whole interest in the patent under the agreement, and the other parties, who are not here, hold the other half. That is obviously a case where the title of the pursuer fails in an action in which he seeks to enforce the agreement.

The Court adhered.

Counsel for Pursuer (Reclaimer) — J. P. B. Robertson — MacWatt. Agent — Alexander Morison, S.S.C.

Counsel for Defenders (Respondents)—Mackintosh—Dickson. Agents—Davidson & Syme, W.S.

Friday, January 9.

SECOND DIVISION.

[Lord Fraser, Ordinary.

COOPER *v.* COOPER AND OTHERS (COOPER'S TRUSTEES).

Minor — Restitution of Minor — Minority and Lesion — Reduction ex capite minorennitatis et læsionis—*Foreign*—Lex loci contractus—Lex loci solutionis.

Held (by Lord Fraser, Ordinary, and acquiesced in) that a question as to the right to reduce an antenuptial marriage-contract executed in Scottish form by an Irish lady, a minor, in Ireland, and with a view to the domicile of the marriage being Scotland, was to be decided by the law of Scotland.

Husband and Wife—Reduction of Marriage-Contract on the ground of Minority and Lesion.

Held that in considering whether a wife could reduce her marriage-contract on the ground that she was a minor when it was executed, and the provisions of it were to her enorm lesion, her husband's estate at the date of the marriage must be looked to, and not his estate at the dissolution of the marriage by his death.

Marriage-Contract—Time of Execution—Antenuptial or Postnuptial.

Opinion (*per* Lord Fraser) that a marriage-contract, the terms of which are finally agreed on by the parties, and which is ready for execution before the marriage, but is executed immediately after the marriage ceremony, is to be regarded as antenuptial, not postnuptial.

Minor—Minority and Lesion—Husband and Wife — Marriage-Contract — Reduction ex capite minorennitatis et læsionis.

By antenuptial-contract a husband provided to his wife in case of her surviving him an unsecured annuity of £80, which she accepted in full of terce and *jus relictæ*, and conveyed to him her whole means and estate then belonging or which might belong to her during the marriage. The husband predeceased, leaving a trust-disposition and settlement by which he increased the annuity to £200, but made no further provision for her. At the time of the marriage the wife was a minor without any legal guardian, and was possessed of no property. The husband, who was a cotton-spinner, was at that date possessed of means, heritable and moveable, to the amount of £15,000. The marriage was dissolved by the death of the husband thirty-five years after its date, during which period his estate had greatly increased. His widow then sought to reduce the marriage-contract on the ground of minority and lesion, and claimed her legal rights. It was proved that she had professional advice at the time of the marriage. *Held* (*diss.* Lord Rutherfurd Clark) that the wife having married a trader, who was subject to the risks of his business, and being at the time herself without means or expectations, there was in the circumstances no enorm lesion, and decree of reduction *refused*

Trust—Husband and Wife—Trust in Husband for Wife's Benefit.

A lady transferred to her son-in-law a sum of money invested in 3 per cent. Government stock, with a letter of trust instructing him that he was to pay to her a certain yearly sum during her life, and after her death to pay the annual proceeds to her daughter, his wife, during her life, and on her decease to divide the principal among their children. The husband received the money, and after the truster's death made the wife an annual allowance—at first £50, and latterly £25—for pin money. In an action of accounting by his widow against his testamentary trustees, in which there was nothing but a declaration to that effect in his trust-settlement to show that the income had been paid to the wife after her mother's death, they pleaded that the sums paid as pin money should be attributed *pro tanto* to payment of the dividends on the stock, and that the balance then remaining unpaid must be held to have been applied for her behoof during the marriage. *Held* (by Lord Fraser, Ordinary) that the duty of the husband, and, after his death, of his trustees, was to have paid over the dividends to the wife, and that they were bound to account to her for them.

The pursuer of this action was the widow of the late Henry Ritchie Cooper. The defenders were the trustees of her late husband, and certain children of the marriage. The pursuer was a native of Ireland, and was the daughter of a merchant in Dublin. She was married in 1846 at Dublin, her native place, being then eighteen years of age. Her husband was a domiciled Scotsman, proprietor of a property in Scotland, and in business in Glasgow. Scotland was to be the home of the parties after marriage. The contract of marriage, which was in the Scottish form, contained the following clauses—"In contemplation of which marriage the said Henry Ritchie Cooper binds and obliges himself, his heirs, executors, and successors whomsoever, to content and pay to the said Mary Butler, in the event of her surviving him, an annuity or yearly payment of £80 sterling, and that half-yearly . . . during all the days of the lifetime of the said Mary Butler, . . . which provisions conceived in her favour the said Mary Butler hereby accepts in full satisfaction of all terce of lands, half or third of moveables, and every other thing that she *jure relictæ* or otherwise could ask, claim, or demand from the said Henry Ritchie Cooper or his afore-

saids by or through his death, in case she shall survive him, or that her executors or nearest-of-kin could ask, demand, or claim of him by or through her death if she shall predecease him, saving always and excepting whatsoever provisions the said Henry Ritchie Cooper may make in her favour of his own free will and accord: Declaring that in the event of a separation taking place between the said parties, whatever may be the cause of such separation, the said Mary Butler shall be entitled to an annual allowance from the said Henry Ritchie Cooper for her support equal in amount to but not exceeding the annuity hereby provided to her in case of her surviving him; for which causes and on the other part the said Mary Butler hereby assigns, dispones, conveys, and makes over from her, her heirs and successors, to and in favour of the said Henry Ritchie Cooper and his aforesaids, the whole estate, heritable and moveable, that then belonged to her or should belong to her during the subsistence of the marriage."

This contract was prepared and written by Mr Cooper's law-agent, Hugh Moncrieff, writer in Glasgow, of the firm of Moncrieff, Paterson, & Forbes, writers there, and bore in the testing-clause to have been "subscribed and sealed at Dublin the 15th of October 1846." On the back of the deed there was written, holograph of the pursuer's mother, the following docquet—"I, Catherine Butler, mother of the within-named Mary Butler, hereby consent and ratify this contract of marriage, written on three pages of this paper, dated this 15th day of October 1846," which was signed by herself (the mother) and the two witnesses to the contract.

The parties to the contract were married in St Bridget's Parish Church, in Dublin, on the same day on which the contract was signed.

Mr and Mrs Cooper thereafter lived in Scotland, either in Glasgow or at Mr Cooper's house of Ballindalloch, about twenty miles out of Glasgow.

In 1863 Mr Cooper granted a bond of provision, whereby, on the narrative that he had resolved to increase the provision made by him for his wife in the case of his decease, and that he had made no antenuptial provision for the children of his marriage with her, and being resolved to make provision to the extent after mentioned, he irrevocably bound and obliged himself, and his heirs, executors, and successors, to pay to her, in the event of her surviving him, an annuity of £200, declaring the same to be in full of all terce, *jus relictæ*, and other claims competent to her at and through his decease, whether at common law or under contract of marriage between her and him, and in full of every claim competent to her, whether legal or conventional, of any kind or nature. He also bound himself to pay to the children of the marriage £8000, reserving a power of apportionment with consent of his wife. This was declared in like manner to be in full of the children's legal rights.

In 1864 Mrs Butler, Mrs Cooper's mother, transferred Mr Cooper a sum of £900, invested in Government stock, along with a letter which declared the purposes for which it was given to him, in the following terms:—"It is my will and purpose that the money I have handed over to you for the benefit of my daughter and her children, and which is represented by the sum of £900 Three per Cent. Government Stock transferred by me to your name, should be held by you on the following conditions, and invested as you think proper, you not being liable for any loss that may arise therefrom, and applied by you to the following purposes:—During my lifetime you are to pay me an annual sum of £50 sterling, and on my death the annual proceeds of the principal sum then remaining are to be paid over to my daughter, your wife, during her lifetime, and on her decease the principal sum then remaining is to be divided among your children then living in equal proportions, share and share alike."

In 1866 Mrs Cooper left her husband's home, and raised against him an action of separation and aliment, in which, after the record had been closed, and the case set down for proof by the Lord Ordinary, both parties concurred in asking to have the order for proof discharged, Mrs Cooper being found entitled to expenses. After the case had been thus taken out of Court, Mrs Cooper returned to her husband's house, and lived with him continuously till his death at Ballindalloch House in June 1882. After Mrs Cooper returned to live with her husband he allowed her £25 a-year as pin-money. Before that he had allowed her £50.

Mr Cooper left a trust-disposition and settlement dated in June 1881, whereby he conveyed his whole estates, heritable and moveable, to certain trustees (the defenders) for certain purposes. By the third purpose of that deed he directed his trustees to pay to Mrs Cooper, in the event of her surviving him, an annuity of £200, quarterly in advance from the first quarterly term after his death, out of the rents of his estate of Ballindalloch. This annuity was declared to be in full of all claims of terce, half or third of moveables, interim aliment, and mournings, and every other claim, legal and conventional, which she could ask or claim *jure relictæ* or otherwise by or through his decease; and in particular, to be in lieu and place and in full satisfaction to her of the whole provisions conferred on her, whether by antenuptial contract of marriage or by any postnuptial deed, contract, or bond of provision, or other writing whatsoever.

The fourth purpose was to the following effect:—In respect of the letter by Mrs Butler to the testator, above quoted, transferring to him the £900 in Government stock, and on the narrative of its contents, and that Mrs Butler had thereby foregone all power competent to her of revocation thereof by any subsequent act of hers, and that during her lifetime he had paid to her the stipulated sum of £50 per annum, and since her decease had applied the income on the £900 for behoof of his wife, therefore he directed his trustees to continue to hold the stock which was vested in his name, and to pay his wife the dividends during her lifetime.

By the fifth purpose he provided that his children's shares of the £8000 provided in the bond of provision should be equal.

At Mr Cooper's death there were seven children of the marriage, three sons and four daughters, all of whom were grown-up except the youngest daughter, who was at school in Brussels. Two of the daughters were married.

Mr Cooper's moveable estate was stated by the trustees in their inventory at £30,234. He had, besides, Ballindalloch. The defenders stated the

rental of his heritage to be £800.

In June 1883 Mrs Cooper raised the present action.

The conclusions of the summons were for reduction of the marriage-contract and the bond of provision, "in so far as affecting the pursuer, and more particularly in so far as they bear or may be held to imply an acceptance by her of the pretended provisions therein contained in her favour as in lieu of her legal rights of terce or *jus relictæ*, or in so far as they might be held as constituting any legal bar in the way of her now claiming and asserting her rights as against her said deceased husband's estate to her terce and *jus relictæ*;" and for declarator "that the pursuer is entitled to be served and cognosced to a just and reasonable terce or third part of the whole lands, annual rents, teinds, heritable securities, and others in which her said husband died infeft and seised; and that she is likewise entitled to her *jus relictæ*, being either one-half or one-third of the free moveable property belonging to her said deceased husband at the date of his death, according as it may be determined in the course of the process to follow hereon whether she is entitled, in respect of the discharge of legitim or otherwise, to one-half or only to one-third thereof;" and further, for production by the defenders of the title-deeds of the heritable properties, including heritable securities, in which her husband died infeft, and for an accounting by them of their intromissions with his estate. There was also a conclusion for payment to her by the defenders of £500 in respect of their intromissions with the heritable estate, and of £10,000 in respect of their intromissions with the moveable estate, or in the event of their failing to account, for payment of £15,000 as the balance of their intromissions. There were also conclusions for certain interim payments during the dependence of the process, and for payment of the dividends or interest on the £900 of Three per Cent. Government Stock which belonged to the pursuer's mother, from the time of her death in 1866 down to the time of raising the action.

