under the new conclusion of the summons.

I add that I agree with Lord M'Laren's observation in regard to relief. I agree with it, but I understand Mr Craigie to say that the pursuers assent to the Lord Ordinary's view that the defender is entitled to operate his relief and undertake to see that it is given effect to.

The Court affirmed the interlocutor of the Lord Ordinary.

Counsel for the Pursuers and Respondents — Craigie, K.C. — Inglis. Agent — James F. Mackay, W.S.

Counsel for the Defender and Reclaimer —M'Lennan, K.C.—A. M. Anderson. Agent —W. R. Mackersy, W.S.

Friday, May 26.

FIRST DIVISION.

[Lord Johnston, Ordinary on the Bills.

FREE CHURCH OF SCOTLAND *v.* MACRAE AND OTHERS.

Administration of Justice — Judge — Declinature — Bill Chamber — Court of Session Act 1821 (1 *and* 2 *Geo. IV, cap.* 38), *sec.* 4.

A cause was enrolled in the Bill Chamber Hearing Roll before a Lord Ordinary who had acted in his capacity of counsel as adviser to one of the parties in a series of kindred litigations, though not in this particular case. His Lordship appeared in the Division and proponed his declinature, referring to the provisions of the Court of Session Act 1821, sec. 4. The Court *sustained* the declinature and remitted the cause to another Lord Ordinary.

Lord Johnston, who before his elevation to the Bench had acted as counsel for the Free Church of Scotland in a series of litigations regarding its property, was Lord Ordinary on the Bills. In his Lordship's Bill Chamber Hearing Roll was set down a note of suspension and interdict at the instance of the Free Church of Scotland against Macrae and others. This was not a case in which he had acted as counsel, but was one of the series of litigations. His Lordship appeared in the First Division and proponed his declinature, saying—"I have to ask your Lordships to deal with certain cases that have appeared in the Bill Chamber Hearing Roll to-day, the first of which is the *Free Church of Scotland* v. *Macrae*, from Aberfeldy. This is not a case in which as counsel I have taken part, but it is in connection with a series of litigations in which I have acted throughout as counsel for the Free Church of Scotland and for the local parties connected with it. Under these circumstances I thought it proper to decline. But looking to the fact that they are Bill Chamber cases I cannot do so without your Lordships' assistance under the statute."

The Court of Session Act 1821 (1 and 2 Geo. IV, cap. 38), sec. 4, provides—"That in case of the death, sickness, necessary absence, or legal declinature of the Lord Ordinary on the Bills during the period of the Session, but at a time when the Court is not actually sitting, any one of the permanent Ordinaries, on a due statement by any of the Clerks of the Bills of such fact and of some urgency in the case, shall and may pronounce on any Bill which may in such case be laid before him such interlocutor as circumstances may require without prejudice *quoad ultra* to the provisions of the aforesaid, and also without prejudice to the power of either Division, upon legal declinature of the Lord Ordinary on the Bills when represented to them in any case, to remit the same to another Ordinary in his stead."

The Court (LORD ADAM, LORD M'LAREN, and LORD KINNEAR) pronounced the following interlocutor:—

"The Lords having heard the verbal report made in Court by Lord Johnston of the reasons for his declinature to act as Lord Ordinary on the Bills in disposing of the cause in the Bill Chamber, in respect of said verbal report sustain the said declinature, and remit the present note of suspension and interdict to Lord Pearson, Ordinary, for disposal, and authorise the Clerk of the Bills to lay the process before Lord Pearson accordingly, and to act as Clerk of Court before him during its discussion and advising."

Counsel for the Complainers — J. R. Christie — Fenton. Agents — Simpson & Marwick, W.S.

Friday, June 16.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

ROBERTSON *v.* HENDERSON & SONS, LIMITED.

Minority — Lesion — Discharge of Claims under the Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37)—*Reduction— Enorm Lesion—Circumstances in which Held that Enorm Lesion had not been Proved.*

A minor employed by a firm of biscuit makers was injured while engaged in his work. The injury involved the loss to a great extent of his right hand. The accident was not in any way due to the fault of his employers, or those for whom they were responsible, so that apart from the provisions of the Workmen's Compensation Act 1897 he would have had no claim against them. For some time after the accident his employers paid him compensation at the rate of half his weekly wage prior to the accident,

and thereafter on his being able to resume work took him back again into their employment.

