v. *North British Railway Company* is right, and that it rules this case.

LORD M'LAREN—Whatever view may be taken of the legal character of the contract between Messrs Barr and the Caledonian Railway Company, it is evidently a complex contract, and not an ordinary contract of carriage of the coal and the waggons taken together. My view of the contract may be best illustrated by supposing the case of a railway company which, instead of running its own waggons, hires them from a waggon-builder at so much per month or so much per train-mile. The charge which the company would make for the carriage of coal in their hired waggons would then be calculated on an estimate of the total cost of the carriage, one of the elements being the hire of the waggons. For the conveyance of coal in the coalmaster's own waggons the company would be able to make an abatement from the carriage commensurate with the hire of the waggons, and its profit would then be the same whether the coal was carried in waggons provided by the company or in waggons provided by the coalmaster. In the present case the Caledonian Company provides its own waggons, but these waggons can only be provided and maintained at a certain annual cost, and the company is therefore able to make an abatement from the price of the carriage of coal to coalmasters who provide at their own cost waggons suited for its transit by rail.

Such being the relations between the railway company and the coalmaster, it is reasonable to conclude that the responsibility of the railway company to the coalmaster for the safety of his waggons, is similar in character and degree to the responsibility incurred by a company hiring waggons to the lessor. In other words, the obligation is to take due care of the vehicles, and the responsibility is for negligence. The difference between the two cases is that in the case first supposed the company pays rent or hire for waggons received on a contract of location, while in the second case the coalmaster receives a consideration for providing the waggons which are necessary for the carriage of his coal in the shape of an abatement of the price of that carriage. I think it is a just and convenient rule, and it is certainly in accordance with the best traditions of our jurisprudence, that in the case of innominate contracts the obligations of the parties and the responsibility for negligence should be the same as in the case of the nearest known contract.

This principle would lead to two conclusions—(1) That the railway company is responsible for the safe carriage and delivery of the coal as under a contract of carriage; (2) that the company is responsible for the care of the waggons as under a contract of location. I do not mean that the contract is that of location, but the responsibility is the same, because the obligations of the parties are identical with those which would arise if the waggons were hired from a third party for a like purpose. The first conclusion is not necessary for the decision of this case, but I cannot in my own mind come to a satisfactory decision of the case without analysing the contract and endeavouring to ascertain under what separate obligations the railway company received these waggons and their contents. It is to be kept in view that the waggons were being regularly run to and from the mines with coals for exportation, and while so used these waggons were taking the place of the rolling stock of the Caledonian Company. The waggons were not being carried, but were being used as a part of the apparatus for the carriage of goods over the company's line. This is quite different from the case of a railway carriage or waggon received by a railway company for delivery at a distant place, and for which freight is paid. In such a case, if the waggons were injured on the journey, the question of the liability of the railway company would not be governed by our decision in the present case.

The Court found that the railway company were not responsible as common carriers for the safety of the waggons.

Counsel for the Reclaimers—Lord Adv. Robertson—Low—Dickson. Agents—Drummond & Reid, S.S.C.

Counsel for the Respondents—D.-F. Balfour—Guthrie. Agents—Hope, Mann, & Kirk W.S.

Friday, November 21.

FIRST DIVISION.

WILSON *v.* SCOTT.

Jurisdiction — Review in Small Debt Actions—Small Debt Act 1837 (1 *Vict. c.* 41), *sec.* 30.

A person whose effects had been poinded under a small-debt decree for £12 of rent, applied to the Court to suspend the decree and interdict a certain sale of her effects, on the ground that the respondent had admitted, since he obtained the decree, that the £12 had been decerned for as "a half-year's" instead of a years' rent of premises let to her. *Held* that the suspension and interdict was incompetent under section 30 of the Small Debt Act.

On 4th June 1890 William Scott, commission agent, Lauder, brought a summons in the Small Debt Court at Greenlaw, Berwickshire, against Mrs Lilias Wilson for payment of £12, which was described in the note of claim annexed to the summons as the "half-year's rent due by the defender, payable in advance, for current half-year of house and small garden plot in Lauder belonging to the pursuer, and let under a verbal lease for one year from Whitsunday 1890." . . . On 26th June the Sheriff granted decree for the sum sued for with expenses.

