only mean, as suggested by your Lordship in the chair, that the returning officer is to decide for the purpose of getting through with the election and till the election is over, whether a nomination is valid or not, I think that might be a very proper regulation for the Board of Education to make. But if they mean that the decision of the returning officer is to be final to the effect of excluding the courts of law, I think that *ultra vires*, for the reasons so lucidly stated by the Lord Ordinary, and particularly upon the ground which is set forth at the part of his opinion where he says—"Were it to receive the effect claimed for it it would preclude all inquiry into the conduct of a returning officer in the matter of a nomination, however grossly incompetent or biased or even corrupt such conduct may have been." Now here it is alleged that the conduct of the returning officer was unfair and malicious. Whether that allegation is true or not remains to be seen, but in view of the possibility of such cases arising it would be a serious thing indeed if it were to be held that it was in the power of a returning officer finally to determine whether a person was to be refused a right of being placed in the list of candidates or not just as he chose to decide. It might be under the influence of wrong motives, or it might be perfectly *bona fide* but on grounds quite unfounded in point of law. If that is the meaning of the finality clause here I do not think it can be held that it is a clause which the Education Department were entitled to enact.

With regard to the second point, I concur in what has been said by your Lordships. The Act of 1890 being a general Act applicable to various kinds of elections, it really was intended to reserve cases arising on the most common grounds of objection in such elections to be dealt with in an election petition before the Sheriff, and to leave cases arising on any other competent ground to be dealt with under the common law remedy of reduction. I may say that I quite concur with Lord Kincairney's opinion in the case of *Hodge* v. *School Board of Ballingry*, 35 S.L.R. 634.

The Court adhered.

Counsel for Pursuer (Respondent)—George Watt, K.C.—Spens. Agents—Bryson & Grant, S.S.C.

Counsel for Defenders (Reclaimers)—The Dean of Faculty (Campbell, K.C.)—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Thursday, May 16.

FIRST DIVISION.

[Lord Dundas, Ordinary.

KRUPP AND ANOTHER *v.* JOHN MENZIES, LIMITED.

Proof—Contract—Written Contract—Error—Performance—Admissibility of Parole Evidence to Prove in Defence against a Claim for Performance an Error in a Written Contract.

In defence to an action by the late manager of an hotel against the proprietor, in which the pursuer sought an accounting of a fifth of the profits of the business alleged to be due to her, under a written contract of employment, the defender averred that the share of the profits due was five per cent., not a fifth; that the error in the contract was the clerical or arithmetical error of the clerk who prepared it; that this was well known to the pursuer, who had accepted certain payments on the basis of five per cent.; that the terms of the contract had been arranged on the basis of a similar contract with another employee, but with a difference as to the share of profits, which had consequently been discussed and settled; and that the share of profits agreed upon, *i.e.*, five per cent., was referred to in the correspondence between the parties' law agents preceding the contract.

Held that the defender was entitled to a proof before answer of his averments.

On 29th December 1905 Mrs Jessie Andrews or Krupp, residing at Station Hotel, Oban, with the consent of William Krupp, her husband, and he for his own right and interest, brought an action against John Menzies, Limited, 12 Queen Street, Edinburgh. In it the pursuers, *inter alia*, sought that the defenders should be ordained "(*second*) to exhibit and produce before our said Lords a full and particular account of the profits of the business of hotel-keepers and others carried on by the defenders at the Station Hotel, Mallaig, Inverness-shire, for the period from 1st November 1900 to 31st October 1905, whereby the true one-fifth part or share thereof due by them to the pursuers may appear and be ascertained," and to make payment to the pursuers of £1000 or such sum as should be ascertained to be the balance due on such accounting, with interest at five per cent.

The question upon which the case is now reported was whether the defenders, who averred that the share of profits payable to the pursuers was five per centum and not, as claimed and as stated in the written contract of employment, a fifth, should be allowed a proof.

The *facts* of the case appear from the opinion (*infra*) of the Lord Ordinary (DUNDAS), who on 20th March 1906 appointed the defenders to lodge accounts as craved and allowed the pursuers to lodge objections thereto.

