much so that it left, in the ordinary state of the stream, a well-marked watercourse. To prevent this Mr Marshall heightened an old wall above the alder tree, and made some excavations below it to admit of the flood stream escaping more rapidly. These operations, their object, and their success, are not disputed; and being operations *in alveo*, which diverted, and were meant to divert, the flood stream, were collectively, as the Lord Ordinary has found, plainly illegal. The case of *Menzies* v. *Breadalbane* is entirely parallel; indeed the latter is the stronger; for the old channel there had become arable land, which this never was.

It will be, of course, open to the Reporter to make any observations on the probable effect of the operations he may think likely to be of use.

The other Judges concurred; and the Court adhered to the Lord Ordinary's judgment.

Agents for Pursuers—Morton, Neilson, & Smart, W.S.

Agents for Defender—Webster & Will, S.S.C.

Friday, July 5.

FIRST DIVISION.

STEVENSON *v.* ADAIR.

Apprentice—Minor—Cautioner. A minor, whose father was alive, entered into an indenture of apprenticeship without his consent. He subsequently deserted his apprenticeship, and the master sued his cautioner for damages. *Held*, in accordance with Erskine iii. 3, 64—without deciding whether the indenture could be enforced against the minor, in respect that it was entered into without consent of his administrator-in-law—that the cautioner was liable.

Observed, that although a breach of contract implies *some* damages, to entitle the pursuer to substantial damages he must prove loss.

In October 1870 an indenture of apprenticeship was entered into between Alexander Stevenson, merchant in Edinburgh, of the first part; and John Bain Mackenzie, and John Adair, hotelkeeper, Edinburgh, as cautioner for Mackenzie, of the second part, by which Mackenzie binds himself as apprentice to Stevenson in his business of merchant, for three years from 17th October 1870 —"And the said John Adair binds and obliges himself and his heirs and successors to indemnify the said Alexander Stevenson for all loss, damage, and expense which he may happen to incur or sustain through the omissions or default of the said John Bain Mackenzie at any time during his apprenticeship, or by his failure to implement this agreement, to the extent of £50 sterling." In return, Stevenson binds himself to teach his business to Mackenzie, and to pay him as wages, £12 for the first year, £15 for the second, and £20 for the third. The deed contains a clause of relief by Mackenzie in favour of Adair, and also a clause by which "both parties bind and oblige themselves and their foresaids to implement the premises to each other under the penalty of £50 sterling to be paid by the party failing to the party observing or willing to observe the same over and above performance."

At the date of the deed Mackenzie was a minor, seventeen years of age. His father was alive, but Mackenzie does not appear to have ever lived with him, and the agreement was entered into without his consent.

Mackenzie entered upon his apprenticeship, and discharged the duties of the same for five months. In March 1871 he left Mr Stevenson's employment, and refused to return.

Stevenson now sued Adair for the sum of £50. He pleaded:—"(1) The pursuer having incurred loss and damage to the amount above mentioned, and through the failure of the said John Bain Mackenzie to implement the said agreement, and the defender having bound himself to indemnify the pursuer for such loss and damage to the extent of £50, the pursuer is entitled to decree in terms of the conclusions of the summons, with expenses. (2) The defender being a party, as cautioner for the said John Bain Mackenzie, in the said agreement with the pursuer, is bound with him for implement of the same, under the penalty therein provided; and he is further, as such cautioner, bound to indemnify the pursuer for all loss and damage sustained by him by and through the said failure of the said John Bain Mackenzie to implement his part of said agreement."

The defender pleaded:—"(1) The alleged agreement having been entered into by a minor, without the consent of his father, as his administrator-in-law, is null and void. (2) The said agreement being null and void as regards the principal, cannot be enforced as regards the defender, who is bound merely as his cautioner."

The Lord Ordinary (JERVISWOODE) pronounced the following interlocutor:—

"*Edinburgh*, 11*th December* 1871.— . . . . Finds that the agreement, as set forth and founded on on the part of the pursuer, is not, in point of law, null and void in the sense and to the effect maintained and pleaded on behalf of the defender; and, with reference to this finding, appoints the cause to be enrolled with a view to further procedure.

"*Note.*—The question which has here arisen, and which gave occasion to a full and very satisfactory debate before the Lord Ordinary, does not appear to the Lord Ordinary to be so precisely and fully settled under the authorities as might have been thought probable.

