LORD MORRIS concurred.

Their Lordships affirmed the judgment appealed from and dismissed the appeal.

Counsel for the Appellant—Rigby, Q.C.—J. Guthrie Smith—Haldane, Q.C.—Birrell. Agents—Keeping & Gloag, for Mitchell & Baxter, W.S.

Counsel for the Respondent—Sir Horace Davey, Q.C.—Graham Murray. Agents—Grahames, Currey, & Spens, for Tods, Murray, & Jamieson, W.S.

Thursday, July 2.

(Before the Earl of Selborne and Lords Watson, Bramwell, Macnaghten, and Morris.)

NORTH BRITISH RAILWAY COMPANY *v.* WOOD.

(*Ante*, vol. xxviii. p. 130.)

Reparation—Railway Accident—Nervous Shock — Document Discharging All Claims—Consideration Inadequate.

A person was injured in a railway accident. Nine days after he accepted £27 from the railway company, and granted 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 damages against the railway company, who pleaded that the action was barred by the discharge. After a proof, the Lord Ordinary awarded the pursuer £500 as damages. This award was affirmed by the Second Division, on the ground that it was a reasonable sum.

Held that the document was in terms a final discharge, and that there was no evidence to support the contention of the pursuer that he did not understand the document as a final discharge, or that he had told the representative of the railway company that if he did not recover he would still hold them liable.

This case is reported *ante*, vol. xxviii. p. 130.

The North British Railway Company appealed.

At delivering judgment—

EARL OF SELBORNE—I think all your Lordships are likely in this case to agree that the judgment appealed from cannot be maintained. One always feels a certain degree of compassion for persons who have suffered injuries of this description if it turns out that the compensation which they have been content to receive is apparently inadequate to the amount of the injury, but I cannot think, my Lords, that this is a proper ground on which to proceed if the parties have really and *bona fide* come to an accord and satisfaction with each other. I cannot help thinking that the consideration of the apparent inadequacy subsequently ascertained of the remuneration had very considerable weight with the Court of Session. In one of the judgments (Lord Young's I think) it is very prominently put forward, but with the greatest respect to that learned judge and to the others who may have concurred in that view, I cannot bring myself to adopt it. I think we must look at the circumstances as they stood at the time.

Now, the first question is a question of principle. Was there anything in the relation of these parties and in the nature of the question which they had to settle which precluded them or precluded the company from making a settlement at the time when it was done without assuring themselves that the pursuer had advice and assistance of a character which is not shown to have been had by him? There was no relation of influence or of confidence between the parties; they were certainly at arm's length. It was simply the case of a man having a cause of action for damages in respect of personal injury against those with whom he had entered into the contract which always subsists between persons travelling by railway and the railway company as carriers, and so long as there was nothing in the circumstances known to the company or in their conduct to give them an undue advantage of which they improperly availed themselves, I cannot think that parties so at arm's length are disabled by law from settling without litigation, and without going through any preliminaries for the purpose of ascertaining that each party is sufficiently informed as to the injuries. I cannot think that there is anything in the law to prevent them from making such a settlement; and it is fair to remember that while on the one hand the railway company offers compensation, and may offer what may turn out to be too little, on the other hand the party injured not infrequently over-estimates his injury, and asks a great deal more than he is fairly entitled to.

Well, then, we must look at the circumstances as they stood. There had been an accident of a peculiar kind, which in point of fact had inflicted no external injury. Whatever injury there might be latent in the case was either upon the nerves arising from the shock of the accident, or consisted in some internal effect upon the bodily system not at the time known to or discoverable by either party. In that respect it seems to me that the reports of Dr Watson are of importance. They show that he had more than once visited the patient and had discovered nothing more than that.

If he had told the company this was a case of a certain kind involving a 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 have been 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 supression 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.

Well, what is the document? It is a full discharge of all claims of this sort, and it is obvious that it is the object of such a payment, offered in such a manner, to get rid of the uncertainty and the expense and the risks of litigation on the one side and on the other. The pursuer signs this document, and then brings this action a year or more than a year afterwards.

Now, of the points which have been insisted upon, the most important, as it seems to me, is the suggestion that the acceptance of the payment and the signature of the document were at the time qualified by an express reservation, which either ought to be taken as accepted by the company's agent, or, at all events, as showing that the pursuer's mind did not go with the words of the document which he was signing. That being the most important matter now insisted upon, it seems to me, in the first place, to be very remarkable that there is no reference to this in the judgments of the Court below, and in the absence of that reference I hardly think that your Lordships ought to assume that the mind of the Court below did turn upon that point. Well, if not, what is there to maintain this judgment? But even taking that point without any prejudice from the absence of reference to it in the Court below, still it seems to me to be a point which, taken as it is, and having regard to such evidence as has been given upon it, makes it extremely important to see what the case was which was put upon the record, and of which case the parties were allowed to proceed to proof, because when the case came by the earlier interlocutor before the Inner House, their Lordships remitted that part of the case "of consent" to the Lord Ordinary, "with instructions to allow parties a proof of their averments made on record."

