is a jury question. Here the language used in the letter precisely expresses the feelings which the defender entertained at the time as to the pursuer's conduct. The defender says in his evidence—"I think from the way the pursuer has acted the sentiments are such as the letter would have warranted, but probably a little of the phraseology might have been changed. He cheated us out of the programmes and he gave us inferior paper." Again—"I wanted the bills printed by the party who were printing the programmes, because the pursuer tried to hold us up in that." In the letter we find these expressions—"We are not surprised at your low action in trying to hold us up with the programmes;" and again—"We shall sue you for defrauding us of the paper furnished for the programmes." Again (besides the Americanisms which it contains) the letter does not strike me as one which a woman like Miss Robertson would have written uninstructed, and it does seem to me just such a letter as an exasperated man would be likely to write under the irritation produced by the pursuer's conduct and the illness under which at the time the defender was suffering.

It is said that at the time he was unfit to do business. I think it is proved that he was very ill, but the doctor did not see and warn him till the next day (2nd February) after the letter was written, and I cannot believe that Miss Robertson, who lived with the defender, did not inform him of what was going on. It would take a very short time and not much exercise of mind to dictate the short though angry letter that was sent to the pursuer. Lastly, neither in the record nor in the evidence is there any trace of regret or apology on the defender's part for the insulting letter which emanated from his office.

If, then, Miss Robertson's evidence is unworthy of credit, the defender has failed to discharge the burden of proof; further, on the same assumption, even supposing that the burden were on the pursuer, there is, in my opinion, sufficient evidence to justify the Sheriff-Substitute's judgment.

I need only observe, in reference to observations which were made by some of your Lordships, that in my opinion the evidence of Miss Robertson and the defender, if disbelieved, cannot merely be struck out and ignored as if it had never been given. The credibility of these witnesses is a material, a vital question in the case, because the truth of the defence is known to them alone. If they are clearly not to be believed, it requires little additional evidence from circumstances to entitle a judge or jury to hold that the defence has failed.

The Court pronounced the following interlocutor:—

"Recal the interlocutors of the Sheriff-Substitute and the Sheriff of Lanark, dated respectively 28th April and 6th October 1898: Find that the pursuer has failed to prove that the defender defamed the character of the pursuer, to the hurt and injury of his feelings: Therefore assoilzie the defender from the conclusions of the action, and decern."

Counsel for the Pursuer—Shaw, Q.C.—Graham Stewart. Agents—Curror, Cowper, & Buchanan, W.S.

Counsel for the Defender—Salvesen—Anderson. Agent—John Veitch, Solicitor.

Friday, January 27.

SECOND DIVISION.

[Sheriff of Lothians and Peebles.

MATHIESON *v.* HAWTHORNS & COMPANY, LIMITED.

Discharge—Reparation—Master and Servant—Essential Error Induced by Defenders.

In defence to an action of damages for the death of a husband, the defenders, in whose employment the deceased had been working when he sustained the injuries which were the cause of his death, pleaded discharge of all claims, and produced a document bearing that the granter had received £25, 4s. in full satisfaction and discharge of all claims "accrued or to accrue." This document was executed notarially on behalf of the deceased while he was lying in the hospital to which he had been taken after the accident, and where he remained till his death. It had previously been signed by the pursuer. The docquet bore, and it was admitted to be the fact, that he had authorised the notary to subscribe for him, having declared that he could not write owing to sickness and bodily weakness, and that the document had previously been read over to him. With regard to this discharge the pursuer averred that a claim had been made by a law-agent on behalf of the pursuer, and that the defenders went behind the law-agent's back and got the pursuer and the deceased to sign a paper which he and she believed to be a receipt; that the discharge was executed by the deceased "under essential error induced by the defenders;" that one of the partners of the defenders' firm, acting on their behalf, had offered, on the representation that there was no claim against them, to pay £25, 4s., being seven months' wages, out of sympathy, but said that the pursuer and her husband would have to sign a receipt; that she communicated this to her husband, and that he authorised the execution of the discharge in the belief so induced that it was a simple receipt, and that when the discharge was executed he was "in a weak condition in body and mind and much depressed, and took no interest in what was being done."

Held (*diss.* Lord Young) that these averments were irrelevant to entitle the pursuer to have the discharge set aside, and that consequently the action must be dismissed.

North British Railway Co. v. *Wood*, 1891, 18 R. (H.L.) 27, *commented on.*

Writ—Subscription by Notary—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 41.

Held that where the deed to be executed and the notary's docquet are all on the same page, it is sufficient if the notary signs once at the end of the docquet, and that he does not also require to append his signature to the deed itself.