Thereafter the minor, with consent of his father and under the advice of his legal adviser, in consideration of a sum of £25 and five guineas of expenses, and an assurance on the part of his employers that while they "cannot guarantee a permanent situation, they will do all in their power to keep him in their employment," agreed to discharge and did discharge all claims which he had against them in respect of the accident, including any claims under the Workmen's Compensation Act 1897. Three years afterwards he was dismissed. He then raised the present action against his former employers for reduction of the agreement and discharge on the ground of minority and lesion. The proof shewed that the pursuer's average weekly wage before the accident was 29s. 9d., and that after the accident he was able to earn in the defenders' employment from £1 to 25s. a-week, but that his chance of getting work in the open market was greatly impaired owing to the injury to his hand. It also appeared that the assurance as to employment had been fairly and reasonably carried out by the defenders. *Held* (*rev.* the judgment of Lord Kincairney, Ordinary) that, as the main consideration of the agreement and discharge was not the sum paid but the assurance of employment, the agreement and discharge was reasonable at the time and in the circumstances, and therefore that enorm lesion had not been proved, and defenders assoilzied.

This was an action at the instance of James Robertson, ovensman, residing at Inverleith Mains, Edinburgh, against S. Henderson & Sons, Limited, biscuit makers, Edinburgh, in which he sought reduction on the ground of minority and lesion of (1) two letters embodying a settlement of certain claims against the defenders, (2) a formal deed of discharge granted by him and his father in favour of the defenders.

The pursuer averred that on 2nd November 1899, when he was in the defenders' employment and attending to a dough-breaking machine, his right hand was caught between the rollers and severely injured, that it was found necessary to amputate the third and fourth fingers, that the two remaining fingers became fixed in a flexed position, and that he had lost to a great extent the use of his hand.

He further averred that at the time of the accident he was in receipt of an average weekly wage of 29s. 9d., and that the defenders thereafter agreed to pay him compensation under the Workmen's Compensation Act at the rate of 12s. 6d. weekly, which they continued to do until the date of the discharge in question.

The defenders admitted that they paid the pursuer the said sum of 12s. 6d. weekly, but explained that they did so *ex gratia* and without admitting liability.

The pursuer further averred that in March 1900 he had sufficiently recovered to be able to work, and the defenders agreed to take him back and to pay him wages at the rate of £1 a-week. Proposals were then made for a settlement of the pursuer's claims, and after negotiations between the parties and their legal advisers a settlement was come to and the discharge in question was signed.

The offer to settle and its acceptance were contained in two letters which passed between the agents for the parties. These letters were as follows:—(1) Letter from pursuer's agent to defenders' agent—"23*rd March* 1900—*Robertson* v. *Henderson & Sons, Ltd.*—With reference to your call yesterday, I have now seen my clients, and have got them to agree to settle on the lines you indicated to me, viz., £25 to the lad and £5s. 5s. of expenses. If therefore you will kindly send me your cheque and a receipt I will undertake to get the latter signed by the lad and his father. I accept your assurance that while your clients cannot guarantee a permanent situation, they will do all in their power to keep him in their employment."

(2) Letter from defenders' agent to pursuer's agent—"23*rd March* 1900—*Robertson* v. *Henderson & Sons, Ltd.*—I have your letter of 23rd inst., in which you state that your clients are prepared to accept £25 and five guineas of expenses in discharge of all claims against Messrs Henderson & Sons, Ltd., which offer I now accept on behalf of Messrs Henderson & Sons, Ltd. I shall send you the discharge to-morrow to be signed by your client and his father. I shall send a copy of your letter to Messrs Henderson & Sons, Ltd., and draw their attention specially to the latter part of the letter."