Now, what are these averments? The first was that the receipt did "not discharge, and was not understood by the pursuer to discharge, his right to make any further claim against the defenders." Now, if there had been a reservation expressly and unequivocally made, so that it must have been understood on the other side, and one which was intended to make out that which seemed to be an absolute discharge in fact a qualified one, as if for payment on certain contingencies or merely on account, if it had taken place with that indication, it must have been from first to last so understood by the pursuer, and it is to me perfectly inconceivable that if it had been so he could have pleaded his defence in the way he does, because no man in such a pleading, with his mind addressed to the point, is in the habit of stating his case greatly below that which he means to rely upon. But as the pursuer states it, it seems to turn on only two propositions—one that the effect of the instrument upon the face of it is not a discharge (as to which I need say nothing, because it is clearly an untenable point), and secondly, that the pursuer did not understand that it was a discharge. But if it was the pursuer only who did not understand that, and if nothing took place to make the document otherwise than that which it was upon its face towards the party paying the money, the point comes to nothing, and so the Lord Ordinary expressly held when he dealt with the issues which were in the first instance proposed.

What were the issues which the pursuer proposed? The first of them was "whether he was injured or not." I put that aside, as there is no question about it. Secondly, "whether when the pursuer signed the receipt he understood that he thereby discharged his claims against the defenders in full." But the Lord Ordinary said that that would not do, that it would be no defence, and if

nothing more had been pleaded but that, the defence would have failed in point of relevancy. It is after the pursuer knows that this defence which he has pleaded is good for nothing that these statements are made in the evidence. Well, since three witnesses speak of having heard something to the effect that in a possible case the pursuer would come back upon the railway company, I should be very sorry to suppose that nothing of the kind was said; but the question is, whether it was so said, either in point of intention on the part of the pursuer or in point of the meaning which is conveyed to the mind of the other party that it amounted to a reservation qualifying the written document. I cannot think that it was. I cannot think that he ever supposed that it was, because otherwise he would have pleaded in a different way from what he did, and that leads me to attribute a much greater weight upon that point to the statement made by Mr William Wood, who both in his statement and his examination-in-chief, and still more emphatically in his cross-examination, says very positively that that did not happen in the sense now relied upon, because though I agree with those who observe that three witnesses who remember a matter are generally more to be trusted than another who does not remember it, yet if it had taken place in the way necessary for the pursuer's argument, so as to convey unequivocally to Mr William Wood the idea that the written document did not express the true sense of the parties, then I think he would have been likely to remember it, and perhaps, as he himself thinks it very probable, he would not have paid the money. The conclusion which I draw from the evidence as a whole upon that point is that whatever was said it was not so said as to be on both sides intended and understood to be a qualification of the *res gestæ* of the written and signed document. That it was not so understood by Mr William Wood I am bound to believe from what he has himself said. That it was not so understood on the other side I cannot but conclude from the manner in which the pleadings stand upon the point.

Then upon the other points which are pleaded, the next two pleas are doubtless those alone which caused the Court to send the case to proof at all. 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." Well, with reference to that there is nothing upon the evidence whatever. The words in a part of the evidence which were referred to by the learned counsel for the respondent were only these—he asked whether he had ever had a slight nervous shock before. That is not telling him that he was suffering only from a slight nervous shock, and still less that "he would be all right in a week or two." If that had been said, it would no doubt have been very material indeed, because Dr Watson's opinion, such as it was, was known to the railway company, but there has been no attempt to prove it. Asking a man whether he has ever had a slight nervous shock is as remote from telling him that in point of fact he is suffering from a slight nervous shock and nothing more as anything can be in the sense of a representation tending to influence action.

Then the third statement in the pleadings is, "that shortly after the accident, and in consequence of it, the pursuer's mind became seriously affected." When we get that upon the evidence it appears thus, that he was in a state of excitement and alarm on the day of the accident when Dr Watson first saw him, and that that alarm was greatly mitigated on the next day; and so far from the state of his mind at the time when the receipt was signed and the money was paid appearing to have been such as to affect his competency to enter into the transaction, his own brother-in-law distinctly proves the reverse. For my part I can see nothing in the evidence of the sister or any other part of the evidence to suggest to me the least doubt that he did really understand what he was doing. If, therefore, we are to look to the averments on the record, it appears to me impossible to hold that any of them which are material have been proved; and what the evidence adds to the averments I think, looked at in the light of those averments, does not amount to that kind of qualification of an act done which ought to be regarded as defining it of the character which it would otherwise have had.