This was an action brought in the Sheriff Court at Edinburgh by Mrs Annie Morris or Mathieson, widow of the deceased William Mathieson, as an individual, and as tutor and administrator-in-law for his pupil children, against Hawthorns & Company, Limited, shipbuilders, Leith, in which the pursuer claimed damages for herself and her children, alternatively at common law and under the Employers Liability Act 1880, on account of the death of her husband.

The pursuer averred that on 13th May 1897, while working in the defenders' employment, her deceased husband was severely burned, and that on his being removed to Leith Hospital and examined, it was ascertained that the skin had been completely removed from his arms and hands, that he sustained a very severe shock to his nervous system, and suffered much from exhaustion; that he was never able to leave the hospital; and as the result of his injuries died there on 30th September 1897, and that his injuries were due to the fault of the defenders and of their foreman for whom they were responsible.

The defenders denied that the pursuer's injuries were due to their fault, or the fault of anyone for whom they were responsible, but in addition founded upon a certain document produced as a discharge of any claims which might have ever existed against them. This document was in the following terms: — "Received of Messrs Hawthorns and Company, Limited, this ninth day of July 1897, the sum of Twenty-five pounds and four shillings in full satisfaction and discharge of all claims accrued or to accrue in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the thirteenth day of May last while in the employment of the above.

"£25 : 4 : 0 ANNIE Penny Stamp. MATHIESON.

Witness—Geo. Johnston,
60 Cornhill Terrace, Leith, Bookkeeper.
Witness—John Mackie, Clerk,
8 Pitt Street, Leith.

"By authority of William Mathieson, 13 Abbey Strand, Edinburgh, who declares that he cannot write on account of sickness and bodily weakness, I, George Paterson Galloway, notary-public, Leith, subscribe these presents for him, he having authorised me for that purpose, and the same having been previously read over to him, all in presence of the witnesses after-named and designed, who subscribe this docquet in testimony of their having heard authority given to me as aforesaid, and heard those presents read over to the said William Mathieson. GEO. P. GALLOWAY,
"*Notary-Public.*

"N. Armstrong, Nurse, Leith Hospital, *witness.*

"W. Morrison Milne, Resident Surgeon, Leith Hospital, *witness.*"

This document had been adjudged duly stamped.

With regard to this discharge, the pursuer, in her condescendence as ultimately amended after the case had come to the Court of Session on appeal, averred as follows:—"(Cond. 4) . . . The pretended receipt and discharge is referred to. The pursuer and her husband never discharged the defenders of their liability. . . . Explained and averred that the defenders, on receiving a letter from a law-agent acting on pursuer's behalf, went behind his back to the pursuer, and got her and the deceased William Mathieson to sign a paper which he and she believed to be a receipt for £25, 4s. The said discharge was executed by the deceased William Mathieson under essential error induced by the defenders. At a meeting on or about 25th June 1897 between the pursuer and Mr Inglis, one of the partners of the defenders' firm, at 210 Great Junction Street, Leith, Mr Inglis, as representing the defenders, offered to pay to the pursuer on behalf of her husband £25, 4s., being seven months' wages. The said Mr Inglis represented to the pursuer that her husband had no legal claim against the defenders, but that they were willing to make her the said payment out of sympathy, and it was explained to the pursuer by Mr Inglis that she and her husband would be asked to sign a receipt for the said money. A draft receipt acknowledging payment of said sum by the defenders to the pursuer was then read over to her. This draft was different in its terms from the discharge subsequently presented to the pursuer for signature on 9th July. On the said 9th July the said discharge was not read over to the pursuer, and she signed it in the belief that it was in similar terms to the draft which had been read over to her on the 25th June. Nothing was said to the pursuer by Mr Inglis or by any other person representing the defenders with reference to a discharge of all claims competent to the said William Mathieson against the defenders either upon the said 25th June or upon any subsequent occasion. The pursuer immediately after the said meeting of 25th June explained to her husband what had passed at said meeting, and that the defenders had offered to pay him £25, 4s., seven months' wages, and that he would be asked to sign a receipt for this sum. At the time of executing said discharge on 16th July 1897 the deceased William Mathieson was in a weak condition in body and mind, being much depressed, and took no interest in what

was being done. The said discharge was executed by him in the belief and in reliance upon the representations of the said Mr Inglis made to the pursuer as above stated, and by her communicated to the deceased, that it was a simple receipt for the sum therein stated. The deceased's attention was not directed to the fact that he was authorising the execution of a discharge of all claims competent to him against the defenders in respect of said accident. The pursuer is an illiterate person and wanting in intelligence."

