a bill. But be that as it may, the suspender has not proved his averments.

LORDS ARDMILLAN and KINLOCH concurred.

Agents for Suspender—M'Caul & Armstrong, S.S.C.

Agents for Defender—Millar, Allardice, & Robson, W.S.

Thursday, July 4.

SECOND DIVISION.

JACKSON'S TRUSTEES *v.* MARSHALL.

River — Property. The proprietor of ground bounded by a private river is not entitled to build on the alveus.

This was an action by the trustees of the late Robert Jackson of Bardykes, against John Marshall of Caldergrove. The following were the conclusions of the summons:—"Therefore it ought and should be found and declared, by decree of the Lords of our Council and Session, that the retaining walls and embankments erected by the defender in the course of the Summer or Autumn of 1809, or about that time, in or upon the alveus of the stream or river called the Calder, opposite to the pursuers' said lands of Bardykes, and which retaining walls and embankments are shown on the plan or sketch herewith produced and referred to, have been so erected or constructed wrongfully and illegally, and to the injury of the pursuers' said lands; and it ought and should be found and declared by decree foresaid, that during the Summer or Autumn of 1869, or about that time, the defender wrongfully and illegally, and to the injury of the pursuers' said lands, quarried or excavated a quantity of rock at three points in the alveus of the said stream *ex adverso* of the pursuers' said lands, and situated on that part of the alveus belonging to them lying between their said lands and the centre of the said stream, and which points are shown on the said plan or sketch; and further, it ought and should be found and declared, that during the said Summer or Autumn of 1869, or about that time, the defender wrongfully and illegally, and to the injury of the pursuers' said lands, removed a number of large masses of rock, lying on the pursuers' property, on the north-east bank of the said stream, nearly opposite the said embankment, and which pieces of rock belonged to the pursuers, and formed, in the situation where they were, a useful protection against the encroachment of the said river upon the pursuers' property; and the defender ought and should be decerned and ordained by decree foresaid, forthwith to remove the said retaining walls, embankments, and works connected therewith, and also forthwith to replace the rock quarried or excavated from the alveus of the stream, as above mentioned, or otherwise to excavate the rock on the half of the alveus adjoining the defender's lands at or near the said points, in such a way and to such an extent as to neutralise the effect upon the said stream of the said excavations upon the pursuer's half of the said alveus, and also forthwith to replace, in the same position as they formerly occupied, the masses of rock removed by the defender from the bank of the pursuers' lands adjoining the said stream, as above mentioned, or otherwise to erect such an embankment along the pursuers' lands at the portion thereof from which the said masses of rock were removed, as will protect the pursuers' lands from the encroachment of the said stream to the same extent as the said masses of rock, if not removed, would have done; as also forthwith to restore the said stream," &c.

The defender pleaded, *inter alia*—"The action cannot be maintained, in respect that the only operations executed by the defender, with the exception of the removal of the three small pieces of rock above referred to, were not in the alveus of the stream, but upon the defender's own lands, for the protection of which they were necessary.

After a proof the Lord Ordinary (MURE) pronounced this interlocutor, from which the whole facts of the case appear:—