In her condescendence the pursuer stated, *inter alia*—At the date of the marriage she was, according to the law of Ireland, an infant, and had no legal guardian. At that time, besides the estate of Ballindalloch, which she believed to be then worth £700 a-year, the pursuer had from the profits of his business an income of not less than £2200 a-year, and the free capital value of his means and estate at that date exceeded the sum of £15,000. "(Cond. 6). . . . The said contract was subscribed after the marriage, and in so far as it affects the pursuer's legal rights as widow of Mr Cooper, she revokes the same as donation *inter virum et uxorem*. Before subscribing the said contract, its terms had not been made known to or considered by the pursuer. Its provisions in her favour are grossly inadequate. The pursuer was at the time a *minor pubes*; she subscribed the document at the request of Mr Cooper, in total ignorance of what her common-law rights as the wife of a Scotsman were or would be, and in ignorance also of Mr Cooper's pecuniary position at the time, and his pecuniary prospects for the future, and in ignorance likewise of the meaning and contents of the document itself, and in entire ignorance more particularly of what the terms 'terce' and '*jus relictæ*' meant. With reference to the answer to this article it is explained that neither Mr Tench (after-mentioned), Mrs Butler, Mr Horan (after-mentioned), nor Irish counsel, had any knowledge of the pursuer's common law rights according to Scotch law, and were in entire ignorance of Mr Cooper's position and prospects as regards money matters, and they did not in any way confer or advise with the pursuer on the subject thereof or of the contract. Denied that the contract was a reasonable one. Mr Cooper's pecuniary position at the date of his marriage was very good, with the prospect of improving considerably, as in point of fact it subsequently did. With reference to the defender's averments made at adjustment, the pursuer explains that she was ignorant of the legal distinction between an antenuptial and a postnuptial contract of marriage; that the only deeds, documents, or papers signed by her at or about the time of or in connection with her marriage, were the said contract of marriage and the marriage register. The marriage was solemnised in St Bridget's Parish Church, Dublin, and the only place in which the pursuer signed any such deed or document was in the vestry of that church, and that was done after the conclusion of the service. That the time when the said contract was signed came first to the knowledge of the pursuer's legal advisers on 10th October 1883, when the fact was elicited by the defender's solicitors in the cross-examination of the said Mr J. V. Horan, under a commission from this Court granted and executed after defences had been lodged." "(Cond. 20) It was one of the primary duties of the trustees, upon an early date after Mr Cooper's death, to have explained to the pursuer, as his widow, the position and extent of both his heritable and moveable estate, as well as to have seen that she understood what were her legal rights as regards her terce and *jus relictæ*, and to have called upon her to elect between her legal and conventional provisions. In place of doing so, they . . . by their agents, wrote to her, with a bank cheque for £15 as a payment to account of the £200 provided to her under the bond of provision of 18th May 1883, and the trust-disposition and settlement of 22d June 1881. She declined to accept of the sum contained in the cheque on that footing, and of this date, through her law-agents, returned the cheque and intimated that she was making the necessary inquiries to enable her to determine as to claiming her terce and *jus relictæ*, and that she would in all probability repudiate the provisions made to her by the marriage-contract in her husband's settlement as being totally inadequate, and that in the meantime she would do nothing to homologate these provisions. She has frequently desired and required the trustees, however, until the question as to to her legal rights is determined, to pay to her for her alimentary use, a sum not exceeding £200 a-year, to be imputed towards payment of her legal provisions in the event of her being found entitled thereto, and of these being in amount equal to that sum, or otherwise, and in the event of her being found not entitled to her legal provisions, then to be held as payment of the £200 of her conventional provisions. But although the trustees are aware that she is not possessed of any means for her

alimentary support, they have refused to make her any interim payment (except a sum of £60) upon the alternative footing just mentioned." "(Cond. 21) The pursuer has claims against the testamentary trustees in respect of the interest or dividends received by her husband as trustee of her mother under a letter of trust, dated 7th July 1864, addressed by the said deceased Mrs Butler to the said Henry Ritchie Cooper, and fully set forth in the fourth purpose of his testamentary trust-deed. Under that letter of trust, and a last will and testament by Mrs Butler, dated 15th October 1863, which excluded his marital rights, the pursuer was entitled to the dividends on the Government stock mentioned in the summons, for the period since the death of her mother in June 1866, for the separate behoof of the pursuer, and which he failed to pay over to her, but, on the contrary, applied them for his own behoof. Ever since that date during the years when she resided with him, her total annual allowance from him for dress and every other personal purpose was £25, which was quite inadequate. She was entitled to the dividend on her mother's stock quite separately and distinctly from that alimentary allowance by her husband, for which he was bound at common law, and he had no legal right to appropriate the trust monies referred to for the purpose of relieving himself of that common law obligation. She likewise reserves her claims at common law for aliment for the period between 14th June and 11th November 1882."

To this the defenders answered that the sums accruing from the Government stock were regularly paid by Mr Cooper to the pursuer, or at least applied by him for her behoof. His whole proceedings in the matter were known to and approved of by her, and the dividends arising since his death had been paid to her.

The final statement of the condescendence, and the defenders' answer thereto were as follows:— "(Cond. 22) The pursuer hereby formally and judicially repudiates the provision of £200 a-year made by her husband by the foresaid bond of provision and trust-disposition and settlement. She also hereby repudiates the provision of £80 a-year (included in the said £200) made by him to her in the foresaid pretended contract of marriage, and she hereby revokes the said contract in so far as it bears to discharge her legal rights and claims at common law on the estate of her deceased husband, and generally she repudiates all the provisions made for her in any or all of these three documents, and she claims her terce and *jus relictæ*. . . . She at the same time reserves right — in the event of her not being found entitled to her terce and *jus relictæ* — to claim the foresaid provision of £200 a-year. The explanations in answer are denied, and it is explained that the pursuer's claims did not emerge until the death of Mr Cooper. Within a few weeks after that event Mrs Cooper intimated her present claims to the defenders. With reference to the addition to their answer made by the defenders by way of amendment (and assuming but not admitting that the law of Ireland is applicable), it is denied that the law of Ireland is as stated, and it is explained that according to that law the pursuer being an infant in 1846, was incapable of contracting to the effect of discharging or renouncing the claims that would according to the law of Scotland be competent to her if she survived her husband, for *jus relictæ*, terce, and aliment; and further, that by the law of Ireland her acceptance of the £80 a year in lieu of these claims is reducible in respect that that annuity was neither certain nor competent, meaning thereby that it was precarious, unsecured, and inadequate; and *separatim*, in respect that she was in ignorance of Mr Cooper's pecuniary circumstances and of her legal rights, and had no legal guardian." "(Ans. 22) Denied that the pursuer is entitled to make any of the said claims put forward by her. Explained that the pursuer was at the date of the marriage a domiciled Irishwoman. So far as regards her capacity to enter into an antenuptial contract with her intended husband in reference to the provision to be made by him for her in the event of his death, the pursuer was subject to the law of Ireland. By the said law the pursuer was capable of entering into the contract now under reduction, and by the said law the contract so entered into by her is not reducible on any of the grounds alleged by the pursuer. Explained that she was aware in 1863 of all the facts connected with the preparation and execution of the said marriage settlement of 1846, and the nature and extent of her legal rights which were thereby discharged. In 1863 and subsequently she took professional advice in regard to her rights under the said contract, and whether it could be reduced on the grounds alleged in this summons. It was in the full knowledge of the whole circumstances now alleged by her that the said postnuptial contract [being the deed of agreement under which she returned to her husband in 1866] was executed by her. She has delayed raising the present action until her husband and those by whom he was advised at the date when the said antenuptial marriage-contract was executed are dead."

The pursuer pleaded—"(1) The contract of 1846 should be reduced and set aside, in respect (1st) that the pursuer was at its date in minority; (2d) lesion—inasmuch as the provision thereby made to her was grossly inadequate, precarious, and unsecured; (3d) that she was in ignorance of Mr Cooper's pecuniary circumstances and of her legal rights, and had no legal guardian. (2) *Separatim*, The said contract having been executed after the marriage, is not binding on the pursuer, who revokes the same, in so far as it surrenders any of her legal rights, as being a donation *inter virum et uxorem*. (4) The bond of provision by Mr Cooper being a unilateral deed, the pursuer is not bound by anything it contains; and in any view, as she repudiates and revokes it, she is entitled to have it reduced and set aside in so far as it bears that the provision it purports to make for her is in full of her terce and *jus relictæ*. (5) Upon the marriage contract being set aside, she is entitled to terce and *jus relictæ*, and to have the amount of these ascertained and decerned for in the present process. (6) Under and in terms of Mrs Butler's last will and testament, and separate letter of trust of 7th July 1864, the pursuer was entitled to the dividends on the Government stock in question as from her mother's death, for her separate use, and Mr Cooper as trustee under that letter was bound to pay over the same to the pursuer accordingly."

The defenders pleaded—"(3) The pursuer having been a domiciled Irishwoman at the date of her marriage, and the deeds libelled not being reducible by the pursuer by the said law on any of the grounds stated by the pursuer, the defenders are entitled to absolvitor from the reductive conclusions of the summons. (4) The said antenuptial contract of marriage being an onerous deed, the pursuer is not entitled to reduce it. (8) The pursuer's rights being limited to those contained in the said antenuptial contract, bond of provision, and trust-disposition and settlement, she is not entitled to call upon the defenders to count and reckon with her, and they are entitled to be assoilzied from the conclusions for count, reckoning, and payment. (9) The claim of interest accruing from the said 3 per cent. Government stocks is excluded by the terms of the said antenuptial contract, or by Mr Cooper's marital rights, and *separatim*, the interest having been regularly paid to the pursuer, or at least applied by her husband for her behoof, with her knowledge and approval, the defenders are entitled to absolvitor from the conclusions of the summons applicable thereto. (10) The defenders never having refused to make payment to the pursuer of the whole sums payable to her under the said antenuptial marriage-contract, bond of provision, and letter of 7th July 1864, the action so far as relating to her rights under the said deeds and writings was unnecessary, and should be dismissed."

The Lord Ordinary before closing the record ordered certain interim payments to be made by the defenders to the pursuer to account of her claims against her husband's estate as those should be ultimately determined, without prejudice to and under reservation of all the pleas of both parties, and also ordered payment to be made to her of the dividends on the £900 Government stock as these had accrued since Mr Cooper's death, and should in future accrue and be received by the trustees.

On 31st May 1884 he repelled the third plea-in-law for the defenders [that the deeds of which reduction was sought not being reducible by the law of Ireland, they were entitled to absolvitor], and appointed the case to be put to the roll for further procedure, granting leave to reclaim.

"*Opinion.*—The deceased Henry Ritchie Cooper was married to the pursuer Mary Jane Butler, in Dublin, in the month of October 1846. At the date of the marriage Mr Cooper was a domiciled Scotsman, and Mary Jane Butler had at that time her domicile in Ireland, and was in minority. A contract of marriage was executed by them in Dublin; and there is a dispute as to whether this contract shall be treated as being antenuptial or postnuptial, seeing that it was signed, according to the pursuer, not before but (in the vestry) immediately after the marriage ceremony. It is not necessary to dispose of this question at present,—the only point argued to the Lord Ordinary being whether the law of Ireland or the law of Scotland is to be held as applicable to the present action.

