the Government annuity, the Lord Ordinary has given decree, in accordance with the principle of decision of this Court in the recent case of *Kippen* v. *Kippen's Trs.*, Nov. 24, 1871, 10 Macph. p. 134.

"Any objection that could be taken by the defenders to the right and title of the pursuer in respect of the partial assignation, No. 20 of process, to her annuity, has been obviated and removed by the retrocession, No. 21 of process. And the offer referred to in the sixth article of the defenders' statement of facts being applicable, not to the period from the 14th of November 1870, when the testator died, to the 5th of April 1871 thereafter, when the Government annuity commences, but to the period from 15th May to 5th October 1871, cannot be held to affect the dispute between the parties as is has now been determined."

The defenders reclaimed.

The Court adhered.

Counsel for Pursuers—Reid and Burnet. Agents—J. & J. Milligan, W.S.

Counsel for Defenders—Solicitor-General (Clark) and Asher. Agent—R. M'William, S.S.C.

I., Clerk.

Tuesday, June 24.

SECOND DIVISION.

[Lord Shand, Ordinary.

DOBIE *v.* LAUDER'S TRUSTEES.

Proof—Recompense—Reparation.

Where a party alleged that on the faith of a certain arrangement she had expended sums of money in taking and furnishing a house—*held* (1) that parole evidence was competent, the claim being one for actual loss sustained; and (2) that the pursuer was entitled to be reimbursed for her expenditure.

This case came up by reclaiming note against an interlocutor of the Lord Ordinary (SHAND). In a note his Lordship fully sets forth the facts of the case and the reasons of his judgment.

"*Edinburgh, 6th January* 1873.—The Lord Ordinary having considered the cause, Finds that the pursuer's claims of £45 and £3, 2s. 11d. are not disputed, and therefore finds the defenders liable to the pursuer in these sums, and grants warrant to the pursuer to uplift the sum of £48, 2s. 11d., consigned by the defenders in the City of Glasgow Bank on 23d October 1872, with the bank interest which has accrued thereon, but finds no further interest due; ordains the City of Glasgow Bank to make payment to the pursuer of the said sum and interest; and grants warrant to the Accountant of Court to deliver up the deposit-receipt to the pursuer, in order that such payment may be made to her, and decerns; further, finds that in or about the month of March 1870 the defenders arranged and agreed with the pursuer that the children of the late James Lauder, then in minority or in pupillarity respectively, other than his eldest daughter, should, at or before Whitsunday 1870, reside in family with the pursuer, and be boarded by her at the rate of £60 per annum respectively, until, in the case of sons, they should attain to twenty-one years of age, and in the case of a daughter, Agnes Lauder, until she should attain that age or be married; and that to enable the pursuer to receive the children under this arrangement, it was stipulated by the defenders, and agreed to, that the pursuer should take a suitable house for their accommodation: and it was further agreed that to enable her to furnish the house she should have the use of the late Mr Lauder's furniture, situated in the house in Lutton Place, formerly occupied by him, and after his death by his family: Finds that, in reliance on this arrangement, and in order to enable her to perform her part thereof, the pursuer, with the knowledge and approval of the defenders, took a lease for a period of seven years of a house in Frederick Street, having the requisite accommodation, and that the furniture above mentioned was removed to it about the end of April 1870, at which date the children of the late Mr Lauder, under the said arrangement, went to reside there with the pursuer; and the pursuer incurred considerable expense in supplying a variety of articles of furniture required for the said house, beyond the furniture taken from Lutton Place: Finds that the stipulated board of £60 was paid for said children, four in number, till 25th April 1871, when Alexander Lauder, the eldest son, with the pursuer's consent, ceased to reside with her, and for the remaining three children's board (including the sum of £45, above found due) has been paid down to 25th October 1871: Finds that the defenders, though called on to do so, have declined to pay board for the children thereafter, or to proceed further in carrying out or implementing the said arrangement: Finds that this declinature on their part has been caused, not by any failure on the pursuer's part to fulfil her part of the said arrangement, or of any conduct on her part to justify it, but because of her refusal to continue to board the children on different and more favourable terms for the defenders than those agreed to between her and the defenders as aforesaid; Finds that, in consequence of the defenders' declinature to carry out the said arrangement, the pursuer has sustained loss to the extent of £50, in respect of outlays made by her on account of rent, taxes, and rates for said house down to April or May 1872, when she was relieved of her liability therefor, and on account of furniture provided by her for said house, to enable her to fulfil her part of said arrangement, and which she was obliged to sell at a sacrifice: Finds, in law, that the defenders are liable to reimburse the pursuer in said loss so sustained by her; therefore decerns against the defenders for said sum of £50: Finds the pursuer entitled to expenses, of which allows an account to be given in, and remits the same when lodged to the Auditor to tax and report, and decerns.