"10*th April* 1872.—The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, and whole process, finds, 1*st*, that upon the defender entering into possession of the estate of Caldergrove in the year 1869, the water of the river Calder passed in time of flood in a considerable body across the lower part of the road leading down to the river, between the point H and J upon the plan No. 100 of process, and from thence through an opening on the Caldergrove side of the point marked I upon the plan into a rut or channel which ran along the Caldergrove side of the alder tree marked K upon the plan, and through which the water flowed into the main stream below the alder tree, after passing over the ledge of rock shown upon the plan: finds, 2*d*, that this ledge of rock extended at that time across the river to the Bardykes side, and consisted of solid rock, with the exception of a place about 4 feet wide, near the point marked O in the centre of the stream, at which the water passed over one or more large blocks of stone, which were detached from the rest of the rock: finds, 3*d*, that there was at this time a considerable quantity of detached rock and boulder stones lying along the main bed of the river, from the letter C to the letter R upon the plan, which had the effect of breaking the force of the stream; and that there were also large stones lying along the greater part of the Bardykes Bank, which had the effect of protecting that bank from the action of the river: finds, 4*th*, that on the right-hand side of the road leading down to the river there were the remains of a rough wall or dyke which had extended into the river; and that there were also on the left hand side of that road some loose rough stones laid along the ground on which the retaining wall is now built, but that neither this old wall nor the rough stones had the effect of preventing the river in time of flood from finding its way across the road into the rut or channel on the Caldergrove side of the alder tree, and thereafter discharging itself into the stream below: finds, 5*th*, that shortly after the defender acquired the property he rebuilt the wall on the right side of the road, and raised it at the part where it entered the bed of the river higher than it had originally stood; and that he also built upon the left side of that road what is marked 'retaining wall' upon the plan, and raised that wall from 1 to 2 feet higher than any of the loose stones that lay along the road; and that he thereafter, in the course of the year 1869–70, filled up the above mentioned rut or channel, which had previously formed a portion of the ordinary water way of the river in time of flood: finds, 6*th*, that during the same period the defender removed, in considerable quantities, the loose rock and boulder stones from the bed of the

river, and used them in making the artificial banks of stone and stone-pitching shown upon the plan; and that he also removed the large block of stone from between the ledges of rock near the point O upon the plan, and quarried out a considerable quantity of solid rock on either side of the place where that block of stone had lain, and so deepened the river at that place, and caused the main body of water to discharge itself through the opening thereby made, instead of diffusing itself across the river, and passing over the ledge of rock as it had formerly done: finds, 7*th*, that there was also, during the same period, a quantity of rock quarried out by the defender at or near the centre of the stream at the point marked R upon the plan; but that the pursuers have failed to prove that there was any rock quarried by the defender at the point marked M upon the plan: finds, 8*th*, that the effect of the operations thus carried on by the defender has been to prevent a considerable portion of the water of the river from passing as formerly in time of flood through the rut or channel on the Caldergrove side of the alder tree; and to divert it from the points marked H and I upon the plan, into the ordinary Summer channel of the river, and thereby direct it against the banks of the pursuers' property in a greater body and with a greater force than it was in use to run before the said operations were performed, and in a manner which is injurious, or calculated to be injurious, to the property of the pursuers: finds, 9*th*, that a considerable portion of these operations, and in particular a portion of the wall at H, where it enters the bed of the river, and of the retaining wall at I; the filling up of the rut or channel on the Caldergrove side; the excavation of the rock at or near the point O; the place marked 'artificial bank of stones;' and a portion of the stone-pitching shown between the places marked 'rock' and K, upon the plan, were operations upon the bed of the river, which, as a whole, the defender was not entitled to make without the consent of the pursuers; and that it is not proved that these operations were carried on with the knowledge and acquiescence of the pursuers: finds, 10*th*, that the draining operations in the field in which the well, referred to in the record, is situated, have had the effect of cutting off the water from the well; but that it is not proved that the defender had recourse to these operations with the view of producing that effect; and that it is not proved that the farmsteading of Bardykes has been injured through the defender's operations; and, before farther answer, remits to Mr James Leslie, civil-engineer in Edinburgh, to examine the localities in question, and to report (1) What portion of the retaining wall between the points marked J and I upon the plan, and of the bank marked "artificially raised," and of the stone-pitching between the points marked K L O, it will be necessary to remove, in order to allow the water of the river, in times of flood, to pass down through the old rut or channel on the Caldergrove side of the point marked K upon the plan, to the ledge of the rock below: (2) Whether, upon that rut or channel being opened up, it will also be necessary to remove any portion of the wall marked H upon the plan, and of the stone-pitching between the end of that wall and the point I, and of the bank marked "artificial bank of stones," in order to prevent the river from being confined and driven over to the Bardykes side in time of flood: (3) What measure he would recommend for replacing the rock which has been taken out at O, so as to fill up the passage which has been made in the ledge of rock at that place; and Whether, if that rock cannot be replaced, he would recommend any farther, and if so, what farther, removal of rock on either side of this passage, so as to allow the main body of water to spread over the river, instead of being carried through the opening as at present: (4) Whether, when the artificial bank and other obstructions to the free course of the river in time of flood down the Caldergrove side of the point K are removed, it will be necessary to lay down any large stones, or raise any embankment upon the banks on the Bardykes side, in order to protect those banks from the action of the river; and reserves, in the meantime, all questions of expenses.