It was admitted at the bar on behalf of the pursuer that the statements made in the notary's docquet were true in fact, but it was explained that the discharge was signed by the pursuer on 9th July, and that the notarial execution on behalf of the husband did not take place till 16th July.

The notary was instructed by the defenders, but he was not their law-agent.

The pursuer pleaded—"(3) The pursuer and her husband having been induced to sign the pretended receipt and discharge by the misrepresentations of the defenders behind her agent's back, in the circumstances condescended on, the pursuer is entitled to have the same set aside by way of exception."

The defenders pleaded—"(1) No title to sue. (3) In respect of the receipt and discharge founded on, the pursuer is barred from suing the present action. (4) The pursuer's statements as to the receipt and discharge founded on are irrelevant."

On 28th February 1898 the Sheriff-Substitute (HAMILTON) issued the following interlocutor:—"The Sheriff-Substitute having heard parties' procurators, and having considered the record and productions, repels the fourth plea-in-law for the defenders, and before further answer allows the pursuer a proof of her averments (Cond. 4) with reference to the signing of the document No. 12 of process, and to the defenders a conjunct probation to proceed at a diet to be afterwards fixed."

The defenders appealed to the Sheriff (RUTHERFURD) who on 29th March 1898 issued the following interlocutor:—"Recals the Sheriff-Substitute's interlocutor of 28th February last: Finds that the pursuer's averments with reference to the discharge (No. 12 of process) granted by her husband, the deceased William Mathieson, in favour of the defenders, are not relevant or sufficient to infer probation; and that the pursuer is barred by the said discharge from insisting in the present action: Therefore sustains the defender's third and fourth pleas-in-law; dismisses the action, and decerns: Finds no expenses due to or by either party."

[The Sheriff's note is omitted in this report as it proceeded upon the original record as it stood before it was amended.]

The pursuer appealed, and argued—(1) The discharge was not validly executed. The stamp had not been cancelled by the notary as it ought to have been. Apart from this objection the notary should have signed twice, viz.—(1) at the end of the receipt itself as signing the receipt in place of the granter, and (2) at the end of the docquet, to certify the cause of his name appearing at the end of the receipt instead of the granter's. This was in accordance with practice. The terms of the Conveyancing (Scotland) Act 1874, section 41, and of the relative Schedule 1, showed that two signatures were necessary. It was enacted that the notary should subscribe "the same," that is, the deed itself, and not "the docquet thereto. It was no doubt true that in *Henry* v. *Reid*, February 10 1871, 9 Macph. 503, and in *Atchison's Trustees* v. *Atchison*, January 21, 1876, 3 R. 388, the notary only signed once, viz.—at the end of the docquet, but it was to be observed that in neither of these cases was this objection stated, and moreover in *Henry* v. *Reid* it was not necessary that it should be, as the notarial execution of the deed was successfully challenged upon another ground. See also Menzies' Lectures 110, and Bell on Testing of Deeds, 169, 171. (2) There were here relevant averments (*a*) of essential error, (*b*) of essential error induced by the defenders, and (*c*) of essential error induced by the defender's misrepresentations. All the negotiations which led up to the granting of the discharge took place between the defenders and the pursuer. They had no communication with the pursuer's husband. It was averred that the defenders misled the pursuer, and that she in turn misled her husband as to the nature of the deed to be executed by him, and that he consequently executed the discharge in the belief that it was a receipt, and not a discharge of all claims. These averments were sufficient—*Stewart* v. *Kennedy*, March 10, 1890, 17 R. 25, which was not as strong a case as the present, in respect that here misrepresentation was averred; *Ritchie* v. *Ritchie's Trustees*, January 13, 1866, 4 Macph. 292; *M'Laurin* v. *Stafford*, December 17, 1875, 3 R. 265, where essential error as to the nature of the deed granted was held sufficient, whether induced by the defender or not. It might be that averments as to weakness of body and mind were by themselves irrelevant in a case of this kind, but here the man's condition was relevant as showing how notwithstanding that the discharge had been read over to him he remained in essential error as to its nature in consequence of his inability to pay attention to its terms, and of his reliance upon what his wife had told him with regard to it. Neither *North British Railway Company* v. *Wood*, July 2, 1891, 18 R. (H.L.) 27, nor *Mackie* v. *Strachan, Kinmond, & Company*, July 15 1895, 23 R. 1030, were decisions upon the relevancy of such averments of essential error as were made by the pursuer here. (3) If as alleged by the pursuer, the sum paid by the defenders was merely a payment made in sympathy and not in discharge of legal claims, then the repayment of that sum was not necessary.

