words was not explained to him, and it is out of the question to suppose that he should have understood it himself. Now, I think it was the duty of the pursuer's agent when he required such a person as the defender to add words to the missives, to explain not only the meaning of the words but their legal effect. It is clear from his evidence that Robertson did not do this. He says—"I told him he would require to sign the document, and that before putting his signature to it he would require to put the words "adopted as holograph." I explained that that meant that the document was practically written by himself. I used words to that effect, I put it in as plain words as possible to him;" and then again—"I read over the document to him so as to let him know what was in it. I did not take any pains to test whether he understood the terms I had employed, except that I read it over very carefully and very slowly to him." There is nothing there to show that he explained that if the words "adopted as holograph" were not added the defender would not be finally bound, but that he would be so bound if they were added. The defender was therefore induced to write the words "adopted as holograph" without knowing their true meaning and effect. I think it would be altogether inequitable to hold him bound by having done so under such circumstances, since he had no independent legal advice, and did only what he was told to do by the pursuer's agent. But I am unable to sustain the interlocutor for another reason. This is an action for implement of a contract of purchase and sale, and failing implement for damages, and the Lord Ordinary holds that the defender is not bound to implement the contract, and yet that he is liable in damages. For the Lord Ordinary has repelled the first plea-in-law for pursuer and dismissed the action so far as regards the primary conclusion of the summons. Now, the primary conclusion of the summons is that the defender should be ordained "to perform his part of the contract by accepting a disposition and paying the price, and the conclusion for damages is in terms made dependent on the pursuer's obtaining that decree. It is only if the defender fails to perform the contract which the decree is to ordain him to perform that damages were claimed. And yet the Lord Ordinary holds that he is not bound to perform the contract, and at the same time that he is liable in damages for not doing what he is not bound to do. It does not seem to me to make any difference that the Lord Ordinary dismisses the primary conclusion on the ground that it is premature, because it does not signify what may be the reason which disentitles the pursuer having decree ordaining the defender to implement the missives if he in fact is not entitled to such a decree. It is too soon to require the contract to be performed; it is too soon to find that the defender is in default.

But the pursuer accepts the Lord Ordinary's view. He does not reclaim against the judgment that he is not entitled to specific implement, and what has happened since the Lord Ordinary's judgment fixes his position. The pursuer has at his own hand altered the subjects which he alleges were sold to the defender. It follows that he cannot now make over the subject in the same condition as when he alleges that the defender bound himself to purchase. And the only explanation is that he accepts the view of the Lord Ordinary that he cannot insist upon implement of the contract. But if he cannot have decree for performance he cannot have damages for failure to perform.

The Court assoilzied the defender.

Counsel for the Pursuer and Respondent —Guy—Mitchell. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defender and Reclaimer —Jameson, K.C.—Munro. Agent—James Andrews, Solicitor.

Friday, November 20

OUTER HOUSE.

[Lord Low.

CHISHOLM AND OTHERS *v.* MACRAE AND ANOTHER.

Writ—Execution—Validity—Will—Subscription by Clergyman as Notary—Notary Sole Executor and Intromitter.

A person who is nominated sole executor and intromitter under a settlement cannot competently act as notary in the execution of that settlement. *Ferrie* v. *Ferrie's Trustees*, January 23, 1863, 1 Macph. 291, *followed.*

The pursuers in this action sought reduction of a deed purporting to be the last will and testament of Farquhar Macrae, and signed on his behalf by the Rev. Duncan Macrae acting as notary. The testator, owing to paralysis, was incapable of writing, and the deed was written out by the Rev. Duncan Macrae. It was in the following terms:—"I, Farquhar Macrae, residing at Letterfearn, in the parish of Glenshiel, as by this, my last will and testament, leave and bequeath all that may belong or be resting-owing to me at the time of my death, as under; and for the purpose of carrying out the provisions of this will I hereby appoint the Reverend Duncan Macrae, minister of Glenshiel, to be my sole executor and intromitter with my moveable estate, with all powers competent to an executor according to law; and I ordain my said executor to pay out of present monies funeral expenses, &c., and various legacies. The Rev. Duncan Macrae was not among the beneficiaries.

The pursuers argued that following *Ferrie* v. *Ferrie's Trustees*, 1863, 1 Macph. 291, the deed was not duly executed and was accordingly invalid, in respect that the notary by whom it bore to be signed

had an interest conferred on him by the deed.

