The Court adhered.

Counsel for the Reclaimer—Macmillan, K.C.—Macquisten. Agent—R. S. Carmichael, S.S.C.

Counsel for the Respondent—Moncrieff, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Thursday, November 21.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

M'ADAM *v.* SCOTT.

Proof—Parole Evidence—Admissibility to Explain Written Documents—Discharge—Ambiguity.

M. sued S. for payment of £500, which he alleged was due to him under an agreement for the settlement of (1) an action by M. against T. & Co., of which firm S. was a partner; (2) an action by T. & Co. against M.; and (3) an action by M. against S. M. averred that the agreement provided that all three actions were to be withdrawn, that T. & Co. were to pay him £2500 at once, and that S. was to pay him a further sum of £500 within a reasonable time. The sum of £2500 was paid to M., but S denied liability for the further sum of £500, and in defence to the present action produced (1) the following letter from M. to S., dated 5th December 1910:—"I hereby acknowledge that all sums of money due by you to me, and all claims by me against you or your firm of (T. & Co.) and partners, are hereby discharged, and I agree to withdraw the actions at my instance against you and your firm of (T. & Co.) and partners on the understanding that (T. & Co.) and partners also withdrew their action against me and abandon all claims against me"; and (2) the following receipt signed by M., dated 7th December 1910:—"Received from (S.) the sum of Two thousand five hundred pounds, being sum agreed to be accepted by me in full settlement of all claims at my instance against him and his firm of (T. & Co.) and partners." S. maintained that these two documents taken together constituted a complete and final discharge, and that, the documents being unambiguous, parole evidence that £500 was still due was incompetent. The Court *allowed* a proof *habili modo* on the ground that the documents were ambiguous and could not safely be construed without knowledge of the facts to which they related.

Essential Error—Discharge Granted sine causa—Relevancy.

S. paid to M. £2500 under an agreement to settle certain litigations between M., S., and a firm of which S. was a partner. M., in respect of the said payment, granted a receipt in full of all claims at M.'s instance against S. and his firm . . . and partners. M. averred that by the agreement S. personally was bound to pay him a further sum of £500, and that by granting the receipt he did not intend to discharge that claim, which he had not then in contemplation, and the discharge of which would have been gratuitous. *Held* (*per* Lord Skerrington, Ordinary) that M. had stated a relevant case for challenging the receipt on the ground of essential error.

Opinions reserved in the Inner House.

On 8th March 1912 David Wilson M'Adam, commission agent, 50 Wellington Street, Glasgow, *pursuer*, raised an action against George Turner Scott, stockbroker, 135 Buchanan Street, Glasgow, *defender*, for payment of £500 in respect of an agreement entered into for the settlement of (1) an action at the pursuer's instance against James Turner & Company, stockbrokers, Glasgow, and the individual partners of the said firm, of whom the defender was one; (2) an action at the instance of James Turner & Company against the pursuer; and (3) an action at the instance of the pursuer against the defender. Along with his defences to the present action the defender produced the letter dated 5th December and the receipt dated 7th December 1910 which are quoted in the rubric.

The following *narrative* of the *facts* is taken from the opinion of Lord Kinnear:—"The pursuer brings this action against the defender Mr Scott for £500, which he alleges to be the sum which he and the defender had agreed that the defender should pay in order to the settlement of an action raised by the pursuer against him. His averment is that he had raised an action against the defender's firm of James Turner & Co. and the individual partners of that firm, who, he says, are the defender Mr Scott and Mr James Turner. He avers further that a counter action was raised by James Turner & Co. against him, both actions arising out of the same transaction. There were, therefore, two actions to which the pursuer and the defender's firm were parties. Then he says, further, that in addition he raised a separate action against the defender himself for the payment of certain commissions. Whether that separate action had any connection with the two other actions or not does not appear, or whether it arose out of the same transactions; but there is a perfectly distinct averment that it was a separate action against the defender. Then he goes on to aver that in the course of the procedure a proof was appointed, first, in the actions with the firm for a day in December 1910, and another and separate proof in the other action against the defender personally in January 1911; that the parties made an agreement for the settlement of those actions; and that the terms on which they agreed were that the defender and his firm should pay the pursuer £2500 in consideration of the withdrawal of the action

against the firm, and that they at the same time should withdraw the counter action at their instance against the pursuer, and then, as a separate part of the agreement, that the defender should pay to the pursuer £500 in the second separate action against him. There is quite a distinct averment of agreement to that effect, and I assume there can be no question at all that that is an averment which can properly be proved by oral testimony. It is a verbal agreement, but none the less relevant, and there is no averment on the other side that as to the agreement for the settlement of the disputes it was reduced to writing at all.