The discharge was as follows:—"I, James Robertson, residing at ten Wardlaw Place, Gorgie Road, Edinburgh, with consent and concurrence of my father Alexander Robertson, residing there, as my curator and administrator-in-law, do hereby acknowledge to have received now and formerly from Simon Henderson & Sons, Limited, Grove Biscuit Factory, Edinburgh, the sum of Thirty-eight pounds, two shillings and sixpence sterling, together with the further sum of five pounds five shillings sterling in settlement of my agent's fee, making in all the sum of forty-three pounds seven shillings and sixpence sterling in full payment and satisfaction of all claims at my instance against the said company in respect of injuries sustained by me, the said James Robertson, to my right hand in their factory on or about the third day of October Eighteen hundred and ninety-nine, and in particular of all claims for compensation competent to us against the said Simon Henderson & Sons, Limited, at common law, under the Employers' Liability Act 1880, and the Workmen's Compensation Act 1897, all of which claims are, with the consent and concurrence of the said Alexander Robertson, hereby discharged: And I, the said Alexander Robertson, warrant the above discharge at all hands.—In witness whereof," &c.

The discharge was duly signed before witnesses by the pursuer and also by his father.

The pursuer further averred—"(Cond. 6) Upon the said payment of £25 being made, the pursuer returned to the defenders' employment at the wage of £1 weekly for the period of one year. Thereafter he was instructed to resume the work of an ovensman, and his weekly wage was increased to 22s. Owing to the crippled state of his hand he was unable to work with his former skill and was also slower at his work, but he continued to discharge his duties faithfully and to the best of his ability, and performed the full work of an ovensman until 2nd October 1903, when the defenders, in breach of the undertaking come to before condescended on, and without any true cause or any reason assigned, dismissed him from their employment on a week's notice. . . . (Cond. 7) The pursuer was at the date of signing said deed and discharge a minor. He was born on 10th December 1880. The said pretended agreement and receipt and discharge were executed and granted to his great hurt and lesion. At their date he was entitled in perpetuity or until commuted, in terms of the Workmen's Compensation Act 1897, to such weekly compensation up to the half of his weekly wage prior to the accident as would bring his present earnings up to the amount of his former earnings. After his injury it would have been impossible for him to obtain employment in the open market at his former work. The crippled condition of his right hand has greatly restricted the classes of employment open to him, and such work as he could do is very difficult to obtain. He has endeavoured to obtain employment of any kind since the date of his dismissal, but without success, and it is believed and averred that since his injury it would have been impossible for him, and will continue to be impossible for him in the future, to earn more in the open market than 15s. per week. Since his dismissal by the defenders the pursuer has made numerous applications to find employment in his own trade, but has on each occasion been refused a situation on account of the injury to his hand."

In their answers the defenders admitted that they repudiated any obligation to keep the pursuer in their service, and explained that they never at any time gave him such an undertaking. This was made clear to the pursuer, his father, and their law-agent. They further explained that the pursuer's work, owing to causes unconnected with the state of his hand, had for some time been unsatisfactory, and they therefore could not see their way to continue his services. The said discharge was signed by the pursuer and his father on their law-agent's advice on a full and fair disclosure of all the facts necessary to form a sound judgment on the question, and in point of fact the settlement was a fair and reasonable one to make.

The pursuer pleaded—"The said arrangement embodied in the letters of offer and acceptance, and the said pretended receipt and discharge, having been made and executed by or on behalf of the pursuer while in minority, and to his great hurt, prejudice, and lesion, decree of reduction should be pronounced as concluded for with expenses."

The defenders pleaded, *inter alia*—"(1) No relevant case. (3) The documents challenged not having been executed to the lesion of the pursuer, the defenders ought to be assoilzied."

A proof was allowed by the Lord Ordinary, and the defender having reclaimed, the First Division adhered to his interlocutor allowing proof—*Robertson* v. *S. Henderson & Sons, Limited*, June 2, 1904, 6 F. 770, 41 S.L.R. 597.