Therefore I humbly move your Lordships to reverse these interlocutors, and to assoilzie the defenders from the conclusions of the action.

LORD WATSON—I am of the same opinion, and I have only to say that I concur in everything which has been said by the noble and learned Earl.

LORD BRAMWELL—I am entirely of the same opinion, and I doubt very much whether I ought to say anything more, when my noble and learned friend, who is better acquainted with this procedure than I can possibly pretend to be, has not said anything more, but as we are differing from the learned Judges of the Court of Session, I should just like to say why I have come to the conclusion which I have. It is very true—I believe it is what plaintiffs trust to when they bring actions of this description—that people are sorry that they should have suffered and not been adequately compensated. That, of course, as the noble and learned Earl has said, is no reason why, if they have entered into a bargain which deprives them of the right to further compensation, they should not be held to that bargain, and I feel disposed to hold them to it strictly, because if on the one hand one is sorry for them, on the other hand it is to my mind a most objectionable thing that they should be encouraged to wriggle (to quote an expression of an Irish Lord Justice) out of an agreement which they have entered into, and to

be tempted to make untrue statements, or if not absolutely untrue, at all events exaggerated and coloured statements, as I have not the slightest doubt has been done here.

Now, I should just like to say one or two words upon the reasons for which I have come to this conclusion. In the first place, as to the facts, I really do think that if ever there was an unreasonable complaint of the conduct of railway people it is in this case. Instead of going to this man privily, as it were, due notice is given to him by his own brother-in-law that a person will come with a named sum of money on the next day. He has time to consider, therefore, whether he will take it or not. When on the next day that person comes the money is given to him in the presence of his sister and of his brother-in-law, and he signs his receipt. Well, now, can anyone pretend for a moment that this man (I forget what his age is, but he is not very young, he is a middle-aged man, I think, and a business man, a commercial traveller) did not perfectly know what it was that he was signing, and the effect of it? If he did not read it he ought to take the consequences, but I think the answer has already been given. If he did not read it, it was because he did not want to read it, for he knew what was in it. Under these circumstances, to charge the railway company with anything like unfairness seems to be really preposterous.

I made a remark in the course of the argument which I should like to repeat. Three people say that something was said about the pursuer's possibly coming upon the railway company again. A witness on the other side, young Mr Wood, says that he does not believe that was said. I think there is some hesitation or ambiguity in his evidence about it. I believe that at one time he says he does not recollect, and at another time he says it was not said. But he gives a very good reason for not believing that it was said, and that is that he would not have paid the money unless it had been conveyed to his mind that it was taken in full satisfaction.

I am reluctant to think that the three people who say that something of that sort was said are telling a wilful untruth about the matter, and I think it is likely, as has been suggested by the noble and learned Earl, that something to this effect might have been said—"Well, I shall make another application to you if I turn out to be very bad." I think it is perfectly possible that that was said, but so said as not to convey to the mind of the man who was paying the money that it was not taken as if it was paid in full satisfaction. Like the noble and learned Earl on the woolsack, I cannot help relying in support of that very much upon the same statement which the pursuer makes in his answer to the case of the defenders. He does not put it forward that he qualified his acceptance of this money by saying—"Mind, I do not take it in satisfaction, for if things turn out to be worse I shall make a further claim upon you." I do not want to go over this—it has been commented upon by the noble and learned Earl. It is clear to my mind that he did not suggest such a thing as that, and I should say, dealing with this as an English lawyer, these answers 1, 2, and 3 would be bad on general demurrer. There was no question raised, unless indeed it was perhaps you may say something like this, that "the defenders' representative assured the pursuer that he was suffering from a slight nervous shock." Whether, if he had so assured the pursuer, it would have made any difference I do not know; I should think it ought not to have done so.

It appears to me therefore, upon the substance of the matter, that there really never was a plainer case than this present one; that the pursuer has no good cause of action. But the oddity of the thing to my mind is, that the judgment was pronounced upon a question which was not properly before the learned Judges, as well as I can understand, and not upon the real question. I look at Lord Young's judgment. He says—"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." There does not seem, in the judgments of the learned Judges, to have been any dealing with the question which is really the question, a question raised explicitly by the defenders on the pleadings, that all future actions were barred by that which had taken place between the parties. That is a very singular thing.