"It is an action of reduction seeking to set aside the marriage-contract, and a subsequent bond of provision granted by the husband seventeen years after the marriage. The ground of the reduction of the marriage-contract is minority and lesion. The bond of provision is sought to be set aside as being an unilateral deed by the husband granted during marriage, not binding on the pursuer, and at all events revocable and revoked by her. The plea-in-law by the defenders, the trustees under the trust-disposition and settlement of the husband and the children of the marriage, is, that 'the pursuer having been a domiciled Irishwoman at the date of her marriage, and the deeds libelled not being reducible by the pursuer by the said law (law of Ireland) on any of the grounds stated by the pursuer, the defenders are entitled to absolvitor from the reductive conclusions of the summons.'

"In support of this plea the defenders have made an averment as to the law of Ireland to the same effect—which they offer to establish, and which comes to this, that an Irish minor may competently enter into a marriage-contract, and is not entitled to the privilege of restitution on proving lesion to which a Scotch minor is entitled. The plea therefore renders it incumbent on the Court to settle which law shall govern the case.

"It is said by the defenders that the capacity of anyone to enter into a contract is, according to international law, to be determined by the law of the domicile, which in the present case was also the law of the place of execution of the contract.

"The question as to the validity of a minor's contracts generally arises as between the law of the domicile, which is in one country, and the law of the place of contract, which is in another. The determination of the question has been variously given by the Courts of different nations, and has evoked very different opinions from the learned writers who have treated of this branch of law. The question, however, in the present case, is not a contest between the law of domicile and the law of the place of the contract, but between the law of the domicile and the law of the place of contract on the one hand, and the law of the place of intended fulfilment on the other. Scotland was the place of the matrimonial domicile; it was the country to which the parties intended to repair after the marriage, and did repair, and in which they lived during their whole married life. The contract was drawn by a Scotch conveyancer, and is couched in language of Scottish legal terminology. It provides for the wife, if she should survive her husband, an annuity of £80, and she renounces her terce and *jus relictæ*, and it is because the annuity provided to her by the contract was, as she alleges, totally inadequate, looking to the husband's means at the date of the marriage, and still more at the date of the death, that the pursuer seeks to set the contract aside.

"In considering which law ought to be adopted, it is necessary, in the first place, to see whether the restitution granted to minors has any reference to the personal capacity or incapacity of the contracting party. If it had, then it would be necessary to determine whether the law of the domicile should be alone regarded, as is the tendency of English Courts, though repudiated on the Continent and in America. Upon this point there is the following statement of the law by Savigny:—After stating the rule that the law of the domicile is the general regulator of the capacity to act, he proceeds to state the exceptions to this rule; and then he adds: 'In other cases the applicability of our principle must be denied,

on the ground that the question involved in them does not relate at all to the capacity to have rights, or the capacity to act, of which alone we are here treating; and that therefore they lie beyond the limits of our doctrine, and can only be brought within it under false pretences. Among these I reckon the following cases:— . . . 3. There is more doubt as to the restitution of minors, since it must be clearly fixed in what sense this right is itself understood by the legislator. Originally it was regarded as a limitation of the capacity to act, so that it would pass as a surrogate to minors for the complete incapacity that protects pupils. But since restitution has been applied to the acts of curators also, and in this form has been extended even to the tutors of pupils, it has lost that character. It does not now, therefore, rank among the limitations of the capacity to act, but it must rather be treated, in regard to the local law to be applied to it, in the same way as other grounds for impugning juridical acts.' [Savigny's Private International Law, translated by Guthrie, 2d edit., p. 168.] The translation here does not clearly convey the meaning of Savigny. What he does say is, that the restitution of minors does not rank among the limitations of capacity to act, but it must rather be treated in regard to the local law to be applied to it as any other grounds of reduction of a transaction. In other words, if it be the law of the place where the contract is to be fulfilled that ought to be applied, then *restitutio in integrum* will be granted if allowed by the law of that place. According to this view of the law, the law of the domicile becomes of no importance, and room is given to the application of that other rule, which is an exception to the rule *locus regit actum*, viz., that the law of the place of fulfilment of the contract must be looked to as that which is to determine the rights of the parties under it. 'The rules already considered,' says Story (sec. 280),'suppose that the performance of the contract is to be in the place where it is made, either expressly or by tacit implication. But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties, that the contract as to its validity, nature, obligation, and interpretation is to be governed by the law of the place of performance. This would seem to be a result of natural justice, and the Roman law has (as we have seen) adopted it as a maxim — *Contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit.*' And again in the law, *Aut ubi quisque contraxerit, contractum autem non utique eo loco intelligitur, quo negotium gestum sit, sed quo solvenda est pecunia.* The rule was fully recognised and acted on in a recent case by the Supreme Court of the United States, where the Court said that 'the general principle in relation to contracts made in one place to be executed in another was well settled, that they are to be governed by the laws of the place of performance.' Now, if Scotland was the place of fulfilment of this contract, then the law of Scotland is the law that ought to be looked to with reference to the rights of the parties under the contract. If it be void or voidable according to Scots law, either of the parties may insist upon its application. The question really becomes one of intention, and when it is seen that the contract deals with the rights of a Scottish wife in obtaining from her a renunciation of the provisions that the law would give her independent of contract, it is only reasonable to hold that she would be entitled to appeal to that law if she has any grounds under it for challenging the renunciation of these legal provisions.

"At the same time, it cannot be said that the question is entirely free from doubt looking to the opinions that have been expressed upon it by lawyers of learning and authority. John Voet has always been regarded in the Scottish Courts as a lawyer whose opinions are entitled to the greatest respect, and deservedly so. He, no doubt, mingles up now and then with his expositions of the Roman law the laws of his own Holland. But there is always a great amount of good sense and sound principle in whatever he offers. He is not a great authority upon questions of private international law, but still an opinion of his cannot be lightly disregarded. His uncle Paul Voet, in his Treatise, De Statutis, does not deal with the subject in hand, and the opinion of the one therefore cannot be cited in support of or in contradiction of the other. John Voet (iv. 1. 29) lays it down that the law to be applied in a case of restitution or rescission of a contract (such as on the ground of fraud, error, force, and fear, &c.) is not the law of the forum nor the law of the domicile, but that of the country where the contract was entered into, unless the contract was to be implemented elsewhere. '*Nisi contractus implementum ad alium locum sit destinatum, tunc enim hujus loci leges in judicando spectandas esse.*' After this dealing with the case of restitution against a contract in general, he takes up the case of restitution on the ground of minority, and lays it down that because a man is to be held major or minor according to the law of the domicile, it is just that the same law should determine whether and in what manner restitution is to be given on the ground of minority and lesion. The reason here assigned does not appear a sufficient one, nor does he assign any reason for applying a different rule to rescission on the head of minority from that which he lays down in reference to rescission on other grounds. No doubt the law of the domicile ascertains the *status* of minority, but that being ascertained, it surely ought to be the place of performance of the contract that should ascertain the minor's rights under or against it.

"Bar in one passage assents to, and in another appears to dissent from this opinion (p. 214 Gillespie's Translation). He first lays down the law as to the right of restitution in general, and he says— 'The result is that restitution against the loss of a real right in immoveable property is determined by the *lex rei sitæ* against the consequences of a binding contract by the laws to which this contract is subject for other purposes; against the prescription of a suit by the laws by which it is itself to be decided, and against delays of process and judicial sentences by the law of the place where the process is proceeding.' Then he makes the following statement—'Many writers, however, make an exception in regard to the restitution of minors.' [It is supposed that among these writers he includes Voet.] 'They hold that to be a special mode of the operation of incapacity to act, and therefore they determine it according to the

lex domicilii of him who seeks the restitution.' From this view the learned author dissents, and gives his reason for his opinion, and then adds, that 'At the same time the following modifications of the general rule we have expounded must be recognised as applicable to the restitution of minors in conformity with the *lex domicili*.' One of these modifications he states as follows—'The restitution of minors rests upon a special protection which is extended to them. That, however, can only take place where it is so extended by the *lex domicilii* of the minor. If a foreign State proposed to afford such protection to a minor against the law of his own State, no benefit would accrue to the minor, but his credit would much more probably be shaken, and his position as a person of property thrown into confusion. No restitution therefore can be afforded by a foreign court where it is excluded on the head of minority by the *lex domicilii*.'

"The case thus dealt with is, that where a person who is a minor by the law of his domicile enters into a contract in a foreign country, and pleads as against the enforcement of such contract the law of *restitutio in integrum*, which is allowed by the law of the contract but not of his domicile. In such a case he is not entitled to shield himself behind the law of the contract as against that of his domicile. But the present case is not one of that sort, for this is a case of contract made in the country of the domicile to be fulfilled in another country which allows *restitutio in integrum*. The parties in such a case are held to have contemplated the application of the law of the place of fulfilment, and it is only giving effect to their intention so to apply it—See also Wilder's Succession, 2 American Reports, p. 721. The result is that the third plea-in-law for the defenders must be repelled."

The defenders having intimated that they intended to reclaim, the Lord Ordinary on 11th June following allowed a proof.

The pursuer deponed—Her father died eleven or twelve years before her marriage. She made her husband's acquaintance a few months before their marriage. Prior to the marriage no explanation was made to her as to the state of Mr Cooper's affairs. It was never explained to her what her rights would be if she survived her husband. After the marriage ceremony she went into the vestry with the clergyman and some friends who were present, and signed first a large book and then a paper. She signed nothing else in connection with the marriage. She first looked at the marriage-contract some years after her marriage, when it was shown to her by her husband, and then saw that it contained something about £80 a-year to her. She thought then it was her marriage certificate. She was not aware what rights it conferred upon her, or what rights she had by Scots law. Her interests in the matter of the marriage were looked after, she supposed, by her mother, and also by her granduncle Mr Gerald Tench, formerly a barrister, and at that time an official of the Court of Exchequer in Dublin. She also saw Mr Vincent Horan, an attorney, about the marriage. She had no means of her own at the time of the marriage. She did not fully know the provisions of the marriage-contract till it was explained to her by Mr Dewar, S.S.C. (her agent in the present case). She delayed reducing it till she raised the present action, because she never heard or knew that she had legal rights until advised by friends after her husband's death. During the early part of her married life her husband allowed her £50 a-year for pin money, but after her return home after the separation in 1865-66 it was reduced to £25.

William M'Kinnon, accountant in Glasgow, was examined on the question of the amount of Mr Cooper's means as presented in his books (the entries in which covered forty years, from 1841 to 1881), which had been submitted to the witness for the purposes of the case. It appeared from these that Mr Cooper began business in 1842, and had no capital when he began. At 31st December 1846 his capital was £15,374. This was made up of Ballindalloch, which stood in his books at £13,700, burdened with an heritably secured debt of £9600 to his father's trustees (from whom he had acquired it by purchase); his part ownership of the mill, worth £9000; and his capital in the business of Cooper, Walker, & Company, £4000. In 1863 his capital had risen to £67,572. In 1866 it had sunk to £43,034, and in 1881, being the balance before his death, it stood at £52,703, in which sum Ballindalloch stood at £22,024, and the moveable estate at about £30,678. From 1846 to 1863 he was living at the rate of about £600 a-year, from 1863 to 1866 at the rate of £1000, and from 1866 to 1881 at that of rather over £1000, his highest expenditure in any one year being £1600. The books showed that he paid his wife £50 a-year at one time, and £25 a-year from 1863 onwards. They also showed that he paid Mrs Butler the proceeds of the £900 which he got from her until her death, but there was no trace of his having paid them to his wife. The witness valued Mr Cooper's business at the time of his marriage at £2660 a-year. Witness had prepared a statement showing Mr Cooper's estate, excluding Ballindalloch and heritable bonds. It was £21,202, after deducting from which the £8000 provided to the children by the bond of provision and settlement, a free balance of £13,203 remained.