The defenders argued that the case of *Ferrie* was distinguishable from the present one.

LORD LOW — "My opinion is that the question raised here is ruled by the decision in the case of *Ferrie* v. *Ferrie*. Mr Welsh founded upon certain differences which exist between the position of executor and the position of testamentary trustee, and no doubt there are differences. But the material point in this case is that the gentleman who acted as notary was nominated sole executor and intromitter in the settlement which he executed as notary. Now, of course, as sole executor and intromitter he was entitled to ingather and administer the whole estate, and that I think is the very disqualification to which the Court gave effect in the case of *Ferrie*. I think it cannot be doubted that a person who is nominated sole executor and intromitter under a settlement cannot competently act as notary in the execution of that settlement.

"But then it was argued that this was an exceptional case, the kind of case which Lord Deas shadowed in his judgment in the case of *Ferrie* as a possible exception to the rule there laid down. But even assuming that the case figured by Lord Deas would form an exception, this case does not come up to it, because it is admitted that other gentlemen competent to act as notaries were within reach, and among others the very medical gentleman who was attending the testator. So far from there being special circumstances in this case to make it an exception to the rule, it seems to me to be a strong case for the application of the rule, because Mr Macrae was not only the notary who executed the settlement, but he himself had prepared it. I shall therefore sustain the first plea-in-law for the pursuers and grant decree of reduction."

Decree of reduction was pronounced.

A reclaiming-note was presented, but subsequently withdrawn.

Counsel for the Pursuers—M'Lennan—Forbes. Agent—Alexander Ross, S.S.C.

Counsel for the Defender — Cooper—Welsh. Agents—Forbes, Dallas, & Co., W.S.

Tuesday, January 12.

OUTER HOUSE.

[Lord Low.

CAMPBELL *v.* M'INNES AND ANOTHER.

Agent and Client — Services—Remuneration — Agent Acting for Client under Curator Bonis—Steps for Recall of Curatory—Preparation of Trust-Disposition—General Professional Advice.

A law-agent who in good faith and upon reasonable grounds attempts, upon the instructions of a ward, who is under a *curator bonis*, to obtain a recall of the curatory, will as a general rule be entitled to remuneration out of the ward's estate even although the object in view be not attained.

A law-agent who entertained a reasonably grounded opinion that a ward under a *curator bonis* was capable of managing his affairs, drew up, on the ward's instructions, a trust-disposition and settlement for him, advised him generally as to his affairs and investments, and took steps for obtaining the recall of the curatory. The latter were ultimately abandoned after an adverse opinion from a medical expert had been obtained.

Held that the law-agent was entitled to remuneration out of the ward's estate for his services only in so far as they related to the recall of the curatory.

The defender John Wilson, chartered accountant in Glasgow, was in February 1896 appointed by the Court *curator bonis* to the defender Andrew M'Innes. The medical certificate produced with the petition certified that the latter was "of unsound mind and the subject of such fixed and extravagant delusions as to make him quite incapable of conducting his business affairs or of giving directions for the management of them."

In December 1901 the pursuer Alexander Campbell, S.S.C., Edinburgh, raised the present action against the defenders, in which he sued for the amount of an account representing (1) services rendered to the ward M'Innes in view of obtaining a recall of the curatory, (2) cost of preparing a trust-disposition and settlement for the ward M'Innes, (3) advising him in regard to certain property and investments. The pursuer averred—"Between August 1896 and October 1899 the pursuer, acting on the instructions of the defender Mr M'Innes, had numerous meetings and considerable correspondence with him and on his behalf regarding his affairs, and expressly in regard to his wish to have the curatory recalled and the settlement of his affairs by testamentary deed. An account of the business so done . . . is herewith produced. . . . Said account was incurred for the benefit of Mr M'Innes, and in the best interests of both him and his estate. The performance of the work set forth in the account was necessary to put him in a position to determine whether or not the curatory should be recalled as well as his testamentary powers."

The defenders in answer stated—"The business for which the pursuer claims remuneration began in August 1896, five months after the granting of the curatory, and appears to have been undertaken upon the initiative of certain third parties interesting themselves in the said Andrew M'Innes and his affairs; the pursuer was fully certiorated at that time of the existence of the curatory, and of the proceedings and circumstances connected with the granting thereof. The said Andrew