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

averred that on or about Tuesday, 6th June 1911, he formed the desire and intention, arising from his said interest, to procure a further examination of the body of Thomas Hughes, to be conducted after the death of Hughes by himself. It is further believed and averred that his object in so desiring was to collect if possible, and preserve, evidence pointing to a cause of death other than accident in the mine, his previous exploratory examination having been too cursory to serve that purpose. . . . (Cond. 12) In the course of the said illegal proceedings certain portions of the body of the said Thomas Hughes were removed by the defender from the rest, and in particular the whole affected portion of the intestines and the heart were so removed. These portions were not, as they ought to have been, replaced *in situ*, but were by the instructions, or at least with the assent and authority of the defender, taken away and burned or destroyed or otherwise dealt with for the purposes of the infirmary. Thereafter the incomplete body was carried to the home of the pursuer Mrs Hughes and deposited there. . . . (Cond. 13). . . . Moreover, by reason of the said wrongous and illegal actings of the defender, and the destruction of most important articles of evidence thereby sanctioned, and by the dealings of the defender with the report after mentioned, the pursuers, other than Mrs Ledgerwood, who were all dependants of the deceased Thomas Hughes, have been made to endure an unnecessary amount of anxiety, delay, and expense in obtaining the compensation to which they were justly entitled. *Inter alia*, the solicitors for the deceased's trade society were authorised by its officials to inquire into the circumstances with a view to taking action on behalf of the relatives if such were justified, and for that purpose, after ascertaining that a *post mortem* had already been made, to instruct a fresh one on behalf of the said society. They did so, but in consequence of the previous mutilation of the body by the defender the result was purely negative. In consequence they felt themselves bound to advise the said society to withdraw their financial support, and the relatives were consequently at the necessity of finding fresh agents and of instructing the prosecution of a claim on their own behalf. This in their impoverished circumstances they found it very difficult to effect, and in the result a much longer time elapsed before they could establish their rights, and more expense was incurred than would have been necessary but for the defender's illegal actings. . . . (Cond. 14) . . . Within a few days of the said *post mortem* examination the defender prepared and obtained the signatures of the two other medical gentlemen to a report of the result of the *post mortem* examination, and sold the same to the agents of the said Ayrshire Coalowners' Association, whom he knew to be acting in the interests of the Caprington and Auchlochan Collieries, Limited, and who had an adverse interest to that of the pursuers, who were dependants of Hughes. Further, upon application being made to the defender on behalf of the pursuer Mrs Hughes for information as to the whereabouts and as to the condition of the missing parts, he replied in terms importing that the examination was conducted on behalf of the said Coalowners' Association, and that the report thereof was consequently their property. The pursuers understood this (as it was intended to be understood) as a refusal to impart to them the information obtained by him through his said unwarranted examination of the body of their relative, on the ground that it was made in furtherance of other interests than theirs. They made application as suggested by the defender to the said association's agent, who refused to supply a copy of the report, and the report was held up against her by the opposing agents, with the defender's knowledge, approval, and sanction, and its terms were, with his knowledge and approval, sedulously concealed from her during the subsequent course of the proceedings under the Workmen's Compensation Act and until a late stage in the resulting proof in the arbitration. . . ."

The pursuers pleaded, *inter alia*—"(1) The defender having wrongfully and illegally made the *post mortem* dissection libelled, and having authorised or permitted the illegal destruction of parts of the body as alleged, to the loss, injury, and damage of the pursuers, is liable in reparation for the injury done to them, and this being moderately estimated at the sum sued for, decree should be pronounced as concluded for."

On 27th November 1912 the Lord Ordinary (DEWAR) approved of the following issue, and by a second interlocutor *eo die* fixed a date for the trial of the issue by a jury:—"Whether, on or about the 7th of June 1911, and in the Kilmarnock Infirmary, Kilmarnock, the defender did wrongfully make a *post mortem* examination and dissection of the body of Thomas Hughes, miner, the husband and the father of the pursuers respectively, to the loss, injury, and damage of the pursuers?"

The defender reclaimed, and argued—It was not competent to claim a slump sum in respect of two different wrongs, and that was what the pursuers were doing here. The issue referred to one wrong, while the condescendence, in addition to averments of that wrong, contained averments of another and different wrong. Further, all the pursuers had not a right to recover damages in respect of that second wrong. The action should therefore be dismissed—*Killin* v. *Weir*, February 22, 1905, 7 F. 526, 42 S.L.R. 393; *Conway* v. *Dalziel*, June 13, 1901, 3 F. 918, *per* the Lord President at p. 921, 38 S.L.R. 662; *Paxton* v. *Brown*, 1908 S.C. 406, 45 S.L.R. 323; *Harkes* v. *Mowat*, March 4, 1862, 24 D. 701. Alternatively, the pursuers ought to delete the averments relating to the second wrong, and failing their doing so the case should be sent to proof before a judge.