Mr Horan, who on account of his advanced age was examined on commission in Dublin, deponed—He was present at the marriage. He had been consulted in reference to it by Mr Tench. He was not aware whether the marriage-contract was ever read over to the pursuer before it was signed, or that the pursuer's legal rights were ever explained to her or to her mother in his presence at any time. He met Mr Moncrieff, Mr Cooper's solicitor, on the only occasion on which he did meet him, in the vestry of St Bridget's Church on the occasion of the marriage, where the parties retired to sign the register, and it was his impression that the marriage-contract was signed then and there by the parties and witnesses, these being himself and Mr Fitzgerald, who was acting as solicitor for Mr Cooper in Dublin. He had himself never read the marriage-contract. To most of the interrogatories which were put to him in reference to the circumstances attending the marriage this witness answered by a reference to the entries in his business books, which contained an account for his professional services in connection therewith. An account of the evidence derived from this source is given by the Lord Ordinary in his opinion.

It was proved from the books of Messrs Mon-

crieff, Barr, Paterson, & Co., writers in Glasgow, successors to Moncrieff, Paterson, & Forbes, that Mr Moncrieff, who was dead before this action was raised, was in Glasgow on the date of the marriage.

An attested order or fiat for marriage license in cases of minority was produced by the pursuer, which bore that Mr Cooper and Mrs Butler in order to obtain the licence for the marriage made oath "that the express consent of Catherine Butler of Peter Street, the mother of the said Mary Butler, a minor, under twenty-one years, is thereunto had and obtained, the father of the said minor being dead, and the said minor not having any guardian of her person lawfully appointed, and her said mother being unmarried."

The Lord Ordinary pronounced this interlocutor:—"Finds that the pursuer and the late Mr Cooper were married on the 15th day of October 1846: Finds that at the date of the marriage the pursuer was a minor of the age of eighteen: Finds that an antenuptial marriage contract was entered into between the pursuer and her late husband, whereby there was secured to her an annuity of £80, payable to her in the event of her surviving her husband, which she did; and she by said contract renounced her terce and *jus relictæ:* Finds that at the date of the marriage the late Henry Ritchie Cooper, the pursuer's husband, was a cotton-spinner in Glasgow, and (including his mill and all his other property) he had an estate to the amount of £15,000: Finds that at the date of the dissolution of the marriage by the death of the said Henry Ritchie Cooper, he had estates which yielded him an annual income of £3500: Finds that the pursuer brought no tocher to the said Henry Ritchie Cooper: Finds that in the circumstances of this case there has been no lesion so as to entitle the pursuer to reduction of the contract; Therefore assoilzies the defenders from the conclusions for reduction of the said contract of marriage: (2) Finds that the said Henry Ritchie Cooper, upon the 18th February 1863, executed a bond of provision, whereby he increased the annuity to be payable to the pursuer in the event of her surviving him to £200, which was declared to be in lieu of every claim, legal or conventional, competent to her against his estate: Finds that the pursuer has repudiated and revoked the said bond of provision in so far as it bears that the provision therein made for her is in full of her terce and *jus relictæ:* Finds it unnecessary to deal with the conclusion for reduction of the said bond, seeing that the terce and *jus relictæ* are validly renounced in the marriage-contract, which stands unreduced; and that it is competent to the pursuer without reduction to renounce all benefit under the bond: (3) Finds that the pursuer's mother Mrs Butler in July 1864 delivered to the late Henry Ritchie Cooper £900, to be held by him in trust for payment to the pursuer during her life of the interest and dividends accruing thereon; and *quoad* the fee, for behoof of the children of the marriage: Finds that Mr Cooper did not pay or account to the pursuer for all the interest and dividends which accrued on the said sum of £900, and that the defenders, as his trustees, are now bound to account for so much of the same as were not paid to the pursuer: Therefore appoints the defenders, by the second box-day next, to lodge an account of the intromissions of the said Henry Ritchie Cooper with the said sum of £900, and allows the pursuer to lodge, if so advised, objections to said account on or before the first sederunt-day in October next, and reserves all questions of expenses; and decerns: Grants leave to reclaim.

"*Opinion.*—This is a kind of action which very seldom occupies the attention of courts; and almost all the decisions in regard to cases of this kind are of an ancient date. The pursuer seeks to set aside, upon the ground of minority and lesion, a contract of marriage; and she also seeks reduction of a bond of provision executed in her favour by her husband, and the benefit under which she renounces. Her case is simply this—that her husband died possessed of realised estate which afforded him an income of £3500 a-year, and that all that was provided to her by her marriage-contract was only an annuity of £80; and the annuity being so small, there was, in law, lesion. If there had been no marriage-contract she would have been entitled to terce and *jus relictæ*, from which she would have obtained—looking to the estate which her husband left—a large sum as *jus relictæ* (one-third of the personal estate), and a substantial terce out of the heritable property.

"I. There can be no doubt that there was here very great inequality, if the time at which the transaction is to be looked at be the date of the husband's death, and not the date of the marriage-contract; and the inequality being enormous, there would in this view be, in law, lesion. The Lord Ordinary will advert immediately to this point—as to the time to be looked at in determining whether the pursuer was lesed.

"The husband was a cotton-spinner in Glasgow at the time of his marriage, which took place in 1846. He kept books shewing the amount of his income, his expenditure, and his capital. These have been produced from the year 1841 downwards. It appears from these books that his whole capital for the year ending 31st December 1841 was £13, 9s. 3d.; for 1842, £1155; for 1843, £6448, 2s. 2d.; for 1844, £8114, 10s. 10d.; for 1845, £13,511, 11s. 9d.; and for 1846, £15,374, 19s. 3d. At the time of his marriage, therefore, he had a capital of upwards of £15,000—valuing all the property in which he had interest—including the cotton-mill. In subsequent years (with some exceptions) the mill produced large profits; and the result was, as already stated, that at his death he left an estate producing about £3500 a-year. He was all along, however, a trader down to 1866, subject to all the uncertainties and contingencies of trade, and what turned out to be a fortunate commercial career might have ended very differently. In the possession of his cotton-mill and of the small estate of Ballindalloch, which he acquired from his father, he resolved to marry. The acquaintanceship with the pursuer commenced in Dublin, and after three months' courtship, terminated in marriage. It does not appear to have been a love match either in its inception or in its continuance. The pursuer was the daughter of a merchant in Dublin, who was dead at the time of the marriage, and she lived with her widowed mother, who had an annuity—from what source is not explained—and which terminated at her death. At the time of the marriage the pursuer was eighteen years of age. She brought no

tocher to her husband, a circumstance of some importance in reference to the decisions upon this branch of the law, and to the reasons assigned for several of these. Most of the persons who were concerned, at the time of the marriage, in the matrimonial arrangements between the pursuer and her husband are dead, and the Court is obliged to rely upon the narrative extracted from the business books of Mr Vincent Horan, solicitor, Dublin, who acted as the pursuer's agent. These excerpts, however, are sworn to as containing a true narrative of the facts, and for want of better evidence they may be resorted to now for the purpose of ascertaining whether the contract was hastily or deliberately gone about.

"It appears from Mr Horan's books that a writ had been taken out from the Sheriff's Court in Dublin against the late Mr Cooper at the instance of the pursuer or her friends, but what the purpose of this writ was is not disclosed either in Mr Horan's books or by the oral evidence led before the Lord Ordinary. The defenders say upon the record that the marriage was 'forced by the pursuer and her relatives on Mr Cooper,' and they point to this writ as justifying their statement. After the writ is issued Mr Horan's books contain entries for attendances by him on Mr Cooper and on Mr Fitzgerald, his agent, 'for two hours on the business connected with Mrs Butler's case.' On the 24th of August 1846 Mr Horan attends upon Mr Wall, barrister, 'for upwards of an hour, when I apprised him of the whole transaction, and when he advised that he and I should go out to Mr Tench (the pursuer's granduncle) to-morrow and consult with him on the matter, and that in the meantime I should see Mrs and Miss Butler and know their ideas on the subject.' What the 'whole transaction' was is not stated either here or in any subsequent entry. It seems to have given rise to considerable commotion, for there are consultations on the subject next day, and a meeting takes place on the 26th of August, when—says Mr Horan—'I explained my views as regarded a settlement to be made on Miss B. previous to marriage, and before any personal interview would be permitted by Mr Cooper with Miss B., and when after fully discussing the matter it was arranged that the interview should take place in my presence, and that I should prepare Miss B. for such interview by giving her notice thereof.' The law-agent was therefore quite alive as to the necessity of a settlement upon Miss Butler; but the odd part of the matter was, that these two persons who were engaged to be married were not to be allowed to see each other except in the presence of the law-agent of the lady. The interview takes place in presence of the agent, and it lasted for two and a half hours, ending by Mr Cooper stating that he would arrange to have the marriage celebrated, 'as he had gotten satisfactory explanations from Miss B. on the several matters he wished to be informed on.' Apparently Mr Cooper was dissatisfied at something on the part of the lady, but was satisfied with the explanations he had received; and he writes a letter to Mr Fitzgerald, a copy of which was handed by the latter to Mr Horan, which he read to the pursuer. It was couched in such terms that Mr Tench, her grand-uncle, directed Mr Horan to submit it to Miss Butler, 'and ascertain from her, on reading over said copy letter, whether she would marry Mr Cooper or not, and if so, for me to see Mr Wall and consult with him as to how the annuity proposed to be settled by Mr Cooper on her was to be secured, and how the marriage could be legally solemnized.' What were the contents of this letter we do not know, but the pursuer and her mother, according to Mr Horan's books, after reading it, came to the conclusion that she would marry Mr Cooper. Further negotiations take place in regard to the annuity to be secured for the wife, who, according to Mr Horan, was 'satisfied to have the annuity secured in any way that he, Mr Fitzgerald, and Mr Cooper should think right.' Then comes an important entry on the 20th of September 1846, when Mr Horan acknowledges receipt of a letter from Mr Fitzgerald, agent for Mr Cooper, 'directing me not to require any settlement or other provision to be made as a condition-precedent to the marriage, as it might hereafter (in case further proceedings should be necessary) operate as injurious to Miss Butler's interest.' All this is very mysterious, and we can only guess at the further proceedings that are hinted at. But then on the same day there is an interview. The matter of the settlement to be made on the future wife is again discussed, and Mr Horan records that he mentioned 'that such a provision should be made by Mr Cooper voluntary, as it was not required by Miss Butler as a condition-precedent to her marriage with him, and when Mr Fitzgerald stated that he would write by this night's post to Mr Cooper acquainting him of Miss Butler's assent to the marriage, and would also recommend him to have prepared in Scotland such deed as he might think right to execute previous to their marriage, securing to Miss Butler the annuity mentioned in his letter.' Then Mr Cooper brings with him from Glasgow a draft of the intended marriage-contract, 'prepared to the Scotch form, between himself and Miss Butler, by which he would settle £80 yearly on her in case of bankruptcy, insolvency, or death, and would leave same with me for my counsel's inspection.' The deed was accordingly left with Mr Horan for inspection, who submitted it to Mr Wall, the barrister, who approved of it as correct, and the deed so approved was handed back by Mr Horan to Mr Cooper to get it extended on stamped paper; 'and when he said he would do so, and when he suggested that the marriage should take place here, the second week in October next, and requested to know if I had any objection to his going to see Miss Butler, as he wished to know if the above time would answer her for the marriage to take place, and when I assented to his seeing her for that purpose only, and apprised him of my intention of letting Mrs and Miss Butler know that he intended paying them a visit.'