The evidence showed that the pursuer had practically lost the use of his right hand, and that his chance of getting employment in the labour market was very greatly impaired; that the main consideration which led the pursuer and his advisers to settle was not the sum paid but the assurance of employment; that the assurance had been fairly carried into effect by the defenders; that before the accident the pursuer's earnings were about 30s. a week; that after the accident he was able to earn from £1 to 25s. a-week; that the pursuer understood he was to get employment so long as he was attentive to his work; that he did not think he was getting a guarantee of permanent employment irrespective of his conduct as a workman.

On 25th November 1904 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds that the agreement formed by the letters dated 23rd March 1900 and the receipt and discharge granted by the pursuer and his father dated 29th and 30th March 1900 were concluded and granted by the pursuer when he was a minor, and were to the pursuer's great hurt, prejudice, and lesion: Therefore sustains the plea-in-law for the pursuer: Repels the pleas-in-law for the defenders, and reduces, decerns, and declares in terms of the conclusions of the summons: Finds the pursuer entitled to expenses," &c.

Opinion.—"The defenders are biscuit makers carrying on business in Edinburgh. The pursuer was for some time in their service, engaged in work which necessitated the use of a machine called a dough-breaking machine, and on 2nd November 1899, while he was working with this machine, his right hand was accidentally caught between its rollers and was very seriously injured. Two of his fingers had to be wholly or partially amputated, and he was incapacitated from working until 3rd March 1900. During that period the defenders, without (they say) admitting liability, paid him compensation at the rate of 12s. 6d. per week, which was the half of his ordinary wage, although he occasionally earned more by extra work. In March 1900 the pursuer had partially recovered, and the defenders considerately took him back to their employment. At that time a settlement was effected by two letters, dated 23rd March 1900, interchanged between the agents for the parties, and by

a receipt and discharge granted by the pursuer in implement of the agreement expressed in the letters. The letters were to the effect that the defenders should pay and the pursuer accept £25 and £5, 5s. of expenses for a discharge of the pursuer's claims. The letter by the pursuer's agent bore--'I accept your assurance that although your clients cannot guarantee a permanent situation they will do all in their power to keep him in their employment.' In his reply the defenders' agent wrote that he would draw the defenders' attention specially to this clause.

"These letters were the result of previous communings and correspondence. They do not seem to have been hasty. There is no ground for supposing that the pursuer was in any way hurried. Effect was given to them by a discharge dated 29th and 30th March 1900, by which the pursuer accepted the sums received by him as being in full satisfaction of all claims at his instance against the defenders in respect of the injuries he had sustained.

"The sum of £25 is, in point of fact, not mentioned in the receipt, which bears that £43, 7s. 6d. was the amount paid. But I understand that the apparent discrepancy is accounted for by the fact that that sum includes not the £25 only, but also other sums which had been previously paid by the defenders, and that the settlement was really what the letters express—a full discharge of the pursuer's claims for a payment of £25.

"These are the letters and the discharge which the pursuer seeks by this action to reduce.

"After this settlement the pursuer resumed his place in the defenders' employment, and continued in it until 20th October 1903, when the defenders dismissed him. Why they did so does not very clearly appear. Up to the date of discharge they seem to have treated him extremely well. They made and make no charge against him, but say merely that he had become careless and that his work was unsatisfactory. They affirm that that was not occasioned by the injury to his hand, but I find it difficult to resist the impression that they were not unconnected.

"The pursuer avers that he believed that it was part of the bargain with the defenders that they should retain him in their employment, and that he would not have granted the discharge but for that belief; yet the pursuer does not now maintain either that the letters contain or imply such an obligation, or that the letters and discharge can be reduced on the ground of misrepresentation or error; nor does he say, in this action at least, that he can challenge his dismissal as a breach of agreement or as a wrongous dismissal; nor does he allege any fault of the defenders or make any claim of damages on account of fault. The action is founded on a totally different ground. The pursuer concedes or alleges that the defenders did not come under any obligation to receive him permanently in their service. Indeed, his case is that they did not, and is rested solely on the ground that at the date of the discharge he was a minor, having been born on 10th December 1880, and being therefore under twenty at the date of the agreement and discharge. That is the pursuer's only plea. On that account the pursuer's father became a party to the settlement, and consents to and concurs in the discharge as the curator and administrator-in-law of his son."