"The defender admits that a settlement was agreed upon, and that the terms of the settlement of the whole three actions were agreed upon. He denies the pursuer's averments as the terms of settlement, but he makes no counter-averment as to what they were except in so far as he tables two documents which are said to be conclusive of the whole matter, because it is said that they amount to a final and complete discharge of all the claims at the instance of the pursuer both against the firm and against the individual partners." (The two documents, viz., the letter of 5th and the receipt of 7th December, are quoted in the rubric.)

The pursuer pleaded, *inter alia*—"(1) The defender having undertaken as one of the terms of the compromise of the actions condescended on to pay the pursuer £500, and having failed to make payment, the pursuer is entitled to decree therefor with expenses. (3) The pursuer is entitled to parole proof of his averments, in respect, *inter alia*, that the obligation to pay said sum was one of the terms of a verbal compromise. (4) The documents founded on by defender not being intended to and not having discharged the said obligation for £500, the pursuer is entitled to decree as craved. (6) The said receipt for £2500, if it was intended to discharge said £500, being to that extent gratuitous and having been granted by pursuer under essential error, the defender is not entitled to rely on it as a defence to the action."

The defender pleaded, *inter alia*—"(1) The present action is excluded by the terms of the said letter dated 5th December 1910, and the subsequent payment of the said sum of £2500, conform to receipt dated 7th December 1910, granted in full settlement of all the pursuer's claims against the defender. (4) The pursuer's averments can be proved only by the writ or oath of the defender."

On 3rd July 1912 the Lord Ordinary (SKERRINGTON) allowed a proof *habili modo*.

Opinion.—[*After a narrative of the facts*]—"I at first thought that it would be legitimate to allow the pursuer a proof of the circumstances under which this receipt was granted for the purpose of enabling him to show that its true meaning was to discharge only the pursuer's claims against the firm, and that the reference to claims 'against him and his firm of James Turner & Company and partners,' was simply a clumsy way of expressing that intention. As at present advised I do not think that such a proof would be legitimate. As, however, I have come to the conclusion that the pursuer has stated a relevant case for challenging a receipt on the ground of essential error, I do not now decide anything as to the competency, admissibility, and effect of any evidence which may be tendered as to the circumstances in which the receipt was granted. The pursuer has, in my opinion, relevantly alleged that if the receipt has the meaning and effect which I think it has, he signed it under essential error as to its true meaning and effect, and that to the extent of his claim for £500 against the defender as an individual the receipt was gratuitous and *sine causa*. He avers that the compromise of 5th December entitled him to receive two sums, namely, £2500 from the firm and £500 from the defender as an individual. The defender does not allege that on the 7th of December when the cheque was exchanged for the receipt any new agreement was come to between the parties. It follows that the receipt, in so far as it discharged the pursuer's claim for the £500, was gratuitous, and the pursuer is, I think, entitled to prove that he signed it in the mistaken belief that it simply discharged his claim against the firm for the £2500 which they had just paid to him. Of course in this question of relevancy I assume the truth of the pursuer's averment as to the terms of the compromise.

"A question was raised whether the receipt was duly stamped, but that question has been obviated by its having been adjudicated on by the Inland Revenue.

"I accordingly allow the parties, before answer, a proof of their averments *habili modo*."

The defender reclaimed, and argued—The letter of 5th and the receipt of 7th December, read together, constituted a complete and final discharge in writing, which it was incompetent to contradict by parole evidence. *Esto* that proof of the surrounding circumstances was competent where the terms of a document were ambiguous, there was no room for such a proof here, where the documents were free from ambiguity. Nor had the pursuer relevantly averred a case for setting aside the receipt on the ground that *quoad* the £500 it was granted *sine causa* and under essential error, as there was no averment that the error had been induced by the defender—*Stewart* v. *Kennedy*, March 10, 1890, 17 R. (H.L.) 25, 27 S.L.R. 469. *Dickson* v. *Halbert*, February 17, 1854, 16 D. 586, did not apply, as there was here present the element of transaction, the receipt having been granted in the course of carrying through a compromise.