"*Note*—The present action concludes, (1) For payment of a sum of £45, on account of board of certain of the children of the late James Lauder, and £3, 2s. 11d. for outlays made by the pursuer on account of the children; and (2) For a sum of £100, in name of damages. From the correspondence which took place between the agents of the parties before the action was raised, it appears that the claim for board was for a time disputed, but in December 1871 the defenders' agent intimated that his clients would pay the sum claimed on that account, and the small accounts for outlay, if correct; and in the 13th and 14th answers to the condescendence, the sums sued for on this account were admitted and consigned. This unfortunate litigation has thus arisen entirely with reference to the pursuer's claim of damages.

"That claim is not maintained upon the ordinary footing of damages for breach of contract where the pursuer claims not only indemnification against loss, but payment for loss of profit or advantage, caused by the defenders' failure to implement a contract, or for breach of it. The claim, as insisted in, is limited to reimbursement of actual loss alleged to have been sustained by the pursuer in consequence of outlays made and responsibility undertaken by her, with the knowledge and approval of the defenders, to enable her to carry out her part of an undertaking and agreement entered into with the defenders, but which the defenders have failed or refused to carry out on their part, to the loss of the pursuer.

"The arrangement alleged to have been entered into between the pursuer and defenders was somewhat peculiar, but not an unnatural one, in the circumstances in which the parties were placed. The pursuer was a cousin of the late Mr Lauder, who died in 1866, leaving several children, some of them in minority and some in pupillarity. His trust-deed, under which the defenders act, and by which they are appointed tutors and curators to the children, contains provisions for keeping the family together, and with that view he directed the house in Lutton Place, in which he lived, to be kept as a home for his children, and his household furniture to be preserved for their use until the youngest child should attain the age of twenty-one years as regards sons, or majority or marriage as regards daughters. In the end of 1869, in consequence of the marriage of the eldest daughter, who had previously managed the household, it became necessary that the trustees should make new arrangements for the maintenance and care of the children, of whom there were four, the only other daughter, Agnes, being then about fifteen years old, and having two elder brothers and one younger, about eight or nine years old. The pursuer alleges that Mr Bower, one of Mr Lauder's trustees, who seems to have been an intimate friend of all the parties, and Mr John Lauder, the other trustee, after some negotiation, arranged with her that the house in Lutton Place should be given up, and that the children should be placed under her care, in a house to be taken by her, on the agreement that a sum of £60 a-year should be paid for the board of each of them, and that they should remain with her so long as they should respectively be under the guardianship of the trustees. It is stated to have been part of this arrangement, that the furniture in the Lutton Place house should be given over to the pursuer, who had not then a house of her own, to enable her to furnish the larger and more important rooms of the house to be taken by her, and to be kept by her for the use of the children, and that her house was to come substantially in place of the Lutton Place house under the settlement of the late Mr Lauder. The pursuer, who at the time referred to was a boarder with a friend, farther alleges, that on this arrangement being made, and in reliance on the defenders' fulfilment of their part of it, she, with the knowledge and approval of the defenders, took a house of a size and character suitable for carrying it out for seven years; and it is proved that she entered into a lease for that period of a house in Frederick Street of ten rooms and kitchen, at a rent of £68, and that as soon as certain repairs required were made by the landlord, viz., in April 1870, the Lutton Place furniture was moved into it, and the children took up their residence there with the pursuer. About February 1871, Alexander, the eldest of Mr Lauder's sons, left the house after serious differences had occurred between him and the pursuer. In August following the other children went to Dunfermline to spend some holidays and never returned, but were sent by the defender to board in another house in Edinburgh. The sum of £45 sued for on account of board, is for the quarter current when the children left, viz., from 25th July to 25th October 1871, and the defenders dispute their liability for any farther payment. The house was left on the pursuer's hands, and, from October onwards, it appears that the defenders demanded delivery of the Lutton Place furniture, in order to have it sold. The pursuer succeeded in getting the lease taken over by another tenant shortly before Whitsunday 1872, and the furniture belonging to the defenders was then given up to them, but in the meantime the pursuer alleges she had sustained actual loss to the amount sued for, (1) in having to pay the rent, and rates, and taxes, on the house from October 1871 to April 1872, the new tenant having taken upon him the rent thereafter; and (2) in having been obliged to sell furniture at a sacrifice, part of which she had owned previously, and part bought to enable her to complete the furnishing of the house.

