father shall have died prior to the passing of this Act, then from and after the passing of this Act, the mother, if surviving, shall be the guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father." Section 3, sub-section 3, provides—"In the event of the guardians being unable to agree upon a question affecting the welfare of any infant, any of them may apply to the Court for its direction, and the Court may make such an order or orders regarding the matters in difference as it shall think proper." Section 5 provides—"The Court may, upon the application of the mother of any infant (who may apply without next friend) make such order as it may think fit regarding the custody of such infant, and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother, and the liability of the father for the same or otherwise as to costs as it may think just."

Argued for the petitioner—The petitioner was entitled to the custody of her two daughters. The Guardianship of Infants Act created the petitioner joint guardian of the children along with the respondent, and it was not suggested that there was any valid reason for her not having the custody of the girls, who were still in pupillarity. No imputation had been or could be made against the petitioner's character. The only allegation was that she was resident in Florence, and outwith the jurisdiction of the Court. This was no reason for refusing the petitioner her legal rights.

Replied for the respondent—The petitioner by her second marriage lost by the common law of Scotland her tutorial powers—Ersk. i. 7, 12. By her second marriage she came under the tutorial powers of her husband, and could not competently be tutor to others. The petitioner desired to remove these children from Scotland against the known wish of their father, and to educate them abroad. Owing to the petitioner's second marriage the statute referred to did not apply. It gave the mother a joint tutorial power along with any tutor-nominate by implication so long only as she continued a widow—*Spiers*, Dec. 23, 1854, 17 D. 289; *Stuart*, March 20, 1861, 23 D. 779.

At advising—

Lord President—I am for granting this application. The 5th section of the Guardianship of Infants Act 1886 provides as follows—[*reads section*]. Now the circumstances in the present case are very simple. The mother of these pupil children has married again, and her husband is a banker in Florence, and she resides there with him. The question which we have to determine is, whether it is most for the interests of these children, and most suitable in the circumstances of the case, that they should reside with their mother or with their uncle at Kilberry? I can only say that I have no doubt that the fitting place for the girls is with their mother. If there had been any imputation upon this lady's character, or anything in the circumstances in which she was placed to render her an unfit guardian of such children—I use the term guardian not in its legal but in its popular sense—then the Court would give great weight to such considerations, but there is nothing of such a kind alleged here. There is not the slightest imputation made against this lady. I think therefore that the proper course is that the girls should live with their mother, while as regards the boy, he stands in a different position, because I understand no application is made with regard to him.

Lord Adam and Lord Kinnear concurred.

Lord Mure and Lord Shand were absent from illness.

The Court granted the prayer of the petition with regard to the custody of the daughters.

Counsel for the Petitioner—Sol.-Gen. Robertson—Jameson. Agent—F. J. Martin, W.S.

Counsel for the Respondents—D.-F. Mackintosh—Graham Murray. Agents—Pearson, Robertson, & Finlay, W.S.

HOUSE OF LORDS.

Friday, February 24.

(Before the Lord Chancellor (Halsbury), Lord Watson, and Lord Macnaghten.)

COOPER *v.* COOPER AND OTHERS.

(*Ante*, Jan. 9, 1885, 22 S.L.R. 314, and 12 R. 473.)

Minority—Capacity to Contract—Marriage-Contract—Law of Domicile and Place of Contract—Irish Law.

An Irishwoman, aged eighteen, was married in Ireland to a Scotsman in 1846. Prior to her marriage she executed an antenuptial marriage-contract in the Scotch form. After her husband's death in 1882 she brought an action of reduction of the marriage-contract against her husband's trustees and the children of the marriage, in which she averred (1) that she was in minority when she signed it, and (2) that there had been lesion. The first of these grounds of reduction was not maintained in the Court of Session, and the judgment of the Court assoilzieing the defenders from the reductive conclusions of the action proceeded upon a finding that there had been no lesion.

On appeal the appellant maintained that by the law of Ireland, which was the law of her domicile, and also of the place where the contract was entered into, she could not, being in minority, bind herself by the marriage-contract. The respondents in answer contended that the appellant had excluded consideration of this question by not arguing it in the Court of Session; that the question of Irish law was a question of fact in the Court of Session; and that no evidence had been led in support of the appellant's view; further, that the Irish law did not apply, as the marriage-contract was Scotch, the domi-

cile of the intended husband was Scotch, and Scotland was the place where the contract was to be fulfilled.

