Tuesday, January 29.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MÜLLER & COMPANY *v.* WEBER & SCHAER.

Proof—Admissibility of Parole to Control Writings—Averment that Contract nominally Sale was really Agency—Sale-Note—Innominate Contract—Writ or Oath.

In an action of damages for failure to deliver certain goods alleged by the pursuers to have been bought by them from the defenders, the pursuers founded on certain sale-notes bearing that the goods in question had been sold to them. The defenders averred that the contract was made subject to an antecedent verbal agreement applicable to all contracts between the parties, whereby in effect the pursuers, although nominally purchasers, were in reality to act merely as agents for the defenders, and that the terms of this agreement had not been observed. *Held* (*aff.* judgment of Lord Kincairney, Ordinary) that this averment could only be proved by writ or oath—*per* the Lord Ordinary, on the ground that the contract averred was innominate and unusual; and *per* the Court on the ground that it was incompetent to prove that a contract proved by writing was in reality a contract of another character except by written evidence or judicial admission.

F. R. Müller & Company, merchants, Glasgow, brought an action against Weber & Schaer, merchants, Hamburg, concluding for the sum of £7500 as damages for breach of contract.

The pursuers averred that they had, by four several contracts in 1899, purchased from Weber & Schaer in all 140 tons of block balata (a species of gum allied to rubber) for delivery commencing in July 1899 and ending in April 1900, and that they had only obtained delivery of 14½ tons. In support of this averment they produced and founded on four sale-notes, applicable to the several contracts, signed by Weber & Schaer and addressed to the pursuers. One of these notes, dated 15th May 1899, was in the following terms:—"Dear Sirs,—We have this day sold to you 60 tons Venezuela Block Balata, July/December delivery, at 1s. 4d. per lb. engl. f.o.b. here, less ½ % for you, payable per cheque on London within 14 days after date of B/L. We remain, dear sirs, yours very truly, WEBER & SCHAER."

The other sale-notes were, *mutatis mutandis*, in similar terms.

They also averred that they had been compelled to purchase balata in order to fulfil their engagements, that the price of balata had risen and continued to rise, and that they had consequently sustained damage to the amount of the sum sued for through the defenders' breach of contract.

Weber & Schaer lodged defences in which they admitted that they had refused to deliver 125½ tons of the balata contracted for, but in explanation they averred that the balata trade was one of a very special character, and dependent mainly on the requirements of one firm, Messrs J. & R. Dick, belt manufacturers, Glasgow; that in view of this fact their firm had come to a certain general agreement with Mr Müller, on behalf of Müller & Company, on the occasion of his visiting Hamburg, with regard to all future dealings between themselves and the pursuers in balata, that Müller & Company had failed to observe the terms of this agreement, and that in consequence delivery of balata had been stopped.

With regard to this agreement they averred as follows:—("Stat. 6) Before Mr Müller left Hamburg he had a meeting with the Messrs Weber and Mr Lussman (who was the defenders' broker in balata), when an agreement was come to as the basis of all future transactions in block balata between the pursuers and the defenders, to the following effects, viz., that while the contracts should *pro forma* continue to be with the pursuers as buyers—(1) The pursuers should be bound to accept a commission of one-half per cent. from the defenders, and to take no further commission or profit from Messrs Dick. (2) The pursuers should be bound to sell all balata supplied by the defenders to Messrs Dick at the defenders' invoice prices, and to put before Messrs Dick all the defenders' offers or proposals of business at the prices and on the terms quoted by them. (3) That if the pursuers desired at any time to speculate in balata on their own account they should only be entitled to do so after advising the defenders beforehand of the transactions, and on condition that any such balata bought by them was not for Messrs Dick but for the pursuers' own account, or eventually for account of one or other of the smaller consumers in the United Kingdom. (4) That in the absence of express stipulation all block balata sold by the defenders to the pursuers should be for Messrs Dick, so as to enable the defenders to keep in touch with that firm's requirements. (5) That the pursuers should not buy any block balata in Hamburg except through the defenders, and that they should not buy in any other market. (6) That the pursuers should transmit to the defenders accurate information as to requirements and arrangements of Messrs Dick in regard to the purchase of balata. The above-mentioned agreement was made as the basis of all future business in balata between the parties, and all contracts made thereafter, and in particular the contracts now sued on by the pursuers were entered into subject to said agreement, and were conditional upon the pursuers duly performing their part thereof. In the contracts carried out after this agreement was come to the pursuers, while appearing as buyers on the invoices, were paid the stipulated commission of one-half per cent. above mentioned."