"*Note.*—The evidence in this case is, in several respects, very contradictory; but it appears to the Lord Ordinary to be clear, even from the defender's own account of the condition in which he found the river when he acquired the property, that there was a well-defined rut or channel which ran from the road leading down to the river at H, along the Caldergrove side of the point marked K upon the plan, and extending to a considerable width at that point, by which a large portion of the water of the river passed down in time of flood, and joined the main body below the ledge of rock on the plan; and that the effect of the defender's operations has been to prevent this portion of the water from passing down on the Caldergrove side, as formerly, is very clearly established. The witnesses are not at one as to the precise width or depth of this rut or channel; but they seem to be almost all agreed that, so far back as they can recollect, a considerable portion of the water of the river—according to the defender's witnesses, in all extraordinary,—and according to the pursuer's witnesses, in all ordinary—floods passed through this channel to the depth of several feet, instead of going down the main channel on the Bardykes side; and that this was no mere occasional spreading of flood-water over a piece of low-lying land is, in the opinion of the Lord Ordinary, pretty clear from the description given by most of the witnesses of the gravelly and stoney character of the bed of the rut; and, in particular, from the fact spoken to by two of the witnesses for the defender, M'Lellan and Maine, who state that the soil and gravel lying along the rut had in places been scoured away and cut down to the rock.

"The fact that there was a passage for the river at this place is also shown by the Ordnance Survey, which all the men of skill are agreed in stating indicates the bed of the river as extending from about the point I on the plan across the bank artificially raised, and very much in the direction and to the same extent as the rut or channel as it existed before the defender commenced his operations, and thus making the river from 45 to 50 feet wide at that place instead of about 30 feet, as shown by the defender's plan.

"In these circumstances, the misapprehension under which the defender appears to have acted, is in supposing that a passage of this sort, which forms the ordinary waterway or channel by which a river is relieved in time of flood, is not subject to the same restrictions, in a question with the opposite proprietor, as the alveus in which the river runs in its ordinary state. The contrary has, however, been decided by the House of Lords, in the case of *Menzies*, July 4, 1828, 3 W. and S., p. 235; and having regard to the rule laid down in that

case, it appears to the Lord Ordinary that the filling up of the rut or passage, and consequent diversion of the water which used to run through it in time of floods from its accustomed course, was an operation which the defender was not warranted in having recourse to, at the risk of injury to the opposite proprietors, and that he is now bound to restore that passage to its former state.

"The same observation applies to the removal of the rock at O, which was beyond question an operation in the bed of the stream; while, as regards the other operations, the proof is, in the opinion of the Lord Ordinary, sufficient to instruct that a few feet of the wall next the river, on the right side of the road at H, and of the pitching between it and the retaining wall, as also a portion of the 'retaining wall' itself, and the artificial bank of stones and pitching reaching down to and round below the alder tree, are operations on the bed of the river tending to contract the waterway, and to force the water over to the opposite side. But whether these operations are of a description which will require to be altogether or partially removed when the old rut or channel is opened up, cannot, in the view the Lord Ordinary takes of the case, be disposed of until a report is obtained from a man of skill upon the subject. Nor can the passage on which the artificial bank has been raised be itself restored except at the sight of some one appointed by the Court. The Lord Ordinary has therefore made a remit to Mr Leslie to report upon the several points which appear to him to require to be cleared up before any operative decree can be pronounced.