Argued for the defenders—(1) The notarial execution of the discharge was valid. Only one signature was necessary, viz., that appended to the docquet—*Henry* v. *Reid*, *cit.*, and *Atchison's Trustees* v. *Atchison*,

cit., in which latter case see *per* Lord Ardmillan at page 394 as to *Henry* v. *Reid*. In these cases there was only one signature. (2) The pursuer's averments as to the granting of the discharge were irrelevant. This was a transaction as to a doubtful claim, and ought not therefore to be set aside except upon the strongest grounds—*Stewart* v. *Stewart*, November 22, 1836, 15 S. 112. It was now conceded that the discharge was read over to the husband, and that he authorised it to be subscribed on his behalf. There was no relevant averment of essential error in the mind of the husband, and no averment whatever of any influence exercised upon him by the defenders. The averments as to essential error in the mind of the pursuer were irrelevant. Putting these aside, all that was said with regard to the husband was that he was in a weak condition of body and mind and had no independent advice. This was not enough —*North British Railway Company* v. *Wood*, *cit.*, and *Mackie* v. *Strachan, Kinmond, & Company*, *cit.* These cases ruled the present. (3) Here a claim was made by the husband, and a sum paid in respect of it. In these circumstances the wife was not entitled to sue the defenders as in her own right but only as executrix of her husband—*Darling* v. *Gray & Sons*, May 31, 1892, 19 R. (H.L.) 31. (4) In any view, the sum paid to the deceased by the defenders must be repaid as a condition of the present action being allowed to proceed—*M'Donagh* v. *P. & W. MacLellan*, June 18, 1886, 13 R. 1000. (5) It was not a relevant ground for setting aside the discharge that the defenders had gone behind the back of the deceased's law-agent. The pursuer had plenty of time to inform her husband's law-agent and to secure his attendance when the discharge was executed if she had considered that necessary or desirable. The parties were at arm's length. There was no relation of influence or confidence between them.

At advising—

Lord Justice-Clerk—The question to be decided is whether the pursuer, who is the widow of a workman of the defenders, who died in consequence of an accident, is entitled to proceed with an action for damages against the defenders in consequence of the loss of her husband following on the accident. The defenders maintain that she cannot do so, she and her husband having agreed with the defenders to accept a sum of money in full of all claims, and given a discharge of any claims that they might have. She of course had no claim, but she was made a party to the discharge. That settlement was made in a formal manner. A receipt and discharge was made out. It was signed by pursuer in the presence of witnesses, and it was signed by a notary for the deceased, he being unable to sign for himself and authorising the notary to sign for him. I do not see what exception can be taken to the document as having been signed by the deceased from anything that appears upon the face of it, and it is not alleged that the procedure at the signing was not the usual and proper procedure. The question is, whether the pursuer has set forth any relevant averment which if proved would entitle her to have this formal discharge set aside. It is not disputed that if it is an effective discharge in itself it bars her claim for further damages. Giving the matter the best consideration I can, and with every desire to find grounds for allowing this question of compensation to be reopened, I am unable to hold that the pursuer has stated a relevant case for setting aside the written agreement. What the pursuer avers as regards the deceased is, that he was in a weak state of body and mind and took no interest in what was being done. It is not averred that he did not hear the terms of the receipt and discharge, or that he did not understand them. That question was expressly put to Mr Sandeman, and he declined to make that statement or to undertake to prove it. It is said that before the meeting at which the document was signed Mr Inglis made certain statements to him, but it is not said that these statements, if made, were made at the request of the defenders, and if made they were quite inconsistent with the terms of the document which was read over to him, and which he signed legally by directing the notary to sign for him. The notary signed in the usual way with an explanatory docquet above his signature, that document being a formal discharge of any claims resulting from his accident. I am of opinion that it cannnot be set aside unless upon allegations very different from those in this case, as, for example, that it was obtained by fraud and circumvention, or fraudulent concealment. And averments to support such a plea must be distinct and clear.

I hold that this case, which is one of discharge by an injured party for a sum instantly paid, is ruled by the case of *Wood* v. *The North British Railway Company*, and that the pursuers have failed to state a relevant case for setting the discharge granted by the deceased aside. And I am confirmed in this by a consideration of the case of *Mackie*.

I would move your Lordships therefore to affirm the judgment of the Sheriff.