Held (*rev.* judgment of the Second Division) that the appellant was not barred from maintaining this ground of reduction, which was averred upon record; that the House of Lords, as the *commune forum* of the three countries, deals with such a question not as one of fact but of law, and therefore no evidence was required; that the law of Ireland, which is the same as that of England, was applicable, by which the appellant, being a minor, was incapable of entering into the marriage-contract; and that therefore the objection was fatal to the validity of the deed.

This case is reported *ante*, Jan. 9, 1885, 22 S.L.R. 314, and 12 R. 473.

The pursuer appealed.

At delivering judgment—

LORD CHANCELLOR—My Lords, in this case the appellant, the widow of a domiciled Scotsman, seeks to set aside an antenuptial contract executed by her on the day of her marriage.

A question has been raised whether the contract was not in fact executed after the celebration of the marriage, but without minutely considering the evidence I am satisfied with the conclusion of the Lord Ordinary that the contract was executed before the marriage, a conclusion which indeed is but feebly contested on the other side.

A Scottish widow is entitled to her *jus relictæ* and to her terce unless they have been discharged, and the appellant seeks to remove the bar to these rights by setting aside the contract in question which, if unimpeached, discharges these rights.

My Lords, I think there has been some slight confusion between the question what *forum* can decide the controversy between the parties, and what law that *forum* should administer in deciding it. Now, it is admitted that the appellant was a domiciled Irishwoman at the time she executed the instrument in question. It is admitted she was a minor, and apart altogether from the remedy peculiar to Scottish jurisprudence of setting aside a contract which operates to the enorm lesion of a minor—a question to be determined in a great measure by the position of the parties and the provisions of the contract itself—the first question arises here whether a domiciled Irishwoman could bind herself at all while a minor by a contract executed in Ireland.

There can be no doubt as to what would be the rule of English law in this respect. The line of cases which were brought to your Lordships' attention upon the subject of provisions whereby the common law right of dower was extinguished seem to me beside any question in this case. The statute created the power of extinguishing the right to dower, and courts of equity have from time to time considered and acted upon their view, how far the provision for the wife has complied with the conditions of the statute, but such cases have no relation to the question of a minor's capacity by his or her act to part with rights with which the law would otherwise invest them. None of these cases relate to the question of incapacity to contract by reason of minority, and the capacity to contract is regulated by the law of domicile. Story has with his usual precision laid down the rule (Conflict of Laws, s. 64) that if a person is under an incapacity to do any act by the law of his domicile, the act when done there will be governed by the same law wherever its validity may come into contestation with any other country—"quando lex in personam dirigitur respiciendum est ad leges illius civitatis quæ personam habet subjectam."

There is an unusual concurrence in this view among the writers on international law—"qua aetate minor contrahere possit et ejusmodi respicere oportet ad legem cujusque domicilii"—Burgundus Tract 2, n. 6. "C'est ainsi que la majorité et la minorité du domicil ont lieu partout même pour les biens situés ailleurs"—1 Boullenois, Princip. Gen. 6. "Quotiescunque de habilitate aut de inhabilitate personarum quæratur toties domicilii leges et statuta spectanda"—D'Argentre. So also J. Voet—"Quoties in questione au quis minor vel majorennis sit obtinuit id adjudicandum esse ex lege domicilii sit ut in loco domicilii minorennis. Ubique terrarum pro tali habendus sit et contra."

It is said that the familiar exception of the place where the contract is to be performed prevents the application of the general rule, and that as both parties contemplated a Scottish married life, and as a consequence a Scottish domicile, the principle I have spoken of does not regulate the contract relations of these two persons. I think two answers may be given to this contention. In the first place, I think it is a total misapplication of the principle upon which the exception is founded. Here there is no contractual obligation to make Scotland the domicile, nor is there any part of the contract which could not and ought not to receive complete fulfilment even if (contrary to what I admit was the contemplation of both the parties) the place of married life should remain Ireland as if they had emigrated altogether and gone to some other country.

But another and a more overwhelming answer is to be found in this, that the argument assumes a binding contract, and if one of the parties was under incapacity the whole foundation of the argument fails.

Two other considerations remain to be noticed. The first, and what I confess has caused me most difficulty, is whether the question is open for your Lordships on this record, or whether the parties have not concluded themselves by their pleadings to the sole question whether, assuming the Scottish law to apply, there has been enough to set aside the contract on the ground of the lesion of the minor. Undoubtedly that does seem to have been the leading contention, and it is the ground upon which the Judges have in the Court below determined this question.