"This, then, was a case where two people had agreed to marry each other; the marriage-contract was arranged, and yet the man could not see the woman without the consent of her law-agent. All this is excessively peculiar, and very different from what we are accustomed to in Scotland. Whether the man or the woman had the whip-hand in forcing on the marriage does not clearly appear from these jottings of Mr Horan. The only other item in his entries of importance is an entry on the 14th of October 1846 (the day,

be it observed, before the marriage), in the following terms—'Attending Mr Cooper this morning, when he handed me marriage settlement to be executed by him on marriage with Miss Butler.' The marriage-contract then had been drawn up, and was ready for execution on the 14th of October, and the marriage took place next day. It is said by the pursuer that the contract was not signed until after the ceremony of marriage in the church. This statement was contrary to what was set forth on the record as originally framed. But Mr Horan, when examined as a witness upon a preliminary point in the case, having given it as his recollection that the contract was signed in the vestry after the ceremony of marriage was performed, the record was altered, and an averment made that it was signed after the marriage ceremony, the object being to throw open the contract to more objections than could be stated against an antenuptial contract. If it were held to be postnuptial there might be stated against it that it was revocable as a donation. The Lord Ordinary is clearly of opinion that Mr Horan's recollections (he is now a very old man) are here at fault, for the following reasons—(1st) This was a contract of marriage in reference to which both parties were represented by law-agents, and it is to be presumed, necessarily, that they saw that the deed was duly executed before the marriage; (2dly) the deed was delivered ready for signature on the day before the marriage; (3dly) Mr Cooper himself has left a statement in which he casually mentions—and therefore it is all the more important—the fact that the contract was signed before the marriage; and (4thly) it is clearly proved that Mr Horan's memory is defective, in respect he says that Hugh Moncrieff, writer in Glasgow, the agent for Mr Cooper, was present at the marriage in Dublin, when it is clearly proved that he was at the time in Glasgow.

"Even though it were held, upon the evidence, that the parties appended their signatures to the deed after the ceremony of marriage, the Lord Ordinary would still consider this to be an antenuptial contract, as it professes to be. It was a contract duly settled before the marriage, and if it was signed in the vestry immediately after the ceremony, and not before it, this circumstance, arising from accident or excitement, will not deprive the contract of its character and quality of being antenuptial.

"The Lord Ordinary has referred with so much detail to the history of these transactions because he considers that in determining the present question it is of great moment to see in what manner and by whom the pursuer was advised and assisted at the time when she signed the contract now challenged. It is perfectly clear that the marriage entered into was one entered into with reluctance, at least on one side. Each had lawyers attending to his or her interest. The subject of the marriage-contract was matter of repeated and deliberate consideration, and if the pursuer did not obtain all that she thinks she ought to have obtained, her interests were not sacrificed by any want of assiduity or intelligence on the part of her advisers.

"Now, it is in these circumstances, and in reference to a contract so entered into, that the pursuer seeks to have it set aside on the ground that she was lesed. If the position that she has taken up be sound—that the time for considering whether the provision given to her by the marriage-contract was sufficient, looking to the amount of the husband's means, be the period of his death—then undoubtedly she was lesed, and she is entitled to succeed in this action. On the other hand, if the time be not that of the husband's death, nor of the time of instituting the present action, but that of the date of the marriage-contract, a very different conclusion must be come to. This law of restitution on the ground of minority and lesion is one which we have borrowed almost literally from the Roman law, except that the period of minority ceases in Scotland at twenty-one and the Prætor declared it to be at twenty-five. In every other respect, however, the Roman law is that of Scotland, and the whole of the title in the Pandects on this subject (Lib. iv. tit. 4) may be declared to be the law of Scotland. Pothier has collected together the whole texts in the Pandects upon the subject, and no one can read them without seeing that redress would only be given by the Prætor when the inequality between what the minor got or gave and what he or she ought to have got or given was enormous as at the date of the transaction. There is no express statement by any of the Roman lawyers either in the Pandects or the Code to the effect that the date of the transaction is to be looked to, and not any subsequent date; but such is the clear inference to be drawn from all the texts collected by Pothier, and these have been so interpreted. Vinnius has a short note upon the subject in his chapter headed, '*De Restitutione Minorum.*' He there says—'*Læsio autem æstimanda tempore contractus non petitæ restitutionis.*' Vinn. *Partitionum Juris Civilis*, Lib. iii. cap. 44, notes, p. 402.

"It is unnecessary to add the names of other civilians to that of Vinnius, and how the law is accepted in modern times may be gathered from the statement by Lord Mackenzie in his 'Studies on Roman Law' (3d edition, p. 151), where he says, 'The lesion or injury must be considerable, and it is estimated as at the date of the transaction itself, not of the challenge.' The Lord Ordinary accepts this as sound law. Take the ordinary case of a professional man—an advocate or a doctor. He begins life simply with sound health, ability, and hope, and he marries a girl perfectly contented to take him with all the disadvantages of narrow means. In course of time his abilities procure him places of high standing, and he makes a fortune. The barrister attains to the head of his profession, and the young physician becomes a millionnaire from his large practice. There was a marriage-contract between these people whereby the wife had agreed to take £80 a year as a provision after her husband's death. This at the time was looked upon by her and her friends as very sufficient. Is that now to be set aside because the husband has been successful in life, and could in his old age settle from his ample means a far larger annuity on his wife than he could do at the date of his marriage? This is a conclusion which is not recommended by good sense or right reason, and it is one that the Lord Ordinary cannot adopt.

"Now then, what was the present case, and how does it differ from either of the cases put. It differs in nothing. Mr Cooper was a tradesman in a fluctuating business, which one year brought profit and another year brought loss. The pur-

suer was a lady without fortune, to whom marriage and a home upon reasonable terms was a great object. To allow her now to get rid of a contract of marriage entered into with all the safeguards for her interests which were taken in the present case would be contrary to justice. The pursuer does not come within the kind of case suggested by the Roman Prætor—of a minor left to her own resources, and made the victim of insidious snares or of bad advice. She is a person who had the most thorough advice—the advantage of the most careful consideration and criticism by her lawyers, by her mother, and by her granduncle. Her guardians were her mother—who consented to the marriage by an endorsement on her marriage-contract—and Mr Tench, her guardian in fact. The Code Civil of France adopts the Roman law entirely upon this matter of restitution of minors; but upon this question as to whether restitution should be given, when the curators, or administrators, or persons acting for the minor gave consent after due deliberation, that law says that there can be no *restitutio in integrum* (Code Civil, sec. 1309).

"It is absurd to say in such circumstances that any advantage was taken of the pursuer's minority to her lesion. All her rights were perfectly guarded. She married a Glasgow cotton-spinner and took the risk of his fortunes. It was a very good marriage, looking at it at the time, for her, and a settlement by a man in his position of £80 a-year for his wife, in return for a renunciation of *jus relictæ* and terce, cannot be said to be one to her lesion entitling her to reduction.

"The Lord Ordinary has, in what he has now said, had before him the decisions of the Courts, and when these are considered they will be found in no way inconsistent with the views now expressed. These were cases where young women and young men gave up large fortunes without a corresponding equivalent. They have no application to a case like the present, where the pursuer gave up nothing. Marriage-contracts have been set aside, according to the equity of the Roman Prætor, where young woman have been entrapped into giving up their estates to their future husbands, and receiving nothing in return, and young men have been saved from obligations to wives, and to the fathers of wives, where they have been clearly deceived and cheated. There is nothing of that kind in the circumstances between the pursuer and the late Mr Cooper. This was a case in which everything was most firmly debated and settled by shrewd business men, and it would really be an abuse of the privilege given to minors to sustain this action of reduction.

"Erskine (i, 7, 38) in dealing with this subject states the law thus—'Restitution is competent to the minor against all obligations arising from contract by which he may be hurt, be they ever so solemn, even against marriage-contracts, in so far as the provisions contained in them are prejudicial to him.' This passage is not stated with the usual precision of the author, and must be taken as controlled by what he states in i, 7, 36, and which is undoubted law, as follows:—'As to the minor's lesion: 1st, If it be considerable, restitution is excluded; for actions of reduction are extraordinary remedies, not to be applied but on great and urgent occasions; 2dly, as restitution is not intended to put minors in a better condition than majors, but purely to defend them against the rashness or imbecility of nonage, the minor's lesion must proceed either from the weakness of judgment, or levity of disposition incident to youth, or from the imprudence or negligence of his curators.' There can be no question that, both according to the Roman law and the law of Scotland, enorm lesion must be proved; and although the law of Scotland does not go so far as that of France in upholding deeds consented to by guardians, yet the decisions show that the statement by Professor Bell is well founded, when he says (vol. i., p. 136) that 'there will be much greater difficulty in the reduction where tutors or curators have authorised the transaction.'

"A short reference to the decisions will show the general import of them to be as now stated. In the case of *Sluman* v. *Ker*, M. 6117 (1635), the wife married at 14 and died before 21. She conveyed her whole lands and heritages to her husband, and the action of reduction was at the instance of her heir. Her lands were worth 10,000 merks, and the provision in her favour was an annuity of 1000 merks a-year, 'which was no way equivalent to the heritable right of her own lands.' On the other side it was averred that 'the contract was solemnly subscribed with consent of the curators foresaid, unto whom the least suspicion of not fair dealing cannot be imputed . . . That there was no disparagement in the match, the defender being a gentleman of means who might have got as much or more in tocher with another.' The Court assoilzied the defender from the reduction.

"*Anderson* v. *Abercrombie's Trustees* (31st January 1824, 2 S. 662).—The wife disponed all her property to herself and her husband in conjunct fee and liferent, and to the children in fee; and he disponed to her in liferent and the children in fee all the property which he possessed or might acquire during the marriage. He was insolvent at the date of the marriage, and his creditors obtained a conveyance to her liferent. The ground of reduction was that she had 'suffered lesion by divesting herself of the fee of her property and not excluding the *jus mariti* as to the rents;' and 'that the provisions in her favour were completely nugatory in consequence of the insolvency of her husband.' The defenders were assoilzied from the reduction, Lord Glenlee remarking that 'in the cases quoted by the pursuer more had been given to the husband by the marriage-contract than he would have had at common law, which was not the case here.' Although the wife's conveyance was not consented to by curators, because she had none, yet it was consented to by her deceased father's trustees, from whom she obtained the property conveyed.

"*Davidson* v. *Hamilton*, M. 8988 (1632).—In this case the husband obliged himself to infeft his wife in all he should conquest during the marriage, which he 'desired to be restricted to a competent provision, seeing there was only conditioned to him in tocher by the contract 1000 merks.' Further, he became obliged to pay to his wife's father 5000 merks, 'and to do sundry other particulars to him if there were no bairns of the marriage.' The Court reduced the contract in so far as there was an obligation to his

father-in-law, but refused to reduce it so far as it gave a provision to the wife of the liferent of his whole estate. The tocher brought by the wife was only 1000 merks, and the contract had been entered into by the minor 'without consent of his curators,' which seems to imply that he had curators, although that is not expressly said.