Opinion.—"The defenders in this action, John Menzies, Limited, are proprietors of the Station Hotel at Mallaig. The pursuer, Mrs Krupp, was until recently their housekeeper in the said hotel. The contractual relations of the parties were constituted by a formal minute of agreement, dated 31st October and 1st November 1900, a copy of which is in process. The summons contains two conclusions the subject-matters of which are quite distinct and separate from one another." . . . [*His Lordship here dealt with a claim for a sum as arrears of salary, for which he gave decree*] . . .

"The second conclusion of the summons raises some points which are not unattended with difficulty. The *sixth* article of the minute of agreement above mentioned provides, *inter alia*, that 'the first party' (*i.e.* the defenders) 'shall also, in addition to the salary above mentioned, pay to the third party' (*i.e.* the pursuer) 'one-fifth part of the net annual profit of the business carried on in the said hotel at Mallaig, as the same shall be shown by the books of the first party. . . . The said share of profit shall be paid by the first party to the third party as soon as its amount can be ascertained after the close of the first party's financial year.' The pursuer demands that the defenders shall account to her for, and make payment to her of, her share of the net profits during the five years which have elapsed, and she alleges that she has hitherto received only two sums of £33, 6s. 8d. and £15, 1s. 2d. respectively 'to account of said share of profits.' The defenders' (fourth) answer is a somewhat startling one. They explain 'that the words "one-fifth" part were inserted in the agreement by a clerical error instead of the words "five per cent," and that the pursuers are well aware of this fact. They are further aware that the managers of the defenders' other hotels were and are paid a percentage calculated on the net annual profits, and that none of them ever claimed or received a share of the profits such as the pursuers are now claiming.' In answer 5 the defenders further explain that the payments to Mrs Krupp which I have mentioned 'were made by the defenders and accepted by the pursuers as representing five per cent. of the net annual profits of the business, as ascertained in the manner specified in the said agreement for the purpose. The pursuer granted receipts for both of these payments. The sum of £15, 1s. 2d. was remitted to her along with a letter (which is produced herewith) bearing that it was made on the five per cent. basis referred to. Five per cent. was well known to the pursuer and her husband to be the rate of bonus arranged for between the parties, and they consistently acted on that footing.' The defenders' counsel asked for a proof *prout de jure* of the averments which I have quoted. Now the agreement, which is a formal document, prepared by the defenders' own lawyer, and executed by the parties, appears to me to be quite clear and unambiguous in its terms. But the defenders say that there was 'a clerical error,' and that an error of that sort can always be put right by a parole proof. I do not think that the decisions to which their counsel referred me bear out the above contention. In *North British Insurance Company*, 1864, 3 Macph. 1, parole evidence was allowed to prove that a policy of insurance upon the lives of two spouses had by a clerical error been so expressed as not truly to express what it was intended that it should express. But then the Lord Justice-Clerk (Inglis) pointed out that 'the policy itself suggests, in the most forcible way, that there has been some clerical blunder, not that one word has been written instead of another, because this part of the contract is printed; but it is plain that this printed form should have been altered in such a way as to express the true nature of the contract.' His Lordship goes on to state that 'there are averments upon the record as to the intentions of the spouses, and evidence of that I should not have been inclined to admit.' He also alludes to 'the settled doctrine which prevents resort to extraneous parole testimony to contradict the written contract of parties.' Lord Benholme in the same case said, 'Now, it is one thing to control the terms of a written contract in so far as it determines the relative rights of the principal contracting parties, and quite another thing to correct its terms by proof of a collateral contract which regulates the rights *inter se* of two individuals who stand together as conjoined parties to the written contract.' His Lordship accordingly thought himself justified in looking to the 'previous collateral contract' between the spouses in order to get at the true meaning of the policy, which was 'plainly bungled.' But he adds, 'I do not think that evidence of the mere intentions of the parties could have been allowed.' Now, this case does not seem to me to help the defenders' argument, because (*a*) the agreement in question is not a 'plainly bungled' document, but is perfectly explicit and unambiguous in its terms; (*b*) no anterior written contract between the parties is averred inconsistent with the language of the agreement; and (*c*) the case cited does not appear to afford any authority for allowing one of the parties to prove that the intentions of both of them were truly quite other than the plain expression of the instrument. The defenders also founded upon the *Glasgow Feuing Company*, 1887, 14 R. 610, and especially upon Lord Young's observations at p. 618 and p. 621. But that was a case where a palpable — and I rather think undisputed—blunder had been made by the colourist of a plan of certain feuing lands and roads. It is also to be observed that the action was one of reduction, and I do not think that it affords support for the view that such an error as is here alleged can be proved *ope exceptionis* by the defenders in a petitory action. I was also referred to the cases of *Grant*, 1899, 1 Fr. 889, and *Grant's Trustees*, 1875, 2 R. 377. But these appear to me to have no application here, because they were cases where the parties were at one in admitting that

