present to sell the school, although I have said certain things in the opinion I have delivered which I think may be a guide to the parties in regard to the future. The fifth question is conditional, and I do not think it ought to be answered at all. We are not asked to answer the sixth and seventh questions.

LORD KINNEAR and LORD JOHNSTON concurred.

LORD M'LAREN was absent.

The Court answered the first and second questions of law in the affirmative in the circumstances as disclosed in the case, found it unnecessary to answer the remaining questions of law, and decerned.

Counsel for the First Parties—Blackburn, K.C. — Black. Agents — Macandrew, Wright, & Murray, W.S.

Counsel for the Second Parties — M'Lennan, K.C.—D. P. Fleming. Agents —Laing & Motherwell, W.S.

Thursday, January 27, 1910.

FIRST DIVISION.

(SINGLE BILLS.)

FORTH BRIDGE RAILWAY COMPANY *v.* DUNFERMLINE GUILDRY.

(Reported *ante*, February 2, 1909, 46 S.L.R. 399.)

Process—Recal of Interlocutor—Interlocutor Dismissing Action as Irrelevant Recalled of Consent, and Interlocutor Finding for the Pursuers with Expenses against Defenders Pronounced.

The Court of consent and in terms of a joint-minute recalled an interlocutor dismissing an action as irrelevant, and found for the pursuers with expenses against the defenders, an intervening judgment of the House of Lords in a cognate case having meanwhile been pronounced.

The case is reported *ante ut supra.*

On 2nd February 1909 the First Division, following the decision of the Second Division in *The North British Railway Company* v. *Budhill Coal and Sandstone Company*, 1909 S.C. 277, 46 S.L.R. 178, held that whinstone was a mineral in the sense of section 70 of the Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), and affirmed the interlocutor of the Lord Ordinary (Dundas) dismissing the action.

On 15th November 1909 the House of Lords reversed the judgment of the Second Division in the *North British Railway Company* v. *Budhill Coal and Sandstone Company*, and held that sandstone is not a mineral in the sense of the above-mentioned section.

The parties to the present action presented a joint-minute to the First Division, craving the Court to pronounce an interlocutor recalling the interlocutor of 2nd February 1909 and the interlocutor of the Lord Ordinary dated 4th June 1908, and declaring in terms of the first conclusion of the summons for the pursuers (reclaimers), with expenses against the defenders (respondents).

The Court pronounced an interlocutor in the terms craved.

Counsel for Pursuers — Clyde, K.C. — Cooper, K.C.—Hon. W. Watson. Agents —Robson & M'Lean, W.S.

Counsel for Defenders—Dean of Faculty (Dickson, K.C.)—Constable, K.C. — Macmillan. Agent—John Stewart, S.S.C.

Friday, February 4.

SECOND DIVISION.

[Sheriff Court at Airdrie.

DICKSON *v.* HYGIENIC INSTITUTE.

Contract — Breach — Reparation — Dentist — Unregistered Dentist — Negligence — Requisite Skill — Failure to Display Ordinary Skill.

An unregistered dentist, if not known to the person operated upon to be unregistered, must attain the standard of skill of the registered practitioner at the place and in the circumstances where the services are rendered; if known to be unregistered, then the skill which he professes to have.

Circumstances where *held* that defenders in an action had held out themselves and their employees as competent to perform dental operations with ordinary skill, and were liable in damages in respect of a grossly careless operation performed by one of their employees.

Bethia C. Dickson, 32 Commonhead Street, Airdrie, brought an action of damages in the Sheriff Court at Airdrie against the Hygienic Institute, Main Street, Coatbridge.

The pursuer averred—"(Cond. 1) . . . The defenders carry on business under the style and name of the 'Hygienic Institute' in Glasgow and elsewhere, and have a place of business in Coatbridge. They supply artificial teeth on the instalment system, and employ, *inter alios*, assistants who are not qualified 'dentists' or 'dental surgeons.' (Cond. 2) The defenders during the autumn of 1907 issued circulars to the public inviting them to purchase artificial teeth from them at the rates and under the conditions set forth in said circulars. . . . The pursuer, during the said advertising period, on 30th November 1907 entered into an arrangement with defenders whereby they undertook to extract her teeth, both in her upper and lower gums, and to supply her with a full set of false teeth set on ebonite and gold. . . ."