Upon considering the first plea-in-law carefully in its several parts, I think it is intended to raise the question of whether minority alone apart from lesion does not invalidate the contract; and therefore I agree that the question is open upon this record, and I also agree that the Lord Ordinary's interlocutor and the annexed note show that in his Lordship's opinion the contract made in Dublin, and by a minor domiciled there, would not deprive her of the right to sue

for reduction if there were grounds for it, though it should be held that the minor was capable of entering into such a contract. It therefore becomes unnecessary to consider how far this appeal opens up every interlocutor for review if it should be found that one stood in the way of your Lordships giving judgment upon the appeal actually before the House.

The only remaining question is one which I certainly do not think one of difficult solution, though the statement of it appears to involve a somewhat anomalous state of things. Your Lordships sitting here require no evidence, indeed can receive no evidence of English or Scottish law. If in the Scottish Courts evidence had been given of English law, and no evidence adduced to contradict it, it would nevertheless be incumbent on your Lordships to decide according to your own views as to what the law of England is, even if it should be in absolute contradiction of all the evidence that had been received in the Scottish Courts; and it is manifest therefore that if all the facts are before your Lordships for decision, and if the point is open (and I have endeavoured to show it is open to the parties to contend), then it is not only competent but incumbent upon this House to decide upon the true view of what legal rights these facts establish, although what was a question of fact in the Court of Session was not there mooted, but is for the first time argued here before your Lordships.

This may affect the costs, and I think ought to affect the costs to the extent that I think the successful appellant ought not to get the costs of an appeal which was brought and successfully argued upon a point not pressed upon the Court below either by argument or evidence, but cannot in my judgment affect the right of the parties in the judgment which your Lordships ought to pronounce.

I designedly abstain from expressing my opinion upon the divergent views of the learned Judges in the Courts below. All the judgments assume as their foundation the validity, subject to reduction upon the ground of a lesion, of the contract in question, but in the view I have expressed as to that matter any opinion I might give upon the very difficult question as to what constitutes enorm lesion so as to justify the reduction of a minor's contract, would be unnecessary, and therefore improper in deciding this case.

I therefore move your Lordships that the interlocutor appealed from be reversed, but that the appellant should have no costs either here or below.

Lord Watson—My Lords, the appellant Mrs Cooper was married in Dublin on the 15th October 1846 to the late Henry Ritchie Cooper of Ballindalloch, who died on the 14th June 1882. At the time of the marriage the appellant, who was about nineteen years of age, and without legal guardians, was domiciled in Ireland. The domicile of the husband was in Scotland, and both the parties contemplated, in accordance with what proved to be the fact, that their married life would be spent in that country.

Upon the same day on which the marriage ceremony was performed the parties entered into a written contract, which bears to have been executed *intuitu matrimonii*. The only provision thereby made in the wife's favour is a personal obligation, prestable by the heir and executors of the husband, to make payment to the appellant in the event of her surviving him of an annuity of £80, and in consideration of that provision the appellant discharges her legal rights of terce and *jus relictæ*, and all other claims competent to her upon his predecease, excepting such provisions as he might give her of his own free will. By his trust-disposition and settlement Mr Cooper directed his trustees to pay to the appellant out of the rents of his lands of Ballindalloch and others, an annuity of £200 in lieu of all claims and provisions, whether legal or conventional.

This action was brought by the appellant after her husband's death for the purpose of reducing and setting aside the discharge contained in the marriage-contract of 15th October 1846, and of enforcing her legal rights.

The facts of the case, so far as I have already stated them, are matter of admission upon the record. The condescendence and pleas-in-law for the appellant when fairly construed disclose three separate grounds of reduction, all of which are disputed by the respondents. Taking the appellant's averments, not in the order in which they occur, but according to their logical sequence, it is alleged—First, that the contract sought to be reduced was executed by the spouses (or at all events by the appellant) after the marriage; secondly, that the appellant being an infant was by the law of Ireland "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;" and thirdly, that assuming the contract to be antenuptial and valid the discharge of her legal rights was to her enorm lesion.

The first and second of these grounds of action go to the very root of the case. If the marriage-contract was, notwithstanding its tenor, postnuptial, then the discharge is revocable by the appellant as a *donatio inter virum et uxorem*. If the capacity of the appellant to contract must be determined by Irish, or (what is the same thing) by English law, and she was according to that law incapable of binding herself, the discharge cannot stand in the way of her legal rights.