the written contract did not correctly express the true agreement between them. In my opinion therefore no authority has been adduced which would warrant me in allowing the defenders the proof which they ask in regard to this portion of the case. If their view of the matter is in fact the true one, they will not be deprived of all remedy by my decision here. It may be that they could successfully reduce the agreement *quoad hoc*, or it would, I apprehend, be open to them to peril their case upon the pursuer's oath. I think that the proper course as regards the second conclusion of the summons will be to appoint the defenders to lodge an account, as craved by the pursuer."

The defenders reclaimed, and after a hearing in the Inner House were, by interlocutor of February 26, 1907, allowed to amend their record.

The defenders' answer 4 (*the portion in italics was added, and the portion in square brackets deleted, in the Inner House*) was:—"Explained that the words 'one-fifth part' were inserted in the agreement by a clerical error instead of the words 'five per cent.,' and that the pursuers are well aware of this fact. [They are further aware that the managers of the defenders' other hotels were and are paid a percentage calculated on the nett annual profits, and that none of them ever claimed or received a share of the profits such as the pursuers are now claiming.] *On or about* 1st *October* 1900 *the pursuers had a meeting with the defenders' managing director and law agent at the office of the latter in Edinburgh. At this meeting terms were discussed for a proposed agreement between the pursuers and defenders relating to the appointment of the pursuers as manager and housekeeper respectively of the defenders' new hotel, which was shortly to be opened at Mallaig, for which posts the pursuers had already applied to the defenders. The conditions of service were fully explained and detailed to the pursuers at the said meeting. These conditions were similar to those in the existing agreement between the defenders and Mr Rusterholz, the manager of the Palace Hotel, Inverness, and his wife. The said hotel also belongs to the defenders, and the pursuers were already familiar with the conditions in the said agreement. The conditions explained to the pursuers at the said meeting were agreed to by them. As regards salary, the same salary as was paid to Mr Rusterholz and his wife, viz.,* £200 *per annum, was offered to and was accepted by the pursuers. As regards a share of profits, it was explained to the pursuers that Mr Rusterholz received a bonus of* 10 *per cent. One-half of such bonus, viz.,* £5 *per cent. of the nett annual profits of the business of the hotel, was offered to the pursuers, and this they agreed to accept. The smaller rate was fixed because of the larger earning capacity of the Mallaig business through the liquor turnover during the winter months. It was further arranged that the defenders' law agent should prepare and send the pursuers a draft of the agreement. . . . . The only changes which fell to be made on the draft agreement, as compared with the agreement with Mr Rusterholz and his wife, were* (1) . . . .; (2) *the substitution of* 5 *per cent. of the annual profits instead of* 10 *per cent. 'Ten per cent.' in the agreement with Mr Rusterholz was expressed as 'one-tenth part of the nett annual profits.' A clerk was directed to draft the agreement on that footing. He was provided with the agreement with Mr Rusterholz for his assistance, and was directed to give effect to the alterations aforesaid, his instructions being as regards the share of profits to give half the share received by Mr Rusterholz under his agreement to the pursuers under theirs. The said clerk by inadvertence inserted the words 'one-fifth part' instead of the words 'five per cent.' or its equivalent 'one-twentieth part,' being an erroneous calculation on his part of one-half of a tenth. On or about* 22nd *October* 1900 *the draft agreement was completed, and on* 23rd *October it was sent, containing the clerical error aforesaid, for revisal to the pursuer Mr Krupp. On or about* 26th *October* 1900 *the defenders' law agent received the draft revised along with a letter from Mr Henry Mackenzie, solicitor, Oban, who then acted and still acts as law agent for the pursuers. The only alterations he made on the draft were* (1) *to allocate the salary by giving* £70 *to the pursuer Mr Krupp, and* £130 *to the pursuer Mrs Krupp; and* (2) *to stipulate for payment of the pursuer Mr Krupp's salary in advance. Mr Mackenzie's letter, which gives the reasons for these alterations, is produced herewith and referred to. On the same date the defenders' law agent wrote Mr Mackenzie in reply, and a copy of said letter is produced herewith and referred to. Reference is made in particular to the terms of the postscript, which refers to the arrangement come to between the defenders and the pursuers for a* 5 *per cent. bonus. On or about* 27th *October Mr Mackenzie wired the defenders' law agent agreeing to the suggestions contained in the postscript. Said wire is produced herewith and referred to. The defenders' agent thereupon gave effect to the said suggestions by* (1) *allocating to Mr Krupp* £1 *a week as salary, and the balance of* £148 *to Mrs Krupp; and* (2) *making the bonus payable to Mrs Krupp instead of to Mr Krupp. On or about* 30th *October* 1900, *the agreement as altered was engrossed and sent by letter to the pursuers' law agent for signature by his clients. On or about* 1st *November* 1900 *the defenders' law agent received the agreement back from Mr Mackenzie duly signed by the pursuers. On the same day the agreement was signed on behalf of the defenders, and a copy for the pursuers' use was sent to their law agent. Neither the pursuers nor the defenders discovered the mistake as to the share of profits which was included in the engrossed agreement till it was discovered by the solicitor acting for the pursuers in this action shortly before the summons was served."*

