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-

pany, and granted them a discharge "in full of all claims competent to him in respect of injury and loss sustained." Eighteen months afterwards he brought an action for £5000 against the company. It was pleaded that the action was barred by the discharge. After a report of the Lord Ordinary upon the issues proposed for the pursuer, the Second Division, of consent, allowed a proof before the Lord Ordinary, who thereafter awarded the pursuer £500.

Held that upon the evidence there was no reason for thinking the Lord Ordinary had awarded an unreasonably large sum, and if so, then the discharge for £27 could not bar the pursuer's right to recover.

Question — Whether, looking to the case of *Victorian Railways Commissioners* v. *Coultas*, February 4, 1888, L.R., 13 App. Cas. (P.C.) 222, a person is entitled to recover damages for a nervous shock resulting from fright alone.

John Wood, formerly commission agent, Manchester, was a passenger in a North British Railway train from Glasgow to Edinburgh upon 21st June 1888. Near Bonnybridge Station a goods train passed, going in the opposite direction. Several pit-props fell off the goods train, and one was forced through the door of the carriage in which Wood was seated. Wood was thrown across the carriage and struck his head, and he sustained certain trivial external injuries from broken glass. He was visited by Dr Heron Watson, on behalf of the North British Railway Company, upon the day of the accident and upon the following day. He was also visited two or three times by a clerk from the railway company, who upon 30th June paid him £27, for which he granted the railway company a discharge, which bore that he accepted that sum in full of all claim competent to him in respect of injury and loss sustained in the accident.

In January 1890 he raised an action against the North British Railway Company for £5000 for injuries sustained by him in this accident.

The answer of the pursuer to the defenders' statement of facts, which set forth the fact of the discharge, was as follows— "Admitted that the pursuer took the £27, and gave the receipt. It does not discharge, and was not understood by the pursuer to discharge, his right to make any further claim against the defenders. The defenders' representative assured the pursuer that he was suffering only from a slight nervous shock, and that he would be all right in a week or two. The pursuer had no one to consult, either agent or doctor. As the event has turned out, he is helpless for life."

The railway company pleaded, *inter alia*— "(3) In respect of the settlement and document quoted in the defenders' statement, the defenders should be assoilzied."

The following issues were proposed by the pursuer, viz.—"Whether, on or about 21st June 1888, and at or near Bonnybridge Station on the defenders' line of railway, the pursuer was injured in his person through the fault of the defenders, to the loss, injury, and damage of the pursuer? Damages laid at £5000. Or, Whether, when the pursuer signed the receipt mentioned in the record, he understood that he thereby discharged his claims against the defenders in full?"

Upon 30th May 1890 the Lord Ordinary (KINNEAR) reported the case to the Lords of the Second Division.

"*Note.*—The Lord Ordinary reports this case, because while he thinks that a relevant case has been stated, and that the action ought not to be dismissed, he is unable to approve of one of the issues proposed by the pursuer.

"The first issue is in ordinary terms, and is admittedly a proper issue if the pursuer has not discharged his claims. But he has granted a discharge whereby he accepts of the sum of £27 'in full of all claims competent to him in respect of injury and loss sustained' by him in consequence of the accident on the North British Railway, of which he now complains. The defenders, founding upon his discharge, plead that the action cannot be maintained, because the pursuer's claim has been settled and paid.

"The pursuer may be entitled to set aside this discharge if it was impetrated by the defenders, or if it was granted under error induced by the representations of their agent. But under the issue he proposes he would be entitled to a verdict on the ground of a mere mistake on his own part, for which the defenders were in no way responsible."

The pursuer argued that he was not barred by the discharge from insisting in the action, and referred to the case of *M'Donagh* v. *P. & W. Maclellan*, June 18, 1886, 13 R. 1000.

Upon 17th June 1890 the following interlocutor was pronounced — "The Lords having heard counsel for the parties on the report by Lord Kinnear, of consent remit to his Lordship with instructions to allow the parties a proof of their averments made upon record."

At the proof the facts stated above were brought out, and the pursuer deponed that since the accident he had been unable to return to work. He had suffered, and was still suffering, from severe nervous shock. He complained of stiffness in his neck, pains in his head, sleeplessness, irritability, inability to walk any distance, inarticulateness of speech, and loss of memory. When he granted the discharge founded upon by the defenders he was not in a fit state to transact business. He only took the money as a payment to account, and never meant to renounce all claims against the railway company. Three medical witnesses corroborated his statements as to the state of his health, and attributed it to the accident.