On 28th June Mrs Wilson's agents wrote

to Scott's agent pointing out that "£12 was the rent for the year and not the half-year, as set forth in the summons," and in his reply Scott's agent admitted that to be the case. In subsequent letters Scott's agent denied that decree had been granted in error, and asserted that the sum decerned for was "justly due," but admitted that by a "clerical error" the word "half-yearly" had been written in the note of claim instead of the word "yearly."

On 21st August Scott used an arrestment under the decree in the hands of the Bank of Scotland, Lauder, and on 22nd August he poinded the furniture and effects in the house occupied by Mrs Wilson as aforesaid.

Mrs Wilson thereupon presented a note of suspension and interdict against Scott in the Court of Session, offering to consign the sum decerned for by the Sheriff, and praying the Court to suspend said decree, recal the arrestments, and interdict the sale of her effects.

She pleaded—"(1) The decree being for £12, while the half-year's rent has, since the decree has been pronounced, been admitted by the respondent to be £6 only, ought to be suspended with expenses, and the arrestment thereunder ought to be recalled and the sale of the complainer's effects interdicted."

The respondent pleaded—"(1) No jurisdiction."

By section 30 of the Small Debt Act it was enacted—"No decree given by any sheriff in any cause or prosecution decided under the authority of this Act shall be subject to reduction, advocation, suspension, or appeal, or any other form of review or stay of execution other than that provided by this Act [*i.e.*, in section 31, which allows an appeal on certain specified grounds to the Circuit Court] either on account of any omission or irregularity or informality in the citation of proceedings, or on the merits, or on any other ground or reason whatever."

On 25th August the Lord Ordinary on the Bills (LEE), on consignation, granted interim interdict as craved, and on 4th September, having advised the note of suspension and interdict, with the answers thereto, he passed the note and continued the interim interdict.

The respondent reclaimed, and argued—The suspension was incompetent and ought to be refused, as the only manner in which the decree of a Small Debt Court could be brought under review was by an appeal on certain grounds to the Circuit Court—Small Debt Act, secs. 30 and 31; *Graham* v. *Mackay*, February 22, 1845, 7 D. 515; *Turnbull* v. *Russell*, November 15, 1851, 14 D. 45; *Miller* v. *Henderson*, February 2, 1850, 12 D. 656; *Lennon* v. *Tully*, July 12, 1879, 6 R. 1253; *Robertson* v. *Pringle*, February 5, 1887, 14 R. 474. This case did not fall within the rule of *Samuel* v. *Mackenzie & Bell*, *infra*, as nothing had occurred since the decree to furnish a reason why it should not be enforced.

Argued for the complainer—Though the Court of Session could not review a small-debt decree on the merits, they would suspend the diligence following on such decree where facts had emerged since the date of the decree which rendered it unjust that the decree should be enforced. In the present case the respondent had admitted, since the date of the decree, that £6 was the half-year's rent, whereas he had got decree for £12 as the "half-year's" rent. That was just an admission that he had got decree for a sum for which he was not entitled to get decree, and furnished a good reason for suspension—*Samuel* v. *Mackenzie & Bell*, November 29, 1876, 4 R. 187; *Wilson* v. *Stronach*, January 9, 1862, 24 D. 271.

At advising—

LORD PRESIDENT—This is a process of suspension and interdict, in which the complainer asks the Court to suspend a decree pronounced by the Sheriff of Roxburgh, Berwick, and Selkirk, and the whole grounds and warrant thereof, to recal certain arrestments, and to interdict a sale of the complainer's effects, which have been poinded in execution of that decree.

Now, the answer made to this note is, that the process is incompetent, because the decree which is sought to be suspended is a decree pronounced in the Small Debt Court in terms of the Small Debt Act (1 Vict. c. 41), and that the jurisdiction of this Court is excluded. An attempt was made to distinguish between the suspension of the decree itself and the diligence following upon it, but it will be seen at once by reference to the Small Debt Act that there is no room for such a distinction, because the 30th section provides that "No decree given by any sheriff in any cause or prosecution decided under the authority of this Act shall be subject to reduction, advocation, suspension, or appeal, or any other form of review, or stay of execution, other than that provided by this Act"—that is to say, by the immediately following section (sec. 31), which provides for an appeal to the Court of Justiciary on certain specified grounds.

