

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. McNeill 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 multiple-poining 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 multiple-poining 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 McNeill 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 disposed 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

8th November 1848, 26th and 31st July 1849, and 7th February 1862, and bore to be executed by Robert Bruce, brother of the said James Bruce of Broomhill; by James Bruce, William Bruce (the pursuer in the present action), and Alexander Bruce, three of the children of the deceased James Bruce, who was the eldest son of Alexander Bruce, who was the eldest brother of the said James Bruce of Broomhill; and by others, as representing other children of brothers and sisters of the said James Bruce of Broomhill. This deed of agreement proceeded on the narrative of the said antenuptial contract of the truster James Bruce and his spouse, and of the said trust-disposition and settlement by them, and codicils thereto, and of the death of the truster, leaving an only child, and of her marriage, marriage-contract, and decease before-mentioned; and, on the farther narrative that it would rather appear that the validity of the conveyance of the said lands and estate of Broomhill by the said Mrs Jessie Bruce or Hamilton, contained in her said contract of marriage, "is open to challenge upon certain grounds in law;" and on the farther narrative of the execution and terms of the said deed of agreement, dated 1st October 1847; and on the farther narrative that, "whereas neither of us, the said James Bruce, William Bruce, and Alexander Bruce, grandsons of the said Alexander Bruce, who was eldest brother of the said James Bruce of Broomhill, nor any of the other descendants of the said Alexander Bruce, were parties to the foresaid deed of agreement above recited, but that having become aware of its existence, and the import, terms, and conditions thereof, we have, for ourselves, and for our interests, and on behalf of the whole other descendants of the said Alexander Bruce, to declare our adherence thereto, and to join the whole other representatives and relations of the said James Bruce of Broomhill in following forth and promoting his views and intentions in regard to the destination and distribution of his means and estates, as contained in his contract of marriage and trust-disposition and deed of settlement, with the special exceptions contained herein, and in the foresaid deed of agreement above recited; and now, seeing that we, for ourselves, and as representing the whole other representatives and relations interested in the succession of the said deceased James Bruce of Broomhill, being actuated by the same motives, and conceiving it to be our duty to observe and fulfil, as far as possible, the whole intentions, conditions, and provisions of the said deceased James Bruce of Broomhill, as contained in the foresaid trust-disposition and deed of settlement, and also in the said antenuptial contract of marriage executed by him, so far as not altered by the said trust-disposition and settlement, and with the said exceptions, have resolved to enter into and execute these presents." After the narrative the deed proceeds as follows:—"Therefore we do all, severally, for ourselves, and representing as aforesaid, and of mutual assent and consent, do hereby not only ratify, approve of, and confirm the foresaid deed of agreement above recited, in its whole articles, clauses, and conditions, but also do hereby, all of mutual consent, make ourselves respectively, and those represented by us, parties thereto, in the same manner as if we and they had all originally executed the same, and bind and oblige ourselves, and them severally, so far as incumbent on each to implement and fulfil the same; and farther, we do hereby severally bind and oblige ourselves, and