Lord Young—I cannot concur in that view of the case, and I cannot think that the case of *Wood*, which your Lordship has referred to, decides that this case, or any case like this, is incompetent. I mean that any averments by a pursuer of an action against the validity of a discharge which is advanced are not to be admitted to proof. On the contrary, in that case of *Wood* a proof was allowed by this Court. No doubt it was of consent of parties, but it was allowed, and the judgment of the House of Lords proceeded upon that proof, as not establishing any case in point of fact sufficient to entitle the Court to disregard the discharge. The case here is in my opinion a very strong case. This unfortunate man, who is now dead, met with this accident upon the 13th of May.

It was very severe—the skin of his arms and hands almost entirely taken off. He lay in hospital, to which he was taken immediately, and apparently, according to the averments — for we have nothing else — in great agony and quite unable to attend to business from the 13th of May till the 30th of September, when he died of those injuries which had deprived him of his skin, and kept him in bed so long. He died of these injuries without ever recovering. The case of *Wood* to which your Lordship has referred, was of a different character altogether. On the 9th July a partner of the defenders' company, after a previous interview with the wife, went to the hospital where the poor man was lying in great agony and suffering and quite unable to attend to business, to make a settlement with him. No care was taken to provide him with a man of business, or to see his man of business, who had written stating his claim to the defenders. He was lying in this state of agony alone upon the 9th of July, when one of the partners of the defenders' firm went to him and took a notary instructed by the defenders—that is to say, there was no notary employed by the dying man, or having any charge of his interests—to sign a paper which, from the state he was in, he was unable to do himself; and the document taken under these circumstances is such as, in answer to a question which I put, had never been seen before, taken for such a purpose. It is a receipt upon a penny stamp, signed by, I suppose, the man's starving wife, for he had been unfit for work from the 13th of May and this was the 9th of July. There was nobody there to attend to him except his wife, and the receipt is signed by her, who had nothing to do with it, and the notary-public appends a postscript—the common postscript very frequently appended to deeds which are executed by a party who cannot write—but such a thing appended to a receipt such as this was never heard of before so far as I am aware, and, as I repeat, I put the question and was told that no instance of it had been seen. Well, this was done under very peculiar circumstances—under circumstances which excite one's compassion naturally, not as matter of law, but as matter of human understanding and feeling, in favour of the man who was lying upon his death-bed and in great suffering. Now, what are the averments? I think the averments are very strong to the effect that he was not in a position, or in a condition, to transact business—not in a condition in which any intelligent honest man would have attempted to make a bargain with him. The averment is that this Mr Inglis had first gone to his wife. I am reading from the amended record. I should myself have been of opinion that upon the record as it stood, and upon the authority of the case of *Wood*, not as proceeding against it, but upon the authority of that case, I should have allowed a proof, but the amendment explains and avers "That said discharge was executed by deceased William Mathieson under essential error induced by the defenders at a meeting on or about 25th June 1897 between the pursuer and Mr Inglis"—that is, between the wife, who was not in hospital, but to whom Mr Inglis, one of the partners of the defenders' firm, had gone. "Mr Inglis, as representing the defenders, offered to pay to the pursuer on behalf of her husband £25, being seven months' wages. The said Mr Inglis represented to the pursuer that her husband had no legal claim against the defenders, but that they were willing to make the said payment out of sympathy"—that is, to her as a wife who was deprived of the services of her husband and of his wages, while he was lying in hospital—"and it was explained to the pursuer by Mr Inglis that she and her husband would be asked to sign a receipt for said money." Now, I assume that this can be proved. "A draft receipt merely acknowledging the payment of said sum by the defenders to the pursuer was then read over to her. This draft was different in its terms from the discharge subsequently presented to the pursuer for signature on 9th July"—that is, the one that is founded upon as a discharge. "On the said 9th of July the said discharge was not read over to the pursuer"—I assume that that can be proved—"and she signed it," if she did sign the receipt, "in the belief that it was in similar terms to the draft which had been read over to her on the 25th of June. Nothing was said to the pursuer by Mr Inglis or by any other person representing the defenders with reference to a discharge of all claims competent to the said William Mathieson against the defenders, either upon the said 25th June or upon any subsequent occasion." Nothing was said. It was not read over, and nothing was said upon the subject of a discharge of any claim for which alone it is produced now as conclusive evidence. "The pursuer immediately after the said meeting of 26th June explained to her husband what had passed at said meeting, and that the defenders had offered to pay him £25, and that he would be asked to sign a receipt for this sum. At the time of executing the said discharge on 16th July the deceased William Mathieson was in a weak condition of body and mind, being much depressed, and took no interest in what was being done. The said discharge was executed by him in the belief, and in reliance upon the representations of the said Mr Inglis made to the pursuer as above stated, and by her communicated to the deceased, that it was a simple receipt for the sum therein stated. The deceased's attention was not directed to the fact that he was authorising the execution of a discharge of all claims competent to him." It is therefore not accurate to say that the averment does not allege that he did not understand what he was signing. It is most distinctly and emphatically alleged that he did not understand it, that he understood that it was something quite different, and that the word discharge, or anything importing that a discharge was desired, was never mentioned. Now, I cannot hold that if these facts are proved

