took the opposite course of buying first without a permit, which I think the Order prohibited.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for the Pursuer (Respondent)—Wilson, K.C.—Cooper. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders (Reclaimers)—Sandeman, K.C. — Robertson. Agents—Simpson & Marwick, W.S.

Friday, November 28.

FIRST DIVISION.

[Lord Sands, Ordinary.

MURPHY *v.* SMITH AND ANOTHER.

Process — Contract — Tender — Locus pœnitentiæ — Acceptance of Tender of Lump Sum to Several Pursuers.

A mother as an individual and as tutrix of her six children sued for damages, stating that her husband had been injured by the fault of the defenders. The summons and issue each contained separate sums as being the damages claimed by the pursuer in her individual capacity and as tutrix for each child. Pending the hearing on a motion to vary issues, the defenders tendered £150 in full of the conclusions of the summons. The agents for the pursuer thereafter wrote to the defenders' agents—"We have been instructed to accept the defenders' tender of £150 and expenses, and we shall be obliged if you will send us a draft of the joint minute for disposing of the action." The pursuer thereafter denied that she had ever authorised her agents to accept the tender, and further, that if the letter referred to was held as an acceptance of the tender on her behalf the contract was incomplete, and she was entitled to resile until a joint minute had been adjusted apportioning the lump sum. *Held* that the action had not been settled; *per* the Lord President and Lord Skerrington, in respect that the settlement was necessarily incomplete, and could be resiled from, until the apportionment of the £150 amongst the several persons interested in it had been agreed upon; *per* Lord Mackenzie and Lord Cullen, in respect that it was *ultra vires* of the pursuer to settle for a lump sum distinct claims on behalf of herself and each of her children.

Mrs Alice M'Gill or Murphy, widow of William Joseph Murphy, as his widow and as tutrix and administratrix-in-law of Agnes Laughlin Murphy, William Murphy, Mary Murphy, Charles Murphy, and Francis Murphy, their pupil children, *pursuer*, brought an action against David Smith and Edwin Heath Smith, *defenders*, concluding for payment of (first) £750 to the pursuer as widow aforesaid, (second) to the pursuer as tutrix and administratrix foresaid of the following sums—£90 for Agnes Laughlin Murphy, £105 for William Murphy, £150 for Mary Murphy, £200 for Charles Murphy, and £250 for Francis Murphy, in name of damages in respect of the death of William Joseph Murphy alleged to have been caused by the negligence of the defenders or one or other of them.

On 22nd November 1918 the Lord Ordinary (SANDS) approved of an issue.

On 29th November 1918 the defenders lodged and boxed a motion to vary the issue, which was sent to the summar roll.

On 20th January 1919 the defenders lodged the following *minute of tender*—"Forbes for the defenders, and under reservation of all their rights and pleas, hereby tenders the sum of £150 sterling, with expenses of process, in full of the conclusions of the action.—In respect whereof,

(*Sgd.*) JAS. WRIGHT FORBES."

Thereafter the following *letters* were sent by the pursuer's agents to the defenders' agents:—

"15 Stafford Street,
Edinburgh, 24*th Jan.* 1919.

"Messrs Menzies, Bruce-Low, & Thomson,
W.S., 23 York Place, Edinburgh.

"Dear Sirs— *Murphy* v. *Smith.*

We have been instructed to accept the defenders' tender of £150 and expenses, and we shall be obliged if you will send us a draft of the joint minute for disposing of the action at your early convenience.—Yours faithfully,

RAINY & CAMERON."

"15 Stafford Street,
Edinburgh, 19*th Feb.* 1919.

"Messrs Menzies, Bruce-Low, & Thomson,
W.S., 23 York Place, Edinburgh.

"Dear Sirs— *Murphy* v. *Smith.*

We duly received your letter of 14th inst. We regret the delay in writing you definitely with reference to this matter, but you will understand that we desired to give Mrs Murphy every opportunity of reconsidering her position. It now appears that she insists on repudiating the instructions which she gave us to accept your tender, and in these circumstances we are unable to continue to act for her. We have written to her to-day to this effect, and we must give you similar notice.—Yours faithfully,

"RAINY & CAMERON."