The pursuer further averred that she was operated on by employees of the defenders,

that the operations were unskilfully performed, and that in consequence she suffered severe pain and sustained serious injury.

The agreement between the pursuer and the defenders (subsequently referred to as No. 9/1 of process) was in the following terms:—

Largest and MOST SUCCESSFUL PRACTICE in Great Britain.

ALL WORK GUARANTEED FOR FIVE YEARS.

Nos. ..... Hours from 10 a.m. to 8 p.m.

THE HYGIENIC INSTITUTE,
146 *Main Street, Coatbridge,*
30 AND 31 ELMBANK CRESCENT, CHARING CROSS.
MAKERS OF ARTIFICIAL TEETH.

ORDER FORM.

To The HYGIENIC INSTITUTE, GLASGOW.

Please supply .....

with .....

..... *at the prices specified in Schedule of Fees below, and which amount I agree to pay at the rate of* 1/ *per pound each week, starting from this date, and a deposit of* 3/ *in the pound of the entire cost of same herewith.*

Signature, *Miss B. Dixon,*
Address, 32 *Commonhead Street,*
Town, *Airdrie,*
Date, 30/11/1907.

During the advertising period Painless Extractions with our own Anæsthetic will be don Free of Charge to all those ordering Artificial Teeth.

SCHEDULE OF FEES.

DESCRIPTION OF WORK.	Quantity.	Price.	
1. Ordinary Extraction, 1s. per tooth			
2. Painless Extraction with our Anæsthetic, 5s. per tooth			
3. Fillings, 5s., 7s. 6d., 10s. 6d., 12s. 6d., and 15s.			
Fillings with Gold, 10s. 6d , 15s. 6d., 21s. and upwards		7	19
4. Teeth on Vulcanite, 5s., 7s. 6d., and 10s. 6d. each			
5. Upper or Lower Set on Vulcanite, £2, 15s. 6d., £3, 15s. 6d., and £5, 10s. *All £5, 10s. Sets on Vulcanite guaranteed for 15 years.*	*Upper & Lower Set Teeth on Ebonite & Gold.*		
6. Upper or Lower Sets on Ebonite, £4, 7s. 6d., and with Gold Strengthener, £5. 10s.			
7. Gum Section Sets on Vulcanite, £4, 4s.			
8. Temporary Case, £1, 5s. (to remain our property)			
9. Teeth on Dental Alloy, 20s. each			
10. Full Upper or Lower Set on Dental Alloy, £9, 9s., £11, 11s., and £15, 15s.			
11. Teeth on Gold, 21s. each			
12. Full Upper or Lower Set on Gold, £12, 12s., £15, 15s., and £21			
13. Crowns, £2, 2s. per tooth			
14. Bridge work, £2, 2s. per tooth			
15. Scaling or Bleaching, 10s.			
Total			

No verbal agreement between Agent and Customer will be accepted by us unless same be put in writing on this form by the Representative and afterwards confirmed by us.

Received on Account - 16/ - £ : 16 :

Representative's Signature, *W. G. Scott.*

On 15th January 1909 the Sheriff-Substitute (GLEGG) allowed a proof.

Note.—"In this case pursuer avers that she was approached by the defenders through the circular No. 9/1 of process. This circular contains two sets of things—first, commendation of the defenders, and secondly, description of work and terms. The pursuer supplied the defenders' representative with the particulars of the work she wanted, and he filled these into the blanks in No. 9/1 and signed it. This paper then contained the contract between the parties, and it is on it that pursuer relies. She says that under her agreement she was entitled to have reasonably painless extraction of teeth, and to have ordinary care and skill applied to the extraction of her teeth, instead of which she suffered great pain, and through the gross incompetence and carelessness of the operators had her mouth badly lacerated, her broken stumps left in the jaws, and has had her mouth permanently deformed. The defenders' answer to the relevancy of these averments is that they did not undertake to supply skill in dentistry, and that the pursuer having employed an unqualified person, was only entitled to have him do his best, whatever that might be, and that there is nothing in her averments inconsistent with the idea that the operator did do his best.