The pursuers admitted that at the meeting referred to the defenders had urged them to agree to certain conditions, the most important of which was that they should act as the defenders' agents only, but *quoad ultra* they denied the averment.

The pursuers pleaded, *inter alia*—"(4) The defenders' averments of agency contract alleged to qualify the contracts libelled in condescendence 3 can only be proved by writ or oath. (5) The alleged contract libelled in statement 6 of the defenders' statement of facts being innominate and unusual can only be proved by writ or oath."

On 4th December 1900 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Sustains the fifth plea-in-law for the pursuers; allows the defenders a proof by writ of the pursuers of defenders' averments in statement 6 of their statement of facts; and *quoad ultra*, and under reservation of all other pleas, allows the pursuers a proof of their averments on record, and to the defenders a conjunct probation."

Opinion—"In this action the pursuers, merchants in Glasgow, purchased from the defenders, merchants in Hamburg, 140 tons of balata, which is a species of gum; and they produce four memoranda signed by the defenders and addressed to the pursuers, each stating that the defenders had sold to the pursuers the quantities of balata therein mentioned, the four contracts making up the total amount of 140 tons. The pursuers aver that the defenders have delivered only 14½ tons, and have refused to deliver the remaining 125½ tons; and this is an action of damages for the defenders' failure to deliver in terms of their contracts. The pursuers allege that the price of balata has risen since the date of their contracts, and they conclude for £7500 as the amount of damage which they have suffered. That, of course, they require to prove.

"The defenders do not dispute the contracts, and they admit the non-fulfilment of them. They plead that they were justified in refusing to make delivery because of the pursuers' breach of a contract which they, the defenders, allege. . . .

"The defence of breach of contract is founded on an averment of a verbal agreement, said to have been entered into in Hamburg at a date not definitely stated, but shortly after September 1898, the parties to which are said to have been the defenders and a member of the pursuers' firm, and which the defenders say 'was made as the basis of all future business in balata between the parties and all contracts made thereafter, and in particular the contracts now sued on were entered into subject to said agreement,' which is a very singular averment. This alleged verbal agreement is quoted in statement 6, and a most intricate and confused and singularly expressed agreement it is. This is the agreement which the pursuers are said to have broken, and until it and the breach of it are proved there seems no defence except as to amount. The pursuers argued that the averment was irrelevant in any view, but that is a point which may be cleared after proof if the agreement and breach are proved by competent evidence.

"In regard to this agreement the pursuers have pleaded that it can only be proved by writ or oath, firstly (plea 4), because it purports to qualify the written contract expressed in the memoranda, and secondly, because it is innominate and unusual. I incline to think that both pleas are good, although, looking to the terms in which the memoranda are expressed and the circumstance that, so far as they form contracts, or rather parts of contracts, they are unilateral, I have some doubt as to the first of these pleas, and prefer to proceed on the second. There is a rule in our law to the effect that contracts which are both innominate and unusual can only be proved by writ or oath. It is a rule which may not be of easy application in all circumstances, but it has been enforced and judicially affirmed too often to be questioned—in particular in *Edmonston* v. *Edmonston*, 23 D. 995; *Taylor* v. *Forbes*, January 3, 1853, 24 D. 19, note; *Johnston* v. *Goodlet*, July 16, 1868, 6 Macph. 1067; *Forbes* v. *Caird*, 1877, 4 R. 1141; and *Garden* v. *The Earl of Aberdeen*, June 24, 1893, 20 R. 896. If ever there was an averment of a verbal agreement to which this rule might be fitly applied, it is the agreement averred by the defenders, for it is so detailed and so confused that the idea that it could possibly be proved by parole seems almost out of the question. It was urged by the defenders that the rule had never been applied to a mercantile contract, and should not be extended. But I see no reason, and the opinions of the Judges suggest none, for making any distinction as to this point between a mercantile contract and any other. The unreasonableness of leaving a complex contract to depend on mere memory is as great in the case of a mercantile contract as of any other, and the reasons for the rule, good or bad, apply equally. I feel therefore bound to sustain the pursuers' fifth plea, which will make it unnecessary to dispose of plea four; and I think the proper course thereafter will be to allow a proof, reserving the other pleas of parties."

The defenders reclaimed, and argued—The rule that innominate contracts could only be proved by writ or oath, on which the Lord Ordinary had rested his judgment, was of a very technical character and rarely applied. In the cases he cited the averment had always been of an agreement not only unusual but almost incredible, such as in *Taylor* v. *Forbes*, January 13, 1853, 24 D. 19, where it was averred that a law-agent had agreed verbally to do legal work for nothing. In *Moscrip* v. *O'Hara*, October 23, 1880, 8 R. 36, parole proof of such an agreement was allowed in the case of a notary-public employed to act as a debt collector. The distinction illustrated the narrow application of the rule. Such a rule was not applicable to the present case, where the agreement averred was not in any sense of an unlikely character, looking to the exceptional character of the trade. They also

argued that the terms of the sale-notes were ambiguous.