"It is maintained strongly on the part of the defender that an obligation by a minor having a curator, such as that here in question, is absolutely null, and so is incapable of homologation. The Lord Ordinary cannot think so. It appears to him that if the act of a minor who has no curators be good until set aside on the ground of actual lesion, it must follow that the mere want of consent on the part of the curator, where such does exist, cannot operate an absolute nullity, though it may have the effect of subjecting the act to challenge. This is not, however, the matter here in question, as raised on the part of the defender, whose pleas are rested on the pure ground of nullity."

A proof was taken. The only evidence taken was that of Mr James Mason, agent for the defender, who deponed that he had revised the indenture on behalf of the apprentice and his grandmother. No evidence was led as to the amount of damage sustained by the pursuer.

The Lord Ordinary thereafter pronounced the following interlocutor:—

"*Edinburgh*, 13*th February* 1872.— . . . . Finds, as matter of fact—1st, That the agreement

founded on by the pursuer, and to which the finding contained in the interlocutor of the 11th December last (1871) has reference, was revised by Mr James Mason, S.S.C., acting as on behalf of the minor, John Bain Mackenzie, under instructions received from Mrs M'Allister, grandmother of the said John Bain Mackenzie; 2d, That Thomas Mackenzie, the father of the said John Bain Mackenzie, took no charge of him, or in any respect discharged his duties as a parent towards him; 3d, That the said John Bain Mackenzie entered into the employment of the pursuer as an apprentice, under the said agreement, and continued in the same until the month of March 1871, in the course of which he abandoned the said employment, and has not since returned thereto; and, 4th, That in consequence of the said abandonment of his employment by the said John Bain Mackenzie, the pursuer has suffered loss and damage to the extent of £20: Therefore, in respect of the obligations undertaken by the defender in the said agreement, as cautioner for the said John Bain Mackenzie, Decerns against the defender for payment to the pursuer of the said sum of £20 sterling accordingly: Finds the defender liable in the expenses of process.

"*Note.*—It has appeared to the Lord Ordinary, on resuming consideration of this case, with the proof which has been led, and having regard to the terms of his previous interlocutor of the 11th December last, and to the character of the proof, that the only duty which remains to him now to discharge is to assess the sum of damages due to the pursuer.

"The Lord Ordinary has little confidence in his ability to do exact justice in such a matter; but he is partly relieved in the discharge of his duty by the fair statement made on behalf of the pursuer, that he did not wish to insist for high damages."

The defender reclaimed.

ADAM and MACKAY, for him, argued (1) that the agreement was null—Ersk. i, 7, 33, and cases cited by Fraser on Parent and Child (Cowan's Ed.) p. 385, &c.; (2) that no damages were proved.

WATSON and TAYLOR INNES, for the pursuer, argued that the contract of apprenticeship was an exception to the general rule, and that in any view the terms of the deed were so conceived as to bind the cautioner by an independent obligation. It was quite possible for the cautioner to be bound more strictly than the principal debtor.

At advising—

LORD PRESIDENT—This is an action of damages for breach of indenture by an apprentice, brought, not against the apprentice, but his cautioner, the apprentice not being called as a defender at all. There is no dispute about the mere fact that a breach of contract was committed. The defence is expressed in two pleas—(*reads first and second pleas for defender*). The Lord Ordinary has found against the defender. On the reclaiming-note we have had an elaborate argument on the question whether a *minor pubes*, whose father is alive, and who enters into an indenture of apprenticeship without consent of his father, is bound by the indenture; and whether that indenture can be enforced against him. The defender maintains the absolute nullity of the contract as against the apprentice, in order to let in his second plea. I do not think that it can be affirmed that the contract is absolutely null and void. It may be that the contract cannot be enforced against the apprentice, and this on account of the peculiar position of the minor, who does not contract properly without consent of his curators, if he has them. But supposing the contract objectionable in this more limited sense, is that sufficient to liberate the cautioner? Even supposing that the apprentice would not be bound by the indenture, I think that the cautioner would be bound. The doctrine is nowhere better stated than by Erskine, iii, 3, 64—"A cautioner can in no case be bound in a higher sum to the creditor than the proper debtor is, for there cannot be more in an accessory obligation than in the principal. Yet he may be more strictly obliged than the proper debtor, as when the cautioner gives the creditor a pledge or a real right on his lands, or where one is cautioner for a debtor who is not himself civilly or fully obliged, for a cautionary obligation may be effectually interposed to an obligation merely natural. Thus a cautioner in an obligation where the debtor's subscription is not legally attested, or a cautioner for a married woman, or for a minor acting without his curators, is properly obliged, though the debtor himself should get free by pleading the statutory nullity, or his own legal incapacity." He adds, "The reason of this is obvious—*sibi imputet* who interposed in such a case. As the cautioner is presumed to know the debtor's condition, the plain language of his engagement is, that if the debtor take the benefit of the law, he, the cautioner, shall make good the debt." Applying that rule to the present case, the cautioner was bound to know, and I think did know, that the apprentice's father was alive. He chose to come under an obligation which, in its terms, bound him whether the apprentice was bound or not. I think the Lord Ordinary is right in his interlocutor, that the first and second pleas for the defender are bad in law.