"The case was debated in the Procedure Roll, when a proof before further answer was allowed, and that judgment was affirmed in the Inner House. The advising is important, and is reported. (*Robertson v. S. Henderson & Sons, Limited*, June 2, 1904, 6 F. 770, 41 S.L.R. 597.)

"A proof has now been taken under this interlocutor, and the effect of it has now to be determined. I regret its length, and fear that it travels into points which have not been raised or have been abandoned. It was not, however, easy wholly to exclude inquiry about the pursuer's alleged understanding that the defenders had agreed to employ him permanently, although it is not a point in the case.

"There is therefore no question in the case about misrepresentation or error in regard to the agreement or discharge; nor any question as to the defenders' fault. Nor is it alleged that the pursuer was dismissed in breach of agreement or wrongously. There is no question except on the ground of minority and lesion. It is, I take it, to be assumed that there would have been no ground of action had the pursuer been in majority.

"In granting the discharge the pursuer was acting with the advice of a law-agent and of a curator. But I do not understand that the defenders plead or argue that the plea of minority and lesion is on that account not open to the pursuer; and no doubt the point is well settled in that way, although it may be that a more complete proof of lesion may be required where the minor has acted with a curator than where he has not—Ersk. i, 7, 34, 36; Bell's Prin., section 2100: Bell's Com., i, 130. There seems, therefore, no doubt that the plea applies, and that the question of lesion must be inquired into, and is practically the only question in the case.

"I think it must be taken that the pursuer got no benefit by the settlement except the £25 paid to him. It is not contended that he acquired a valid claim to a permanent engagement, and it seems to me that he took no benefit by the clauses in the letters about his re-employment which have been quoted. These imposed no obligation on the defenders. I think parties were substantially agreed that the question is simply whether in the whole circumstances the payment of £25 can be held to be so wholly inadequate as to constitute the discharge granted in return for it enorm lesion in the sense of the plea.

"Now, whether there was lesion or not depends on the nature and value of the right discharged of which the pursuer was deprived. It is manifest that but for the Workmen's Compensation Act there would have been no lesion at all, for the argu-

ment is taken on the footing that no fault by the defenders has been proved, and that the pursuer had no claim to reparation or compensation either at common law or under the Employers' Liability Act. But under the Workmen's Compensation Act there was a right to compensation without fault; and it has not been said that in the circumstances there was at the date of the discharge anything which could prevent the pursuer from claiming compensation under that Act.

"The right which the pursuer discharged was thus his right to claim the remedy provided by the Workmen's Compensation Act, that is to say, to claim it under arbitration. The nature of the claim is very peculiar; and Mr Bevan seems to be correct when he says that it is not compensation for pains and suffering, but rather maintenance during the period of disability—Bevan on Employers' Liability, 3rd ed., p. 388. He was at the time in receipt of 12s. 6d. per week. That had been paid since the accident, but of course might be subject to reduction under the provisions of the Act, particularly sub-sections 2, 11, 12 of section 3. Now, the pursuer has been deprived of his statutory right to make that claim. He gave it up for £25. The question is whether that claim was worth more and much more than £25. £25 is just forty times 12s. 6d., and payment of that 12s. 6d. for forty weeks would amount to £25. On this point I may refer to the opinions of the Lord President and Lord Kinnear in advising this case under the former reclaiming note.

"The Lord President in his opinion says that 'it is to be presumed that an arbiter will fix the amount of compensation justly and intelligently, and to prevent an injured person from having the amount due to him so fixed appears to me to be to his lesion,' not necessarily to his enorm lesion, but still to his lesion. Lord Kinnear in his opinion says that while the Court cannot tell what compensation an arbiter 'would have awarded or might now award, it may be possible to find that a sum fixed by agreement is less than a reasonable arbiter could have awarded, although the precise sum to be given by such an arbiter cannot be ascertained.'

"While I am not entitled to say what sum an arbiter would award to the pursuer on full inquiry, and hardly entitled to speculate upon that subject, still I seem to be warranted in coming to the opinion that this sum of £25 is less than a reasonable arbiter would have awarded, or would award in this case.