The postscript to the letter of 26th Octo-

ber 1900 from the defender's law-agent Mr Tweedie to the pursuer's law-agent, to which reference is made, contained the following paragraph:—"*P.S.*—On considering the matter further, probably the best way for my company will be to pay Mr Krupp a salary of £1 per week, payable weekly after hand, and to pay Mrs Krupp £148 per annum, payable quarterly after hand. This, I think, will save any question of arrestment so far as Mr Krupp is concerned. Would you not also approve of the 5 per cent. bonus being transferred from Mr Krupp and added to his wife's wages? Kindly let me hear from you as to these points by wire to-morrow. . . ."

At a hearing on the amended record the reclaimers argued — This was not a case of mutual error, nor was it a case of the defenders seeking to contradict the terms of a written contract by parole evidence. The averment was that all the terms of the contract which the parties were to sign were agreed upon, but that owing to the mistake of a clerk these terms were not correctly set forth in the document subscribed. The statements as to how this occurred were clear and specific, and these statements the defenders were entitled to prove, for, if they were true, to enforce the written agreement would be to violate the real contract between the parties—Dickson on Evidence (Grierson's ed.), vol. 2, sec. 1041; Taylor on Evidence (10th. ed.), vol. 2, sec. 1140; Greenleaf on Evidence (16th. ed.), 1, 296 a; *Marquess of Queensberry* v. *Scottish Union Insurance Company*, July 10, 1839, 1 D. 1203, 1 Bell's App. 183, Lord Cottenham at p. 198; *Carricks* v. *Saunders*, March 1, 1850, 12 D. 812; *North British Insurance Company* v. *Tunnock & Fraser*, November 1, 1864, 3 Macph. 1, Lord Justice-Clerk (Inglis) at p. 5; *Stewart's Trustees* v. *Hart*, December 2, 1875, 3 R. 192, 13 S.L.R. 105; *Glasgow Feuing and Building Company, Limited* v. *Watson's Trustees*, March 11, 1887, 14 R. 610, Lord Young at pp. 618 and 621, 24 S.L.R. 429. Further, the action being for specific performance of a written agreement, the defenders were entitled to a proof of any averments showing that it would be inequitable to enforce it—*Harris* v. *Pepperell*, L.R. 1867, 5 Eq. 1; *Garrard* v. *Frankel*, 30 Beav. 445; *Manser* v. *Back*, 6 Hare 443, *v.* the opinion of Wigram (V.C.); *Wood* v. *Scarth*, 2 K. and J. 33; *Earl Beauchamp* v. *Winn*, L.R. [1873], 6 E. and I. App. 223, Lord Chelmsford at 232-3; *Townshend* v. *Strangroom*, 6 Ves. Jun. 328, Lord Eldon at 332-3. Proof should be allowed.

