for considering that the children will be less well cared for if the petitioners carry out their intentions. What they do say is, that the deceased father had verbally expressed on his deathbed a desire that the children should live with the respondents, and they found on an unsigned writing to that effect. They are unable, however, to say that these verbal and written expressions were uttered later than a codicil to the will, which was executed on deathbed, and which is irreconcileable with the informal writing. It seems to me therefore that we have nothing to derogate from the full legal authority of the petitioners as tutors nominated by the deceased. They, and not the Court, have the primary duty and responsibility of selecting the residence of the wards, and I see nothing in the present case to call for our interference in the interests of the children. I feel sure that the petitioners have considered any circumstances which the present proceedings have disclosed that might properly affect their judgment as to which place of residence would be most beneficial for the children and most in accordance with their father's real wishes. And as we are moved to grant the prayer of the petition, I think we are bound to do so.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court found the petitioners entitled to the custody of Thomas M'Crossan's pupil children, ordained the respondents to deliver up the said children to the petitioners within seven days, and found the respondents entitled to expenses out of the trust-estate of the said Thomas M'Crossan.

Agents for the Petitioners — M'Lennan. Agents—Cumming & Duff, S.S.C.

Counsel for the Respondents—Guy—W. L. Mackenzie. Agents—Clark & Macdonald, S.S.C.

Friday, May 26.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

GRANT *v.* MACKENZIE.

Proof—Writ—Sale of Heritage—Admission of Extrinsic Evidence.

Where parties are agreed that writings purporting to set forth a contract between them do not truly express the contract, although they differ as to what the contract was, parole evidence of the contract is admissible.

In an action for specific performance of an agreement for the sale of certain heritable subjects, the defender did not dispute the sale, but stated that the price agreed upon was £5500, while the pursuer maintained it was £5000. The documents relating to the sale were (1) missives of sale between the parties, in which the price was said to be £5500, and (2) a receipt for £500 as paid to account of the price. Both parties were agreed that no money had passed between them in respect of the receipt, but a conflicting account was given as to the reason for granting it. It was admitted that the defender had previously purchased the subjects for the sum of £5000, and the pursuer averred that the defender had acted as his agent in making this purchase, and that the subsequent transaction by way of sub-sale was merely intended to conceal the fact of this agency, the sum of £500 being added to the price at the defender's suggestion as a fictitious sum, which would not be exacted, in order to give colour to this scheme, while the receipt was granted by the defender in furtherance thereof. The defender, on the other hand, averred that the re-sale to the pursuer had really been for £5500, and that he had been induced to grant the receipt without receiving money for it on the understanding that he would subsequently get the money.

The Court *held* that parole evidence was admissible to prove the contract, and, on a proof, *ordained* the defender to execute a conveyance of the subjects on the footing that their price was £5000.

Proof—Improbative Receipt.

Where parole evidence had been allowed to explain a contract contained in documents, one of which was an improbative receipt, *held* that the receipt might be shown to and spoken to by witnesses, and that it formed part of the evidence in the case.

This was an action at the instance of Mr James Grant, wine merchant, Glasgow, against Mr Donald Mackenzie, plasterer, Glasgow, concluding for decree that the defender should be ordained "in implement of the obligations incumbent on him in favour of the pursuer under missives of sale and relative receipt by defender, all dated 12th May 1897, or otherwise in virtue of the obligations incumbent on him as the pursuer's agent in the purchase of the subjects after mentioned, to make, grant, subscribe, and deliver a valid and sufficient conveyance of the subjects following." The subjects referred to in the summons were Nos. 377 to 389 Dumbarton Road, Glasgow, which in May 1897 were vested in Mr Andrew Crawford, ironfounder, Glasgow. On the 11th May they were purchased by the defender from Messrs J. & T. D. Colquhoun, Mr Crawford's agents, at the price of £5000. The pursuer averred that he was desirous of purchasing the subjects himself at a price not exceeding £5000, but was unable to come to terms with Mr Crawford's agents; that the defender suggested that he should try to make the purchase on the pursuer's behalf, and that he made the offer for the subjects "on behalf of and as agent for pursuer, but without disclosing to Crawford or his law-agents that he was acting for pursuer."

The pursuer further averred that the defender was unwilling for personal reasons to disclose to Mr Crawford's agents that the purchase had been made on the pursuer's behalf, and that he suggested that the transaction between them should take the form of a sub-sale by him to the pursuer at a nominal or fictitious profit, which he fixed at £500, and undertook to grant to the pursuer a letter or other document explaining that the addition of £500 was purely nominal.