Argued for the respondents—(1) The Lord Ordinary was right, on the authorities cited by him, and *Reid* v. *Reid Brothers*, June 8, 1887, 14 R. 789. (2) Apart from the rule regarding innominate contracts, a contract expressed in writing could not be contradicted by parole evidence—*Sutherland* v. *Montrose Shipbuilding Co.*, February 3, 1862, 22 D. 665; *Lee* v. *Alexander*, August 3, 1883, 10 R. (H.L.) 91; *National Bank of Australasia* v. *Turnbull & Co.*, March 5, 1891, 18 R. 629; *Burrell & Son* v. *Russell & Company*, March 26, 1900, 37 S.L.R. 641. Proof that one contract was in reality another must be in writing. [LORD M'LAREN referred to *Hamilton* v. *Western Bank*, December 13, 1856, 19 D. 152.]

LORD PRESIDENT—I am of opinion that the result at which the Lord Ordinary has arrived is correct, although I prefer to rest my judgment on somewhat different grounds.

The first question is, what is the nature of the contracts, if any, which appear to have been made by the four "sold-notes," to describe the writings by the most general name. The four notes emanate from the defenders, they are their writings, and they were in effect accepted by the pursuers.

Taking as a sample the note of 15th May 1899 we find that it runs thus—[*His Lordship read the note*].

That appears to me to be as distinct a record of a contract of purchase and sale (unless it is at once rejected by the person to whom it is sent) as could well be imagined. If the relation of the parties had been such that one of them was entitled to reject, and did timeously reject, the offer, a different question would have arisen. These notes, however, were not rejected, but were retained, and this retention of them seems to me to infer the acceptance of an unambiguous offer of sale in which all the essential terms of such a contract are to be found. The only point, as I understood the argument, that was made on the construction of the notes was that there was one ambiguous expression, viz., "less ½ % for you." This it was argued suggests agency, and so raises an ambiguity which requires to be cleared by proof. The expression, however, appears to me to be a natural and ordinary way of describing a discount. The "to you" which occurs in one of the notes seems to be a variation which is immaterial. The contract then is in writing, and it is when retained an unequivocal record of a transaction of purchase and sale.

The defenders, however, deny that there is any contract of sale, or any relation of buyer and seller, alleging that the agreement was truly one of agency. The pursuers reply that to allow the proof asked would be to sanction an attempt to convert what on the face of a written instrument is one contract into an essentially different contract, which should not be permitted unless by the production of evidence of a similar character to that by which the original contract is established; *i.e.*, proof *scripto*. Accordingly, without having recourse to the plea that the contract which the defenders seek to establish is innominate and unusual, it appears to me to be a sufficient ground of judgment that the defenders' proposal is to displace the effect of documents constituting or recording contracts of sale, and to substitute for these another and a wholly different contract. And when we inquire how it is proposed that this should be done, we find that it is not by another writing or writings, but by parole proof of a statement [defenders' stat. 6] to this effect, that Mr Müller had a meeting in Hamburg with Mr Weber, "when an agreement was come to . . . to the following effects, viz., that while the contracts should *pro forma* continue to be with the pursuers as buyers (1)," and then follow six detailed heads embracing many matters of a somewhat complex and unusual kind. It is to be observed that not only is it not alleged that there was any writing embodying the contract proposed to be set up, but it is not said that the words set out in the six heads were in fact used on the occasion of the meeting. They purport to be merely a summary or result of what in the view of one of the parties passed between them at the meeting. But it is well known that the effect of a conversation is a thing about which parties may very well differ, and to allow a proof of so general an allegation would be to take off the effect of an unequivocal written contract by an allegation of the effect or result of verbal communings. Further, the proposal is not to modify the written contract by anything which happened subsequently; it is to prove that the written contracts were governed by an antecedent master contract which was to regulate all the future dealings of the parties, although no such contract is ever mentioned in the writings instructing their transactions. If the agreement of the parties was such as the defenders allege, it ought to have been reduced to writing, so that the subsequent written contracts could have been read along with it. Further, the tenor of the governing contract which the defenders seek to prove is inconsistent with the writings. The peculiarity is, that while one of the defenders' allegations is that the contracts for the future should *pro forma* continue to be with the pursuers as buyers, the proposal now made is to prove that the contracts are not sales at all. It is hardly necessary to point out the improbability of such an agreement as is alleged, and the danger there would be in setting aside later written contracts, when the presumption is that a subsequent writing is the last and governing expression of the agreement. The agreement alleged is not only very improbable, it is also very one-sided, binding the pursuers to give up all other trade connections, and deal only with the pursuers, while the defenders are not placed under any corresponding restriction. It would, in my view, be contrary to the settled rules of evidence to

permit a clear and unequivocal writing to be displaced by a parole agreement such as that alleged by the defender.