"The first question, of course, is what the circular which became the contract says, and what it means.

"It is headed 'The Hygienic Institute, Makers of Artificial Teeth, Order Form.' Under the title 'Description of Work' are entered such things as 'ordinary extraction, painless extraction, fittings, sets of teeth, bridge work, scaling or bleaching,' &c., with a note of the charge for each. There is also printed in prominent type that 'During the advertising period Painless Extractions with our own Anæsthetic will be done free of charge.' In the order it is expressly stated that 1s. per pound per week is payable from the date of the agreement, and that 'a deposit of 3s. in the pound of the entire cost of the same herewith.' The pursuer's order is filled in as upper and lower set of teeth on ebonite and gold, £7, 19s.,' and a deposit of 16s. is marked as paid. On the top of the paper is printed, 'Largest and most successful practice in Great Britain.'

"Now it is obviously incontestable that the defenders hold themselves out as extractors of teeth, and indeed practisers of dentistry. It seems also clear that they contracted with pursuer to extract her

teeth for a money payment. It is true that the charge for extraction is omitted, but they agree to extract in consideration of a payment of £7, 19s. for the false teeth. The pursuer could not walk off after the extraction without paying, because there is a binding agreement to pay for the false teeth, and it is also to be noticed that 16s. was paid down before anything is done. It is useless therefore for the defenders to say that they only charged for the teeth. The price is for the whole job—drawing, supplying, and fitting teeth. And their professions cover the same field. 'The most successful practice in Great Britain' is a practice in the acts of dentistry above set forth. And it is a statement which means that they have skill in dentistry. Perhaps no reasonable person would accept the defenders at their own valuation, but no reasonable person would read the words in any other sense than that defenders claim 'to have skill,' and indeed exceptional skill, in dentistry. No doubt defenders do not use, but avoid the use of, the words 'dentist' and 'dentistry,' for the very good reason that they know they would get into trouble under the Dentist Act if they did. But the pursuer cannot on this ground be expected to know defenders are not qualified or to be certiorated that they are quacks because they avoid the use of these technical terms. The ordinary meaning of the circular is that defenders perform dentistry operations successfully. Their position as unregistered dentists does not qualify this profession—pursuer would probably know nothing about that. It would be irrelevant to her view of their capabilities, and therefore irrelevant to this case. The defenders hold themselves out as dentists, do not disclaim skill in that art, and are therefore to be taken as promising the usual skill of practitioners of that sort.

"Some English authorities were cited to me to show that ordinary professional skill is not to be expected from a quack, and that a quack is to be treated more leniently as regards skill and care than a duly qualified practitioner. But on the other hand it is to be observed that even a quack is liable for gross negligence, and for undertaking what he has not the skill to perform (see Addison on Contract, 664). In any event, any relaxation of the rule as to skill can only take place when 'the person employed is known to be unskilled. This is evidently Bell's view, as he lays down in his Commentaries, 7th ed. i, 489, that 'the general rule as to all workmen is . . . they are responsible for the skill and art necessary to accomplish safely what they undertake, in so far as ordinary skill and art can accomplish it.' He then goes on to state 'that if one applies to an apprentice in an art, or to a man skilled in another, but not professing that in question, such person will be responsible only for the fair exertion of his capacity.' Here, however, the exception is not established, as the defenders cannot be taken as not professing dentistry. . . ."