On the other hand, a lady who had been in the same railway carriage deponed that none of the eight people in the carriage received any external injuries, that

there was no great shock, but that they were all considerably frightened. A doctor from Doune deponed to his treating the pursuer for rheumatism, and to his having met him walking six miles from home. Dr Heron Watson said there was nothing organically wrong with him. He had received a mental shock, and was suffering from treating himself so long as an invalid, and that he would be much better if he returned to work.

By joint-minute the defenders admitted that the accident happened through their fault.

Upon 22nd July 1890 the Lord Ordinary decerned against the defenders for the sum of £500 and expenses.

The defenders reclaimed, and argued—(1) *Upon the discharge*—The pursuer had renounced any claim he had against the company. But even if it were not an absolute bar to the pursuer's success, it laid a heavy *onus* upon him of showing that circumstances had altered since he granted the discharge. The discharge was evidence tending to prove that he had not been so severely injured as he desired now to make out. (2) *Upon the evidence*—He had received no external injuries. There was no trace of organic disease caused by the accident. He had received a fright or mental shock, but for that he was not entitled to recover—*Victorian Railways Commissioners* v. *Coultas*, February 4, 1888, L.R., 13 App. Cas. (P.C.) 222. Even if the shock could be called physical, it had been greatly exaggerated. If £27 was too little, £500 was too much, and should be modified.

Argued for the pursuer—There was no reason to disturb the Lord Ordinary's judgment. The sum awarded was not too large unless the pursuer was shamming. His witnesses deponed to his being in a very critical state of health, and even Dr Watson did not say that he was perfectly well. A nervous shock was a very insidious form of injury. He could not tell at once how much his health was impaired. When he granted the discharge he did not know how serious his case was, and taking £27 in a case justifying a verdict for £500 could not bar the pursuer's right of action. That he had provisionally settled with the company, and had no trial impending, would have hastened his recovery if he had been suffering only from fright.

At advising—

Lord Justice-Clerk—I do not think it necessary to consider in this case the questions raised in the case of *Victorian Railways Commissioners* v. *Coultas*. In that case the question was whether a person suffering from fright alone could claim damages. If any opinion had to be expressed upon that case I should like time for further consideration, but there is no such case here.

The accident here was a very deplorable one indeed. Some pit-props were being carried on a railway waggon, and while the waggon was passing the carriage of a passenger train going in the opposite direction, one of these props suddenly burst through the door of the carriage in which there were some eight persons. In fact it got so fixed that it could not be removed without considerable force. One of the persons in the carriage says he received a severe shock, from the effects of which he is still suffering. The defenders say he cannot have received anything more than a mental shock, because the other people in the carriage did not receive any external injury. I do not understand that. Whether a person in a carriage, through the door of which a pit-prop has burst, received a physical shock or not is not determined by the fact that others did not. That may depend upon the position at the time of the person said to be injured. I see no ground for differing from the opinion of the Lord Ordinary that this man received a physical shock, and if so, he is entitled to compensation.

The question in this case is, whether he is barred from recovering further damages from the railway company by having accepted £27 in lieu of all claims a few days after the accident? Now, it was not maintained by Mr Dickson that if it turned out after such a discharge had been taken that the injuries actually received were of such a nature as were not in the contemplation of the parties when the settlement was made, and that the amount paid was quite inadequate, the pursuer would be barred by such settlement. All he maintained was, that if the pursuer took £27 his injuries could not have been so serious as he now sought to make them out to have been. But that cuts both ways, for if he was relieved from anxiety by being paid at once, he should have recovered rapidly if he was not really seriously injured.

The next question is, has he recovered? Some of the doctors say he has completely recovered. He is still to some extent suffering from the injuries. His own doctor finds certain symptoms which the other doctors do not find, but these are just the circumstances which the Lord Ordinary was entitled to take into account. He has considered these matters, and has given the pursuer £500. It is a large sum, but the only question is, whether if it was in his province to grant it we should cut it down. I regard the question as if this sum had been awarded by a jury. I do not think we should have ordered a new trial.