But I feel a little difficulty as to the subsequent interlocutor of 13th February 1872. The Lord Ordinary has there found the pursuer entitled to the sum of £20 as damages. I look in vain for any evidence that the pursuer has suffered loss to that or any extent. No doubt, as there was a breach of contract, there must be some damages due, but to justify an award of £20 loss must be proved. It would be a pity to allow the pursuer to prove the loss actually sustained. It would be much better for the parties to agree in fixing some sum in place of £20.

LORD DEAS—I am of the same opinion, that the law laid down by Erskine applies to this case, and that the defender is liable whatever may be said as to the position of the apprentice. That is sufficient to decide the case, but, as a matter of opinion, I am disposed to agree with the Lord Ordinary.

LORD ARDMILLAN—The circumstances out of which this action has originated are so few and simple that scarcely any explanation is required. In October 1870 an agreement or contract of indenture was entered into between the pursuer Mr Stevenson and John Bain Mackenzie, in terms of which John Bain Mackenzie bound himself apprentice to the pursuer for three years, and the pursuer undertook to instruct him in the business. The defender Adair became a party to that agreement of indenture as cautioner for John Bain Mackenzie, and bound and obliged himself to indemnify the pursuer Stevenson for all loss, damage, and expense which he might happen to sustain through the omissions or default of John Bain Mackenzie during his apprenticeship, or by his failure to im-

plement the agreement, to the extent of £50 sterling. By another clause both parties bound themselves to implement the premises to each other under the penalty of £50.

At the date of the indenture John Bain Mackenzie was between seventeen and eighteen years of age; and his father was, and is, alive. Therefore John Bain Mackenzie was a minor having a curator at law.

The deed of agreement was revised by an agent, Mr Mason, on behalf of John Bain Mackenzie. That agent was aware of the fact that the father of John Bain Mackenzie was alive. He immediately, and before execution of the agreement, communicated with Mr Adair, the intended cautioner; and I think it plainly appears from the evidence that Adair also knew that John Bain Mackenzie was a minor, and that his father was alive.

It appears that in March 1871 John Bain Mackenzie deserted and abandoned his apprenticeship, and departed from the obligations therein contained. The present action has been brought to recover damages from the defender Adair, as cautioner under the agreement.

Two questions—both of them interesting and important—have been raised. The first is, Whether the indenture is *ipso jure* null and void without proof of lesion, in respect that it is a deed executed by a minor having a curator, without his consent? The second is, Whether, assuming that the indenture is void for the reason stated, the cautioner is thereby released from obligation ? or, Whether the cautioner is not still responsible for the default of the principal obligant?

If it were necessary here to dispose of the first question, I must say that I should have difficulty in holding that an indenture of service is not only voidable on proof of lesion, but *ipso facto* and absolutely void and null, in respect that it was entered into by a young man, between seventeen and eighteen years of age, without his father's consent. I am aware that there are authorities to that effect, applying generally to deeds and obligations undertaken by a minor. But the contract of indenture or agreement for apprenticeship, or service, for three years, as in this case, is naturally appropriate to the age and position of a minor, and may perhaps be presumed to be for his benefit; and, unless I am much mistaken, such agreements by young men of that age are very generally signed without the father's interposition. He may be absent, or aged, or careless, and, so far as I am aware, the want of his signature, if there be no lesion or injury to the minor, has not, in the practice of Scotland, been held to be necessarily and absolutely fatal to the agreement. There must be hundreds of instances in which engagements to serve for two, three, or four years, rest entirely on the obligation of the minor and his cautioner.