those represented by us respectively, that in the event of its appearing that all or any one or other of us or them are or may be entitled to succeed as heir or heirs, executor or executors, to all or any part of the lands and estates, heritable and moveable, of the said deceased James Bruce of Broomhill, or the said Jessie Bruce or Hamilton, whether situated in Great Britain or in India or elsewhere, to collate the same with the whole parties interested and called to the succession by the said James Bruce, under his foresaid contract of marriage and trust-disposition and settlement, and that in terms and in strict conformity with the conditions and provisions contained in these deeds, all and each of which deeds we, for ourselves, and representing as aforesaid, do hereby homologate, ratify, and confirm, and bind ourselves to observe, fulfil, and give effect to, each for his interest, and so far as in his power, all defects and objections of every kind, so far as regards the interests of either of us, or those represented by us respectively as aforesaid, being hereby dispensed with, and the last-mentioned deed being held as altering, amending, and supplementary to the former; and for that purpose, we, the whole parties, and as representing the whole relations of the said testator, called to and interested in his succession, or such one or more of us or them as may happen to be the heir or heirs-at-law, or executor or executors foresaid, not only authorise and empower the remainder of their number, or any one or more of us or them, to make or cause to be made up all necessary titles in one or either of our, his, or their name or names in due and legal form, and to take or use their name or names in prosecuting and following forth such actions and suits at law as may be found necessary for vindicating their rights to the foresaid property and estates, or otherwise in relation thereto, granting all necessary commission to the said remainder of us, or any one or more of us for that purpose, but also when required by us, the said remaining parties hereto, or any one or more of us, to assign, convey, and make over to such person or persons, as the majority of those of legal age at the time of the representatives of the said deceased James Bruce of Broomhill, called to his succession under his foresaid deeds, and entitled at the time to the liferent of his said estates, shall name and appoint as trustee or trustees in succession for the purpose of carrying out his whole purposes and intentions, as contained in his said contract of marriage and trust-disposition and deed of settlement declaring that the whole expenses of such titles, and of these presents, and other deeds necessary, already executed or yet to be executed, as well as that of all actions at law which may be found necessary, or adopted under the advice of counsel or agents, or by general consent, and raised by both or either of the parties hereto, and having the objects and intentions herein expressed in view, shall be held to be a preferable debt, and, as such, deducted and paid out of the first and readiest of the funds to be realised from the foresaid estate, or any part thereof."

Further, the deed concluded with certain arrangements, which it is not necessary to narrate here. The first of the said two deeds of agreement, bearing date 1st October 1847, was not signed by the pursuer William Bruce, or by his brother the now deceased James Bruce, or by any one empowered to act for them. The second agreement was signed by all the granters thereof, except the pursuer, betwixt 6th November 1848 and 31st

July 1849, both inclusive, and was signed by the pursuer at St John's, New Brunswick, on 7th February 1862.

It was in order to reduce the second deed of agreement that this action was raised; and in support of it the pursuer William Bruce made the following averments, being articles 12 and 13 of the condescence:—"The signature of the said deceased James Bruce, the pursuer's brother, was attached by him to the said second agreement at Kurrachee, in Scinde, on 26th July 1849. It was transmitted to him for his signature by or through the agency of the defenders, or one or more of them, or those acting for them, without any explanation that the agreement was intended to do more than effect the purposes before mentioned, as being the real intention of the parties. It was not stated to him, and he was not aware, that the Indian property would descend in the line of his father, the said James Bruce, whose eldest son he then was, and this was fraudulently concealed from him by the defenders, or one or more of them, or those acting for them, or that he was, in signing the said agreement, dealing with any right of succession of his said father or himself as heir of the said Jessie Bruce or Hamilton in the said Indian property, and it was untruly and fraudulently represented to him by the defenders, or one or more of them, or those acting for them, that the said Indian property would descend in the line of the said truster's younger brother, and he signed the said agreement under misrepresentation and essential error, and in ignorance that he or his said father would be or was such heir, and in the erroneous belief that the said Indian property would descend in the line of the said truster's younger brother Robert Bruce. He was quite unacquainted with business, and was at the time in very bad health, from which he never recovered, and he died in India on or about the 13th October 1851. If James had, at the time of signing the deed, or subsequently, any right to the said heritage, such right descended to the pursuer as his nearest and lawful heir by the law of India, and the pursuer has thus good right and title to challenge his said deed, so far as executed by James, in the event of such execution being pleaded against the pursuer. The said second agreement was not signed by the pursuer until the said 7th February 1862, when it was signed by him at St John's, New Brunswick, where he was then stationed along with a portion of the Royal Engineers, in which corps he was and is a private. It was transmitted for his signature by or through the agency of the defenders, or some of them, or an agent or agents acting for them, without any information as to the judgment which the Court had pronounced rejecting the claim of the brothers and sisters of the truster and their descendants, or as to the pursuer possessing a right, or even any probable claim, to the character of the heir in the Indian heritage, or as to the deed importing a distribution of, or dealing with the subject of the pursuer's rights as heir foresaid, and the deed was represented to him on the part of the defenders as a matter of course and of small moment. All knowledge of the said opinion obtained from Mr James Anderson was withheld from the pursuer, and he was left to suppose that the statement or implication of the deed that the succession to the Indian property was in Robert Bruce and his issue was correct. Of the various matters thus kept back from the pursuer's knowledge, the defenders, or some of