Proof was thereafter led, and on 19th March 1909 the Sheriff-Substitute pronounced this interlocutor—". . . *Finds in fact* that—(1) pursuer, on the solicitation of the defenders' agent, who represented defenders to be expert dentists, entered into the contract, No. 9/1 of process, on 30th November 1907; (2) during the earlier months of 1908 pursuer had teeth extracted on six occasions by Mr Mylie, an operator in the employment of defenders; (3) in August 1908 pursuer went to Coatbridge, where she was operated on by Mr Dalziel senior, another of defenders' operators; (4) on this occasion Mr Dalziel subjected the pursuer's mouth to unnecessary violence, and while extracting or attempting to extract the upper right canine he tore away a piece of the jaw-bone and the adherent flesh; (5) severe inflammation and suppuration of the upper jaw followed; (6) on 3rd October 1908 pursuer visited defenders' Glasgow place of business, and was operated on by Mr Dunbar, another of defenders' operators; (7) Mr Dunbar unsuccessfully tried to draw a stump which had been left after a previous unsuccessful attempt to extract; (8) this was followed by suppuration; (9) when pursuer began to be operated upon by defenders she already wanted several teeth, the result of previous extractions, but her jaws were otherwise normal, and continued so until she visited Mr Dalziel in August 1908; (10) after defenders ceased operating on her the front part of the upper jaw-bone was prominently enlarged; (11) this enlargement is permanent, and is of such a nature that it will prevent the fitting of false teeth unless removed by a surgical operation; (12) the enlargement is due to inflammation; (13) the inflammation was set up by the injury to the bone inflicted by Mr Dalziel in August 1908; (14) this injury was due to the treatment of Mr Dalziel being lacking in the skill and competence possessed by ordinary practitioners of the dental art. . . . *Finds in law* that (1) the defenders, by virtue of their terms of the contract, No. 9/1 of process, were under obligation to supply the ordinary skill and competence of persons practising dental art; (2) defenders are in breach of this obligation, and are liable in damages to pursuer; assesses the same at the sum of £30. . . ."

On 4th August 1909 the Sheriff (GARDINER MILLAR) adhered.

Note.—" . . . The defenders not only state that they are unregistered and unqualified, but found upon that very fact as a ground upon which they should not be found liable. If anyone goes to a quack he does so at his own risk—an unregistered dentist is not bound to do more than his best, and is not liable for ordinary professional skill and knowledge. It seems clear that when a person employs anyone whom he knows to have no skill whatever to perform a professional act he does so at his own risk. But if the person undertaking the operation sets himself forward as having skill and knowledge, then this defence will not avail. Looking to the contract produced, it seems to me perfectly plain

that the defenders did set themselves forth as having skill and knowledge in the practice of dentistry. It is headed, 'Largest and most Successful Practice in Great Britain. All work guaranteed for five years.' On the side of the contract there are the following words — 'During the advertising period painless extractions with our own anæsthetic will be done free of charge to all those ordering artificial teeth.' In the whole paper there is no suggestion that the persons forming the defenders' company were not skilled and were not qualified to perform the operations which they offered to do. Then there is the evidence of their agent through whom the contract was entered into, who says—'When I called I showed her one of the order forms, and I explained it to her; I just explained how the defenders worked it, and the benefit she was getting, as we had a special offer at the time. I said it was painless dentistry. I was under the impression that they worked as painless dentists; I thought they were experts, and I told her so.' I agree therefore with the learned Sheriff-Substitute in thinking that the defenders did set themselves out as being qualified to perform the operations which they undertook. . . ."

The defenders appealed, and argued—The contract here was a contract for the supply of artificial teeth. The defenders had not held themselves or their employees out as specially skilled in teeth extraction — *Emslie* v. *Paterson*, June 12, 1877, 24 R. (J.) 77, 34 S.L.R. 674; *Bellerby* v. *Heyworth*, [1909] 2 Ch. 23, *overruling Barnes* v. *Brown*, [1909] 1 K.B. 38. Apart from holding out, an unregistered practitioner was only liable for the *bona fide* exercise of such skill as he had, and was not bound to display the ordinary skill of a registered practitioner—Bell, Prin., sec. 154 (1); Addison on Contracts (10th ed.), p. 830; Jones on Bailments, p. 100. This was only reasonable, because the unregistered practitioner could not sue for fees, while the registered practitioner could. It was not proved that Dalziel senior had been guilty of negligence. Further, the pursuer was not entitled to subject herself to treatment by Mr Dalziel. Her case was one of difficulty, and the defenders had deputed a specially skilled employee to attend to it, and had obtained a letter of indemnity with regard to any operation performed by him. In these circumstances the pursuer was not entitled to resort to any of the defenders' employees to whom the letter of indemnity did not apply.