Thereafter the defenders lodged a note in which they *averred*—[On 23rd January 1919] "the pursuer accompanied by her brother-in-law attended in consultation with her senior and junior counsel and her agents, when the tender was fully discussed and considered. Later in the same day she went with her brother-in-law to her agents' office, when she finally determined to accept the defenders' tender and instructed her agents to do so"; and referred to the letters above quoted.

The pursuer lodged answers, in which she *averred*—"The defenders' said tender was considered by the pursuer at a meeting with her then agents Messrs Rainy & Cameron, W.S., Edinburgh, on 23rd January 1919. After considerable discussion the pursuer informed her said agents that she required further time to consider the defenders' tender, as the sum was totally inade-

quate to compensate her and her children for the death of her husband. On the following day, however, 24th January 1919, the pursuer's said agents, who appear to have been under a misapprehension as to the pursuer's instructions, wrote the defenders' agents in terms of the letter of said date, to which reference is respectfully made. The said letter was not authorised by the pursuer. The pursuer submits that the terms of the said letter even if it had been authorised by her do not constitute an acceptance on her behalf of the defenders' offer, but amount merely to (1) an intimation that the pursuer's agents had her authority to accept the said tender, and (2) a request that the draft of the appropriate minute for completion of the contract between the parties might be sent to them for revisal. The said draft has not yet been sent by the defenders' agents to the pursuer or her agents. No part of the said sum of £150 with expenses of process has been paid to the pursuer. On said 24th January 1919 the pursuer wrote to her said agents intimating that she required further time to consider the defenders' offer. The pursuer's letter is herewith produced. At a later meeting with her said agents the pursuer informed them that on reconsideration she was not prepared to accept the defenders' offer. Thereafter the pursuer's said agents wrote the defenders' agents in terms of the said letter of 19th February 1919. The pursuer still adheres to her refusal to accept the said tender. In these circumstances the pursuer submits that the defenders' tender has never been accepted by or on behalf of her. Alternatively, and in the event of the pursuer's said agents' letter of 24th January 1919 being held to constitute an acceptance on her behalf of the said tender, it is submitted that the pursuer was and still is entitled to withdraw her acceptance, and that the same is no longer binding on her."

The case was sisted to enable the pursuer to apply for the benefit of the poor's roll. On 24th October 1919 she was admitted to the benefit of the poor's roll.

Thereafter the defenders lodged a *further note*, in which they *averred*—"The defenders deny the pursuer's statement in the note to the effect that she did not authorise the acceptance of the defenders' tender, as also her averments that the letter written by her solicitors to the defenders' solicitors does not constitute an acceptance of the defenders' tender. The tender was considered at a consultation with counsel in the Parliament House on 23rd January 1919, at which the pursuer was present. No definite decision was then come to, but later on the same day, at a meeting with her then agents Messrs Rainy & Cameron, W.S., the pursuer decided to accept the tender, and authorised her agents to intimate her acceptance to the defenders' agents. The pursuer's letter of 24th January 1919 was not received by her then agents until after the tender had been accepted as authorised by her. It is admitted that no joint minute was prepared following upon the lodging of the defenders' tender and the pursuer's acceptance thereof, and that no part of the said sum of one hundred and fifty pounds (£150) with expenses of process has been paid to the pursuer"—and *craved* the Court to allow a proof of the averments in the two notes and the answers.