Argued for the pursuers and respondents —There was no authority for the Court re-forming a contract made in terms such as were here. Every care had been taken, and both parties to the contract had been assisted by an agent in framing the agreement. Nor was there anything on record to show that the existing document did not embody the true contract. Parole evidence, which was defined as all evidence not under sealed contract—Stroud's Judicial Dictionary, *sub voce* parole—was inadmissible to prove the error here alleged — Pollock on Contract, 7th. ed., pp. 513-4. In all the cases cited for the reclaimers there had been some antecedent expression of the contract in writing which explained it. If parole evidence were admissible to contradict a written contract, then there would be an end to all finality with respect to written contracts. The interlocutor of the Lord Ordinary should be sustained.

LORD PRESIDENT—I quite agree with the words of Lord President (Boyle) in the case of *Carricks* v. *Saunders* (12 D. 812), which has been cited to us, that it is a very delicate matter to interfere with a written contract expressed in clear terms, and that parole proof should not be rashly allowed in such a case. But there are cases in which it would be truly a disgrace to any system of jurisprudence if there was no way available of rectifying what would otherwise be a gross injustice. I do not prejudge this case, but take it on the averments of the defenders. According to these averments, the pursuers Mr and Mrs Krupp were by their contract, in addition to a *cumulo* salary of £200 per annum, to receive a proportion of the net profits earned by the hotel at Mallaig, which they were to manage for the defenders, viz., 5 per cent. This condition was similar to that in an agreement existing between the manager of the Palace Hotel, Inverness, and the defenders, save that in the case of Inverness the proportion of profits coming to the manager was 10 per cent. This difference was explained to the pursuers as being based on the fact that the gross receipts at Mallaig were larger. The Inverness agreement was given to a clerk, that from it he might draft the agreement with the pursuers, and he was instructed to follow the Inverness agreement, but to halve the percentage of the profits. This clerk somewhat carelessly miscalculated one-fifth as a half of 10 per cent., and inserted that figure in the agreement between the pursuers and the defenders in place of 5 per cent. The error remained undiscovered by either party, and the pursuers received a share of the profits on a 5 per cent. basis until the parties eventually quarrelled as to the amount due. Then the pursuers demanded a settlement on the basis of 20 per cent., or one-fifth of the net profit as the proportion allotted to them under the agreement. This case seems to me to have nothing to do with the avoidance or re-formation of the contract. The only question is whether proof is admissible that a document which in ordinary circumstances would be held to express the intentions of the parties does not in fact do so.

I am clearly of opinion that proof should be allowed.

LORD M'LAREN—It may be kept in view that it is a condition of the pursuers' case that neither party was under error as to the terms of the contract intended. That being so, we are not at all in the region of rescinding or re-forming a written contract where one of the parties has been led into

error by the fault or negligence of the other party.

What it is proposed to prove is that the fraction one-fifth was inserted in the agreement in place of 5 per cent., the true quantity. This was either a clerical or an arithmetical error, and is *prima facie* subject to correction. We know, for example, that a misnomer is always subject to correction, for on proof of the true name of the person or thing effect is always given to that proof. Then in deeds of conveyance arithmetical errors are subject to correction when it appears on the face of the deed that they are arithmetical errors. In such cases we do not vary the terms of the contract at all, but merely seek to give expression to the true contract as agreed to by the parties.