The pursuer further averred that to carry out the transaction in this form the defender had addressed an offer to the pursuer's agents which had been accepted by them, and had granted a receipt for the £500. The missives of sale and receipt were in the following form:— "75 *Holland, Street,*

"*Glasgow,* 12*th May,* '97.

"Messrs T. C. Young & Orr, Writers.

"Dear Sirs,—I now sell to you that property Nos. 377 to 389 Dumbarton Road, Glasgow, at the price of Five thousand five hundred pounds sterling, over the ground rent of £52, 14s., entry and settlement at Whitsunday first. DONALD MACKENZIE.

"Adopted as holograph,

"Glasgow, 17th May, 1897."

"We accept the foregoing offer.

"T. C. YOUNG & ORR."

"75 *Holland Street,*

Glasgow, 17*th May,* '97.

"Received from Messrs T. C. Young & Orr the sum of Five hundred pounds stg. to account of price of Dumbarton Road property sold to them to-day. They are to relieve me of all expense, and pay the balance of Five thousand pounds to Messrs Colquhoun at settlet.

"DONALD MACKENZIE."

The receipt was not holograph.

The pursuer maintained that by these documents the defender agreed to sell the property to him for £5000, being the price for which he had bought it on his behalf, or otherwise that he agreed to sell him the property for £5500, and to discharge him of the sum of £500 thereof. He offered to pay the sum of £5000 in exchange for a conveyance.

The defender admitted the missives of sale, and that he had signed the receipt, but averred he had expected to receive cash for the amount, and immediately after signing it had written to the pursuer's agents, calling upon them to pay the amount, and that he was ready and willing to implement the contract of sale.

The Lord Ordinary (KINCAIRNEY) on 12th May 1898 allowed the parties a proof before answer.

The nature of the evidence sufficiently appears in the opinions of the Lord Ordinary and of Lord M'Laren.

The Lord Ordinary on 20th July pronounced the following interlocutor: — "Decerns and ordains the defender to make, grant, subscribe and deliver to the pursuer a valid and sufficient conveyance of all and whole the subjects and others described in the summons, which description is here held as repeated *brevitatis causa,* with entry at the term of Whitsunday 1897 in favour of the pursuer and his heirs and assignees whomsoever, and that by the first sederunt day of next session in terms of the draft disposition, or in such other terms as the parties may agree upon, or failing agreement, as the same may be adjusted at the sight of Hugh Moncrieff, Esquire, writer, Glasgow: Grants leave to reclaim."

Opinion.—"As I have formed a decided opinion in this case in favour of the pursuer I do not think it necessary to make avizandum before giving judgment.

"The question is whether the defender is bound to convey to the pursuer certain licensed premises in Dumbarton Road, Glasgow, for the sum of £5000. The documents relating to that question are (1) missives of sale between the parties (there being no question that Messrs Young & Orr are merely the pursuer's agents), in which the price is said to be £5500, and (2) a receipt for £500 as paid to account of the price. These are the only documents by which the contractual relations between the parties have been constituted or expressed. They agree with the pursuer's case, and if the action were to be determined on these documents alone he would be entitled to the decree concluded for. If the pursuer had rested his case on the documents alone there might have been room for the argument that the case must be decided on consideration of these documents exclusively, and that parole evidence was incompetent. But that course has not been adopted. Parole evidence has been led on either side, rightly and competently as I think, considering the averments. But at all events the competency of the parole evidence has not been challenged. The question then is whether the conclusion deducible from the documents has been displaced by the parole evidence.

"Now, there are three possible views which may be taken on this matter—(1) that the bargain was, as the pursuer avers, that the property was bought by the defender for the pursuer at the price of £5000; or (2) as the defender avers, that it was sold by the defender for £5500, and that no part of that price has been paid—a view which would entitle the defender to £5500 for the property, and would result in absolvitor, but which cannot receive full effect in this case; or (3) that the parties misunderstood one another, and that in consequence there was no bargain.

"The defender's view is supported—so far as the parole evidence goes—by his own evidence almost alone; for I think that the evidence of his clerk, Miss Hervey, adds little, and does not call for separate examination. For the pursuer there are three witnesses—himself, Mr Orr his agent, and Mr Auld, Mr Orr's clerk.

"If the case had depended on the evidence of the pursuer and defender alone it might have been hard to say how it should be decided, or whether there would be any sufficient ground for holding the one more credible than the other. Each tells a story which appears unlikely and suspicious, but these accounts are so discrepant and contradictory as, in my opinion, to exclude the

possibility of the theory of misapprehension, which no doubt I would willingly adopt if it were at all possible. But I think it is not possible. As between the pursuer and the defender misapprehension or error is not in the case.