"I found that opinion on the grave nature of the injury done to the pursuer's right hand, on its probable permanence, on his consequent incapacity to earn the same wage as he formerly could earn, and also on the provisions of the Workmen's Compensation Act, which, while leaving a wide discretion to the arbiter, seems to indicate a restoration to the original wage-earning power of the injured person as frequently a guide to the amount of the compensation to be awarded. It does seem to me that £25 was greatly under the pursuer's chances before the arbiter. I require to say as much as that to warrant the finding that the lesion which the pursuer has suffered may be called enorm, while I do not say more lest I should seem in any degree to dictate to the arbiter. The matter is one for the discretion of the statutory arbiter if the pursuer's claim be brought before him, and it will be his duty to proceed according to his own judgment on the evidence which may be laid before him irrespective of the impression which I have formed on less complete evidence.

"On the whole, I am of opinion that the settlement was to the enorm lesion of the minor and falls to be reduced."

The defenders reclaimed, and argued—The onus lay on the pursuer to prove lesion, and to prove it at the date of the deed sought to be reduced. Further, the lesion must be "enorm," as this transaction was authorised by the minor's guardian and legal adviser—Bell's Com. vol. i, p. 131. The agreement made was a fair one. The Lord Ordinary was in error in thinking that all he got in exchange for the discharge was a sum of £25. The important consideration was the assurance of employment. That assurance was acted on for three years, and had the pursuer been attentive to his duties he would not have lost his employment. The loss of his situation was due to his own negligence. That being so no lesion had been proved—*Cooper* v. *Cooper's Trustees*, January 9, 1885, 12 R. 473, 22 S.L.R. 314. A guarantee of permanent employment was not the bargain come to. The pursuer had got all he bargained for. He got employment and the chance of learning his business and he had failed to take advantage of it. Moreover, he was now in a position to earn full wages as an ovensman. In such circumstances an arbiter under the Workmen's Compensation Act would declare the compensation at an end—*Freeland* v. *Macfarlane, Lang, & Co.*, March 20, 1900, 2 F. 832, 37 S.L.R. 599; *Husband* v. *Campbell*, July 15, 1903, 5 F. 1146, 40 S.L.R. 822.

Argued for the respondent—The Lord Ordinary was right. The agreement made was to the lesion of the pursuer. He had suffered severe injury, by which his chance of gaining employment in the labour market had been rendered almost futile. He had valuable rights under the Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), First Schedule, Rules 1 (*b*), 2, 11, 12. The arrangement to pay 12s. 6d. per week might have been recorded in terms of the Act. These rights had been discharged for a consideration purely inadequate, viz., a sum of £25 and an offer of employment. The employment was uncertain, for he could be dismissed at any time. The discharge was therefore improvident and unreasonable, and amounted in effect to "enorm" lesion. It had not been proved that the pursuer had been inattentive to his duties.

LORD PRESIDENT—This case has been well debated on both sides, but I have little

doubt in my own mind that the conclusion which the Lord Ordinary has come to is wrong. I think his Lordship's interlocutor is vitiated by a misapprehension as to the contentions of the parties. His Lordship's judgment proceeded on the view that the only consideration given in the bargain struck between the pursuer and the defenders was the pecuniary one of the sum of £25, and says that parties were substantially agreed that the whole question in the case was whether £25 was a payment so inadequate as to amount to enorm lesion to the pursuer. There has been no such agreement as to the question in the pleas before your Lordships, and the question so put does not, in my view, present a correct view of the bargain.

The action is one of reduction, and that on one ground only, minority and lesion. The minority is admitted, and the question is whether the lesion has been proved. Lesion, in the sense of the authorities, must not be trifling, but must be enorm, which means that the consideration which the minor got must be immoderately disproportionate to what might have been got.