this so-called discharge ought to be sustained, and with reference to the case of *Wood*, to which your Lordship has referred as conclusive in this case, I repeat again that in that case the Court, with the approval of both parties, allowed a proof. When the case was before this Court—I think that was mentioned in the course of the argument here—the junior counsel for the Railway Company there declined to maintain the discharge and argued the reclaiming-note against the Lord Ordinary's interlocutor on a different ground. The Lord Ordinary was of opinion that the discharge ought not to be sustained, and that £500 of damages should be given instead of the sum which the Railway Company had paid extra-judicially. It was explained, I say, in the course of the argument in that case, that the junior counsel for the Railway Company declined to maintain the discharge under these circumstances, and he argued the reclaiming-note upon the footing that the £500 was excessive damages, and that on the evidence there was really no shock to the pursuer's system caused by the accident, and that the sum given by the Railway Company was a fair sum, and that the Lord Ordinary had misapprehended the nature of the injuries. The Solicitor-General appeared as senior counsel for the Railway Company and he argued the same point that the junior had, but at the end of his speech he said he did not abandon the discharge. The case went to the House of Lords, and Lord Selborne's judgment proceeds entirely upon the evidence, and there is not a word in it from beginning to end to the effect that the evidence ought not to have been taken, and that proof ought not to have been allowed. I read his opinion pretty carefully through some days ago, and I only refer here to one or two passages. He begins by saying—"We must look at the circumstances as they stood." He repudiates the view which his Lordship seemed to think I entertained, that the fact of £500 having been given as the true amount of damages which should have been given, was in point if the man was in a condition to understand what he was doing when he granted the discharge, and he says that the opinion of the parties when he granted the discharge, the opinion of himself and others, was alone important, and that his coming subsequently to think that the damages were really much greater than he thought at that time, would not be a material circumstance at all. I am entirely of that opinion, but I nevertheless thought that if the true damage was £500, as the Lord Ordinary and the Court thought, that had a material bearing upon his condition at the time he granted the discharge. However, Lord Selborne says, "We must look at the circumstances as they stood," and then he gives the circumstances as they appeared in the evidence. Dr Watson's evidence is referred to, and it shows that he more than once visited the patient and had discovered no visible injury. "If he," that is, the Doctor, "had told the company this was a case of a certain kind involving permanent disability, it may be that the company, having received that information, would have been acting in a manner not becoming them in keeping it back, and taking advantage of that knowledge to obtain a settlement which under those circumstances might reasonably be said to be too favourable to themselves. But there was nothing of that kind. It was a case as to which it was doubtful whether there was anything more than a temporary shock which would pass away—there was no external injury. As far as I can see, there was no improper suppression of anything which Dr Watson had said. He had said that he had been unable to discover any external injury, although I do not think that that appears in the written report. That was told, and as far as I can see was quite truly told, to the sufferer. The sufferer was a man of business, for I must consider that a commercial traveller may be so described, and there is no suggestion that he was not a man of intelligence. He was living with his sister and her husband, the husband himself being in the employment of the Railway Company, and no motive is even suggested for his not giving such fair assistance as he could to his brother-in-law in the circumstances as they stood. He was informed by the Railway Company beforehand, in order that he might inform his brother-in-law (the sufferer) beforehand, of what it was that they proposed to offer. And more than that, at the very outset the Railway Company had invited from the pursuer any demand which he might think fit to make, and he had preferred apparently to wait for what they might be pleased to offer. Well, the parties met, and with that previous notice, and when he was in a state of mind which, according to his brother-in-law's evidence, appears to me totally to exclude the notion of inability to understand what he was about — the pursuer deliberately took this money which was offered, £27, and signed the document which your Lordships have seen, which is short and partly printed, leaving the necessary particulars to be filled up, which he did himself in, as appears to me, a very good handwriting, not at all indicative of any species of bodily disability at the time. For my part, I should say that whether he did or did not carefully read the document, it was impossible for him to have filled it up and signed it as he did without seeing enough of it to understand it, and if he is to be trusted when he says that he did not read it, I can only say that I should conclude from that that he did not read it because he knew perfectly well what was in it without reading it." There is a good deal more, all proceeding upon the evidence. Now, how different the evidence would be if the pursuer proved her case according to the averments which I have read here; and yet that case is referred to as conclusive that there should be no evidence taken at all, because such averments as are made here, and which were not made in the case of *Wood*, should not be admitted to probation at all. I

cannot concur in that. I am of opinion that this is a clear, I should say a very strong, case for making inquiry into the whole circumstances, and into the truth of the averments which are made by the pursuer in regard to those circumstances in which a transaction is said to have been effected by a man lying on his deathbed in the hospital.