In my opinion the appellant has failed to prove that the contract was executed after marriage. The only evidence bearing upon that part of her case is to be found in the testimony of the appellant herself, and of Mr Horan, both of whom signed the deed under reduction, the one as a contracting party, and the other as a witness. Their recollection of other circumstances occurring at the time is not very distinct, and I do not think that their reminiscences as to the signing of the deed, however honest, can be held after the lapse of eight-and-thirty years sufficient to displace a material fact appearing from the tenor of a probative deed which they attested by their subscriptions. Had it been proved that in point of fact the parties adhibited their signatures immediately after the ceremony was concluded, I should still have been of opinion that the deed was not thereby deprived of its antenuptial character.

The respondents argued that the second ground of reduction is excluded from this appeal, and that your Lordships have not jurisdiction to determine either the applicability of English law or its effect as regards the appellant's capacity to contract. In the course of the argument it was suggested that the appellant's case, so far as it is based on the law of England, was disposed of by an interlocutor of the Lord Ordinary dated the 31st May 1884, which simply repels the third plea-in-law for the respondents. That interlocutor has been appealed from, although it was not submitted to the review of the Inner House. Taken by itself it does no more than affirm in general terms the relevancy of the appellant's action as laid, but the annexed note shows that the Lord Ordinary merely intended to decide, on the assumption of the Irish contract being valid, that the appellant was nevertheless so entitled to sue for the remedy of reduction on the head of minority and lesion according to the law of Scotland, her matrimonial domicile.

It is admitted that the appellant did not ask the judgment either of the Lord Ordinary or of the Inner House upon the merits of her objection to the contract founded upon English law. But according to the ruling of the Lord Chancellor (Brougham) in *Luke* v. *The Magistrates of Edinburgh* (6 W. & S. 241) that circumstance of itself does not necessarily prevent your Lordships from considering the objection now if it be sufficiently raised on the record. The peculiarity of the present case, upon which the respondents strongly relied, consists in this—that in the Courts of Scotland English law is treated as matter of fact, and must be proved as well as averred in order to enable the Judges to give a decision upon it. The appellant adduced no evidence as to the law of England, and was therefore not in a position to press her objection before the Court of Session. On the other hand, this House, as the *commune forum* of the three countries, deals with such an objection as matter not of fact but of law, and gives its decision upon the legal issues raised without regard to evidence led in the Court below.

I am of opinion with your Lordships that the objection may be competently disposed of by the House. If the question had been one of fact we could not in the absence of proof have entertained it. I think, however, that as the case stands the appellant is not in a worse position than she would have occupied if she had brought forward evidence of English law, and had then failed to submit it to the judgment of the Courts below. That course was actually followed by the pursuer and appellant in the case of *Longworth* v. *Yelverton*, 4 Macq. 743, who not only pleaded that she was married to the defender according to one or other of three modes permitted by the law of Scotland, but averred and brought legal evidence to prove the constitution of a fourth marriage in Ireland according to the law of that country. The weight of the evidence being against her, she refrained from pleading upon it before the Scotch Courts, and in her appeal against their final judgment, which was unfavourable to her, she pressed the Irish marriage in argument for the first time. The Lord Chancellor (Westbury) observed—"The respondent also affirms on the record that a religious ceremony took place between the parties in Ireland, which amounted to a marriage if there was none before; but she was content in the Court below to have it assumed that this ceremony did not *per se* constitute a valid marriage, and having so submitted, it is not competent to her to maintain a different view of the case before this House as a Court of Appeal." The language of the noble Lord very concisely states the substance of the respondents' argument in this appeal. But the other noble Lords present did not adopt the view of the Lord Chancellor, and Lords Wensleydale, Chelmsford, and Kingsdown entertained the question of the alleged Irish marriage, and gave judgment on its merits against the appellant. I need scarcely add that so far as concerns the matter of competency it is immaterial on which side judgment was given.

Whether the capacity of a minor to bind himself by personal contract ought to be determined by the law of his domicile or by the *lex loci contractus* has been a fertile subject of controversy. In the present case it is unnecessary to decide the point, because Ireland was the country of the appellant's domicile, and also the place where the contract was made. It was argued, however, for the respondents that the appellant's objection to the contract, although it rests upon her alleged incapacity to give consent, must be decided by the law of Scotland as the *lex loci solutionis*. I am by no means satisfied that Scotland was, in the proper sense of the phrase, the place of performance of the contract. The spouses no doubt intended to reside in Scotland, but they must also have intended that the contract should remain in force, and be performed in any other country where they might from choice or necessity take up their abode. Apart from that consideration, and assuming Scotland to have been in the strictest sense of the term the *locus solutionis*, I think the argument of the respondents is untenable. The principle of international private law, which makes in certain cases the law of the place where it is to be performed the legal test of the validity of a contract, rests in the first place upon the assumption that the parties were at the time when they contracted both capable of giving an effectual consent, and in the second place, upon an inference derived from the terms of the document or from the circumstances of the case, that they mutually agreed to be bound by the *lex loci solutionis* in all questions touching its validity. That principle can in my opinion have no application to a case in which, at the time when they professed to contract, one of the parties was, according to the law of that party's domicile, and also of the place of contracting, incapable of giving consent.