Argued for the pursuers—There were here, not two wrongs, but merely a con-

tinuation of the same wrong. The record was both relevant and competent—*Pollok* v. *Workman*, January 9, 1900, 2 F. 354, *per* Lord Kyllachy, 37 S.L.R. 270; *Gray* v. *Caledonian Railway Company*, 1912 S.C. 339, 49 S.L.R. 219; *Smyth* v. *Muir*, November 13, 1891, 29 S.L.R. 94; *Gibson* v. *Macqueen*, December 5, 1866, 5 Macph. 113, 3 S.L.R. 83.

At advising—

LORD KINNEAR—I am not prepared to hold, in accordance with one part of the reclaimer's argument, that there is not a relevant case in this action to go to a jury. I think that the main cause of action is just one of those which are most appropriate for jury trial, and in ordinary circumstances I should have no hesitation in sending it to a jury, even although there might be some perplexities suggested on record which might embarrass the trial. But then I think that in the present case there is a little more than the suggestion of such perplexity. I think the case is so laid as to raise a really very troublesome question for the consideration of the tribunal—whatever it be—that has to consider the facts. The action is in my opinion competent in so far as it is founded on the wrong done to all the pursuers jointly. It is plainly incompetent in so far as it is founded on a separate and distinct wrong done to certain of the pursuers and not to others, who are nevertheless joined with them in one summons. I think that it might have been maintainable in these circumstances that the action should be dismissed as laid, leaving it to the pursuers to frame a different condescendence in support of a second action. But that, to my mind, would be too harsh a view to take of the actual record before us, because the only issue allowed is confined to the joint wrong. But the pursuers insist on retaining in their record averments which go to support the incompetent and not the competent claims. It is not for us to so make a new record, and since the difficulties are all occasioned by the introduction into the condescendence of statements which do not directly go to prove the only wrong which the pursuers ask to be sent for the verdict of a jury, and as these are difficulties which might be, I think, very simply removed by amendment of the condescendence so as to make it clear that the case to be actually tried must be limited by the terms of the issue sent to the jury, and as the pursuer has declined to make these amendments, I am afraid there is no other course, in order to do justice between the parties, than to allow a proof and let the case be tried by a judge. Personally I have a very strong feeling of sympathy with the pursuers' argument that cases of this kind should go to a jury. I think they might easily have had this case sent to a jury by making sundry simple amendments upon the record, but as they decline to do so I propose to your Lordships that it should be sent for proof before the Lord Ordinary.

LORD MACKENZIE—I am entirely of the same opinion. If the pursuers' averments had been of the same nature as the averments in the case of *Pollok* v. *Workman* (1900, 2 F. 354), I should then have taken the view Lord Kyllachy took in that case and held that the case was one which was appropriate for jury trial. The leading averments of the pursuers are directed to the same issue that was adjusted in the case *Pollok* v. *Workman*, but they go on to overlay those leading averments with a great deal of matter which in my opinion might create a difficulty in disposing of this case by way of jury trial.

No doubt, theoretically, it would be possible to obtain directions at various stages of the case to keep the jury right; but as I read the record I am unable to be sure that the jury might not go entirely wrong in consequence of the way in which the evidence could be presented which bears upon the articles in the condescendence we were referred to by Mr Wilson, and, more particularly, the passages in cond. 13. I think it might well be that a jury, under this issue, might take the view that there had been a failure to prove that there was no consent, but at the same time that although the consent had been given by the pursuers they never sanctioned the mode of carrying out the *post mortem* which the pursuers describe in article 13. And therefore under this issue the result might be that although the pursuers failed to establish what is essential to obtaining a verdict, nevertheless the jury might, considering that the defender's actings had been of such a character, award damages—that is to say, they might apply, as Lord Adam points out in the case of *Conway* v. *Dalziel* (1901, 3 F. 918), the view that the mode of conducting the *post mortem* as described by the pursuers here went far beyond the mere wrong which is done by performing a *post mortem* on a relative without obtaining the necessary consents.

Accordingly I think that the pursuers have really brought the result your Lordship proposes upon themselves. If they desired to try the simple issue whether there was an unauthorised *post mortem* they could have done that by framing their record in exactly the same way as in *Pollok* v. *Workman*, and have proved all necessary incidents in connection with the *post mortem* examination—that is to say, proved so much of what they aver in cond. 13 as has a bearing upon the damages due in name of *solatium*. But they trace out the bearing of those averments upon the preparation of a case under the Workmen's Compensation Act, and they condescend upon the expense they were put to in preparing that case in consequence of the way in which the defender is alleged to have acted; and that seems to me to bring in what might be considered an entirely separate and different ground of action; so though one is averse to keeping cases of this class from a jury, I think this is a case where there is a grave risk of a miscarriage of justice unless the case is tried before a judge.