LORD TRAYNER—I agree with the Sheriff and think that this appeal should be dismissed.

On 13th May 1897 the late James Mathieson (the husband and father of the pursuers) received, while in the employment of the defenders, certain injuries which are said to have resulted in his death on 30th September following. I assume that this is so, and in the present stage of the case also assume that the defenders were liable in damages to Mathieson on account of the injuries he sustained. But the defender's case is that they settled Mathieson's claim and were discharged by him of all liability in connection therewith; and in proof of this they produce Mathieson's discharge. Standing that discharge the present action is excluded. At the time when the discharge was granted none of the pursuers had any claim or ground of action against the defenders. Such a claim was vested in Mathieson himself, and in him alone, and by him it was discharged.

The pursuers, however, maintain that the discharge founded on by the defenders is (1) ineffective in respect it was not duly executed, and (2) *separatim* that it is liable to reduction.

1. When the discharge was granted Mathieson was in the hospital and unable to write. In these circumstances it was subscribed for him by a notary-public, who in the usual docquet according to statutory form sets forth that Mathieson authorised him to subscribe the receipt in respect of his (Mathieson's) inability to write himself "on account of sickness and bodily weakness," and that the discharge had been previously read over to him in presence of the witnesses named and subscribing. None of the statements in that docquet are questioned; they are admitted to be true. But the objection to the execution is that the notary subscribing the docquet did not also subscribe the receipt, which is written on the same page and immediately above it. I think this objection quite untenable. The discharge was executed by the notary according to the law and practice of Scotland, and is duly executed as if Mathieson had himself subscribed it. It is said that this is an exceptional case because it is the execution of a receipt by a notary. But that the document is a receipt makes no difference. Any document executed by a notary for a person who cannot execute the writ himself must be executed in the mode here adopted.

2. The only ground of reduction alleged is that at the time of executing the discharge Mathieson "was in a weak condition in body and mind, being much depressed, and took no interest in what was being done." I think that is not a relevant ground for setting the discharge aside: and it was so decided in the case of *Mackie* (23 R. 1030). It is not averred that Mathieson was not in a condition to understand the discharge that was read over to him—or that he did not understand it—or that he was induced to grant it by any misrepresentation made to him by the defenders. In short, there is no relevant ground for reduction averred. I disregard as irrelevant in a question as to the reduction of Mathieson's own discharge any averment of essential error on the part of pursuer, who had discharged no claim and had no claim to discharge.

It was made a point against the defenders that they went direct to Mathieson and settled with him outwith the knowledge of the law-agent that Mathieson had employed (as the defenders knew) to enforce his claim. Now, I could understand a complaint to the effect that one law-agent had gone to another agent's client to settle a claim behind the back of the client's adviser. That would be a breach of professional etiquette that I would disapprove of and discourage. But if a person upon whom a claim is made prefers to settle directly with the claimant, instead of going to the claimant's lawyer, I am not prepared to blame him. There may be circumstances which make such a course quite proper. But in any view, such a proceeding forms no ground for the reduction of the setttlement so obtained.

LORD MONCREIFF—I agree with the Sheriff and the majority of your Lordships that this action is barred by the discharge No. 14 of process. Certain dates require to be noted. They are as follows—The accident occurred on 13th May 1897. Notice of claim was given through an agent acting for the pursuer's husband to the defenders on 6th June. The defender Mr Inglis met the pursuer on 25th June and offered to pay her on behalf of her husband, £25, 4s. On 9th July, being a fortnight later, the receipt or discharge No. 13 of process was read over to the deceased by a notary-public and subscribed by the latter on his behalf. Lastly, the pursuer's husband died of his injuries on 30th September 1897, having lived nearly three months after the execution of the discharge.

Having regard to the principles on which the case of *North British Railway Company* v. *Wood*, 18 R. (H. of L.) p. 27, was decided by the House of Lords, and our own recent decision in *Mackie* v. *Strachan, Kinmont & Company*, 23 R. 1031, I do not think that the pursuer has stated any ground relevant to infer reduction of the discharge.