"At the proof which took place before the Lord Ordinary, the pursuer admitted that there was no written agreement between the parties, and that she was unable to prove the agreement by writing, and it was thereupon maintained for the defenders that parole evidence on the subject was incompetent. The Lord Ordinary repelled this objection, and admitted the parole evidence tendered. Had the case been one of implement, or an ordinary claim of damages for non-implement or breach of contract, such evidence in proof of an agreement, to extend over a period of years, would have been inadmissible; but the Lord Ordinary was, and is, of opinion that the case falls within the rule to which effect was given in *Bell* v. *Bell*, 9th July 1841, 3 D. 1201, and in the previous case in regard to the Melville Monument there referred to, viz., that parole evidence of the arrangement and actings of parties is competent when the claim made is for relief or indemnity from actual loss sustained by a party acting in reliance on the fulfilment by another who has refused to carry out his part of an arrangement which had been entered into, but which could only be made legally binding, so as to be capable of enforcement on being committed to writing. The indemnification from loss which in such a case is claimed has been directly caused by the representations and conduct of a party who refuses to fulfil his undertaking. The claim for relief is supported by obvious considerations of equity, and it is only reasonable that the representations and conduct of the parties which give rise to it should be capable of proof in the ordinary way in which representations, actings and conduct are generally proved, viz., by parole evidence.

"Into the details of the case or the proof, the Lord Ordinary deems it unnecessary to enter very fully. He is of opinion that an arrangement of the general nature above mentioned was entered into between the parties. The parole evidence of the pursuer, Mr Ross, and Mr Bower, seem to lead to this inference. The provisions of Mr Lauder's

deed make such an arrangement reasonable and probable, and the facts—(1) of the pursuer herself undertaking the responsibility of such a lease as she entered into, and (2) of the furniture supplied by the defenders having been really necessary for the continued occupation of the house, are matters of real evidence which strongly support the pursuer's case.

"The evidence, farther, in the opinion of the Lord Ordinary, shows that the pursuer undertook the responsibility of the house, and supplied a considerable amount of furniture of her own, suitable for its occupation, with the knowledge of the defenders, and in reliance on their representations and actings, and on their fulfilment of the arrangement entered into.