"With reference to the injury to the pursuers' property, it may be that no serious injury has as yet been actually sustained. But it is in evidence that several parts of the banks on the Bardykes side have been to some extent affected since the defender's operations were begun; and this at the places where, in the opinion of the pursuers' engineers, they would expect the river to run with greater force in consequence of these operations. And although the men of skill examined on the part of the defender do not appear to be apprehensive of much injury, there is, in the opinion of the Lord Ordinary, sufficient in their evidence, particularly in that of Mr Gale, to show that it is not improbable that the blocking up of the passage on the Caldergrove side may seriously increase the risk of the river cutting into the Bardykes side, and this, having regard to the law as laid down in the case of *Bicket* v. *Morris*, July 10, 1866 (4 Macph. 44), seems sufficient to entitle the pursuers to the remedy they ask.

"In disposing of this case the Lord Ordinary has not considered it necessary to decide whether the original bank of the river, on the Caldergrove side, was in the precise line shown upon the pursuer's plan. But he has dealt with the case upon the broad fact, deponed to by most of the witnesses, that, so far back as they remember, the accustomed course of a considerable portion of the water in the river in time of flood was upon the Caldergrove side of the alder tree, after the water had crossed the road, a few feet above the point marked I upon the plan. As regards the original bank, he thinks it not improbable that Mr Cunningham may be correct in his opinion that the line claimed by the pursuers, at least between B and J upon the plan, has not been the river boundary for many years; but he thinks it pretty clear, on the other hand, upon the evidence, that the river, as contracted by the defender's operations, is not now in all respects in its original bed. And as the width of river shown upon the Ordnance Survey Map corresponds pretty nearly with the line in which the water is proved to have passed for many years in time of flood, the Lord Ordinary has come to the conclusion that the safest way to deal with this part of the case upon the evidence may be to take that line to be the boundary of the river on the Caldergrove side."

Mr Marshall reclaimed.

Solicitor-General (CLARK) and BALFOUR for him.

WATSON and ASHER, for respondent, were not called for.

At advising—

LORD BENHOLME—In this case I agree with the opinions which have been delivered. I apprehend that the whole operations on the alveus are illegal, and that it is irrelevant to allege that they were not injurious to the other side. It was laid down by the House of Lords in the case of *Bicket* v. *Morris* (4 Macph. p. 44) that no human sagacity can say what injury will arise from operations in the alveus of a stream. Therefore, I am not prepared to go so far as your Lordships have gone.

A proprietor may fortify his own bank. But he must not do it to such an extent as will cause injury to the other side. The difference is, that when the operation is *in alveo*, it is not necessary to allege injury. Mr Marshall has not only interfered with the alveus, but he has also raised an embankment, which has had the effect of throwing the water on the opposite bank. Upon the whole, I think the Lord Ordinary has pronounced a very able and just judgment.

LORD JUSTICE-CLERK—I concur in the result arrived at by the Lord Ordinary, who has disposed of the case in a very able and discriminating manner; and have little to add to the views contained in his Note.

It is not necessary, in my opinion, in coming to that conclusion, to question the law which was pleaded to us on the part of the defender. Had the operations complained of been shown to be *innocuæ utilitatis*, I do not say they would have been necessarily illegal. The alveus of a running stream belongs *ad medium filum* to the proprietor of the adjoining bank; but he is not entitled to put that property to a use which injures, or may probably injure, his opposite neighbour; and if he perform operations on the alveus which obstruct or alter the current, the opposite proprietor may prevent him, unless he show that no injury can thereby arise. This was clearly laid down in *Morris* v. *Bicket*. I am not prepared to say that all operations on the channel are in themselves illegal; nor does that judgment establish any such proposition. I can conceive operations on the channel incident to the legitimate use of the bank and river, and plainly productive of no injury, with which a court of law would not interfere. But there is no such case before us.

On the fact, my opinion proceeds mainly on the evidence of Mr Marshall himself, which seems to me to be candid and conclusive. The rest is to a large extent exaggerated on both sides. But it seems clearly established that the ordinary flood channel of this stream—a rapid and brawling brook, the banks of which, at this part of its course, require protection—passed behind and within the alder tree marked K on the plan,—so

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