I do not mean at present to express any decided opinion upon this point. I reserve my opinion till such a case arise, merely saying that I think it merits serious consideration.

In dealing with the second question, I must, however, assume, as I now do, that the obligation in the indenture is null and void, in so far as regards the minor John Bain Mackenzie.

But the cautioner has, by his own act, voluntarily become liable to the employer, and for the employer's security, that the party engaging to serve him shall duly and faithfully do so. Within the scope and meaning of the cautionary obligation there is included and implied an obligation to protect the employer against the attempt by the apprentice to escape from the duties and responsibilities undertaken. This proposition, in point of law, is distinctly stated by Mr Erskine (Ersk. 3, 3, 64) in the passage which your Lordship has mentioned and read. I may add that Mr Erskine says, "As the cautioner is presumed to know the debtor's condition, the plain language of his engagement is, that if the debtor take the benefit of the law, he, the cautioner, shall make good the debt." In the present case there is not merely the presumption to which Erskine refers, that the cautioner knows the debtor's condition, but it appears clearly enough that, in point of fact, the cautioner did know that the principal obligant was a minor, and that his father was alive, and of course he saw and knew that the minor's father was not a party to the agreement. It appears that the cautioner was consulted from the first,—that the draft agreement was revised by the agent, who communicated with the cautioner before execution of the deed, and that the cautioner got a guarantee in writing from the grandmother of the principal obligant, who of course well knew the condition of that obligant. These facts are important, and of much more weight than the mere presumption to which Erskine refers.

In these circumstances, I have come to the conclusion that if any damage has been incurred by the pursuer in consequence of John Bain Mackenzie deserting his apprenticeship, the defender Adair, as cautioner, is responsible to the pursuer.

The Lord Ordinary has come to this conclusion, and has found the pursuer entitled to £20 of damages. Now, I am unable to perceive any sufficient proof of actual damage to that extent, or to any extent; or any facts and circumstances from which the existence of such actual damage can be legitimately inferred. Some inconvenience there must have been, and therefore some damage,—it may be, very little in excess above nominal damages—may be presumed from the mere facts disclosed. As I do not see sufficient grounds for awarding the sum which the Lord Ordinary has awarded, I think that we must either now award a very trifling sum of damage, or afford the pursuer an opportunity of leading a proof of actual damage sustained by him, if so advised. But your Lordship's suggestion, that the parties had better agree on a moderate,—a very moderate sum of damages,—seems to me to be well deserving of their consideration.

Lord Kinloch—The claim with which we have to deal is one made against the cautioner in an indenture, for the damages occasioned by the apprentice deserting his employment. The leading defence is, that the indenture is null, the father and legal administrator of the apprentice being then alive, and not a party to the indenture.

If the question were now with the apprentice himself, I should have some difficulty about the case, because I am not prepared to say that a formal written indenture, binding for three years, can effectually be engaged in by a minor without concurrence of his legal administrator, if he have one. The case may possibly be different as to other contracts of service. But I think this is a plea of which the cautioner cannot take advantage. It is trite in our law that a cautioner may be bound where the principal debtor may escape liability from personal privilege, as minority. I con-

sider the present to be peculiarly a case for the enforcement of this principle. There is no just reason why the employer should not be indemnified by the cautioner of any loss sustained by him; and, besides this, from anything that appears, the employer was ignorant of the existence of the minor's father; and both minor and cautioner engaged him in the contract without disclosing the fact.

I therefore agree with the Lord Ordinary in holding the defender liable, though I do not precisely proceed on his Lordship's grounds. But I cannot agree to decerning for £20 of damages, without at least further inquiry. There is no proof of actual damage; and although the circumstances may imply *some* damage, I see no ground at present for fixing it at this amount.

The Court substituted £5 for £20 in the interlocutor of 13th February 1872, and *quoad ultra* adhered, and found the pursuer entitled to three-fourths of his expenses since the date of that interlocutor.

Agents for Pursuer—Lindsay & Paterson, W.S.
Agent for Defender—James Mason, S.S.C.

Friday, July 5.

FIRST DIVISION.

BRUCE *v.* SMITH.

Issues—Process—Reduction—Fraud—Misrepresentation and Concealment.

A party to an agreement brought an action of reduction of the deed, on the ground of fraudulent misrepresentation and fraudulent concealment. Form of issues adjusted to try the question.