Argued for the defenders in support of their crave for a proof—The letters effected a binding agreement between the parties unless the letter agreeing to accept the tender had not been authorised, as to which question a proof at large should be allowed —*Love* v. *Marshall*, 1872, 10 Macph. 795, *per* Lord Kinloch at p. 796, 9 S.L.R. 502; *Dewar* v. *Ainslie*, 1892, 20 R. 203, 30 S.L.R. 212; *Gow* v. *Henry*, 1899, 2 F. 48, 37 S.L.R. 40; *Anderson* v. *Dick*, 1901, 4 F. 68, *per* Lord M'Laren at p. 70, 39 S.L.R. 42. A compromise was a favourite of the law—*Stewart* v. *Stewart*, 1836, 15 S. 112, *per* Lord Justice-Clerk (Boyle) at p. 115—and would not be cut down for mere want of formalities. Here there was an undoubted agreement to accept the lump sum. No doubt the pursuer represented several parties, but it was open to her to accept a lump sum or not as she pleased, and she accepted it. In those circumstances the want of a joint minute and of the apportionment of the lump sum was immaterial. A joint minute was merely executorial of the agreement already reached. The defenders in tendering a lump sum took the risk of the apportionment which the pursuer might make. Apportionment was a matter between the pursuers themselves, and even if an inequitable apportionment might give rise to further claims against the defenders, they could accept the risk of that as they had done, for that risk still remained even if the lump sum had been apportioned by the defenders. Further, apportionment was a matter subsequent to the agreement and could be worked out in the process or in a separate action. In any event it was implied from the apportionment of the claim in the summons that the lump sum tendered would be divided *pro rata* to the sums sued for. In *Dewar's* case and in *Anderson's* case the action was held settled though the parties were not agreed on the terms of settlement. A guardian could grant a valid discharge of a child's claims—*Dumbreck* v. *Stevenson*, 1861, 4 Macq. 86; *Murray's Trustees* v. *Bloxsom's Trustees*, 1887, 15 R. 233, 25 S.L.R. 191; *Jack* v. *North British Railway Company*, 1886, 14 R. 263, 24 S.L.R. 211; *Gow's* case.

Argued for the pursuer—No proof should be allowed, for there was no agreement between the parties. The letter clearly showed that the acceptance of the tender was subject to the condition that the agreement of parties should be reduced to writing in the form of a joint minute. It was not the case that the joint minute was merely a formality to carry out the agreement already reached. The acceptance of the tender was subjected to the signing of a joint minute, because the matter of apportioning the lump sum had still to be agreed upon. That was a matter of importance and till that was done there was *locus pœnitentiæ* — *Van Laun & Company* v.

Neilson, Reid, & Company, 1904, 6 F. 644, *per* Lord President Kinross at p. 650 and Lord Kinnear at p. 652, 41 S.L.R. 569. The pursuer represented different persons, each of whom had a claim of his own; they had to sue in the same action, but each had to claim a separate sum in the summons and issue—*Gray* v. *Caledonian Railway Company*, 1912 S.C. 339, 49 S.L.R. 219; *Macphail* v. *Caledonian Railway Company*, 1903, 5 F. 306. If so, each claim must be individually settled, and until all the claimants agreed there was *locus pœnitentiæ*—*Gordon's Executors* v. *Gordon*, 1918, 55 S.L.R. 497, *per* Lord Haldane at p. 502; *Winn* v. *Bull*, 1877, 7 Ch. 29, *per* Jessel, M.R., at p. 32. The cases cited for the defenders were distinguished.

LORD PRESIDENT—I am of opinion that there was no concluded agreement to settle this action, because there remained over for consideration the question of allocation or apportionment of the sum tendered.

On the 20th January 1919 the defenders tendered a sum of £150 in full of the conclusions of this summons, and when we turn to the summons we find that it concludes for payment of a sum to the pursuer as an individual and for payment to her as tutrix of her five pupil children of five separate and distinct sums, one payable to each. That was, I am satisfied, the correct form which the conclusion of the summons in such a case as this ought to take, for, as Lord Kinnear observed in the case of *Gray* v. *Caledonian Railway Company* (1912 S.C. 339, 49 S.L.R. 219) the pursuer in such an action as this "cannot be allowed to sue for one lump sum in respect of six separate injuries to six different people. The question of the injury done to each child is a separate and distinct question from the injury done to the other children. . . . It is clear enough that each child has a separate case for separate injury done to itself; and the fact that the father"—the mother as here—"as administrator-in-law is entitled to recover the damages for each of his children does not make the six children into one pursuer."

