duct being so entirely reasonable—when he says that he never made any inquiry about Mr Mackay's life at all. He saw him when he came to the bank, and saw him in the street, and it did not occur to him that there was anything the matter with him. But the idea of trust and confidence on the part of Mr Mackay and his wife, and of a consequent obligation upon the defender to inquire into the state of Mr Mackay's health and see what the policies were worth as a speculation, is also, in my opinion, entirely out of the question, and not sensible or reasonable in any view.

Then it just comes to this, that he bought such a common article of sale as two policies of insurance at what is admitted to be the full value of them if sold, and that he did not advise them, after inquiring into the state of Mr Mackay's health, that they had better go without the £60 and take the consequences, than sell the policies at their value as subjects of sale.

My opinion therefore is with the Lord Ordinary on the assumption, which I cannot make, that there was a relation producing trust and confidence here, the view of the Lord Ordinary being that there was no trust and confidence induced which was abused. I repeat it is part of the case of both parties, and is too clear to be disputed, that the £60 could not have been raised as a loan upon those policies upon any arrangement that it would not have been ridiculous for anybody, a man of business or not, to suggest and recommend. My opinion upon the whole matter therefore is, that this is a clear case, and that the action is unfounded, and that the defender is entitled to absolvitor with expenses.

Lord Trayner—I concur. The only point in the Lord Ordinary's interlocutor with which I am unable to agree is the second finding in fact that the defender stood in the relation of law-agent to Alexander Mackay and to the pursuer. I think that is not proved. I am also of opinion (assuming that the defender was the agent of the pursuer) that there was no failure on the part of Mr Macarthur in any duty which the position of law-agent to these parties imposed on him, and I would like to add that in my opinion Mr Macarthur's conduct is not in any respect open to censure.

Lord Moncreiff—I am of the same opinion. I think the Lord Ordinary has rightly disposed of this case, and that even assuming Mr Macarthur stood in the position of confidentiality to the pursuer and her husband, I do not think it is proved he did anything he should not have done in that relation, or that he omitted to give them any advice which he ought to have done. Having examined the whole of the evidence, I think he acted entirely in *bona fides*, and that he rather reluctantly bought these policies, and paid more for them than could have been got in the market.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming-note for the pursuer against the interlocutor of Lord Kincairney dated 14th December 1898, Recal the second finding in the said interlocutor: *Quoad ultra* adhere to the said interlocutor reclaimed against, and decern: Find the defender entitled to additional expenses, and remit," &c.

Counsel for the Pursuer and Reclaimer—Balfour, Q.C.—G. Watt. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Defender and Respondent—W. Campbell, Q.C.—Graham Stewart. Agents—Gill & Pringle, W.S.

Friday, May 26.

FIRST DIVISION.

HOGAN AND OTHERS (M'CROSSAN'S TRUSTEES) *v.* M'CROSSAN.

Minor and Pupil—Tutor-Nominate—Custody of Ward.

Averments by the near relations of a pupil which *held* insufficient to override the decision of her tutors, nominated by her father's settlement, as to her custody and residence, the Court being satisfied that that decision was based upon adequate grounds.

Expenses—Minor and Pupil—Petition for Custody of Pupil Children.

Circumstances in which the respondents in a petition for the custody of pupil children *held*, though unsuccessful, entitled to their expenses out of the estate of the children's deceased father.

This was a petition presented by the Rev. Richard Hogan and others, the testamentary trustees of the late Thomas M'Crossan, for the custody of the said Thomas M'Crossan's two pupil daughters, aged seven and five respectively.

The petitioners averred that the testator, who died on 28th March 1898, had appointed them trustees for the execution of the purposes of his settlement, and had also nominated and appointed them to be tutors and curators to such of his children as at and after his decease might be in pupilarity or minority.

The petitioners further averred that after Thomas M'Crossan's death his pupil daughters, who up till that time had resided with him in Paisley, went to live with two paternal aunts in Londonderry, and that for some weeks the trustees paid board for the children to these ladies. The petitioners continued—"On 1st July 1898 the petitioners, as trustees and tutors foresaid, considered carefully what course should be adopted in the interest of said children with regard to their custody and education. They arrived at the conclusion that it was not judicious to leave the children in the custody of the Misses M'Crossan, and that it was better they should be brought to Scotland, where their education and welfare generally could be properly supervised by the petitioners. They ascertained that a Mrs Hogan, who resides in Stirling, and

was an aunt of the mother of the said children, was prepared to receive them and take custody of them. Mrs Hogan is in very comfortable circumstances and has a large house, and in the petitioners' opinion would take great care of the children, and would be a very suitable custodian of them. She is the mother of the Reverend Richard Hogan, one of the petitioners, and she has residing with her a daughter who is a teacher in a Roman Catholic school. Said children have been brought up in the Roman Catholic religion."