I should just like to say one word more, although I suppose it will be *obiter*. If when the document was signed, the pursuer had made it intelligible to young Mr Wood that he was not taking the money, as the paper said, in full satisfaction and discharge of all claims, I am inclined to think that if he could have proved that in point of fact, he would have been at liberty to maintain this action, and I do not see anything in the cases which were cited and relied on which goes further than that. I cannot suppose that a man might not sign a document, and at the same time give to the person to whom he had handed that document, and with whom he was dealing, to understand, "Mind, I do not mean what I say." I do not mean to say that such things ought to be encouraged, and I do not mean to say that I should believe a statement of that kind very readily if such a case came before me. But, as I have said already, I do not think that anything of that sort took place here. I think that if anything was said, the principle of *Croft* v. *Lumley* would apply, that it must be taken that the man paying was paying according to the terms upon which he said he was paying, and that he was not informed that he must not understand that. I really do think, my Lords, that this is

about as plain a case as ever was, and as to any complaint against the conduct of the railway company and of the Woods, who acted for the company, it not only seems to be utterly unfounded, but it does seem to me that they behaved in the very fairest way.

LORD MACNAGHTEN and LORD MORRIS concurred.

The House ordered and adjudged that the interlocutor appealed from be reversed, and the defenders (appellants) be assoilzied.

Counsel for the Appellants—Finlay, Q.C. —Haldane, Q.C. Agents—Loch & Goodhart, for Wm. White-Millar, S.S.C.

Counsel for the Respondent—Rhind—Baxter. Agent—A. Beveridge, for Wm. Officer, S.S.C.

Thursday, July 2.

(Before the Earl of Selborne and Lords Watson and Bramwell.)

M'INROY *v.* THE DUKE OF ATHOLE.

(*Ante*, vol. xxvii. p. 341, and 17 R. 456.)

Servitude — Road — Right-of-Way — Occasional Use—Use for Sport.

In an interdict against the use of a path through a mountain pass the respondent proved that for more than forty years he and his predecessors had used the path as a convenient short cut in passing from one part of their shooting to another. This use was only occasional—extending to ten or twelve times a-year—and was only made late in the shooting season. Between 1846 and 1878 the path was scarcely used by the respondent. Although this use by the respondent was known to the complainer's foresters, there was no evidence that it had been under the immediate observation of the complainer or his ancesters except on one occasion in 1857 when the use was challenged.

Held (*aff.* the decision of the Second Division) that there had been no use to support a claim on the part of the respondent to a servitude right-of-way.

This case is reported *ante*, vol. xxvii. p. 341, and 17 R. 456.

The respondent in the Court of Session appealed.

At delivering judgment—

LORD WATSON—My Lords, the Cromalton Pass is a natural hollow about 1000 yards in length between two mountains forming part of the Ben-y-Ghlo range. It runs nearly due east and west, and the Cromalton Burn, which has its source to the north, flows along the bottom of the pass for more than half its length on the western side, and then enters the estate of Lude belonging to the appellant. The pass and the land on either side of it are the property of the respondent. Carn Liath, one of the mountains enclosing it, rises on the south to the height of 3193 feet above sea level, but only the upper part, which apparently comprises about one-third of its altitude, belongs to the respondent. The lower two-thirds are included in the estate of Lude, which surrounds Carn Liath on the east, south, and west, and comes up to both ends of the pass. The mountain range to the north of the pass is the property of the respondent.

On the north side of the pass there is a track or path continuing all the way through it, which forms the subject of the present controversy. Starting from the west the track runs along the hill face a considerable distance above the Cromalton Burn, which it eventually crosses, and is then continued along the hillside until it reaches the lands of Lude on the east. In this action the appellants asserted their right to use the track, on the ground that it formed part of an old public road leading from Glen Tilt in the north-west to Glenferrate and Kirkmichael in the south-east, and alternatively that they had acquired by prescriptive use a praedial servitude of way for themselves, their tenants, servants, and others occupying the lands of Lude.

The appellants were allowed a proof of both alternatives, but they appear to have abandoned at a very early stage their claim for a public right-of-way. The user upon which they relied in the Court below as sufficient to constitute a servitude was by the family of Lude, their game tenants, and gamekeepers, for sporting purposes, and by shepherds on their farms of Monzie and Glenloch, which are on opposite sides of Carn Liath.

The Lord Ordinary (KINNEAR) and all the learned Judges of the Second Division were of opinion that the appellants have failed to show that there was any user by shepherds as in the assertion of a right. The Lord Ordinary being of opinion that the track had been used as of right during the prescriptive period for sporting purposes, sustained the alternative claim of the appellants as made by them on record. In the Inner House his interlocutor was reversed, and the respondent obtained interdict as craved. In the argument addressed to this House on behalf of the appellants their claim was limited to a servitude of way for purposes connected with sport.

I think it right to say that I entirely concur in the observations which were made by the late Lord Lee upon the interlocutor of the Lord Ordinary. Assuming that the appellants had in the open assertion of a right persistently used the track for the purpose of shooting or watching game, I do not think they could thereby acquire the right to free passage for every man, woman, and child on the estate of Lude, for any purpose whatever. I cannot conceive how a general servitude of way could arise in a case like the present, where it is clear that the use had by Lude shepherds during the prescriptive period was by permission and not as of right.

As for the track in dispute, the evidence