"The pursuer says that he was desirous of purchasing the property in question from the owner Mr Crawford through his agents Messrs Colquhoun, and that the defender acted as an intermediary for him with the Messrs Colquhoun, in inquiring about the price and making the purchase. He says that the defender offered to do this in return for a service which he had tendered him in the way of business. He explains that his reason for adopting this circuitous method was because he feared (groundlessly, as appears) that Messrs Colquhoun might raise the price on account of his connection with the property, his brother being tenant and holding a licence, and he acting for his brother in his absence. I suppose that account must be accepted as true, because both parties are agreed that the defender had negotiations with the Messrs Colquhoun with a view to the purchase of the property for the pursuer. The pursuer says that he authorised the defender to go the length of £5000. The defender says that the pursuer would not go above £4800.

"Parties are agreed that the defender bought the property from the Messrs Colquhoun, as agents for Mr Crawford, for £5000, and that he bought it as for himself, not disclosing the name of the pursuer. Beyond that the parties are at total variance. The pursuer's averment is that the defender said that he had bought the property for the pursuer, and was ready to convey it to him, but that he wished that a nominal addition should be made to the price, in order to conceal from the Messrs Colquhoun that he had been deceiving them and buying for the pursuer when he had represented that he was buying for himself — a lame enough and somewhat absurd story apparently. But the pursuer is corroborated in it by Mr Orr and Mr Auld.

"The defender says that having failed to get the property at the pursuer's price (£4800) he bought it for himself at £5000, and that he re-sold it to the pursuer immediately for £5500, through the intervention of Mr Orr acting as the pursuer's agent. The defender does not, I think, say that the pursuer understood that he had given up his endeavours to obtain the property for him, the pursuer. But it may be that the defender was under no obligation to continue his efforts on the pursuer's behalf, and was entitled as mere matter of law, apart from considerations of fairness and good faith, to acquire the property for himself and make money by re-selling it at an enhanced price to the pursuer. With reference to the receipt for £500, he represents that he granted it at the request of Mr Orr, and on his representation that it was necessary in order to enable him to settle at the term, and that he received no money for it —an extremely unintelligible and unlikely story. Mr Orr's account is that the receipt was granted, although no money passed, simply because the £500 was a fictitious price added to conceal the real purchaser from Messrs Colquhoun, as he says the defender fully understood.

"The primary question is whether the defender made this purchase for himself or as agent for the pursuer. Assuming, what I understand has not been disputed, the competency of the parole evidence, I think this case must be answered for the pursuer. The evidence of the defender may fairly be set agaiust the evidence of the pursuer on this point. But then there remains the evidence of Mr Orr and of Mr Auld unbalanced. I do not think there is room for the view that Mr Orr was under a misapprehension. Such a view seems untenable either on his own evidence or, what is more important, on the defender's. He does not suggest any misunderstanding on the part of Mr Orr, but suggests a gross fraud without personal motive, an idea which I do not entertain for a moment. It appears to me on this point that it is necessary to take the missives and the receipt together, and that if parole evidence is admissible at all, it must be admitted in regard to the whole transaction. If it is not admitted at all, the documents prove the pursuer's case. If it is admitted, the preponderance of it supports the documents.

"If it is held that the defender made the purchase as the pursuer's agent, then the conclusion that the pursuer is entitled to judgment to the effect that he is entitled to a disposition of the lands for the sum of £5000 follows immediately. For in that view there is no difficulty whatever in preferring Mr Orr's statement as to the defender's reason for signing the receipt for £500 without receiving the money to that of the defender.

"I am therefore of opinion that judgment to that effect should be pronounced. The pursuer will require to consider in what manner under the conclusions of the summons it is to be made operative."

The defender reclaimed, and argued—(1) The Lord Ordinary was wrong in allowing a proof at large. If the pursuer's claim were founded on a contract of agency the only proof admissible was the writ or oath of the defender—*Dunn* v. *Pratt*, January 25, 1898, 25 R. 461. When parties embodied their contract in a written document it was incompetent to fall back upon former actings and arrangements. The reclaimers were not barred from attacking the allowance of proof by the fact that they had had no plea to this effect. The proof had been allowed before answer, and they had done all that was necessary by protesting against it. (2) If the action depended on the missives it was clearly irrelevant, for the pursuer had made no offer to pay the £5500. The receipt was not holograph or tested or properly stamped, and was therefore not probative. The pursuer tried to found upon it, not as evidence of the contract but as evidence of one of the terms of it, and this he was not entitled to do. Accordingly, the missives of sale alone

could be looked at, and the pursuer's case apart from parole evidence was negatived.