them, and those acting for them, were well aware; and these matters were fraudulently concealed from the pursuer by or on the part of the defenders; and the foresaid representations were fraudulently made on the part of the defenders. The pursuer signed the agreement after a very partial and imperfect perusal, he being entirely unacquainted with business, and little able to follow the import of a long and involved deed, and he had no professional assistance whatever. Neither he nor his brother James had, or pretended to have, any authority to bind any other of the relatives of the said truster James Bruce, as the deed bears them to do, and this was well known to the other parties. The pursuer signed the agreement in ignorance of the death of his brother James, and that through the death of his brother James he had become heir to the property in India, and this, although known to the defenders and those acting for them, was fraudulently concealed by them from the pursuer."

The pursuer had, *inter alia*, the following plea in law:—"The meaning of the said second agreement having now been determined as aforesaid by this Court, the pursuer is entitled to have the same reduced as concluded for, in respect that—(1) The agreement was entered into by the pursuer, and also, *separatim*, by his deceased brother James, under essential error; (2) the agreement was impetrated from the pursuer and his said brother by those for whom the defenders are responsible, by fraud and misrepresentation; (3) the agreement was impetrated from the pursuer and his said brother by fraudulent concealment of material and essential facts on the part of those for whom the defenders are responsible; (4) the deed constituting the mutual agreement was not completed during James Bruce's lifetime, and is therefore invalid and ineffectual."

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

"*Edinburgh, 7th June 1872.*—The Lord Ordinary having heard the counsel for the parties, opens up the record, and allows the pursuer to amend the 13th article of his condescence, and the same being done at the Bar, of new closes the record: Repels the pursuer's plea that the second agreement is invalid and ineffectual as it was not completed during James Bruce's lifetime: Allows the parties to adjust the draft of a case to be submitted for the opinion of the Superior Court of Law in Calcutta, in terms of the statute 22 and 23 Victoria, c. 63, in regard to the new questions stated on record, relative to the law of succession and title to the real property in Calcutta, which belonged to the late James Bruce of Broomhill, the truster, in order that the same may be approved of and the questions of law settled on which the opinion of the said Court is desired, in terms of the said statute; and appoints the said draft case to be lodged within ten days."

The pursuer reclaimed.

FRASER and SCOTT for him.

SOLICITOR-GENERAL and PATERSON for the defenders.

The Court expressed an opinion that the pursuer's averments of fraud were relevant, and were proper subjects for a jury, and therefore recalled *in hoc statu* the Lord Ordinary's interlocutor, and appointed the pursuer to lodge issues.

The following were the issues which were at first proposed by the pursuer:—

"1. Whether the pursuer William Bruce, in signing the agreement, No. 120 of process, was

under essential error as to his legal rights and the nature and effect of the deed.

"2. Whether the defenders, or one or more of them, by themselves, or by another or others, by wrongful misrepresentation, induced the pursuer William Bruce to sign the agreement, No. 120 of process.

"3. Whether the defenders, or one or more of them, by themselves, or by another or others, by wrongful concealment, induced the pursuer William Bruce to sign the agreement, No. 120 of process.

"4. Whether the pursuer's brother James Bruce, in signing the agreement, No. 120 of process, was under essential error as to his legal rights and the nature and effect of the deed.

"5. Whether the defenders, or one or more of them, by themselves, or by another or others, by wrongful misrepresentation, induced the pursuer's brother James Bruce to sign the agreement, No. 120 of process.

"6. Whether the defenders, or one or more of them, by themselves, or by another or others, by wrongful concealment, induced the pursuer's brother James Bruce to sign the agreement, No. 120 of process."

The SOLICITOR-GENERAL, for the defenders, objected to an issue of essential error alone. The only thing averred was fraudulent concealment and fraudulent misrepresentation, and the issue should be to that effect.