After commenting on the writing founded on by the respondents and referred to below, and pointing out that the copy furnished to them was unsigned and undated, the petitioners proceeded—"Besides founding on the said writing, Miss Anna M'Crossan is understood to assert that the deceased on his deathbed, and in presence of a Roman Catholic clergyman, expressed a wish that his children should be taken charge of by her. The petitioners have not been able to verify this assertion, but in any view, they submit that neither the said writing nor said expression of wish made upon deathbed can override the express appointment of tutors-nominate to the deceased's children, or affect the legal right and duty of said tutors to provide for the custody of the children according to their view of what is most in the children's interest.

"The petitioners the said tutors-nominate, along with the other petitioners, are satisfied that the residence of the Misses M'Crossan is not a suitable residence for their wards. The Misses M'Crossan maintain themselves by keeping a boarding-house, and the petitioners consider that the children cannot there have the advantages and enjoy the social influences which are desirable. Further, it is obvious that while the children remain at such a distance from the petitioners as Londonderry it is impossible for the petitioners to know whether the children are receiving proper attention. The petitioners also doubt whether it is consistent with their duty to permit their wards to reside beyond the jurisdiction of the Court."

In these circumstances the petitioners craved the Court to decern and ordain the respondents to deliver up the children to the petitioners.

Answers were lodged by Miss Anna and Miss Dora M'Crossan, Londonderry, sisters of Thomas M'Crossan, who averred—"In the spring of 1896, when the respondent Annie M'Crossan was in Paisley on a visit, her deceased brother, who was then a widower, arranged with her that she should take the said two children to reside with her in Londonderry, where they might be educated in the Convent school there as his son Thomas had been before. She accordingly took the said children to Londonderry in or about the month of April 1896, where they resided with the respondents and attended the said school. They visited their father when on holiday, and in the autumn of 1897, when they were residing with their father, it was the wish of the deceased and the intention of one of the respondents that the latter should come from Londonderry and take the children back. Neither of the respondents was able to go to Paisley at the time, and the children remained in Paisley with their father. On 10th March 1898 the respondent Annie M'Crossan received a telegram from her brother asking her to come that night and take the children home. She went accordingly to Paisley for the purpose of taking back the children to Londonderry. She remained for some days in Paisley, and while there her brother became ill and died on 28th March 1898. While on his deathbed the deceased repeatedly expressed his wish that the two children should be brought up by the respondents, and he handed to the respondent Annie M'Crossan the document which is quoted by the petitioners, and is herewith produced."

The document in question was in the following terms:—"Disposal of my two daughters.—I wish them to go to Rosannah M'Crossan and Marie M'Crossan, now residing in Queen Street, L'Derry, Ireland; or failing them, to Margaret M'Crossan or M'Nally, now residing in 29 Bk. Sneddon, Paisley; also make Robert M'Nally, 29 Back Sneddon, one of my trustees."

In the course of the argument, the import of which sufficiently appears from the opinion of the Lord President, it transpired that by a codicil executed on his deathbed, on 23rd March 1898, and duly tested, one of the respondents being a witness thereto, the testator had revoked the appointment of the said Robert M'Nally as trustee made under his settlement.

At advising—

LORD PRESIDENT—The petitioners are the guardians of these pupil children appointed by the father, with full confidence (so the law holds) that they will properly order the residence and education of the wards. The petitioners, exercising this responsibility, say that in their judgment it is better for their wards that they should reside in a family, which they name, rather than continue to reside with the respondents. They say nothing of the respondents that is at all injurious, and their objections to the children's residence with them are not clamant. They are evidently and very properly disposed not to say anything to create hostile feelings about these children in the minds of these near relatives, and what they say is in substance that they think the children would be better in a house which is not a boarding-house, and that they feel that if the children live in Londonderry, while they are themselves in Scotland, they are less able than they would desire to see to their wards' welfare. As I say, these are not strong reasons, but they are adequate to show that the actions of the guardians is not capricious.

This being the decision of the legal guardians of the children, it is for the respondents to show cause why the Court, in the interests of the children, should override this decision. They have, however, nothing to say against the residence proposed for the children, and have advanced no reasons

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."