The construction of these sections of the statute have been made the subject of several judgments of this Court, the first of which is the case of *Graham* v. *Mackay*, 7 D. 515. That was a very strong case for sustaining the jurisdiction of this Court, for there the complaint was that the Sheriff had no jurisdiction over the defender, and could not pronounce a decree against him. If any ground could have been found as an exception to the general rule laid down by the statute, that would most readily have suggested itself, because if there is no jurisdiction to pronounce a decree, then there is no decree. The Court, however, disregarded that consideration, and held that everything called and bearing to be a small-debt decree must receive effect unless set aside in the manner prescribed by the 31st section of the Act.

The respondent here got a decree for £12, but it is said that by mistake the £12 was described as rent for half-a-year, whereas it

was a full year's rent. I am quite willing, if necessary, to assume that the complainer—the defender in the Small Debt Court—was not owing the respondent any money at all, but even then I think we cannot get the better of the 30th section of the Act, because this is in form a small-debt decree to all intents and purposes, and therefore effect must be given to the plain language of the 30th section.

It is quite true that subsequent to the case of *Graham* v. *Mackay* certain learned Judges in the Outer House have departed from the rule so plainly laid down there, misled, I think, by a phantom light which is generally called "substantial justice." But these departures have been corrected by appeal to the Inner House. "Substantial justice" in the abstract may be the *maximum bonum*, and in the smooth current of the administration of justice, where nothing intervenes to prevent it, there is no reason why "substantial justice" should not always be done. But there are many inconveniences and considerations of public policy that some times intervene, and are recognised by the Legislature as good grounds for refusing effect to the plea of "substantial justice" in any particular class of cases, and a court of law is bound to subordinate the wisdom of the philosopher and the scientific jurist to the wisdom of the Legislature. We have occasion some times to lament that the wisdom of the Legislature is expressed in terms somewhat approaching to the ambiguity of the Delphic Oracle, but if the Legislature speaks distinctly and without ambiguity, then it is the sole guide for a court of law. So, in the present case, I apprehend that "substantial justice" coming into conflict with a precise and unambiguous enactment is naught, and must go to the wall. The wisdom of the Legislature must prevail over everything.

This doctrine, and the particular rule established in the case of *Graham* v. *Mackay*, have been repeated in several later cases, which it is unnecessary for me to go over, but they repeat in almost so many words the rule laid down in the case of *Graham* v. *Mackay*.

It is necessary, perhaps, to add, in conclusion, that there may be facts emerging subsequent to the date of the decree which will prevent the holder of the decree putting it in force. If the defender can show that his debt has since been paid or otherwise discharged, that will be a good ground for preventing the decree being put in force, but there is no case of that kind here. Perhaps the best and most instructive illustration of the reservations under which the general rule must be accepted is the case of *Samuel* v. *Mackenzie & Bell*, which was the case of a discharge granted in English bankruptcy proceedings. That discharge, which came into effect only after the decree in the Small Debt Court was pronounced, was pleaded successfully as a ground for suspending the execution of diligence.

For these reasons I am in favour of recalling the interlocutor of the Lord Ordinary, and refusing the note.

LORD ADAM—This is a decree pronounced under the Small Debt Act, and I agree with your Lordship that under that Act it is impossible to review such a decree on the merits or anything touching the merits. I do not understand, however, that that is disputed, for Mr M'Lennan says that he is not asking us to touch the decree on the merits, but on the ground that certain events have happened since the decree was pronounced, in respect of which the complainer is entitled to have diligence stayed.

As a matter of principle, I think that Mr M'Lennan is right in this, that it is quite competent to have diligence suspended, even when it follows on a decree under the Small Debt Act, where the grounds of suspension do not touch the validity of the decree itself, as in the case mentioned by your Lordship. If the complainer came forward and produced a receipt for the amount, it would be impossible to say that we could not entertain that as a good ground for suspending diligence, and other illustrations of the same principle might be given. There is, however, nothing of that sort here. Suspension is sought on the ground of admissions made by the respondent since the decree was pronounced, but all that is admitted is, that while the decree is for a sum of £12, the note of claim in the Small Debt Court sets forth by mistake that that sum is due for a half-year's rent, whereas in point of fact it was a whole year's rent. It is not admitted, even if that were sufficient, that the sum is not due. On the contrary, it is averred, and not disputed, that the sum is due, and all that is said is that there was a clerical error in the state of claim in respect of which the decree was pronounced.

On these grounds I think that the note of suspension should be refused.