FRASER, for the pursuer, argued that the signatures were adhibited under essential error; that the pursuer's averments were relevant to support the plea, and that he was entitled to an issue to that effect. That, at all events, he was entitled to an issue to the effect that the deeds were executed by the pursuer and his brother under essential error, "induced by" the fraud of the defenders.—*M'Conachy v. M'Indoe*, Dec. 23, 1853, 16 D. 315; *Johnston v. Johnston*, March 11, 1857, and 9 D. 706, 3 Macq. 619; *Adamson v. Glasgow Water-Works Commissioners*, June 22, 1859, 21 D. 1012; *Wilson v. Caledonian Railway Co.*, July 6, 1860, 22 D. 1408.

LORD PRESIDENT—The questions of fact which arise in this case are contained in articles 12 and 13 of the condescendence, and upon these I cannot avoid the conclusion that the only case of the pursuer is one of fraud—that is the true character of the case as it appears upon the record. So I think there should only be one issue as regards each of the signatures, and the issue should be, whether the signature was obtained by the fraudulent misrepresentation or fraudulent concealment of the defenders. Perhaps it would be well to add the words "or of others acting for them," because an issue of this sort, without any such extension, has been held to confine the proof to the personal fraud of the defender.

LORDS DEAS, ARDMILLAN, and KINLOCH concurred.

The pursuer then proposed the following amended issues:—

"1. Whether the signature of the pursuer William Bruce to the deed of agreement, No. 21 of process, was obtained by the fraudulent misrepresentation, or fraudulent concealment, of the defenders, or one or more of them, or of others acting for them.

"2. Whether the signature of the pursuer's

brother James Bruce to the deed of agreement, No. 21 of process, was obtained by the fraudulent misrepresentation or fraudulent concealment of the defenders, or one or more of them, or of others acting for them."

The Court approved the issues last proposed by the pursuer, but struck out the words "or of others acting for them," on the express understanding, however, that the issue as amended should include, and allow proof of, fraud on the part of agents.

Agents for the Pursuer—Ferguson & Junner, W.S.

Agents for the Defenders—Wotherspoon & Mack, S.S.C.

Friday, July 5.

MRS HELEN M'DOUGALL OR GIBSON AND HUSBAND v. MRS JEAN GRAHAM OR HUTCHISON.

Donation mortis causa—Husband and Wife.

A *mortis causa* donation by a husband to his wife held proved.

Donation mortis causa—Husband and Wife—Deposit Receipt.

A sum of money stood deposited in bank in the maiden name of a married woman, and continued so deposited till the husband's death. The *jus mariti* was not excluded by any deed. Held (*dissent* Lord President) that an effectual transference of the legal property in the same, by way of donation *mortis causa* by the husband to the wife, had been sufficiently instructed.

This was an action at the instance of Mrs Helen M'Dougall or Gibson—as executrix nominated by the late William Hutchison, India Place, Edinburgh, who died on 20th August 1870, in a trust-disposition and settlement executed by him on 28th July 1866—and her husband, against Mrs Jean Graham or Hutchison, widow of the said William Hutchison, to have it found that all sums of money deposited in bank in name of the said William Hutchison and the defender, or either of them, prior to the death of William Hutchison, form part of his executry. There were also conclusions of count, reckoning, and payment.

There were two sums in dispute between the parties—1st. A sum of £185, which had been uplifted by William Hutchison about five months before his death, and which the defender alleged he had gifted to her; 2d. A sum of £235, deposited in bank in the defender's maiden name, which the pursuer claimed as part of William Hutchison's executry, but as to which the defender alleged that her husband had effectually renounced his right of property in her favour.

The Lord Ordinary (GIFFORD) allowed a proof, the import of which was as follows:—

It was clearly proved that the sum of £235, which stood in Mrs Hutchison's maiden name, and which was the proceeds of her own industry, was never uplifted by Mr Hutchison, and for nearly twenty years he allowed his wife to uplift and re-deposit it as she pleased. The *jus mariti* was not, however, excluded by any deed.

On 28th July 1866, Mr Hutchison executed a settlement, by which he gave to his wife, the defender, the liferent of his whole estate, and the fee