"*M'Gill* v. *Ruthven*, M. 5696 (1664), was a case where the wife sought to reduce a marriage-contract which has some similarity to the present case, because although the contract was signed by the wife '*after the marriage* in Gairn House, she being removed from all her friends,' yet the Court dealt with it as if it were an antenuptial contract, and refused to find the wife's provision in favour of her husband to be a donation *inter virum et uxorem*, revocable. The ground of reduction on the head minority and lesion was based upon the fact that the wife disponed in favour of her husband and the heirs of the marriage £8000 of money and tenements worth £1100 yearly, and all the liferent that she obtained was 8 or 10 chalders of victual out of her own tenements. In short, what she brought was property to the value of £20,000, and this was destined to the husband's heirs in the event of heirs of the marriage failing. The Court dealt with this case in the way which the Court was moved to do in the case of *Anderson* v. *Abercrombie's Trustees*—they reformed the contract. They 'found it not relevant to reduce the fee of the wife's provision, but found it relevant to add to her a further conjunct fee, and therefore rectified the contract in so far as she had assigned her sums of money without reserving her own liferent,' and they also gave her the liferent of her own portion with the 8 or 10 chalders of victual.

"In *Lyon's Creditors* v. *Stewart*, M. 6059 (1714), the wife had disponed the fee of her estate without reserving her own liferent to her husband, 'who had no estate whereby to make her any suitable remuneratory provision. He had more debt than means,' and the Court in this case held that there was clearly proved enorm lesion.

"*Byers* v. *Reid*, M. 8995 and 6045 (1780).—The wife in this case had 10,000 merks, and her husband had nothing. 'He flies first to the Abbey, and then out of the kingdom, and takes on to be a soldier in Flanders, and his creditors seize upon his wife's estate and reduce her to beggary.' The Court held enorm lesion proved, and reduced the contract so far as the wife conveyed the fee of her own estate.

"In *Leven* v. *Montgomery*, M. 5803 (1683), a provision by an heiress in favour of her husband of 10,000 merks of free annuity during his life, 'out of a crazy and burdened estate,' was held not reducible on the ground of lesion at the instance of the wife's heir—the Court holding that the provision was not exorbitant.

"In *Boswall* v. *Boswall*, 4 Supp. 515 (1701), the Court, in disposing of an action of reduction for minority and lesion, found as follows:—'The Lords having considered this debate, they thought it was not every lesion that could repone minors entering into contracts of marriage, but it behoved to be *enormis et immodica*;' as Spottiswood observes, tit. of Husbands *Fleming* against *Hog*, that a wife being minor was not restored against her disponing her lands to her husband *nomine dotis*, though his fortune and means were unanswerable thereto, and that an exact equality was not necessary.'

"Such of these cases where the challenge was successful disclosed transactions which on the face of them indicated *enormis et immodica lesio*. Young heirs and heiresses were inveigled into contracts by which they gave away their money and lands without any, or for a most inadequate consideration, and if the privilege of restitution were not to be considered as an empty name, these were cases where it ought to be given effect to. But we have to deal at present with a case where, in return for her annuity, the minor only resigned a bare possibility or hope, the fulfilment of which depended upon contingencies over which she was not the master. She might no doubt get a larger provision from terce and *jus relictæ*, but that was dependent on her husband's success as a trader, and of his being a domiciled Scotsman at his death. The chances on both sides were duly estimated when the pursuer and her advisers consented to the bargain they made.

"II. With regard to the bond of provision for £200, all that need be said is, that it is free to the pursuer to reject or to accept it at her pleasure. As the Lord Ordinary reads the record, she does not absolutely reject it, but only in so far as there is attached to the acceptance of it the condition that it is to be taken as in full of all legal and conventional provisions which she might claim. The granter of the bond had the right to attach such a condition to his gift. If the donee will not take it under this condition she must just leave it. There is no necessity for reduction of the deed.

"III. There is a conclusion in the summons to the effect that the defenders should be ordained to pay to the pursuer 'the dividends or interest upon the sum of £900 of three per cent. Government stock which belonged to the pursuer's late mother Mrs Catherine Byrne or Butler, and which at the time of the death of the said deceased Henry Ritchie Cooper stood in his name in the books of the Bank of England, as the said dividends have accrued since the date of his death to the present time, and hereafter to pay the same to the pursuer, as the same shall accrue during her lifetime.' There is a further conclusion that the defenders, as representatives of Mr Cooper, should make payment to the pursuer of the dividends that were drawn by him during his lifetime.

"These are conclusions dependent upon two documents, which now fall to be referred to. The pursuer's mother had the £900 belonging to her invested upon Government stock. She handed this stock over to the late Mr Cooper in the year 1864, for purposes declared in a letter of trust dated 7th July 1864, wherein she said—'It is my will and purpose that the money I have handed over to you for the benefit of my daughter and her children, and which is represented by the sum of £900 three per cent. Government stock transferred by me to your name, should be held by you on the following conditions, and invested as you think proper, you not being liable for any loss that may arise therefrom, and applied by you to the following purposes:—During my lifetime you are to pay me an annual sum of £50 sterling, and on my death the annual proceeds of the principal sum

then remaining are to be paid over to my daughter, your wife, during her lifetime; and on her decease the principal sum then remaining is to be divided among your children then living, in equal proportions, share and share alike.' This was a simple trust in Mr Cooper's favour. He received the money, and he drew the dividends during his life. Before the date of this trust he had paid over to his wife an annual sum of £50 in name of pin-money, which he afterwards reduced to £25, and he gave her upon one occasion a sum of £5; and it is now contended—1st, That the sums of £50 and of £25 paid as pin-money must be taken as a payment—*pro tanto* at least—of the dividends; and 2dly, with reference to any balance over, that it must be held to have been applied for the pursuer's behoof, in respect that Mr Cooper must be held to have appropriated it for the maintenance of the household. These are defences against accounting which the Lord Ordinary cannot accept. It was the bounden duty of Mr Cooper as trustee, and now of the defenders, to pay over the dividends upon that stock to the beneficiary appointed by the truster. There is no proof that Mr Cooper ever intended the £50 or £25 given as pin-money to be as a part payment of the dividends which as trustee he was bound to account for; and whether he could compel her to contribute to the support of the household out of these dividends is a question that need not be answered, because it was never put to the wife, and the claim to do so was never insisted in or intended to be so by the husband. It is only necessary to refer further—although it has not much bearing upon the point—to the will of the pursuer's mother, whereby she bequeaths all that she should be possessed of to the pursuer 'for her own sole and separate use, free from the control of her husband, and not subject to his debts or engagements.' If the pursuer's right to the dividends rested upon this will, and not upon the letter of trust, then there would have arisen the question disposed of in the case of *Douglas' Trustees* v. *Kay's Trustees* (2d Dec. 1879, 7 R. 295), because by the marriage-contract between the pursuer and her husband the pursuer made a conveyance to him of 'All and Sundry lands and hereditaments, goods, debts, effects, and sums of money, and in general the whole property, real and personal, now belonging to her, or which may become due, or that shall belong to her during the subsistence of the said marriage.' It is impossible to apply the rule laid down in the case of *Douglas' Trustees* to a case like the present, where a trust is constituted, and the husband himself is made the trustee, and it would be a violation of that trust to make the clause of conveyance operate upon the fund secured by the mother."

The pursuer reclaimed, and argued—Assuming that the contract to be held an antenuptial one, she had merely to show minority and enorm lesion in order to have it set aside. The doctrine of restitution on the grounds of minority and lesion applied to any kind of contract; a marriage-contract, even antenuptial, was no exception—Ersk. i. 7, 34, 38; Stair, i. 6, 44; *M'Gill* v. *Ruthven*, 1664, M. 5696; *Bruce* v. *Hamilton*, Dec. 23, 1854, 17 D. 265; Fraser, Par. and Child, 396; Bell's Com. v. 131. It was no doubt true that in all the cases hitherto in Scotland where restitution had been given against a marriage-contract the minor had parted with property of his or her own; but the decisions were not based on the stripping of the minor, but on the general principle—*Gibson* v. *Scoon*, June 6, 1809, F.C. A minor might be lesed as much by the discharge of rights—even these were more or less contingent—as by conveying away property which he or she possessed. The question was solely one of lesion to the minor; the question of the husband's advantage did not enter into the discussion. The provision made for her by her husband was unsecured and entirely precarious, and was no more than a *jus crediti;* and for this he got a conveyance of all she had or might succeed to. The *quid pro quo* was not a reasonable provision—*Beattie* v. *Beattie's Trustees*, May 23, 1884, 11 R. 846. This enhanced the inadequacy. In England, such a provision to be good against a wife's claim must be settled, that is, secured, as well as given—*Carruthers* v. *Carruthers*, 1794, Beavan's Ch. Rep. 511; *Smith* v. *Smith*, 1800, 5 Vesey, 188; *Claugh* v. *Claugh*, 1801, *ib.* 710. The next question was—At what date was the husband's pecuniary position to be taken as estimating the adequacy or inadequacy of the provision? The Lord Ordinary in taking the date of the marriage had acknowledged that if the date of dissolution were taken there would have been enorm lesion. The latter was the time to be taken, for it was then only that the widow's rights emerged, and then only, first, could it be ascertained what the extent of her legal rights were. The question of prejudice could not be settled, or the amount of lesion computed, till then. What she gave up was a thing which could only come into existence when she became a widow. The contract was a purchase from her of her terce and *jus relictæ* in return for the annuity of £80, and the amount of these could be ascertained only at the husband's death—*Mitchell* v. *Mitchell's Trustees*, June 5, 1877, 4 R. 800; *Hunter* v. *Dickson*, Sept. 19, 1831, 5 W. & S. 455. Consent by legal guardians was no bar to restitution by a minor, and here she had no legal guardian. There was not evidence to show that her interests were sufficiently safe-guarded by her relatives as the Lord Ordinary thought. They were foreigners, ignorant of the laws of the country by which her rights were regulated, and they had no professional advice as to the law of Scotland. It was the duty of the husband, knowing that he was dealing with a minor, to have fully informed her and her relatives of the effects of that law on her rights as a wife and a widow, and this duty he failed to discharge. It was one of the objects of the law of restitution to reinstate minors against the ignorance or supineness of guardians.

The defenders replied—The case was not within the ordinary law of restitution of minors on the head of minority and lesion. The general *dicta* of the institutional writers referred to by the pursuer met the circumstances of the case. In none of the decisions was there presented a case like the present, in which the only lesion alleged consisted in a mere renunciation of contingent rights. They were cases in which restitution was instantly available by return to the person lesed of property of which he had in minority been deprived. The English law instanced by the pursuer was not without exception—*Drury* v. *Drury*, 4 Brown's Chan. Rep. 505.

The contract was the condition on which the marriage was entered into, and without the marriage the rights renounced could never have been present to renounce. The marriage itself was the consideration for the renunciation of her rights and conveyance of all she had. The Lord Ordinary was right on the question of the safe-guarding of pursuer's rights at the time of the marriage. She was advised by experienced professional relatives. Her husband was not bound to provide her with a Scottish agent.

[On the question as to the date at which the husband's estate was to be estimated, the Court intimated that no argument was required].

At advising—

Lord Craighill—The pursuer of this action, a native of Ireland, was married to her late husband Mr Cooper, a Scotsman, in 1846, when she was eighteen years of age. She had no property, nor had she any prospect of succession. Mr Cooper was possessed of means, and he had, besides, prospects from his father. Furthermore, he was in a trade which previously had been prosperous, but of which the result in the end might be a gain or a loss. As things were, his fortune at the date of his marriage might approximately be put down at £15,000. The pursuer's father was dead, but her mother was alive, and the latter as well as other near relatives of the pursuer made the marriage-contract proposed by Mr Cooper the subject of serious consideration and of frequent consultation. In this they were assisted by Mr Horan, a solicitor in Dublin, an intimate friend of one of her relatives, and the conclusion arrived at was one in which they all concurred. They would have liked it better that there should be no marriage-contract, but to this it was found that Mr Cooper could not agree, and they as well as the pursuer, to whom their views had been communicated, in the end agreed to what Mr Cooper proposed. The result was the contract which the pursuer now seeks to set aside.