Accordingly there was a very important question to be settled, namely, how the £150 was to be apportioned between the pursuer herself and the pursuer as tutrix for each of the five children. It may possibly be that the defenders had no duty to see to the apportionment of the sum, but the defenders certainly had an interest and a right to see to the apportionment of that sum, for until it was apportioned there was and could be no settlement of this action.

In so saying I am not to be held as gainsaying the doctrine that an action can be effectually settled although the parties may be at issue as to the meaning of the terms of the settlement. The parties here are not at issue as to the meaning of the terms of the settlement, for they have not fixed one of the terms or even so much as considered it. Nor am I to be held as contradicting the view that the mother of the pupil children here could grant a valid discharge of the sums paid to the pupil children, nor that failure to execute a joint minute, although, as here, a joint minute was in contemplation, would affect the settlement.

In the present instance the joint minute would no doubt have contained the apportionment, and it had therefore a very important function to perform, and left a space of time in which either party might resile from the bargain. In holding that there was only an interim and not a concluded agreement settling this action, I think we are not disregarding or going contrary to any of the authorities cited to us for the reasons I have given.

LORD MACKENZIE—I concur in thinking that this case has not been settled, and that therefore the action must be allowed to proceed. Whatever the pursuer may have intended upon the state of facts as represented by the defenders in the case, I think that if it is attempted to be argued that what she did was a settlement, then what she did was *ultra vires*, because she could not settle this case without finally determining in the agreement to settle the answer to be returned to six separate questions — how much was to be paid to her in name of her claim for £750; how much was to be paid to her daughter Agnes in name of her claim for £90; how much to William for his claim for £105; how much to Mary for her claim for £150; how much to Charles for his claim for £200; and how much to Francis for his claim for £250.

Now all those questions are left unanswered, and accordingly it is of no avail for the defenders to have recourse to those cases in which, undoubtedly, there was an agreement which completely settled the case although the terms of the settlement might require to be cleared up in a subsequent action. In the present case I am unable to see how, there being a division of interest between the position of the mother in her individual capacity and as tutrix and administratrix for her pupil children, she could settle without an apportionment of the lump sum.

LORD SKERRINGTON—I have always regretted that Lord Young's view (*Gow* v. *Henry*, 2 F. 48, at p. 52) did not prevail, to the effect that when an action is in Court it should in the ordinary case be settled only by a joint minute to which the authority of the Court has been interponed. I must assume, however, in deference to the authorities, that an extrajudicial settlement of an action is valid provided there has been *consensus in idem* for the purpose of bringing the litigation to an end.

On principle it seems to me too clear for argument that there was no effectual consent on the part of the pursuer to settle for a lump sum of £150 her individual claim and the separate claims which she put forward as guardian of her five children. No authority was quoted in support of the view that a person in a fiduciary capacity can compromise for a lump sum his individual claim and those of various beneficiaries whom he represents.

I apply to the letter from the solicitors for the pursuer, dated 24th January 1919, the ordinary rule of construction to the effect that when a writing is susceptible of two meanings, one of which will lead to a legal result and the other of which will lead to an illegality, that construction ought to be preferred which the law will countenance and to which it will give effect. The letter requests that there should be sent a draft of a joint minute for disposal of the action. Obviously what would have to be inserted in that minute in order that the case might be taken out of Court would be an apportionment of the £150. The defenders were entitled to scrutinise that apportionment and if there appeared any suspicious circumstances in connection with it they would have been entitled to bring it under the notice of the Court.

In these circumstances it seems to me that there was no concluded bargain until the joint minute had been adjusted and approved of by the Court.