Argued for respondent—As the reclaimer had failed to reclaim against the decision of the Lord Ordinary allowing a proof, it was too late for him to maintain now that the evidence could not be taken into account—*Kerr's Trustees* v. *Ker*, November 16, 1883, 11 R. 108; *Simpson* v. *Stewart*, May 14, 1875, 2 R. 673. There was a relevant averment that the receipt had been granted for an ulterior purpose to that which appeared, both parties were agreed that no money had passed, and the Court would admit parole evidence upon this—Dickson on Evidence, section 1038. The reclaimer wished to decide the case on a selection of the documents, and to attack the receipt. His point as to the improbative nature of the receipt was raised for the first time now, and so far from challenging it on record he had admitted it.

At advising—

Lord M'Laren—This is an action at the instance of James Grant, wine and spirit merchant, Glasgow, against Donald Mackenzie, plasterer there, in which the pursuer sues for specific performance of an agreement for the sale of certain heritable subjects in Glasgow. The defender does not dispute the fact of the sale, but says that it was a sale for £5500, while the pursuer's case is that the property was sold to him for £5000. The Lord Ordinary has given decree, and under this reclaiming-note the decision of the case depends, according to the best of my judgment, on whether the Lord Ordinary was well advised in allowing parole evidence explanatory of the contract.

The case made by the pursuer is of this nature. He had made various offers for the property of sums below £5000 and was reluctant to give any higher price. The defender he says then offered to act as an intermediary, and there is no doubt that he purchased the property for £5000 from Mr Colquhoun, the seller's agent. The defender desired that a higher and illusory price should be inserted in the contract of sale by him to the pursuer, on the representation that he was unwilling that Mr Colquhoun should know that he was acting only as agent, and he suggested that the price should be £200 or £300 above the price arranged with Mr Colquhoun. This is denied by the defender, who alleges that the sum inserted in the letter which constituted the contract of sale, namely £5500, is the true price, and he claims a profit of £500. Now, the most important fact for consideration in the question of the admissibility of parole evidence is that at the time of the sale a receipt was granted by the defender to the pursuer for £500. That certainly looks as if it was intended to extinguish the price to the extent of £500. Neither party stands by the documents. The pursuer cannot succeed on the documents alone, for although he might have said—"Here is an agreement for the sale at £5500, and I produce a receipt evidencing that the price has been already paid to the extent of £500;" he does not say so. He admits that no money passed and that the receipt was granted simply for the purpose of correcting the error that had been purposely made in the statement of the price. That is a view of course which does not appear on the face of the documents. Then again the defender is unable to stand by the writings because by these it appears that he has already been paid £500 to account of the price and that he could only claim £5000.

In the leading case on this subject—*Grant's Trustees* v. *Morison*, 2 R. 377, the late Lord President made the observation that when parties are agreed that the written contract does not truly express the agreement then parole evidence is admissible. This is a doctrine very well founded in principle, for if both parties are agreed that the writing does not express the contract, and yet differ as to what the real contract is, then unless evidence were admissible there would be a complete *impasse*, no solution being possible. If authority were needed for the doctrine, there could be no higher authority than that of the eminent Judge whose opinion I have quoted. Accordingly, I think the Lord Ordinary was right in allowing proof in this action; and indeed, as his Lordship says, the admissibility of proof was not disputed before him although it has been before your Lordships. When we come to the evidence it is the less necessary for me to consider it in detail, as Lord Kincairney has already done so in his well-considered judgment. The substance of the evidence is this, that the solicitor for the pursuer, his conveyancing clerk, and the pursuer, concur in thinking that a fictitious addition to the price was inserted in the missives of sale for the purpose of concealing from the seller's agent that the defender was acting only as an intermediary. That may seem a a very odd and inadequate reason to explain such a transaction, but these three witnesses speak to it, and it is quite possible that there may have been other reasons of which we are not fully aware. There is no reason to suppose that the pursuer's solicitor had any motive to fabricate this story, or to get his clerk to do so. On the other side we have only the evidence of the defender himself, who, of course, is interested in obtaining the larger price which he has demanded. Your Lordships usually accept the opinion of the judge of first instance on a matter of pure credibility, and I never saw a case which has resolved more completely into a question of credibility than the import of the evidence in the present case. But apart from that consideration, it may be satisfactory to the parties to know that my opinion, and I believe that of my colleagues, is in entire accord with that of the Lord Ordinary.