"It remains only for consideration whether the defenders unwarrantably refused to go on with the arrangement, and in consequence the pursuer sustained loss in the sense already explained, and the Lord Ordinary is of opinion that both of these questions must be answered in the affirmative. It cannot, perhaps, be said that if the children, from causes over which the defenders had no control, had themselves refused to continue to reside with the pursuer, and had left her against the defenders' remonstrances and efforts, that the defenders would have been liable to such a claim as the present,—for the agreement which was entered into, without its terms being very clearly defined, taken reasonably, would probably not admit of being carried the length of an absolute undertaking by the defenders that, in any circumstances, the children should reside for the full term with the pursuer, but amounted to this only, that the defenders, who had the control of the trust-funds, would use all means in their power for this purpose. But it is unnecessary to consider this view, for it is clear to the Lord Ordinary that three of the children would have been quite ready to remain with the pursuer had the defenders desired it, and that the true cause of their being taken away, or rather of their not having returned as they intended to do after their holidays, was the pursuer's refusal to reduce the agreed-on rate of board from £60 to £45. The defenders founded on the pursuer's letter of 22d March 1871, as showing that she was quite willing that the whole family should leave her, but the explanation of that letter is evidently the same as that of some similar expressions used by the pursuer, and spoken to by some of the witnesses, viz., temporary annoyance and impatience at the conduct of one or more of the members of the family. The alleged excess in expenditure, taking the board and outlays together, of the children's income is not very clearly proved; but, even it were so, would not justify the defenders in withdrawing the children as they did, without indemnifying the pursuer. The defenders had it in their power to restrict the outlays beyond the board to such sum as they desired.

"The Lord Ordinary is of opinion that the loss proved may fairly be taken at £50. The rent of the house, with rates and taxes, is stated at £88. The pursuer had about six months' rent and charges, or £44, to pay, without any return; but she and Mrs Stevenson had the use of the house for themselves, and the loss on this head ought not to be estimated beyond £25 or £30. The loss in furniture is not very clearly proved, but the Lord Ordinary is satisfied that it must have been from £20 to £25, and, on the whole, therefore, he has fixed the total loss at £50, for which decree has been given.

"It does not appear that the defenders required the pursuer to abandon her claim of damages as a condition of paying the other sums for which decree has been given, and the Lord Ordinary has therefore allowed bank interest only on the sums consigned."

The defenders having reclaimed—

It was argued for them—(1) The contract set forth in the record being innominate, could not be proved by parole. (2) The defenders being curators of minor children, could not bind them as parties to such a contract, and the pursuer being in the knowledge of the ages of the children cannot insist against the defenders individually. (3) There was not sufficient parole evidence to prove the cont tract, at least as against the trustees, for only one of two trustees was made a party to it. (4) The breach of contract, if there was a breach, was justifiable.

The respondent in answer—(1) The action is not for implement or for damages for breach of contract, and it is not maintained, nor is it necessary for the pursuer's case to maintain, that there was a concluded contract—it is not disputed that the defenders were entitled to resile; the action is simply for the monies expended by the pursuer in reliance on the defenders' promises, leading her to understand that the children were to be placed with her under an arrangement as set forth for a term of years, and is of the same kind as the actions of *S. & P. Walker* v. *The Subscribers to the Melville Monument*, and the other case referred to in the Lord Ordinary's note—to the effect concluded for parole evidence was admissible; and (2) the proof fully established the pursuer's case to the extent of the sums decerned for by the Lord Ordinary.

The Court unanimously adhered to the judgment of the Lord Ordinary.

Counsel for Defenders and Reclaimers—Smith and M'Kechnie. Agent—T. M'Laren, S.S.C.

Counsel for Pursuer and Respondent—Pattison. Agent—R. P. Stevenson, S.S.C.

Thursday, June 26.

SECOND DIVISION.

SPECIAL CASE — GEORGE WEIR COSENS AND MRS IRWIN AND OTHERS.

Contract of Marriage—Alimentary Annuity—Power to Discharge.

Where the free rents of an estate burdened with an alimentary annuity in favour of A, the widow of the truster, were not sufficient to meet the annuity, an arrangement was entered into between the annuitant and the heir-at-law of the truster, for an unconditional sale of the annuity.—*Held* that the annuitant had no power to discharge the annuity, and that the trustees were not entitled to carry the remainder of the estate to the heir-at-law.

The parties to this Special Case were—first, the brother and heir at law of the late Robert Cosens Weir of Bogangreen—and second, the widow and trustees acting under the trust-disposition and settlement of the said Robert Cosens Weir. It was presented under the following circumstances:—