The parties after the marriage came to Scotland, the home of Mr Cooper, and they lived together till 1864, when they separated by agreement. Thenceforward they lived apart till 1881, when Mr Cooper died, leaving a testamentary deed by which he bequeathed an annuity of £200 to the pursuer, and subject to this burden divided his fortune, which had increased so much that it then produced an income of over £3000 a-year, among his children. The pursuer, thinking that her annuity of £200 was inadequate, repudiated this provision—indeed she asks in this action that so far as she is concerned the deed by which it is conferred shall be reduced. But repudiation is all that is necessary for her purpose, which is to clear the way for challenging the validity of her marriage-contract. But for that contract, by which parties before their marriage fixed the pecuniary rights which in their case were to result from the marriage, the pursuer would have been entitled to *jus relictæ* and terce, and these for her would be better than the annuity of £80 which she accepted in full of everything—far better indeed than that and the testamentary annuity combined. For this reason she has challenged the marriage-contract, that should she prevail she may betake herself to her legal rights as widow, the ground of reduction being that she was in minority when the contract was executed, and that this contract by its provisions operates to her enorm lesion.

That she was in minority is admitted. The controversy turns on the question, whether the contract when it was made was to her enorm lesion? If it was, the law will give the redress which the pursuer seeks, but it must be remembered while this is so, all such contracts as may be thought to be hard, or to be ill-balanced in their provisions, may not be repudiated or reduced. There must be enorm lesion, and the proof of that rests on the pursuer. Fraud, of course, taints everything it touches, and where that has been practised the proof of the fraud will be all that is required to establish the ground of action. In the present case fraud is not imputed, the pursuer's case being that though Mr Cooper may have been perfectly earnest, and proposed and carried through all which he did in absolutely good faith, he by the contract so seriously injured the pursuer, that on the ground of her minority, and of enorm lesion the contract must be disregarded in the distribution of his estate. This is the pursuer's contention, but in my opinion this has not been proved, nor even relevantly alleged. Now, how according to the pursuer is this enorm lesion brought about? First, by the limitation of her interests in her husband's estate to £80 per annum. Second, by the conveyance by the pursuer of all she possessed or might acquire to her husband; and thirdly, by the renunciation of all her legal rights as wife and widow. These look formidable, but their strength when we examine the circumstances is found, as I think, to be apparent rather than real. The cardinal fact in the case is, that nothing was carried to Mr Cooper by the clause under which the pursuer made over her property to her husband. She got little and she gave nothing, for she never had property of any kind which could be the subject of disposition. This distinguishes the present case from any which has hitherto been before the Court. There have been numerous challenges, but none in which the ground of action was not the proportion between what was conveyed by the one to that which was conveyed by the other. The difference is the lesion; the extent of the difference is that by which it is determined whether the lesion was enorm. The present case is one in which these tests are not presented, and to which they cannot be applied. The pursuer gave nothing, and even if she had got nothing, she would by making over all she had at the time or might afterwards acquire to Mr Cooper, have been none the poorer. And this appears to me to be subversive of the ground of action so far as the clauses within which we are dealing is concerned.

The pursuer, however, says in the second place, that she renounced her legal rights in consideration of the annuity of £80, and that this of itself has resulted in her enorm lesion. The Lord Ordinary holds that taking the date of the marriage as the date of comparison, the difference was not such as to amount to enorm lesion. I also think that the date of the marriage is the *tempus inspiciendum*, but even if the date of Mr Cooper's death, when he was so much richer than he was at the date of his marriage, was to

be held to be the *tempus inspiciendum*, the reduction in my opinion could not be decreed. The pursuer, as I think, misapprehends the ground on which a challenge in such a case can be allowed. That is not the obstacle presented by the contract to the acquisition of gain, but the loss inflicted by the contract through the transference of property belonging to the party said to have been injured, which was thereby accomplished. Not to gain what but for the contract would have been got, is one thing—to lose that which was taken away by the contract is quite another; and this last is, so far as I have discovered, the only lesion recognised as a ground of reduction. There is certainly no trace of any other to be discovered in the books. Nor is this wonderful. How could enorm lesion be proved? Let it be assumed that the husband at the date of the marriage was possessed of property which if in the end it were to be distributed according to legal rule would yield to the wife something much greater than her marriage-contract provisions, how is it to be shown that the contract was to her enorm lesion? The property belonging to the husband might be lost, or it might be squandered, or it might be invested in a way by which the rights of the wife would be excluded or diminished, or the husband might change his domicile, and when he died the rights belonging to a wife might be entirely different from those to which she would be entitled by the law of the country where at the marriage he was domiciled. In short, there appears to me to be an entire want of *data* for determining whether by the renunciation of the pursuer's legal rights she as at the date of the contract could be said to have been thereby to any extent injured. The thing would be reduced to something like a wager. There was no certainty, so far as value was concerned, of that which had been surrendered, and without this it would be impossible to show that the contract when it was made was to the pursuer's lesion. Nor is this all. The contract here was that which led to the marriage. The marriage, which therefore is to be ascribed to the contract, must be taken into computation in determining whether the pursuer was or was not injured, and if its value is brought into estimation there seems no reason to doubt that she was not the worse for that without which the marriage would not have been contracted at all. The benefits were many and various; for one thing, the pursuer shared the prosperity of her husband. She lived for long with him as the wife of a wealthy man, and at the end she was bequeathed an annuity which but for the marriage never would have been granted. True, no doubt, that annuity is smaller than she thinks—and many others think—might well have been bestowed, but in determining whether or not the results of the marriage are to be taken into account in deciding whether the contract which led to it was or was not to her enorm lesion, the smaller must be, just as much as the larger annuity would have been, taken into computation.

On the whole matter I agree in the conclusion at which the Lord Ordinary has arrived, and as I am constrained to think that any other would be extremely inconvenient, because there could hardly ever be a marriage-contract with a minor in which it would be perfectly certain whether the conditions agreed on between the parties were or were not to be those by which the distribution of the property of the spouses was to be governed.

On the two subsidiary or, as they may be called, prejudicial questions, I concur in the view on which the Lord Ordinary has proceeded. In the first place, I think that the contract was an antenuptial contract, and this opinion I adopt, because according to the weight of the evidence it was signed before the marriage; even, however, on the assumption that it was signed after the parties had gone from the church to the vestry, I think with the Lord Ordinary that it is to be held in the circumstances to be an antenuptial contract.

In the second place, as I have already indicated, I think that, supposing the case were one in which something was renounced by the pursuer which furnished materials for determining whether the contract was or was not to her lesion, the date of the marriage is the *tempus inspiciendum*. If the pursuer of such an action is entitled to reduce, the sooner the reduction is sought the better. He or she is not bound to wait till the death of the other spouse, and yet if the date of the husband's death is to be the period when alone there can be a determination, there must during the existence of the marriage be uncertainty as to the validity of the contract. Such a result might be not only inconvenient, but anomalous, for a contract which was considered by all concerned to be perfectly fair and reasonable as things were, could be invalidated by even an unexpected increase of fortune during the marriage.

Lord Rutherfurd Clark—When she was married the pursuer was in minority, and she had no legal guardian. By this action she seeks to set aside the marriage-contract into which she then entered. The ground of reduction is minority and lesion.

The marriage was celebrated in Dublin, but the Lord Ordinary has held that the right to reduce the marriage-contract is a question which is to be determined by the law of Scotland. In this judgment both parties have acquiesced.

By the marriage-contract the pursuer assigned to her husband all the property which she then possessed or might acquire. On the other hand, her husband bound himself to provide to her in case she should be the survivor an annuity of £80, in consideration whereof she discharged her *jus relictæ* and terce.

It appears that the pursuer had no means at the date of the marriage, and succeeded to little, so that the marriage-contract is injurious to her only in so far as it discharges her legal rights.

It is not, I think, doubtful that marriage-contracts are reducible on the head of minority and lesion. The marriage cannot of course be set aside, but the marriage-contract may be. All our authorities are at one on this subject. No doubt the Court will not interfere except in cases where the prejudice is great. But though the desire will be to protect the marriage-contract, it cannot be sustained if enorm lesion be proved.

In this case the alleged lesion consists, not in the conveyance of property which belonged to the pursuer, but in the discharge of rights which only opened to her if she should be the survivor of the spouses. The defenders maintain that the discharge of such contingent rights which are brought into existence by the marriage itself cannot be to the lesion of the pursuer, or, at least, not in such a sense as to give occasion to the re-

duction of the marriage-contract. They argue that the marriage never would have been entered into if the discharge had not been granted, and that as the marriage must subsist so must the marriage-contract.

The distinction which is thus taken between a conveyance of property and a discharge of rights arising from the marriage has not the authority of any one of our institutional writers, nor is it mentioned in any of the cases which have been cited. I see no legal principle on which it can be sustained. As much injury may result from the discharge of rights, even though they be contingent, as from the conveyance of property, and in my opinion there is no reason why a remedy should exist in the one case and not in the other.

Every widow is by law entitled to her *jus relictæ* and terce unless they have been discharged. The purpose of this action is to vindicate these legal rights, and the defenders plead in answer to the pursuer's demand the discharge which she granted in her marriage-contract. The question then is, whether that discharge is binding on her? It would have been binding on her had she been in majority when she granted it. But the pursuer being a minor had not an absolute capacity to do any act, and therefore had not an absolute capacity to grant a discharge. It seems to me to follow that if the discharge is to her enorm lesion she can set it aside just as she could set aside the discharge of a debt or of any other obligation. The protection accorded by the law to minors is almost universal, and I think that it must include discharges. To hold otherwise would be to hold that a discharge granted by a minor would be as effectual and as binding as a discharge granted by one in majority, for which, in my opinion, there is no authority.

If the distinction which is taken by the defenders were well founded, it would follow that the remedy of a woman marrying in minority would be limited to the case of a conveyance of her real property. So far as her moveable property is concerned, it is immaterial whether she assigns it or not. If there be no conveyance it will pass to her husband *jure mariti*, and even a reduction of the voluntary conveyance would leave the legal assignation in force. The consequence necessarily is, that if a woman who marries in minority cannot reduce a discharge of the legal rights belonging to her as a widow, she must not only lose her whole moveable estate, but, for a consideration which may be grossly inadequate, be deprived of these rights which emerge in her favour at the dissolution of the marriage, and which are given by the law as her share of the *communio bonorum*.

It is urged that as the marriage must subsist, so must the conditions under which it came into existence.

This proposition cannot be true. For it is conceded that a minor might reduce a conveyance of her real property if such conveyance were to her lesion. Yet such a conveyance is as much a condition of the marriage as a discharge of legal rights. In either case it might be said, with the same reason, that the marriage would not have taken place had the conveyance or the discharge not been granted, and if the subsistence of the marriage does not protect the one, neither should it, I think, protect the other.

The question then comes to be, whether the discharge was to the enorm lesion of the pursuer, and I agree with the Lord Ordinary in thinking that this must be decided by reference to the condition of the husband at the date of the marriage and not at the dissolution. But it seems to me to be right not only to consider the amount of his fortune at the prior date but the prospects which he had of increasing it. And as these prospects have now become realities, it is, I think, legitimate to have regard to the means which he possessed at his death, as furnishing some indication of the value of what were but prospects at the time of the marriage.

In 1846, when he married, the late Mr Cooper had a capital of more than £15,000, and he had a share in a well-established business. This income was fluctuating, as incomes derived from trade often are. In the year of his marriage it seems to have been between £2000 and £3000, if it did not reach the latter sum. His prospects were very good, and without, so far as appears, any exceptional or unlooked for success he died in 1882 leaving an estate which produced £3500 a-year.