This was an action at the instance of William Bruce, against Jane Bruce or Smith and others, for reduction of a deed of agreement, dated 6th and 8th November 1848, 26th and 31st July 1849, and 7th February 1862. The pursuer was the grandson of a brother of Mr Bruce of Broomhill, who died in 1835; and the defenders were also children or grandchildren of Mr Bruce's brothers and sisters, or their husbands or representatives. The trust-estate of the said Mr Bruce of Broomhill had already been the subject of much litigation between his trustees, the husband of his only child Janet or Jessie Bruce or Hamilton, and his brother and other relations. For the previous reports see 11 D. 577; 17 D. 265; 19 D. 745; 20 D. 473; 21 D. 972; and 9 Scot. Law Rep. 102.

The circumstances which gave rise to the present action are as follows:—Mr James Bruce of Broomhill, who, as already mentioned, died in 1835, left considerable property in Scotland, and also in Calcutta. He was survived by one daughter, Miss Janet or Jessie Bruce, who, in February 1846, married Mr T. M. M'Neill Hamilton of Raploch, and who died in June 1847, survived by her husband, but without issue. Mr James Bruce of Broomhill had regulated the succession of his property by an antenuptial marriage-contract, and by a subsequent trust-disposition and settlement; and his daughter, the said Mrs Hamilton, had entered into a marriage-contract with her husband. Upon the death of Mrs Hamilton a process of multiplepoinding was raised in this Court, in name of the trustees of the truster James Bruce, in which his whole estate, heritable and moveable, was stated as the fund *in medio*. In that process of multiplepoinding claims were lodged for various parties, and in particular, one for Mr Hamilton, the surviving husband of Jessie Bruce, and one for Robert Bruce and others, being the surviving brothers and sisters of the truster and their descendants, or persons claiming to act for or represent them. In this process the First Division of the Court, on 17th June 1859, found that right to the free residue of the trust-estate of the late James Bruce, beyond what may be required for satisfying his debts and obligations and testamentary provisions, was vested in his only child Janet Bruce, when her marriage to the claimant Thomas Montgomery M'Neill Hamilton took place; and that the said Janet Bruce's right to such residue, excepting the Indian property mentioned in the said trust-settlement, or the proceeds thereof, was conveyed by her to her said husband by the general conveyance in their contract of marriage, and that accordingly the same belongs to him. This decision settled the succession to all Mr Bruce's property except that in Calcutta, which is now the subject of dispute.

Before the date of this decision two deeds of agreement had been executed by the surviving relations of Mr Bruce of Broomhill. The first of these deeds was dated 1st October 1847, and was executed by Robert Bruce, a brother of Mr Bruce of Broomhill, with consent of James Bruce, eldest son of Robert Bruce, for his interest—*of the first part;* and by certain persons as representing the whole other children and grandchildren of the said deceased James Bruce's brothers and sisters—*of the second part.* The deed of agreement proceeded on the narrative of Mr Bruce's marriage-contract and trust-disposition and settlement, and also of Mrs Hamilton's contract of marriage, and that certain doubts and disputes had arisen between the *first* and *second* parties as to the right of succession to the property upon the death of Mrs Hamilton. Accordingly, by the said deed of agreement, in order to avoid the heavy expenses of litigation and other inconveniences thence arising, but more particularly for the purpose so far of acquiescing in and following out the expressed intentions of the said truster as regards the ultimate destination of his whole means and estate in the event of himself and of his daughter dying without lawful issue, the said first parties disponed and assigned to themselves and to the said second parties all and whole their right and interest as heirs of the said deceased James Bruce of Broomhill, and of the said deceased Mrs Hamilton; and, on the other hand, the said second parties bound themselves, and their heirs, &c., in the event of their succeeding conjointly with the said first parties in making effectual their claims to, and obtaining possession of, the foresaid lands and estates, heritable and moveable, to make up and provide to the said Robert Bruce, during all the days and years of his life, such an amount as should be equivalent to the full liferent interest of a brother or sister of the said deceased James Bruce, as provided by his foresaid contract of marriage; the whole expenses incurred in making these rights and interests effectual being first deducted; and that the children, grandchildren, and other descendants of the said Robert Bruce, should be entitled to succeed in the same manner as those of the other brothers and sisters of the said deceased James Bruce.

The second deed of agreement was dated 6th and