Argued for the pursuer—The defenders had held themselves out as specially qualified in the extraction of teeth. They were bound to exercise the skill which they professed to have—in this case the ordinary skill of a registered dentist—1 Bell, Com., M'Laren's ed., p. 489; Bevan, Negligence, ii, 1170. On the evidence it was clear that their employee Dalziel senior had not displayed ordinary skill, and therefore the defenders were liable in damages. Further, Dalziel had not only failed to display ordinary skill, but had been guilty of gross negligence. If that were so, the defenders were liable, even if they had not held themselves out as specially qualified—*Ruddock* v. *Lowe*, 1865, 4 F. and F. 519; *Jones* v. *Fay*, 1865, 4 F. and F. 525. The pursuer was not barred by the letter of indemnity. That letter did not apply to Dalziel senior, on whose negligence the action was founded. The pursuer was entitled to resort to Dalziel senior. There was no averment on record to the contrary.

At advising—

The judgment of the Court—the LORD JUSTICE-CLERK, LORD ARDWALL, and LORD DUNDAS—was delivered by

LORD DUNDAS—The pursuer in this case seeks to recover damages from the defenders in respect of their fault and negligence in the extraction of her teeth under a contract or arrangement between the parties dated 30th November 1907. The defenders carry on business under the style and name of the "Hygienic Institute" in Glasgow and elsewhere, and admittedly employ assistants who are not qualified dentists or dental surgeons. The Sheriffs have found the defenders liable in damages, but the issue has been practically narrowed to the question of their liability in respect of one operation upon the pursuer's mouth by Mr Dalziel senior, the defenders' sub-manager at their Coatbridge office, in August 1908. The defenders protected themselves against any claim for damages arising from anything that was done to the pursuer by their employee Mr Mylie, by a letter which they got from her dated 16th December 1907; and as regards the operations by another of their employees, Mr Dunbar, the Sheriffs have in effect found a verdict of not proven, against which no argument was submitted for the pursuer at our bar.

The law involved in the matter does not, in my judgment, raise any serious difficulty. The general maxim applicable to such cases is, of course, that the person employed *spondet peritiam artis*. I apprehend that any man who performs a service of art for another is responsible up to the limit of his own profession—that is, what he professes or announces to the employer. In the case of a registered practitioner—including the holder of a diploma, or licence, or other such badge of his art—it needs no announcement of his own; for in such cases the law assumes that he holds himself out as possessed of the ordinary skill and care of his profession. As regards an unregistered practitioner, the law is, I think, nowhere better stated than by Mr Bevan—Negligence in Law, 3rd ed., vol. ii, p. 1170—whose language I adopt as my own:—"An unregistered practitioner, if not known to the person operated upon to be unregistered, must attain the standard of skill of the registered practitioner at the place and in the circumstances where the services are rendered; if known to be unregistered, then the skill of his profession"—that is, the skill which he professes or announces. These words are, I think, quite in accordance

with what is laid down in our own law, *e.g.*, by Professor Bell (Prin., sections 153, 154; Comm. (7th ed.), i, 489). The question then comes to be, whether or not the actings of the defenders, or of their employee Mr Dalziel, have come up to the professions made by them to the pursuer. I should add that the cases, Scotch and English (*Emslie*, 1897, 24 R. (J. C.) 77; *Barnes*, 1909, 1 K.B. 38; *Bellerby*, 1909, 2 Ch. 23), decided upon the terms of the Dentists Act 1878, seem to me to have no application whatever to the present case. There is here no question as to alleged infringement of that Act by the defenders; and we are not here concerned to criticise or interpret the words "specially qualified" which occur in its third section.