Being of opinion that the capacity of the appellant to bind herself by the marriage-contract must be determined by the law of England, I agree with your Lordships that the discharge which she seeks to set aside cannot stand in the way of her claiming her legal rights as a Scotch widow. The rule seems to be clear that an infant cannot during minority effectually subject herself to any contractual obligation which cannot be shown to have been for her benefit. She may ratify the contract after attaining majority, and so become liable to implement it, but in the cir-

cumstances of the present case any such ratification of the contract would according to the law of Scotland have been revocable by her as a donation *inter virum et uxorem*. The respondents argued, from the supposed analogy of the case of settlements in bar of dower, that the provisions made by her husband in the appellant's favour by the marriage-contract and by his trust-disposition ought to have the effect according to English law of excluding her legal claims. In reality no such analogy exists. The rule which enables a husband by his own act to exclude the peculiar right of dower rests upon statute, although the Court of Chancery has from equitable considerations enlarged the scope of its enactments so far as regards the character of the provisions which are to be deemed as in satisfaction of the widow's right, but these enactments, as well as the decisions of the Court, leave untouched the personal incapacity of the minor, and cannot in my opinion be extended to terce and *jus relictæ*, which are rights essentially differing from that of dower.

These considerations are sufficient for the disposal of the whole merits of this appeal. It is therefore unnecessary to determine whether the marriage-contract is reducible on the head of minority and lesion, which was the only question argued and decided in the Court of Session. All I shall say upon that point is, that had it been necessary to decide it I should as at present advised have hesitated to disturb the judgments of the Courts below. I think the appellant is greatly to blame for having kept back her leading ground of reduction until she appeared at your Lordships' bar, and that she ought not to have the costs incurred by her either in the Court of Session or in this appeal.

I accordingly concur in the judgment which has been moved by the Lord Chancellor.

Lord Macnaghten—My Lords, in this case Mrs Cooper, who is the widow of a domiciled Scotchman, but an Irishwoman by birth, challenges on various grounds the validity of a settlement made on the occasion of her marriage, by which she purported to discharge her legal rights—her terce and her *jus relictæ*. It seems to me to be satisfactorily proved by the evidence that the settlement was executed before the ceremony of marriage took place. I mention this because notwithstanding the opinion of two of the learned Judges, and the opinion just expressed by my noble and learned friend opposite, I should venture to doubt whether a contract executed after the status of the contracting party had been definitely altered by the marriage could be regarded as an antenuptial contract. Be that as it may, it is not disputed that at the time of the execution of the contract the lady was an infant, and it is averred by the defenders and admitted by the pursuer that "the pursuer was at the date of the marriage a domiciled Irishwoman." As regards the contracts of infants the law of Ireland, which does not differ from that of England, is well settled. Infants are incapable, speaking generally, of binding themselves absolutely by contract. A settlement on marriage not being a settlement under the Infants Settlement Act (18 and 19 Vict. c. 43) forms no exception to the rule.

Prima facie therefore Mrs Cooper was not bound by the settlement in question. *Prima facie* it was voidable by her, and she has elected to avoid it. It is not alleged that she has done any act to confirm it if it was not binding upon her at the time of its execution.

This was the main ground of appeal before this House.

Three answers were suggested on behalf of the respondents—In the first place, it was said that this was a Scotch marriage-contract, that the domicile of the intended husband was Scotch, and that Scotland was the place where the contract was to be fulfilled—that is, where the parties intended to reside after marriage. All that is very true; but it is difficult to see how it can affect the question.

It has been doubted whether the personal competency or incompetency of an individual to contract depends on the law of the place where the contract is made, or on the law of the place where the contracting party is domiciled. Perhaps in this country the question is not finally settled, though the preponderance of opinion here, as well as abroad, seems to be in favour of the law of the domicile. It may be that all cases are not to be governed by one and the same rule. But when the contract is made in the place where the person whose capacity is in question is domiciled there can be no room for dispute. It is difficult to suppose that the infant could confer capacity on herself by contemplating a different country as the place where the contract was to be fulfilled, if that be the proper expression in a case like this, or by contracting in view of an alteration of personal status which would bring with it a change of domicile.