LORD SKERRINGTON—I agree with your Lordships.

The LORD PRESIDENT and LORD JOHNSTON were absent.

The Court recalled the two interlocutors of the Lord Ordinary, both dated 27th November 1912, except in so far as dealing with the amendment of the record, disallowed the proposed issue, allowed a proof, and remitted to the Lord Ordinary to proceed.

Counsel for the Pursuers (Respondents)—Crabb Watt, K.C.—A. M. Mackay. Agent—E. Rolland M'Nab, S.S.C.

Counsel for the Defender (Reclaimer)—Wilson, K.C.—D. M. Wilson. Agents—Fraser & Davidson, W.S.

Tuesday, December 17.

SECOND DIVISION.

[Lord Hunter, Ordinary.

NASMYTH'S TRUSTEES *v.* NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN AND OTHERS.

Succession—Legacy—Extrinsic Evidence—Admissibility — Designation of Beneficiary.

A Scotsman resident in Scotland left along with legacies to Scottish charities a legacy to "The National Society for the Prevention of Cruelty to Children." The legacy having been claimed by "The National Society for the Prevention of Cruelty to Children," London, and by "The Scottish National Society for the Prevention of Cruelty to Children," Edinburgh, *held* (*rev.* judgment of Lord Hunter, Ordinary) that the designation of the society was ambiguous, and proof allowed of extrinsic facts averred by the claimants to show testator's intention.

Thomas Goodall Mason, M.D., Edinburgh and others, the trustees acting under the trust-disposition and settlement of Alexander Hogg Nasmyth of Middlebank, Fife, *pursuers and real raisers*, brought an action of multiplepoinding against the National Society for the Prevention of Cruelty to Children, London, and the Scottish National Society for the Prevention of Cruelty to Children, Edinburgh, and Ninian Hill, the general secretary thereof, *defenders*, to determine the rights of the defenders in a sum of £500, the amount of a legacy bequeathed by Mr Nasmyth under his trust-disposition and settlement to "The National Society for the Prevention of Cruelty to Children."

Mr Nasmyth by his trust-disposition and settlement bequeathed, *inter alia*, the following legacies:—"To the Dunfermline and West of Fife Hospital, One thousand pounds free of legacy or other Government duty and other charges, To the Royal Blind Asylum, Edinburgh, Five hundred pounds, free of legacy or other Government duty and other charges, To the Edinburgh Deaf and Dumb Benevolent Society, Five hundred pounds free of legacy or other Government duty and other charges, To the National Society for the Prevention of Cruelty to Children, Five hundred pounds free of legacy or other Government duty and other charges, To the Royal Edinburgh Hospital for Incurables (Longmore Hospital) Five hundred pounds free of legacy or other Government duty and other charges, To the Scottish Society for the Prevention of Cruelty to Animals Two hundred and fifty pounds free of legacy or other Government duty and other charges, To the Royal Edinburgh Hospital for Sick Children, Five hundred pounds free of legacy or other Government duty and other charges, and to the Edinburgh Royal Infirmary, One thousand pounds free of legacy or other Government duty and other charges."

The National Society averred, *inter alia*—"(Cond. 2) The claimants originated in 1884 as the London Society for the Prevention of Cruelty to Children. In 1889, under a new constitution, they adopted the title of the National Society for the Prevention of Cruelty to Children. In 1895 they were incorporated by royal charter as a body corporate under that name. Since 1889 they have continuously borne the name of 'The National Society for the Prevention of Cruelty to Children.' No other society or body is or ever has been known by that name. By the constitution as contained in the charter the sphere of operations of the Society embraces the whole of the United Kingdom. It is widely known throughout the Kingdom, including Scotland, as the National Society for the Prevention of Cruelty to Children. Its sole right to that name has recently been prominently before the public in Scotland, particularly in 1905 and again in 1907. This right was admitted by the competing Society in 1907, and since that year that Society has disclaimed that name and prominently published its disclaimer. The present claimants receive financial assistance from supporters in Scotland. (Cond. 3) The claimants are the only society for the prevention of cruelty to or otherwise for the furtherance of the interests of children whose constitution and operations are national in their scope by embracing the whole of the United Kingdom. The other defenders are in all respects limited to Scotland, and are not entitled to use and do not use the name 'The National Society for the Prevention of Cruelty to Children.' All the charitable societies named as legatees in the will are carefully and accurately designed. Another of those societies is the Scottish Society for the Prevention of Cruelty to Animals, which is so named in the will with the intention and result of distinguishing it from the Royal Society for the Prevention of Cruelty to Animals, whose head office is in London. (Cond. 4) With