The first matter, therefore, for consideration is what the defenders held out or professed to the pursuer. I attach no special importance to the representation made at the time by Scott, their accredited canvasser, to the pursuer, viz.—"I said it was painless dentistry. I thought they were experts, and I told her so,"—though I consider that, for what it is worth, the evidence is quite competent. I am content to take the order form as embodying what the defenders held out or professed to the pursuer. I need not quote or refer to its language in detail; the Sheriff-Substitute does this sufficiently in the note to his interlocutor of 15th November 1909. It appears to me to be quite idle to contend, as the defender's counsel did, that the document holds out the defenders merely as makers of artificial teeth, and not as dentists. I think it is plain that they also held themselves and their assistants or employees out as extractors of teeth and practisers of dentistry. The lump sum to be paid by the pursuer includes the extraction of her teeth. She was, in my judgment, entitled to expect that the defenders' employees could perform the necessary dental operations with ordinary success and with ordinary care and prudence.

This being, as I hold, the fair scope and meaning of the contract between parties, one turns to the proof to consider whether or not the defenders' actings—and especially the operation performed by Mr Dalziel senior — fell short of their contractual professions to her; and I agree with the Sheriffs that the answer upon that issue must be in the affirmative.

The evidence discloses that in 1907, before any of the defenders' employees touched the pursuer's teeth and mouth, these were in a perfectly normal condition; whereas after Mr Dalziel's operation in August 1908 a piece of her upper jaw bone and part of the flesh of the external gum had been torn away, with the result that certain abnormal and distressing conditions manifested themselves in her mouth, and she suffered not only great pain but also serious injury to her general health. That this tearing away of bone and gum involved gross carelessness on the part of the operator is, I think, fully proved by the medical and dental evidence in the case, and it is also in my judgment sufficiently established that these injuries were in fact caused by Mr Dalziel's operation in August 1908. Indeed I should not have thought it necessary to refer with any detail to the proof but that the appellants' counsel presented a keen argument to the contrary upon the point last mentioned. Mr Dalziel's evidence is not to my mind satisfactory. He admits that he did deal with the tooth or stump of tooth in relation to which the lesions have occurred, and he says—"I tried it two or three times but I could not get a hold of it, and I told her I could not get a hold of it and I was doing more harm than good, and the irritation was causing her more pain and I stopped. . . . There was no tearing of the gum whatever. . . . From the appearance of the mouth, so far as I saw, there was nothing abnormal, and I had no hesitancy in the least in operating upon it." The fact, however, that both bone and gum have been torn away is abundantly proved. The pursuer herself gives as clear an account of what happened as could reasonably be expected under the circumstances. She depones that Mr Dalziel "tore away part of the gum of the top jaw. I suffered a great deal of pain; he was very rough. When I came out of the surgery I showed my mouth to my lady friend; it was bleeding very much." The lady friend, Miss Sneddon, says—"I asked to see her mouth, and when I looked at it I noticed a piece of flesh was torn from the gum, and it was bleeding very much." Then the pursuer's father states—"I was not with my daughter when Mr Dalziel senior operated upon her, but I saw her mouth when she came home. I saw the injuries; part of the bone of the upper jaw was taken away, and he had also taken away part of the flesh at the front. There was a part awanting, and that part of the bone also. I saw that." At another part of his evidence he says—"I saw her mouth after August. I saw there was something wrong with the right top gum; you could have laid your finger in where the bone was taken away." The pursuer's sister says—"After August my sister had a very bad mouth; she said it was Dr Dalziel, Coatbridge, that had done it. The sore was on the top part, on the right-hand side. It was very black and suppurating, and it had an awful smell. . . . I saw the sore myself; I saw it first two or three nights after, when she came over to see me." All this is of course the evidence of unskilled and perhaps partisan witnesses, but their description of the injuries corresponds wonderfully closely with that given by the medical and dental experts in the proof; and the case against Mr Dalziel is further strengthened by the pursuer's evidence that on 3rd October 1908 she went with her father to the defender's surgery in Glasgow when Mr Dunbar examined her mouth, and according to her statement "he asked who had mangled my upper gum, and I said it was Mr Dalziel senior, that he had torn away part of my gum and had used a great deal of force." The pursuer's father corroborates his

daughter's statement, and depones that Mr Dunbar said—"Well, he has taken away part of the gum, and also been using great force." Against these distinct statements I attach small weight to Mr Dunbar's evidence, which amounts to a mere *non memini.* He does not remember ever doing any extractions for the pursuer.