I have not had much difficulty in making up my mind as to the true state of the facts. It is clear that the accident to the pursuer was serious, resulting in the practical loss of all the fingers of his right hand. But it is clear that when he got well and returned to the service of the defenders he was still capable of doing the work of an ovensman, a position demanding rather common-sense, attention, and watchfulness than manual skill or strength. At the same time I think it is indisputable that his chance of employment in the open market was impaired. After his return the pursuer remained in the employment of the defenders for three years and was then dismissed. He now raises this action on the allegation that the bargain he entered into was one that gave him a consideration entirely disproportionate to that he could have got under the Workmen's Compensation Act. But, looking at the whole bargain, he got not merely £25 but an engagement on the part of the defenders that, though they could not guarantee him a permanent situation, they would, so far as they could, give him employment, as in fact they did. I cannot think this employment and the chance of gaining experience can be disregarded in the consideration. It is clear that the point was considered by the pursuer, his father and mother and law-agent, and I think that at the time they were well advised to prefer this arrangement to getting a larger sum of money. If this is the true state of the facts, the case is at an end, as the pursuer has failed to show any enorm lesion. I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled and the defenders assoilzied.

LORD ADAM—I am of the same opinion. The pursuer received his injury in November 1899, when nearly 19 years of age, and was incapacitated for work till March 1900. During that period the defenders paid him 12s. 6d. per week, half his ordinary wages. In March 1900 the pursuer, after consultation with his parents and his legal adviser, entered into an agreement with the defenders to settle his claims.

By a letter dated 23rd March 1900 he offered to settle his claims for £25 and 5 guineas of expenses on the footing that the defenders would do all in their power to keep him in their employment. The letter which was written by his agent concluded thus—"I accept your assurance that while your clients cannot guarantee a permanent situation they will do all in their power to keep him in their employment."

On the same date the defenders' agent wrote accepting the offer and stating that he would send a copy of this letter containing it to his clients and "draw their attention specially to the latter part of the letter."

The sum agreed on was duly paid by the defenders and a discharge taken of the pursuer's claims. This discharge the pursuer now seeks to set aside.

Now, the bargain between the parties is to be found in the letters above referred to, and the question is—"Was the bargain so entered into to the enorm lesion of the pursuer?"

The sole ground of reduction is minority and lesion. The minority here is admitted, and the only question therefore is, was there enorm lesion to the pursuer in entering into this agreement. The point to be considered is not whether the bargain has turned out well for the pursuer, but whether at the date of the agreement it was a proper and reasonable one for him to make.

It seems to me that the fallacy in the Lord Ordinary's judgment is to be found where he says—"I think it must be taken that the pursuer got no benefit by the settlement except the £25 paid to him. It is not contended that he acquired a valid claim to a permanent engagement, and it seems to me that he took no benefit by the clauses in the letters about his re-employment which have been quoted. These imposed no obligation on the defenders. I think parties were substantially agreed that the question is simply whether in the whole circumstances the payment of £25 can be held to be so wholly inadequate as to constitute the discharge granted in return for it enorm lesion in the sense of the plea."

If that were a correct statement of the question I should have agreed with the Lord Ordinary in holding that the bargain was to the enorm lesion of the pursuer. I think, however, that the most valuable part of the consideration of that agreement was the promise by the defenders to do all they could to give the pursuer employment. This may not have been an obligation which could have been enforced by law, but none the less it was a valuable consideration for this lad and it was acted on by the defenders for three years in all honesty and good faith, and might have been still in force but for the boy's negligence. I agree with your Lordship in thinking that this agreement, which was made with the boy's consent, was in the circumstances a most sensible and reasonable one to make.

LORD M'LAREN and LORD KINNEAR concurred.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

Counsel for Pursuer and Respondent—Watt, K.C. — Mercer. Agent — John A. Tweedie, Solicitor.

Counsel for Defenders and Reclaimers—Shaw, K.C.—T. B. Morison. Agent—R. S. Rutherford, Solicitor.

Saturday, June 17.

FIRST DIVISION.

BETT *v.* DALMENY OIL COMPANY, LIMITED.

Reparation—Personal Injury—Negligence—Master and Servant—Statutory Duty—Common Employment—Coal Mines Regulation Act 1887 (50 *and* 51 *Vict. c.* 58), *sec.* 49, *Rule* 21.

