that the document is intended to be a final and conclusive statement of the transaction between the parties. But the true question between the parties is whether this document is a final and conclusive expression of the whole transaction between them or not. The pursuer says—"There was an agreement about claims against defender and his firm; there was a separate agreement about a claim against him personally; and these two were settled upon different terms applicable to each claim respectively. This is a good discharge of the claim against the firm; it is not a discharge of the claim against the defender personally." Now if that can be proved it would be perfectly legitimate to conclude that the claims against the firm were finally settled in terms of the written documents, but that there stood over a separate oral agreement about the claim which had not yet been withdrawn against the defender personally. I do not at this moment form any opinion at all or make any suggestion as to what the effect of the proof may be, but I think it would be extremely unsafe to seek to construe the documents without knowing what the facts to which they refer really are. I am therefore for adhering to the Lord Ordinary's interlocutor.

I only add that I am not prepared at this moment to assent to the view indicated by his Lordship, that if the construction of the documents were clearly against the pursuer he would still be entitled to a proof on the ground of essential error. I think that is a ground of relief which it is very difficult to apply when the error is not said to have been induced by the representations of the other party. But it cannot be safely applied until the facts are known, and I should be very unwilling to express any antecedent opinion as to what questions might arise after the documents had been construed beyond those which are raised upon the primary question of construction. It may or it may not be that when the true meaning and effect of the documents has been ascertained there might be questions as to how far the pursuer might be mistaken in his understanding of the words used under his own hand. But I do not think it would be safe to anticipate what these questions may be or how they may be settled; and therefore I should be disposed to adhere to the Lord Ordinary's interlocutor, but without any further expression of opinion.

LORD PRESIDENT—I concur.

LORD MACKENZIE—I am of the same opinion. I think it is impossible to dispose of this case without a proof, because the pursuer avers, and the defender admits, that on 5th December there was a bargain made between them by which certain pending actions were compromised. The only question in this case is whether the bargain that was then made has been fulfilled or not. How you can answer that question without first of all ascertaining what the bargain was, which it is quite competent to do by means of parole, I am unable to see.

If the defender had tabled documents in unambiguous terms the case might have been different; but the documents which are tabled are not in unambiguous terms, because the first, the letter of 5th December, which professes to discharge "all claims by me against you or your firm," does not state what the money payment is to be in return for that discharge. And when you get to the receipt of the 7th December, which acknowledges that the sum of £2500 had been paid, that does not contain the expression "all claims by me against you or your firm," but "all claims at my instance against him and his firm." Now that may or may not include the claim against him as an individual, and therefore it is necessary to have a proof in the terms allowed by the Lord Ordinary in his interlocutor in order to see what the terms of the bargain were. As regards the further ground upon which the Lord Ordinary puts his reason for allowing a proof, I agree with what has been already said by Lord Kinnear.

The Court adhered.

Counsel for the Pursuer and Respondent—Ingram. Agent—John Bird, Solicitor.

Counsel for the Defender and Reclaimer—Murray, K.C.—Hamilton. Agents—Webster, Will, & Company, W.S.

Wednesday, December 11.

SECOND DIVISION.

[Sheriff Court at Dundee.

FLORENCE *v.* SMITH.

Process—Mandatory—Foreign—Appeal—Defender Abroad in British Dominions.

Where a defender, who had been assoilzied in an action in the Sheriff Court, had since then gone to South Africa on business, but was still within the jurisdiction of a British Court, the Court *refused in hoc statu* to ordain him to sist a mandatory to defend the action in an appeal.

Catherine Eleanor Florence, *pursuer*, brought an action of affiliation and aliment in the Sheriff Court at Dundee against George Smith, *defender*.

On 26th July 1912 the Sheriff-Substitute (NEISH) assoilzied the defender.

The pursuer appealed to the Court of Session, and lodged a note in which she averred that "the defender and respondent has been out of the country for some weeks," and moved in the Single Bills that he should be ordained to find caution or sist a mandatory.

Argued for the respondent—The rule was that when a defender was abroad he should sist a mandatory, but it was in the discretion of the Court to enforce it or not. The rule had not been enforced in some recent cases—*D'Ernesti* v. *D'Ernesti*, February 11, 1882, 9 R. 655, 19 S.L.R. 436; *Aitkenhead* v. *Bunten & Company*, May

19, 1892, 19 R. 803, 29 S.L.R. 659. The defender had been successful in the Sheriff Court, and had gone abroad on *bona fide* business to South Africa, where he was still within the jurisdiction of a British Court. This was therefore a case where the rule should not be enforced.