LORD ADAM concurred.

LORD M'LAREN—I quite agree, and have very little to add. The case is, that the purchasers of goods under a sale-note bring an action of damages against the sellers for failure to deliver the goods. The case for the defenders is that this sale-note is only *pro forma* a sale, and is subject to an antecedent agreement whereby five or six conditions have to be observed in all transactions between the parties. The effect of these is to reduce the contract of sale to one of agency. *Prima facie* this appears to be a kind of agreement which could only be proved by written evidence, because it is an agreement which the parties who might desire to enter into it would be careful to reduce to writing. It is not difficult to find a good legal justification in support of the result at which the Lord Ordinary has arrived, *i.e.*, that the defenders' averments can only be proved by writ or oath. I think the key to the question is to be found in the consideration that the effect of the alleged agreement is not to add to or vary the contract, but to put an end to the contract of sale and to substitute a new and different contract for it. Now, there is a doctrine in our law that where by a written contract property has passed, any agreement to restrict the right of property which has passed must be proved by writ or oath. I referred to certain cases in which, by an extension of the principle of the Trust Act 1696, rather than by the direct application of that Act, it was held that you could not transform a written agreement of sale into some other contract otherwise than by the writ or judicial admission of the *ex facie* owner. In *Hamilton* v. *Western Bank*, 19 D. 152, where goods were transferred to a bank *ex facie* absolutely, this principle was applied. A proof was allowed to the bank of its averment of pledge, but the Lord President announced that the proof had completely failed, and his Lordship's judgment is rested on the ground that the title could only be qualified in terms of the bank's judicial admission, which was that the bank had taken over the goods in security of present and future advances.

In what I say I recognise that there may be cases of sale where the essentials of the contract are in writing, in which nevertheless certain conditions of the contract may be proved by parole. As an illustration, the case may be figured where the time and place of delivery are not expressly stated in the agreement. In such a case the law implies the usual conditions in the particular trade, and allows parole evidence to prove what these are. And I do not think that our judgment at all infringes on the principle that in the case of sale, which is a proper consensual contract, evidence of all conditions in the contract is competent, and such evidence may be partly oral and partly in writing. Nor do I wish to suggest a doubt as to the principle on which the Lord Ordinary has rested his judgment, because I have no doubt that there may be cases of contracts so unusual that they can only be proved by writ or oath. As an illustration, take the case of a contract of service for an unusual period—say for a term of years. But I prefer to rest my judgment on the ground I have stated, that this is an attempt to substitute one contract for another by evidence less satisfactory than that by which the apparent contract is proved.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers and Respondents — Guthrie, K.C.— Cook. Agents — Menzies, Black, & Menzies, W.S.

Counsel for the Defenders and Reclaimers —Shaw, K.C.—Hunter. Agents—Auld & Macdonald, W.S.

Tuesday, January 29.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

BAYNE & THOMSON *v.* STUBBS LIMITED.

Reparation — Slander — Privilege — Trade Slander—Malice—Trade-Inquiry Association—Answer to Confidential Inquiry—Issue—Malice in Issue.

In an action of damages for slander, brought by a firm of traders against S., the pursuers founded on a letter written by the defenders in which they stated that the pursuers' account "from various causes is not regarded with much confidence in these markets, although in certain quarters they appear to be in receipt of moderate credit. The capital at command, however, is limited, and the payments of late have been slow and unsatisfactory, but their settlements for years have always been dilatory. At the same time several of their shops are not thought to be paying, and it is feared that credit transactions meanwhile represent more than an average risk." The pursuers ultimately admitted that the defenders were a company formed for the purpose of obtaining confidential information regarding the commercial standing and credit of traders, which they disclosed in answer to confidential inquiries made by subscribers to the company, and that the letter complained of was written in answer to such a confidential inquiry by a subscriber of the defenders' company. *Held* (1), *dub.* Lord Trayner, that the pursuers were entitled to an issue, and (2) that on the pursuers' averments and admissions a *prima facie* case of privilege was disclosed, and that consequently malice must be inserted in the issue.