fullerton.—I only object to the evidence as

not sufficient, and I could not know that the pursuer might not bring other evidence. Writ, or oath of party, is the only legal evidence of a gratuitous promise to pay a sum of money.

LORD CHIEF COMMISSIONER.—There is no doubt of the rule, that you cannot prove by parol what requires writing. There was an instance of this, which was carried from this Court to the House of Lords. But the question here is, Whether that rule applies to this sort of document? Bills are documents in mercantile transactions, and I should be sorry to lay it down, that the rule applied to a document of this nature.

Fullerton.—This case is the same as if the name of the party was not at the document; and the question then occurs, What evidence is sufficient of such a promise? The case would have been different if this had been in the course of a bargain, or if they had proved that the pursuer was to do any thing in return. But supposing the evidence competent, the case is not proved, as the first is only a single witness, and the second not only does not support him, but contradicts him in material facts.

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Verbal acceptance of a bill may be proved by facts and circumstances.

LORD CHIEF COMMISSIONER.—Whatever opinion may be formed of this case, it will probably not rest here, as there is a point of law as to the competency of the proof, upon which it may be carried to the other Court.

I shall not detain you by stating the machinery for discussing points of law, but there is matter which I have looked into since I came into Court, that makes it necessary for me to lay the case fully before you.

Mr Bell lays it down, in his excellent Commentary, that verbal acceptance of a bill is sufficient, and as there is no form of words necessary for this purpose, the acceptance may be collected from facts and circumstances. Bills of exchange have a law peculiar to themselves, and I cannot doubt that, in this case, the evidence was properly laid before you, although it was all parol. I could not have rejected the evidence if application had been made to me to do so, and having admitted it, I am not in a situation to say that you ought to reject it. On the first part of the issue, this evidence must be admissible, and if you think it makes out the acceptance, that concludes the case; but if you do not think the acceptance is made out, then the question rests on the second part of the issue.

It is stated, that a gratuitous promise to pay money, in order to be binding, must be in writing, and on this subject it would have been more satisfactory to me, if I had had time for consideration. I do not feel sure that my law is correct, but I shall state it as it appears to me at present, and it is the principle of this institution that the Jury take the law from the Court. If then the case turns on the second part of the issue, it appears to me that the promise ought to have been in writing;—but the question remains, Whether this is a case of acceptance or of promise to pay? If you think this not an acceptance, or if I should tell you that in law it is not an acceptance, then, on the second point, I lay it down that the evidence of the agreement is not sufficient.

Another question here is, Whether the evidence applies to the bill mentioned in the issue? On this subject, though the question of forgery is not here, I think you may look at the bill, to judge whether the name is written by the same person who wrote the bill. It also appears to me that the pursuer has made out a *prima facie* case to prove that this is the bill referred to in the conversation, which was all he was bound to do in absence of evidence on the other side. The witnesses say a bill was mentioned

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—a bill is produced in process, and no objection is stated to it as not the bill referred to. An admission by a party, when put on his guard, is the best evidence; the condescendence and answers have been given in evidence, and in the second article, the bill in process is admitted to be the same that was discussed at the meeting of the parties.

On all mercantile questions, the law of Scotland and the law of England mutually derive light from each other, and Mr Bell's work has been quoted by the Lord Chief Justice in England. On the question of verbal acceptance, the law is the same in both countries.

2, Bell, Com. p. 69 and 250.

The question then is, Whether the facts as to the acceptance are proved to your satisfaction, and whether these facts amount to what the law holds to be acceptance? for, as I have said before, I do not consider the evidence competent in proof of a promise to pay.

Mr Fullerton properly argues, that, from the form of the question, the bill must be held forged; but that only applies to the question of agreement to pay, for the party not having stated it to be forged at the time, leaves it in the same situation as if forgery had never been mentioned, and the question comes simply as to the acceptance. The first witness speaks to an

obligation under a bill, and not to a promise to pay a sum of money, and if you are satisfied that this is the bill to which the conversation applied, then, in law, I state the evidence as sufficient to make out a verbal acceptance, there being no form of acceptance prescribed.

His Lordship then commented on the evidence in detail, and concluded by stating, that the subjects for the Jury to consider were,

1. Whether the bill produced is that which was under discussion at Perth? And that the leaning of his mind was, that the bill was the same.

2. Whether the party accepted this bill? And upon this a verbal acceptance is sufficient. It is said there is only one witness, and that he is contradicted by the other. That depends a good deal on the view taken of his evidence, and even if he is a single witness, there are facts and circumstances proper for your consideration.

3. The other point in the issue is the agreement. But upon this I am of opinion that there is not sufficient evidence.

After the Jury had retired to consider their verdict, his Lordship stated to the counsel,—You may have a Bill of Exceptions, on the following points:

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1*st*, On the ground that I left the fact to the Jury, while you hold, that it is incompetent in this form of proceeding.

2*d*, On the question, how far I am right in stating that facts and circumstances may constitute in law a verbal acceptance.

3*d*, Or you may move for a new trial, and then except to the decision given, whether the Court agree with or overrule what I have decided.

Verdict "For the pursuer."

Hope, for the Pursuer.
Fullerton, for the Defender.

(Agents, *David Gray*, S. S. C., and *R. Hotchkis*, W. S.)

July 3, 1822. An application was made for a new trial, which was refused, without hearing the counsel for the pursuer.