LORD M'LAREN—I agree with the observations made by your Lordship as to the conditions under which a suspension of a small-debt decree may be entertained. I shall only add—and I do not think your Lordship will differ from me in this—that there is really no violation of the principles of justice in refusing to entertain appeals from the Small Debt Court in the Court of Session, because the Legislature has provided for review by another Court for the purpose of correcting any departure from substantial justice on the part of the Sheriff. It is true that the statute does not permit any review of a small-debt decree on the merits, but there is no hardship in that, because the parties are entitled to the opinion of a competent Judge, and such cases are not considered of sufficient importance to justify an appeal on the merits; but if the Sheriff has not heard parties, or has deviated from the statutory regulations wilfully, or so as to prevent substantial justice being done, a remedy is provided.

In the present case an attempt has been made to show from the correspondence that something has occurred since the decree was pronounced to prevent the holder from enforcing it, but having given my best consideration to the correspondence, I am

of opinion that it does not appear that the holder abandoned his right to enforce the decree, and I think the defender in the Small Debt Court was bound to go to the Court of Justiciary or pay the sum due, taking whatever obligation the holder was willing to give her in order to prevent her being made subject to a second claim for the same debt.

LORD KINNEAR—I am of the same opinion. I agree that it is clear that a decree pronounced under the Small Debt Act cannot be reviewed in this Court, and at the same time I also agree that a decree of the Small Debt Court, though it cannot be reviewed, may be brought under the consideration of this Court by reason of facts emerging after the date of the decree, which make it contrary to justice and the true meaning of the decree to enforce it, as in the cases suggested by your Lordship as illustrations.

The only point which appears to me to require consideration in this case is, whether such facts have emerged here, and whether the respondent's letter can be construed as an admission that he obtained the judgment in the small-debt decree on a false statement of the facts, but that he meant to enforce it, on the ground that he would have got it all the same if the facts had been truly stated. I do not know whether that might not be a good ground for staying the execution of the decree if it was admitted that it had been obtained by something like fraud. It is quite clear, however, that that is not the meaning of the letter. The only admission made is that there was a clerical error in the statement of claim, and I do not see that that in any respect invalidates the decree, or affords a ground for reviewing it, or staying execution.

Even if substantial justice had not been done in the case, we could not review the decree, as the Act explicitly excludes the jurisdiction of this Court; but it is satisfactory to see that no substantial injustice has been done, as the complainer does not dispute that the sum decerned for is due under the contract of lease between her and the respondent. I therefore cannot see any reason why we should stay execution of this decree.

The Court recalled the interlocutor of the Lord Ordinary, repelled the reasons for suspension, and refused the note.

Counsel for the Complainer—M'Lennan. Agent—James Skinner, S.S.C.

Counsel for the Respondent—G. Watt. Agent—John Macmillan, S.S.C.

Saturday, November 22.

SECOND DIVISION.

[Commissariot of Edinburgh.

TOD, PETITIONER.

Settlement—Executor—Confirmation.

A testator by holograph settlement appointed a person "judicial factor, to carry out the purposes of this trust." *Held* that the clause conferred the powers of executor upon the person named, and confirmation as executor-nominate *allowed.*

Archibald Henderson, watchmaker and jeweller, Edinburgh, left a holograph will, by which he divided his property among certain persons mentioned therein. The will concluded with this clause — "I appoint Mr Henry Tod, 45 North Castle Street, or his partner Mr Rutherfurd, judicial factor, to carry out the purposes of this trust." Mr Tod presented a petition in the Sheriff Court of the Lothians and Peebles at Edinburgh for confirmation "as executor-nominate of the deceased Archibald Henderson."

The Sheriff-Substitute (RUTHERFURD) refused the prayer of the petition.

"*Note.*—The objection to grant this petition is not that the petitioner has not been expressly named 'executor,' but that he has been named something else. It is not uncommon in practice to confirm as executor-nominate a person upon whom executorial powers are conferred though not expressly named executor by the deceased. But in this case the testator has named a 'judicial factor,' whose office differs from that of executor-nominate in this important respect, that the factor finds caution, while the executor-nominate does not."

The petitioner appealed.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff-Substitute appealed against, and remit the cause to the Sheriff with instructions to grant the prayer of the petition, and decern."

Counsel for the Petitioner — Craigie. Agent—J. Stuart Watson, W.S.

Tuesday, November 25.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

WOOD *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation — Railway Accident—Nervous Shock—Discharge of all Claims for Inadequate Consideration.

A person was injured in a railway accident. Nine days after he accepted £27 from the railway com-