Lord Young—I have all along regarded this case as one of considerable interest and importance, because it is certain that railway companies are not seldom victimised. Here the pursuer was in the train to which the accident occurred, and he says that he sustained a severe shock. He had little or nothing to show in support of that statement at the time, and he accepted £27, and granted a receipt as for all he could demand from the company. A year or more afterwards he brought an action for £5000 for injuries sustained, and it is not surprising that the action should be defended, and every plea competent to the defenders urged against it. The case came before us first upon the question of the discharge, and considering the state of the pursuer,

and the alleged circumstances in which the receipt was granted, we thought that the case should be sent for trial before determining the effect of the discharge. The parties very wisely agreed that the case should be determined by the Lord Ordinary without a jury. We now have before us the evidence taken before the Lord Ordinary, and the judgment pronounced upon it. As he has thought £500 a proper sum to award, I am not prepared to hold that the pursuer is barred by accepting £27. The question we have to determine is, whether we should interfere with that judgment? It has come to be a question of damages, and of damages only. The accident is admitted. It is admitted that the pursuer received some injuries through the fault of the defenders. Now, the amoun of damages turns upon whether the pursuer was pretending injury or not. If he was not, a sum of £27 is absurd. The Lord Ordinary thought he was not pretending injury, and awarded him £500. I think there is evi dence which reasonably supports that view, and I am not for altering the judgment. Whether another view might not have been taken, and reasonably supported by the evidence, I do not say.

LORD RUTHERFURD CLARK—I have had some difficulty about this case, but I agree that we should adhere to the Lord Ordinary's interlocutor. I do not think, however, that we are in precisely the same position as if we were considering the question of granting a new trial. We have more power here in dealing with the judgment. The case turns entirely upon the question of whether or not the witnesses for the pursuer are to be believed. The Lord Ordinary has believed them, and I see no reason for saying that I disbelieve them, and no ground for altering the judgment.

The Court adhered.

Counsel for the Pursuer and Respondent —Rhind—Baxter. Agent — Wm. Officer, S.S.C.

Counsel for the Respondents and Appellants—Asher, Q.C. — Dickson. Agents — Millar, Robson, & Innes, S.S.C.

Friday, November 28.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

HART *v.* ANDERSON AND ANOTHER (ANDERSON'S TRUSTEES).

Diligence — Meditatione fugæ Warrant — Civil Debt—Rent—Debtors (Scotland) Act 1880 (43 *and* 44 *Vict. c.* 34).

A tenant of heritable subjects was imprisoned on a warrant as *in meditatione fugæ* until he should find caution *de judicio sisti* in any action for payment of past and future rent. The Court *suspended* the warrant and ordered liberation, on the ground that both before and after the Debtors Act 1880 warrants *in meditatione fugæ* were only incident to the power of imprisonment for debt, and as personal diligence was not available in respect of the debt alleged, the warrant was incompetent.

The Debtors (Scotland) Act 1880 (43 and 44 Vict. c. 34), sec. 4, provides—"With exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be apprehended or imprisoned on account of any civil debt. There shall be excepted from the operation of the above enactment —1. Taxes, fines, or penalties due to Her Majesty, and rates and assessments lawfully imposed or to be imposed. 2. Sums decerned for aliment. Nothing contained in this Act shall affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being *in meditatione fugæ*, or under any decree or obligation *ad factum præstandum*."

In November 1890 Mrs Anderson, Leithfield House, and John Clanachan Gardner, solicitor, Stonehaven, trustees of the deceased John Anderson, petitioned the Sheriff of Aberdeen for the arrest of Joshua Hamilton Hart, tenant of Bridgeton House, Aberdeenshire, as being *in meditatione fugæ*. They averred that by a missive of lease dated 11th January 1890 the defender had offered to take the house of Bridgeton, with shootings, from 1st August till Martinmas 1890, and to pay £60 rent therefor. By a lease dated about the same time, the defender had agreed to take the subjects for a period of ten years from Martinmas 1890 at a rent of £125, with a break at the end of the first three years. He had refused to pay the rent of £60, and failed to give security for payment of the rent of the subjects for the next ten years.

They pleaded—"The defender being justly indebted to the pursuers in the sums foresaid, and he being about to leave Scotland before they can obtain decree therefor, and so defeat their claim, the pursuers are entitled to have him arrested and detained till he find caution *de judicio sisti*."

After certain procedure the Sheriff-Substitute (BROWN) upon 15th November 1890 pronounced this interlocutor—"Finds the complaint proved: Grants warrant to apprehend Joshua Hamilton Hart, within designed, and to commit him to the prison of Aberdeen, therein to be detained till he find caution acted in the Books of Court *de judicio sisti* in any action for payment of the debt mentioned in said petition to be brought against him at the pursuers' instance in any competent court within one month from this date."

The defender was accordingly arrested and lodged in prison.

In this note of suspension and liberation he averred that the respondents were entitled to charge him for payment on a recorded extract of the lease without further proceedings. He denied that there had