LORD CULLEN—I think that the letter of the pursuer's agents was intended to conclude on her behalf a *de præsenti* agreement to settle the action in question. I am unable to read the document as meaning that there was to be a further period of bargaining before a settlement was reached, the vehicle of which further bargaining was to be the joint minute. I think, however, that, for the reasons which your Lordships have already stated, the settlement was one that the pursuer did not have legal power to conclude on behalf of the pupil pursuers.

The Court refused the prayer of the note for the defenders craving for proof as to the authority of the pursuer's agents.

Counsel for the Pursuer—Brown, K.C.—Patrick. Agent—P. T. Macintosh, W.S.

Counsel for the Defenders—Constable, K.C.—D. M. Wilson. Agents—Menzies, Bruce-Low, & Thomson, W.S.

HIGH COURT OF JUSTICIARY.

Thursday, December 11.

(Before the Lord Justice-General, Lord Mackenzie, and Lord Anderson.)

WALKER *v.* BRANDER.

Justiciary Cases — Procedure — Statutory Offences — Dogs Acts — Amendment of Order Issued on a Summary Complaint ad factum præstandum — Summary Jurisdiction (Scotland) Act 1908 (8 *Edw. VII, cap.* 65), *secs.* 4 *and* 75, *and Schedule C—Dogs Act* 1871 (34 *and* 35 *Vict. cap.* 56), *secs.* 2 *and* 5.

A woman was charged upon a summary complaint under the Act of 1908 that she was the owner or person in charge of a dog which was dangerous and not kept under proper control, and which on a certain date bit a boy, contrary to the Dogs Act 1871, section 2, whereby she was liable to be ordered to keep said dog under proper control or to destroy it. Her agent objected to the competency of the proceedings against her, in respect that until such an order as that craved was infringed proceedings under the Dogs Act 1871, section 2, were of a civil character, whereas the complaint against her was criminal in nature, and had been so treated because warrant for her arrest had been granted. The Sheriff-Substitute repelled that objection, and after a proof, at which the woman though cited was not present, he found that the dog in question was a dangerous dog and not kept under proper control, and ordained the woman to have it kept under proper control or to destroy it. In a suspension it was averred for the procurator-fiscal that it was proved that the woman was the owner of the dog, which averment was not denied. *Held* (1) that proceedings under the Dogs Act 1871, section 2, were civil proceedings until an order had been obtained and had been infringed; (2) that the proceedings were in terms of sections 2 and 5 of the Act of 1871, and section 4 and Schedule C of the Act of 1908, properly brought by way of summary complaint; and (3) that upon the pleadings in the suspension the Sheriff-Substitute had held it proved that the woman was the owner of the dog before he made the order complained of; and order *amended* under section 75 of the Act of 1908 by inserting a finding to the effect that it was proved that the woman was the owner of the dog in question and confirmed; suspension *refused.*

The Dogs Act 1871 (34 and 35 Vict. cap. 56) enacts—Section 2—"Any court of summary jurisdiction may take cognisance of a complaint that a dog is dangerous and not kept under proper control, and if it appears to the court having cognisance of such complaint that such dog is dangerous, the court may make an order in a summary way directing the dog to be kept by the owner under proper control or destroyed, and any person failing to comply with such order shall be liable to a penalty not exceeding twenty shillings for every day during which he fails to comply with such order." Section 5—"In this Act . . . 'Summary Jurisdiction Acts' means as follows:— . . . As to Scotland 'the Summary Procedure Act 1864,'. . . 'Court of summary jurisdiction' means . . . in Scotland any justice or justices of the peace, sheriff or sheriff-substitute, police or other magistrate or officer, by whatever name called, to whom jurisdiction is given, or proceedings before whom may be regulated by the Summary Jurisdiction Acts or any Acts therein referred to."

The Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 65) enacts—"Section 4—"This Act so far as relating to summary procedure shall apply to summary proceedings in respect of . . . (*c*) any order *ad factum præstandum*, or other order of court or warrant competent to a court of summary