While I have a strong opinion that such a power of correction is inherent in the Supreme Court, the first step in the operation evidently is to ascertain the facts of the case, and the considerations raised by these facts. I concur with your Lordship that proof should be allowed.

LORD KINNEAR and LORD PEARSON concurred.

The Court recalled the Lord Ordinary's interlocutor *quoad* the second conclusion, and remitted to his Lordship to allow the parties a proof before answer of their respective averments, the defenders to lead, &c.

Counsel for the Pursuers (Respondents) — M'Lennan, K.C. — Mercer. Agent — D. Maclean, Solicitor.

Counsel for the Defenders (Reclaimers) —The Dean of Faculty (Campbell, K.C.)— Morton. Agent—John A. Tweedie, Solicitor.

Tuesday, May 28.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

NELSON AND SONS *v.* THE DUNDEE EAST COAST SHIPPING COMPANY, LIMITED.

Ship—Charter-Party—Breach—Obligation to Provide a Ship "with all Convenient Speed" with Option to Charterer to Cancel Contract after Certain Period—Right of Charterer to Cancel and also where Delay caused by Shipowners to Claim Damages.

By charter-party entered into between charterers and shipowners it was provided that "the s.s. 'Alice,' now trading and expected ready to load about 3rd March," . . . should, "with all convenient speed," proceed to the loading berth and there load. "In the event of . . . any mishap entailing delay in arrival at port of loading beyond seven days of her expected readiness, charterers to have the option of cancelling this charter. . . . Owners to have the option of substituting their s.s. 'Douglas' (sister ship)." The shipowners failed to provide either ship by the 10th of March owing to their conduct in having, subsequent to the charter-party, so chartered their vessels as to make it impossible for them to do so.

Held that as the shipowners had through their own fault failed in their obligation to provide a ship with all convenient speed, they were liable in damages.

Per Lord M'Laren—"If it could be shown that the shipowners had used their best endeavours and that the delay was due to unavoidable accident or perils of the sea, I should have been of opinion that no damages were due. The contract could be cancelled but damages would not be due, for each party would then be within his rights."

On 10th July 1905 Thomas Nelson & Sons, publishers, Parkside Works, Edinburgh, raised an action against the Dundee East Coast Shipping Company, Limited, registered owners of the steamships "Alice" and "Douglas," in which they sued for £44, 17s. 2d. as damages for breach of contract.

The following *narrative* is taken from the opinion of the Lord President—"This is an action of damages for breach of a contract of charter-party entered into between the pursuers, who are a firm of publishers in Edinburgh, and a firm of shipowners in Dundee, and the question turns on the true meaning of the charter-party. That charter-party provides—'It is this day mutually agreed between Messrs R. Cairns & Company, Leith, agents of the s.s. "Alice" . . . now trading and expected ready to load about 3rd March 1905, and T. Nelson & Sons, Parkside Works, Edinburgh, freighters, that the said ship . . . shall with all convenient speed sail and proceed to a customary loading berth or berths as ordered at Leith,' and there load a cargo of paper in bales, and being so loaded shall proceed with her cargo to London. The charter-party further provides—'In the event of misrepresentation regarding steamer's size or position, or of any mishap entailing delay in arrival at port of loading, beyond seven days of her expected readiness, charterers to have the option of cancelling this charter.' I ought to mention this other clause—'owners to have the option of substituting their s.s. "Douglas" (sister ship).' Now what happened was this. By the 10th of March neither the 'Alice' nor the 'Douglas' was tendered, and as Messrs Nelson were under contract to send on paper which was urgently required in London, they shipped part of it by the ordinary line of steamers, and sent on the remainder by another boat, which by chance happened to belong to the same firm of shipowners. The damage sued for is the difference of freight between that of the 'Alice' and that charged by the ordinary line of steamers."