It is stated in the amendment that at the meeting between the defender Inglis and the pursuer, Inglis represented to her that her husband had no legal claim against the defenders, but that the defenders were willing to make her a payment out of sympathy, and that the pursuer and her husband would be required to sign a

receipt for the money. There is no more in this than is stated in every case where a tender is made while liability is denied. It is to be observed that the pursuer does not say that Mr Inglis represented that any further payment would be made; the £25, 4s. (not merely money to go on with, but seven months' wages) was all that the defenders offered to pay.

Next, it is to be observed that the pursuer and her husband were not hurried or taken by surprise; they were not asked to sign a receipt for a fortnight after the interview at which the offer was made, during which time they had ample opportunity to consult their agent.

Again, it is not said that the pursuer's husband did not hear or was incapable of understanding the receipt which was read over to him; he is said to have been listless and in a weak condition of body and mind; but such averments were disregarded in the case of *Mackie* which I have cited. Lastly, it is said that the defenders made this settlement with the deceased behind the back of his agent. Of itself this is not a sufficient ground of reduction; and besides, as I have explained, if the pursuer and her husband had had the slightest wish to consult their agent they had ample time in which to do it. They no doubt had their reasons for not communicating with him.

This is a hard case, but I think we must sustain the discharge.

The Court pronounced this interlocutor:—

"Dismiss the appeal and affirm the interlocutor appealed against: Of new sustain the third and fourth pleas-in-law for the defender: Dismiss the action and decern.

Counsel for the Pursuer—Sandeman. Agent—William Cowan, W.S.

Counsel for the Defender—Vary Campbell—A. Moncreiff. Agents—Drummond & Reid, S.S.C.

Friday, January 20.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

COUNTESS-DOWAGER OF SEAFIELD AND OTHERS *v.* KEMP.

Superior and Vassal—Feu of Distillery—Pollution of River.

S, by feu-contract, conveyed to the predecessor of K "the distillery of M, with the right to take water for the use thereof from the burn of R," declaring that "it shall not be lawful to nor in the power of" the vassal "to erect or carry on upon the piece of ground hereby disponed any manufactures or operations which may be legally deemed a nuisance or be dangerous or injurious to the amenity of the neighbourhood, but which declaration shall not apply to the carrying on of the said distillery." *Held* that, as it was not proved that the working of the distillery necessarily caused pollution of the burn, these clauses could not be construed to confer on the vassal any larger right than was possessed by the superior, and that consequently the vassal had no licence, as against the superior, to discharge into the burn such impurities as to create a nuisance.

River—Pollution—Salmon-Fishings—Injury to Spawning Beds—Lower Riparian Proprietors.

A riparian proprietor on a river at a distance above whose lands pollution was proved, who led no evidence as to the quality of the water *ex adverso* of her lands, but who complained of the pollution as injurious to spawning beds higher up the river, and consequently injurious to her salmon-fishings, *held* entitled to decree as a pursuer in an action of declarator and interdict against the author of the pollution.

Interdict—Nuisance—Pollution of River—Remedial Measures.

Where, in an action for interdict against the pollution of a river, pollution is proved within a recent period, the execution of remedial measures by the defender will not deprive the pursuer of the right to the security of interdict, unless the defender consents to his remedial measures being tested by inspection and analysis over a lengthened period, and not made *ex parte* but by neutral authority.

This was an action raised against Roderick Kemp, proprietor of the Macallan Distillery on the Ringorm Burn, a tributary of the river Spey, by the Countess-Dowager of Seafield, proprietrix of the estate of Easter Elchies, and Mrs Kinloch Grant, proprietrix of the estate of Arndilly, and the proprietors of the estates of Wester Elchies and Aberlour. The estates of Easter Elchies and Wester Elchies are situated on the Ringorm Burn and the river Spey, and the estates of Aberlour and Arndilly are on the Spey. The conclusions of the action were for declarator that the pursuers Lady Seafield and Mr Grant of Wester Elchies had a right to have the water of the Ringorm Burn, and that the whole of the pursuers had a right to have the water of the Spey, transmitted in a state fit for the use of man and beast, and for all primary purposes, and that the defender was not entitled to pollute the water of the Ringorm Burn or the Spey by putting into the burn discharges from his distillery, so as to make it unfit for primary purposes, and to the prejudice of the pursuers' salmon-fishings, and for interdict against his doing so.

The estate of Arndilly, which was situated on the Spey at some distance below the Ringorm Burn, was that which was farthest removed from the seat of the alleged pollution.

The pursuers averred that in the process