The Coal Mines Regulation Act 1887 (50 and 51 Vict. c. 58), sec. 49, provides—"The following general rules shall be observed so far as is reasonably practicable in every mine:—Rule 21—The roof and sides of every travelling road and working-place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel or work in any such travelling road or working-place which is not so made secure."

A miner's drawer raised an action at common law against his employers, an oil company, to recover compensation for personal injuries received through a fall of shale from the pit roof. He averred negligence and breach of the statutory duty imposed by the Coal Mines Regulation Act 1887. The defenders relied on the doctrine of common employment.

Held, in a hearing on a rule, that the doctrine of common employment could not be pleaded as a defence for the breach of the statutory duty.

Groves v. *Lord Wimborne* [1898], 2 Q.B. 402, *approved.*

Wilson v. *Merry & Cuninghame*, May 29, 1868, 6 Macph. (H.L.) 84, 5 S.L.R, 568, *commented on.*

Robert Bett, miner's drawer, Queensferry, with consent of John Bett, his father, he being a minor, raised an action at common law against his employers the Dalmeny Oil Company, Limited, Dalmeny, to recover £500 as damages for personal injuries received on 13th April 1903 while in their employment through a fall of shale from the roof of a main level road passing No. 5 Brae in their Dalmeny Shale Mine.

The pursuer averred—"(Cond. 3) The said roof of said level road at No. 5 Brae is upwards of 20 feet high. It is a roof over one of the permanent travelling roads in said mine, and owing to its great height it required special treatment to render it safe. It had not been in a safe condition for a long time prior to the accident in question. It is the duty of the defenders under the Coal Mines Regulation Act 1887, and in particular general rule 21 under sec. 49 thereof, and at common law, to have the said roof at all times made secure and perfectly safe." . . .

He pleaded—"(2) The pursuer having been injured through the fault of the defenders in neglecting a clear duty incumbent upon them, as well as in contravening the general and special rules of the Coal Mines Regulation Act 1887 as condescended upon, is entitled to compensation at common law as concluded for."

The defenders denied negligence, and averred—"(Ans. 5) . . . There was nothing to warn the defenders that at the place of the accident any such fall as caused injuries to the pursuer was likely to take place. The defenders took all the known and ordinary precautions for keeping the said pits in a safe condition and free from danger to their workmen, and all the necessary plant and equipment were supplied for that purpose. They also employed skilled oversmen and firemen to see to the safety of the roads in their pit. On the morning of said accident the fireman, whose duty it was to attend to the road in which it occurred, reported that he had inspected said road among others and found it safe. Prior to said accident no report was made to the defenders by anyone that said road was in any way unsafe, or that it required any propping or timbering. If the said accident was caused by the fault or negligence of anybody, which the defenders deny, it was due to the fault of those in common employment with the pursuer."

They pleaded—"(3) *Separatim*, the said accident having occurred through the fault of fellow-workmen with the pursuer, the defenders are entitled to absolvitor."

The further necessary facts are fully stated in the opinion by Lord M'Laren.

The case was tried before the late Lord President (LORD KINROSS) and a jury, and the pursuer obtained a verdict for £250. The defenders moved for a new trial on the ground that the verdict was contrary to evidence, and a rule was granted.

Argued for the pursuer — The verdict should be upheld. The defenders were well aware from the frequent falls which had occurred of the dangerous condition of the pit roof, and they had neglected it. The principle to apply was that laid down in *Patersons* v. *Wallace & Company*, July 3, 1854, 1 Macq. 748, 17 D. (H.L.) 16, viz., that a master was bound to take all reasonable precautions to secure the safety of his workmen. Moreover, the defenders had failed in their statutory duty under the Coal Mines Regulation Act 1887, which consolidated the common law and was absolute in its requirements—*Kelly* v. *Glebe Sugar Refining Company*, June 17, 1893, 20 R. 833, 30 S.L.R. 758, and *Groves* v. *Wimborne* (*Lord*), June 27, 1898, L.R. [1898], 2 Q.B. 402. The case of *Wilson* v. *Merry & Cuning-*