Argued for the pursuer and respondent—When it was attempted to apply the terms of the receipt to the facts, it became apparent that it was an ambiguous document, and extraneous evidence was admissible to clear up a latent ambiguity—Bell's

Principles, sec. 524. Moreover, the defender admitted that the £2500 was not paid until 7th December. The letter of 5th December was therefore inaccurate, and one of the documents said to embody the discharge being admittedly inaccurate it was competent to prove the true bargain between the parties by parole evidence. It was competent to prove the compromise of an action by parole—*Love* v. *Marshall*, June 12, 1872, 10 Macph. 795, 9 S.L.R. 502. Even if the discharge had to be construed without further proof, it did not discharge the £500, but only the £2500 — *Marquis of Tweeddale* v. *Hume*, May 26, 1848, 10 D. 1053; Bell's Principles, 584. Assuming, however, that it did discharge the £500, the pursuer's averments that to that extent it was granted *sine causa* and under essential error were relevant to set it aside—*Dickson* v. *Halbert*, *supra*; *Macandrew* v. *Gilhooley*, 1911 S.C. 448, 48 S.L.R. 511.

At advising

LORD KINNEAR—I think that no sufficient reason has been shown to us for disturbing the Lord Ordinary's interlocutor. His Lordship has allowed the parties a proof *habili modo* of their averments on record, and I think that we should always be reluctant to interfere with the opinion of the Lord Ordinary before whom the case is to be tried when he considers that in the conduct of the case it is necessary that the facts should be proved before judgment. His interlocutor is very cautiously guarded by the use of the phrase *habili modo*, because, although that phrase has been subjected occasionally to some criticism, it is a perfectly recognised and familiar method of notifying that the allowance of proof does not foreclose questions of competency of oral evidence to prove particular averments. I think, further, that the Lord Ordinary was quite right in allowing a proof, because I do not think it would be at all safe to construe the documents which raise the question between the parties without ascertaining the facts to which they relate. . . .

Now I do not think, to begin with, that there is any difficulty created by the mere universality of the words with which the letter (*v. sup. in rubric*) begins—because the canon of construction applicable to discharges is perfectly well settled. It is laid down in the judgment of Lord Westbury in the House of Lords in the case of *The London and South-Western Railway Company* v. *Blackmore* (4 E. & I. Ap. 610, at p. 623), where his Lordship says that "the general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given." And therefore we must look to see what was in the contemplation of the parties when this discharge was taken. Now the letter goes on to describe the discharged claims more specifically by referring to the actions against the defender and his firm and the action at the instance of the firm against the pursuer. Well that, so far, identifies the thing which it is intended to discharge. But still the letter, taken by itself, is by no means a complete and exhaustive document determining the rights of parties. It is admitted that the discharge is granted in respect of a previous settlement, and that that previous settlement was to embrace, or at least it was not denied that the settlement was to embrace, an agreement for payment of money. The letter does not refer at all to the previous settlement, and does not refer to any payment whatever. Taken by itself it is incomplete, and, according to the defender's own statement, it is plainly incomplete, because he goes on to say that after this discharge had been delivered a cheque for £2500 was given to the pursuer, and he accepted that in payment of the sum which he had agreed to accept in full settlement of all claims at his instance against the defender and his firm. This receipt is the second document upon which the defender founds, and it is the two taken together which are alleged to constitute the final conclusive settlement. Now if the receipt, taken along with the previous letter, were perfectly clear and unambiguous in its terms, there might have been very strong ground for the defence maintained by the defender and reclaimer in this case; but, on the face of it, it appears to me to be an ambiguous document. It purports that a sum of money has been paid and accepted in settlement of all claims at the instance of the pursuer against the defender and his firm of James Turner & Co. and partners. Now it is obvious, on the face of it, that that may mean all claims either against the firm and the partners or against the individual defender, or else it may mean all claims against the firm and partners including the individual defender, but leaving any separate claim against the defender untouched. I do not say which of these would be the most natural and reasonable construction to put upon the document at all, but I think that before the Court can safely construe it, it is indispensable that we should know the facts to which it relates.

It is perfectly settled and familiar law that you cannot alter or contradict the terms of a written document by oral testimony. But every document must be interpreted with reference to the surrounding circumstances—that is to say, with reference to the facts to which it relates. And in this particular document there is no such clear and distinct reference as would make it safe to construe the document without knowing what the facts are. It is agreed—and the terms of the receipt are in accordance with that agreement—that this money was paid and received in performance of a full settlement of certain claims. It is indispensable that we should know what the claims were which were settled and what the settlement was before we can ascertain the true legal effect of that document. The whole doctrine of the exclusion of parole testimony with reference to an agreement which is in the form of a written document rests upon this—

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