There seems, then, to be no doubt that bone and flesh were in fact torn away from the pursuer's upper jaw with serious and distressing consequences. No other cause is suggested than Mr Dalziel's operation, and it is plain upon the evidence that such an operation was a grossly careless one. If, then, the defenders held themselves and their operators out as competent to perform dentistry with ordinary care and success, as I think they did, they must be liable in damages to the pursuer unless they can escape upon a special ground, to which I must now refer.

This last ground of defence appears to me to be at best a very unhandsome one. It was urged that the defenders are not liable in damages because the pursuer had no business to subject herself to treatment by Mr Dalziel senior. The learned Sheriff has disposed of this point by saying that as matter of fact she did so under the directions and request of the defenders. I am not sure, though there is a balance of evidence, that the proof wholly bears out this view of the matter. But even assuming the contrary, it seems to me that the pursuer was quite entitled to go to the Coatbridge branch of the defenders' business, having been told by their canvasser Mr Scott that the Glasgow operator, Mr Mylie, whom she was going to consult, was away from home. She had never been warned by the defenders not to do so. The letter of 16th December 1907 implies nothing of the sort. She had been to that office before upon the defenders' instructions. The contract "order form" gives the Coatbridge address, inserted in manuscript, and she found there the sub-manager, Mr Dalziel senior, who as he says "had no hesitancy in the least in operating." This last argument for the defenders seems to me therefore absolutely to fail.

For the reasons stated I am of opinion that we ought to affirm the interlocutors appealed against.

LORD LOW was absent.

The Court dismissed the appeal.

Counsel for Pursuer—J. R. Christie—A. M. Stuart. Agents—Balfour & Manson, S.S.C.

Counsel for Defenders—Spens. Agent—James G. Bryson, Solicitor.

Tuesday, December 14.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

SMITH *v.* M'COLL'S TRUSTEES.

Process—Declarator ab ante—Declarator of Right to Immediate Payment—Declarator of Vesting Subject to Defeasance.

A residuary legatee under a will brought a declarator that he was entitled to immediate payment of the trust fund, or, alternatively, that he was entitled to have it found and declared that the fee had vested in him subject to defeasance only in the event of his having issue. The defenders pleaded that the action was premature. *Held* that *qua* the conclusion for immediate payment (*reversing* the opinion of the Lord Ordinary) the pursuer was entitled to a judgment on the merits, and defenders assoilzied, but that *qua* the conclusion for vesting subject to defeasance the action was premature, there being possible contradictors who were not represented, and should be dismissed.

Succession—Vesting—Liferent and Fee—Direction to Trustees to Hold and Retain—Repugnancy.

A testator directed his trustees to hold and retain the balance of his estate for behoof of the children of his deceased daughter, and to pay the annual proceeds to them in equal portions, and on the decease of the survivor to divide the balance among the grandchildren of his said deceased daughter, and their issue *per stirpes.* He then went on to declare that in the event of any of the children dying leaving issue, the issue prior to the time of division should take the share of annual proceeds payable to the parent, and in the event of any of the children dying without leaving issue, then the shares of said annual proceeds, or of the principal sum as the case might be, of such children, should be divided equally among the surviving children and the issue of any child who might have died. *Held* that the sole surviving son of testator's daughter, who was under a mutual settlement the universal legatory of the other children who had died, was not entitled to an immediate conveyance, not having a fee.

On 23rd February 1909 Adam Smith, residing at 17 Dunolly Gardens, Ibrox, Glasgow, brought an action against (1) James Burns Kidston and others, the testamentary trustees of the late Dugald M'Coll, acting under his trust-disposition and settlement, dated 22nd September 1881, and registered 23rd November 1882, and (2) Mrs Jessie M'Coll or Smith for any interest she might have as one of the next-of-kin and heirs *in mobilibus* of the testator. In it the pursuer, in his own right and as universal