I desire to notice two other points before concluding. First, as to whether the receipt for £500 is to be taken as part of the evidence. My opinion is in the affirmative, because when once it is settled that parole evidence is admissible, I think the receipt

may be shown to and spoken to by witnesses, just like a letter or other informal document. If that is so, the receipt is evidence in support of the pursuer's case. Second, the Lord Ordinary expresses some difficulty in accepting the evidence on account of the great improbability of the story. Now, if we assume that the defender persuaded the other contracting party to put in a fictitious price merely to deceive Mr Colquhoun, I would agree that the story was an improbable one; but there is this other alternative, that in putting in the false sum he may have all along intended to get the higher price, and on this point I may read a sentence from Mr Orr's evidence—"He was inclined to treat me very much as he treated Grant. 'It is all right, Grant and I know each other.' And I said 'No, this is business; you must discharge this sum or I won't accept your offer.' And he did so, and I then accepted his offer." Now, if I am right in the conclusion I have come to, I agree with the Lord Ordinary that the defender is putting forward an unconscientious claim, and I confess I have no difficulty in accepting the suggestion that he had intended to make it from the beginning, but gave a false reason to induce the pursuer—the other contracting party—to put in a fictitious price. On the whole matter I agree entirely with the Lord Ordinary.

The Lord President, Lord Adam, and Lord Kinnear concurred.

The Court refused the reclaiming-note, adhered to the interlocutor reclaimed against, and remitted to the Lord Ordinary to proceed. Thereafter on 7th June the Court refused leave to appeal to the House of Lords.

Counsel for the Pursuer—Sol.-Gen. Dickson, Q.C.—Cook. Agents—A. P. Purves & Aitken, W.S.

Counsel for the Defender—W. Campbell, Q.C. — Deas. Agent — J. Gordon Mason, S.S.C.

Friday, May 26.

FIRST DIVISION.

[Sheriff Court of Renfrewshire.

M'KIMMIE'S TRUSTEES *v.* ARMOUR.

Process—Appeal from Sheriff—Competency—Value of Cause.

An action raised in the Sheriff Court for payment of a year's rent amounting to £28, contained conclusions for authority to carry back certain furniture which had been removed by the defender, and for sequestration thereof. When the case first came before the Sheriff he granted warrant to arrest on the dependence, and to the officers of the Court to carry back the furniture as craved. The sum concluded for was consigned by the defender in Court, and accordingly the warrant to sequestrate was not executed. From the defender's subsequent averments on record, which were admitted by the pursuer, it appeared that the defender had paid a quarter's rent of £7.

The defender having appealed against the Sheriff's judgment to the Court of Session, the pursuer objected to the competency of the appeal on the ground that the true value of the cause was only £21.

Held that the appeal was competent on the grounds (1) (following the case of *Buie* v. *Stiven*, 2 Macph. 208) that the cause having originally been not under the value of £25 did not cease to be of that value if at an ulterior stage the interest of the parties was diminished, and (2) that as the sum consigned still remained in Court, the value of the cause had not been diminished.

An action was raised in the Sheriff Court of Renfrewshire by the trustees of the late Mrs M'Kimmie, as proprietors of the subjects No. 21 Queen's Crescent, Cathcart, against Mr Thomas Armour, ship chandler, who was tenant of a dwelling-house at the above address. The summons craved the Court "to grant warrant to officers of Court to search for, take possession of, and carry back from premises at Crookston, or such other premises to which they have been removed, to the premises No. 21 Queen's Crescent, Cathcart, now or lately occupied by the defender, the whole fittings, furniture, goods, and other effects which have been in the said last-mentioned premises since the term of Whitsunday last 1898, and were and still are subject to the pursuers' hypothec." . . .

There was a further conclusion for sequestration of the defender's furniture, and for payment of two sums of £14 each, being the rent of the premises for two half-years, and for warrant to sell the whole or so much of the sequestrated effects as would pay the above amounts.

The pursuers averred that the defender took the said dwelling-house as from Whitsunday 1898 to Whitsunday 1899 at the rent of £28, and that he had removed therefrom certain furniture and other effects belonging to him which were subject to the landlord's right of hypothec.

The defender averred that he had been compelled to remove from the house owing to its insanitary condition. He further averred that the rent was payable quarterly, and that he had paid the first quarter's rent of £7. The pursuer admitted this payment.

The Sheriff-Substitute (Henderson) on 17th October 1898, when the petition was presented, granted "warrant to arrest on the dependence; meantime to officers of Court to carry back, inventory, and secure as craved." The defender consigned in Court the sum concluded for, £28. On 1st November the Sheriff-Substitute allowed the parties a proof.

The Sheriff-Substitute on 14th February 1899 pronounced an interlocutor by which he found that the defender was entitled to leave the pursuers' house, and that he was therefore not liable in the half-year's rent from Martinmas 1898 to Whitsunday 1899.

The pursuers appealed to the Sheriff.