Argued for the appellant—The respondent being now resident out of Scotland ought to sist a mandatory — Mackay's Manual, p. 235—*Bank of Scotland* v. *Rorie*, June 16, 1908, 16 S.L.T. 130; *Young* v. *Carter*, November 9, 1903, 14 S.L.T. (O.H.) 411, *affd.* March 9, 1907, 14 S.L.T. 829.

The Court, in respect that the defender (1) had been assoilzied in the Court below, (2) had left the country *bona fide* for the purposes of his business, and (3) was within the jurisdiction of a Court of the British Dominions, refused the motion *hoc statu*.

Counsel for the Appellant (Pursuer)—Paton. Agents — Clark & Macdonald, S.S.C.

Counsel for the Respondent (Defender)—Lippe. Agents—Douglas & Miller, W.S.

Wednesday, December 11.

FIRST DIVISION.

[Lord Dewar, Ordinary.

HUGHES *v.* ROBERTSON.

Process—Reparation—Proof or Jury Trial—Condescendence Containing Averments of Two Separate Wrongs, One Affecting Some only of the Pursuers—Only Issue Proposed Relating to First Wrong—Averments of Second Wrong likely to Mislead Jury.

The wife and children of a deceased workman brought an action against a doctor for having wrongfully without their consent made a *post mortem* examination on the body of the deceased. The pursuers also averred that in consequence of the manner in which the defender had performed the examination, particularly in removing and destroying certain parts of the body, some of them had been put to unnecessary expense in obtaining compensation under the Workmen's Compensation Act. The only issue proposed for the trial was whether the defender had "wrongfully made a *post mortem* examination and dissection of the body" of the deceased.

The pursuers having declined to amend their record by deleting these averments, the Court, on the ground that the averments were likely to mislead the jury, *sent* the case to *proof* before a judge.

Mrs Agnes Cunningham or Hughes and others, widow and children of the deceased Thomas Hughes, miner, Kilmarnock, *pursuers*, brought an action of damages against R. C. Robertson, surgeon and physician, Kilmarnock, *defender*.

On 31st May 1911 Thomas Hughes was injured by a fall of coal in No. 5 Pit of the Caprington and Auchlochan Collieries, Limited, with whom he was employed as a miner. As a result of his injuries Hughes suffered much pain, and on 5th June he was ordered to be taken to the Kilmarnock Infirmary, where he died on the 7th June. On the evening of that day Dr Robert C. Robertson, who had attended Hughes in the infirmary, made a *post mortem* examination and dissection of his body.

The pursuers averred that the *post mortem* examination and dissection of the body of the deceased had been made by the defender wrongfully and illegally, without any authority to do so and without the consent of the pursuers or any of them.

They also averred—"(Cond. 6) Shortly before his removal to the infirmary the deceased Thomas Hughes instructed an intimation and claim under the Workmen's Compensation Act 1906 to be made against his employers, the Caprington and Auchlochan Collieries, Limited. The said intimation and claim were made on or about the 6th of June 1911 by the pursuer Michael Hughes on his behalf. Following upon the said intimation and claim, an arbitration under the said Act was instituted after Hughes' death by the pursuer Mrs Hughes on behalf of the dependants of Thomas Hughes, and upon 20th March 1912 Sheriff-Substitute Mackenzie, as arbiter therein, pronounced a finding that Hughes' death was caused by injury by accident arising out of and in the course of his employment, and awarded the dependants a sum of £196, 6s. sterling as compensation. The sum so awarded was compensation provided by Act of Parliament for the loss of means of support resulting to the dependants from the said accident. . . . (Cond. 8) The defender is and has been familiar with compensation claims and other legal claims arising out of accidents in connection with the industry of coal-mining. He was accordingly bound to understand from the circumstances stated, and he did in fact understand, that a question or questions of legal liability depended upon the determination of the cause of Hughes' death. All such questions within the district in question, and particularly those arising with Hughes' employers, are conducted on the employers' behalf by the Ayrshire Coalowners' Association, for whom the defender has regularly and constantly acted as chief medical and surgical expert in contested cases for at least the past ten years. The defender had accordingly a strong interest in respect of his connection with the Caprington and Auchlochan Collieries, Limited, and the other coalowners belonging to the said association, to ascertain whether the origin of the inflammatory condition of Hughes' intestines could be ascribed to any other origin than that of accident in the course of his employment, and to procure and preserve evidence, if such were forthcoming, to that effect. It is believed and