The only provision which he made for his wife in consideration for the discharge of her legal rights was an annuity of £80, and it was wholly unsecured. I cannot regard that annuity as anything like a fair equivalent for the discharge which was taken from the pursuer. On the contrary, it seems to me to be mean in the extreme, and to her enorm lesion. An unsecured annuity is hardly any provision at all. It is exposed to all the risks to which the husband's estate is exposed. Where there is no discharge of the legal rights, a wife must follow the fortunes of her husband. If he dies insolvent she of course can take nothing. But if he become bankrupt, and, as not unfrequently happens, become wealthy again, she would share in his prosperity. It would have been otherwise with the pursuer. 'If her husband had been sequestrated, she would have had a ranking on his estate for the value of her contingent annuity, and as the debt was contingent on her surviving her husband, a dividend would be set aside to meet it. This dividend would be the utmost benefit which she could take. For inasmuch as a discharge in a sequestration discharges all debts incurred prior to the sequestration the husband would be freed from all the obligations undertaken in his marriage-contract, and though he afterwards accumulated a large estate she could have no claim against it, but only for the dividend which had been set aside to meet her contingent annuity.

The fairness of the equivalent for the discharge can only be judged of by a comparison of the benefits given and of the rights discharged. I do not think that the possible bankruptcy of the husband can be taken into account. That would have been a very important element if the annuity had been secured. But when it is unsecured, bankruptcy, as I have shown, operates, or may probably operate, more prejudicially when the legal rights are discharged than when they are not.

Leaving, therefore, that element out of view, I cannot doubt that in this case the disproportion between the conventional and legal provisions is enormous. I would be of this opinion if Mr Cooper's fortune had remained the same as it was at the date of the marriage. But looking to its

great increase and to the chances which the pursuer surrendered in discharging her legal rights, I am strengthened in the opinion which I have expressed, and I can arrive at no other conclusion than that the discharge was to the enorm lesion of the pursuer, and therefore that she is entitled to set it aside.

There may be cases where a contract of marriage with a minor might be sustained, though the conventional provisions were greatly less than the legal rights. The case was put of a girl who had been seduced, and who was offered marriage on the condition of being satisfied with a small provision. In such a case, and in others which might be figured, the advantage derived from the marriage may more than overcome any injury arising from the provisions of the marriage-contract. But there is no such case here. The pursuer and her late husband were in equal social positions. I cannot tell or even guess whether the marriage would or would not have taken place if the pursuer had not been willing to accept the annuity in lieu of her legal rights, and I can see no advantage that she gained by the marriage which can be taken as compensating her for the grossly inadequate provisions made in the settlement.

The Lord Ordinary has noticed some peculiar circumstances which preceded the marriage. I need not repeat them. He has not been able to draw any inference from them one way or the other. Neither can I. They have, I think, no relevancy to this question, unless they were founded on as proving that it was for the advantage of the pursuer to marry Mr Cooper at whatever sacrifice of her pecuniary interests. But no such allegation is made, and I can see nothing in this case which can bring it within the exceptions to which I have referred as having a possible existence.

It is further said that at the time of her marriage the pursuer had the advice of her mother and Mr Horan, a solicitor in Dublin. But this fact will not avail the defenders. The pursuer was not the less without legal guardians, and not the less injured by the marriage-contract.

I am therefore of opinion that the pursuer is entitled to reduce the marriage-contract.

Lord Young—I concur in the result of the Lord Ordinary's judgment and of the opinion of Lord Craighill, although for my own part I should be disposed to put my judgment on more general and comprehensive grounds. There is now no controversy about the £900 which the pursuer's mother made over to Mr Cooper, the parties having arranged that matter, and so the question relates only to the marriage-contract. I entirely concur with Lord Craighill that there is nothing to indicate any unfairness or impropriety in the manner in which the contract was made. It appears to have been a perfectly honourable contract, with no discreditable circumstances attending the execution of it.

But it is a new idea to me that a penniless woman or a penniless man can say that she or he was injured by the terms of a contract about money. This contract relates to property only, and the contracting party who alleges lesion had no property at all. The cases of a man and a woman in these circumstances are absolutely undistinguishable, for the doctrine of minority and lesion applies to both alike. This Court will no doubt interfere for the protection of any proprietor, whether boy or girl, who has been deprived of property unfairly in minority, and as far as possible rectify the injury; but here there is none for the minor to be deprived of and to be injured with respect to, and the proposition—entirely novel to my mind—is that by the law of Scotland a man of property cannot marry a penniless girl on the condition that she shall take such annuity as he pleases in satisfaction of terce and *jus relictæ*. There is no authority to that effect hitherto in our law, and if we were to decide this case otherwise than as we are about to do we should be making an authority to that effect. I quite agree that an antenuptial marriage-contract, like any other deed, may be set aside on the head of minority and lesion, if thereby a minor has been unfairly deprived of property which he or she possessed. But I do not understand how, and there is no case to the effect that the lesion may consist in taking something in satisfaction of what the law would give in the absence of any contract. With respect to *jus relictæ* the law of Scotland is altogether peculiar. I had occasion recently to point out how, with regard not only to *jus relictæ* but to legitim also, the law of Scotland is unique, in depriving the husband and father of the right to dispose of his property according to his own judgment in favour of his widow and children; and the law would be absolutely intolerable if it were not in the power of the husband to regulate the disposal of his property by antenuptial marriage-contract, both as to his wife and his children. But that peculiarity of the law operates only where there is no antenuptial contract making other provisions or setting it aside. By the antenuptial contract the law may be set aside as to legitim also, and I suppose that although both parties were in minority, or at all events one of them, it would operate quite effectually as to legitim. Then why should it not operate equally as to *jus relictæ?* That a penniless girl is injured by being married to a wealthy man, with such prospects as she may have of being suitably provided for after his death—how she is thereby lesed, I cannot comprehend. It is true that if there had been no contract she might have got more on her husband's death, but that would be according to the investment of the husband's money. Even then, however, it only comes through the marriage. It must be the marriage-contract altogether which injures her. She could have nothing except by the marriage. The only condition on which she shall have it is that she shall come on her husband's will after his death, and take only what he in his beneficence or love for her, or his sense of duty, judging of her conduct in her married life, may see fit and proper to give her. Her condition with respect to fortune may be a serious element, and a very proper element, for his consideration in determining what he would give her.

I have said that I cannot distinguish between the cases of a man and that of a woman in relation to the law of restitution on the head of minority and lesion, and they are indeed indistinguishable; and if it be true that a penniless girl could complain of lesion because she had married, accepting of such an annuity as this in lieu of terce and *jus relictæ*, a penniless young man who is in

minority could equally complain when he had married a great heiress, renouncing his courtesy. The day after the marriage he could complain that he had been entrapped into this marriage-contract to his lesion, and ask to have it set aside. I think that is an extravagant proposition, and I know of no case which gives it the slightest countenance. The cases hitherto have all been of this kind—that the minor had property either in possession or in prospect, the prospect having been afterwards realised, and had been stripped of that property by the instrumentality of an unfair contract which he or she had been induced to sign while still a minor. I shall not, however, enlarge further on the question. I do not think it is incumbent where a man in an antenuptial marriage-contract gives an annuity to his wife, or a wife to her husband, to show that it was equivalent to what the law would have given had there been no contract. I do not think it within the category of lesion.

Without, therefore, enlarging any further on the matter, I would only, for myself, repeat that I am quite prepared to put the judgment on more general grounds than those of Lord Craighill, while concurring with him without hesitation or doubt in the conclusion that the defenders should be assoilzied.

The Lord Justice-Clerk was absent.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Trayner—Comrie Thomson. Agents—H. B. & F. J. Dewar, W.S.

Counsel for Defenders (Respondents)—J. P. B. Robertson—Pearson. Agents—Webster, Will, & Ritchie, W.S.

Friday, January 9.

SECOND DIVISION.

[Sheriff of Inverness, Elgin, and Nairn.

ROBERTSON *v.* BOYD AND WINANS.

Lease—Informal Minute of Agreement—Rent Fixed by Arbitration—Assignation—Homologation.

R., the tenant of a farm, sublet by an informal minute of agreement to B., for sporting purposes, with liberty to assign, part of his grazing ground, the rent to be assessed or valued by two valuators, one for each of the above-named parties, with an oversman if required. Possession followed on the agreement. B. offered to W. an assignation of the sublease, the offer to be binding for a certain time. During the currency of this offer, B. and R., by formal minute of reference, nominated arbiters and an oversman, who accepted the reference and fixed the rent by an improbative award. Thereafter W. accepted B.'s offer, and entered on possession under the assignation, and while he was in possession B. paid R. the rent fixed by the award for the period prior to the assignation. In an action by R. against W. for the rent applicable to his possession at the sum fixed by the award—*held* (*diss.* Lord Rutherfurd Clark) that the informal award having been homologated by the payment by B., was binding on him and on W. as his assignee.

On 27th May 1880 Duncan Robertson, tenant for fifteen years from Whitsunday 1873 of the farm and lands of Comar, Strathglass, situated in the counties of Inverness and Ross, entered into a minute of agreement with Major Walter Boyd, residing at Fasnakyle, Strathglass, whereby he agreed to sublet to him a portion of his grazing ground for sporting purposes for and during the remainder of his (Robertson's) lease, with entry at Whitsunday 1880. This agreement bore that "the yearly rent for the land hereby let shall be assessed or valued by two valuators, one for each of the above-named parties, with an oversman if required, and the two contracting parties hereby agree, one to accept, and the other to pay over his yearly rent thus assessed as rent for said lands." It was further provided that Major Boyd should be at liberty to sublet or assign the sublease. The rent of each year was to be payable in one sum at Martinmas in order to correspond with the way in which Robertson had to pay his rent under the principal lease, and the first payment was to be at Martinmas 1880. Major Boyd thereupon entered on possession under this sublease.

On 1st September 1880 Major Boyd offered to assign his sublease to a Mr Winans, the offer to be open to the end of 1880. It was not accepted till the 13th December 1880, as after stated.

On the 9th and 10th November 1880, on the narrative of the previous agreement, Mr Robertson and Major Boyd entered into a minute of agreement and reference providing that, "Whereas the subrent payable by the said Major Walter Boyd to the said Duncan Robertson for the said portion of land has, by the arrangement of parties, to be ascertained and fixed by persons of skill to be mutually chosen, or an oversman, Therefore the parties hereto have agreed, and do hereby agree, as follows, viz., that Duncan Macmillan, farmer, Drumclune, Drumnadrochit, and Alexander Maclennan, grazier, Leanassie, Kintail, shall be, and they are hereby, mutually chosen and nominated and appointed as valuators in the premises, and in the event of their differing in opinion, John Mundell, tacksman of Gorthlick, shall be oversman, with full power to them respectively to inquire into, ascertain, and fix the yearly subrent payable by the said Major Walter Boyd to the said Duncan Robertson for the said portion of land; and whatever the said valuators, or in the event of their differing in opinion, the said oversman, shall fix and award in the premises, the parties hereto bind and oblige themselves, and their respective heirs, executors, and successors whomsoever, to implement and fulfil to each other." This document was executed before witnesses, and contained a formal testing-clause.

The valuators and oversman accepted the reference in writing as follows:—"*Inverness, 10th December* 1880.—We accept of the foregoing reference." Then followed the signatures of Macmillan, Maclennan, and Mundell. On the same date, 10th December, this minute, written by one of them, and signed by him and the others, was endorsed on the submission:—"*Inverness, 10th December*