In the next place, it was argued, though somewhat faintly, that the contract ought to be held binding on Mrs Cooper by analogy to those cases where, before the Dower Act, a reasonable provision, though not amounting to a bar to dower under the statute of Henry VIII., was held to be a bar in equity. This seems to be a very refined argument. Moreover, the foundation for it seems to be wanting. Undoubtedly, even in the case of an infant, a reasonable provision by antenuptial contract was held to be an equitable bar to dower. Considering the way in which the authority of *Drury* v. *Drury* (2 Ed.) was shaken or circumscribed by the observations of Lord Thurlow and Lord Eldon, and considering the reasoning of Turner, L.J., in *Field* v. *Moon* (7 D. M. & G.), it is somewhat difficult to ascertain the precise grounds on which in the case of infants that doctrine rested. No case was cited to your Lordships, nor am I aware of any, in which the doctrine was recognised where the father or guardian of the infant did not concur in the contract. "A female infant," says Sir John Leach in *Sunson* v. *Jones* (2 R. & M. 377), "is bound by the settlement made on her marriage as to dower and thirds, not by force of her agreement in the settlement, but by reason of the consent of her parents and guardians, and of the statute of Henry VIII." Here the father of the infant was dead, and it is admitted that she had no legal guardian.

The third answer on the part of the respondents seems at first sight more formidable. It was said that the point was not argued before the Lord Ordinary or in the Court of Session, and that the appellant has deliberately excluded the

consideration of Irish law. It is true that in the Courts below there was no evidence of what the law of Ireland was, and those Courts therefore were unable to consider the question. But there is enough upon the pleadings to raise the point, and the peculiarity of the case is that what must necessarily have been a question of fact in the Courts below becomes a question of law in your Lordships' House. It is not competent to your Lordships on an Irish question, though involved in a Scotch appeal, to shut your eyes to the law of Ireland, and to determine the rights of the parties in the dark, as the Courts below were compelled to do. The authorities cited by the learned counsel for the appellant seem to show conclusively that in a case like the present your Lordships cannot divest yourselves of your judicial knowledge of Irish law.

The interlocutor of the 31st of May 1884, whether it be now appealable or not, does not, I think, present any difficulty. The interlocutor itself does not touch the question. There are expressions in the opinion of the Lord Ordinary which, taken apart from the context, seem to be unfavourable to the view now presented by the appellant. But the opinion was directed to a wholly different point. Proceeding on an erroneous assumption of what the law of Ireland was the defenders pleaded that the law of Ireland was a bar to the pursuer's remedy in a Scotch Court. And to that the opinion of the Lord Ordinary was addressed.

Upon these grounds, without expressing any opinion on the reasons upon which the decisions of the Lord Ordinary and the Court of Session are founded, I concur in the conclusion that the appeal ought to be allowed, and I agree as to costs.

Interlocutor of the Lord Ordinary of the 31st July 1884, and also the interlocutor of the Second Division of the 9th January 1885, and of the Lord Ordinary of the 31st January 1885, so far as the said interlocutors were appealed from, reversed, and cause remitted with the declaration that the appellant was not barred by the marriage-contract sought to be reduced from electing to take her legal rights as the widow of the deceased Henry Ritchie Cooper; no costs to either party in the House of Lords or in the Court of Session.

Counsel for the Appellant—Rigby, Q.C.—Salvesen—W. F. Hamilton. Agent—Andrew Beveridge, for H. B. & F. J. Dewar, W.S.

Counsel for the Respondents — Sol.-Gen. Robertson—E. W. Byrne. Agents—Grahames, Currey, & Spens, for Webster, Will, & Ritchie, S.S.C.

COURT OF SESSION.

Saturday, March 10.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

WINANS AND ANOTHER *v.* LORD TWEEDMOUTH.

Heir of Entail—Permission to Adjoining Proprietor to Erect Bridge on Entailed Lands—Tolerance.

The proprietor of the estate of G, situated on the south side of a river, obtained, in the year 1858 from the heir of entail in possession of the lands of K upon the north side, permission to erect a bridge across the river to enable foot, horse, and cart traffic from G to reach the county road which ran along the north bank of the river. The bridge was solely for the convenience of the estate of G, and was built at the expense of the proprietor, who had an undertaking from the proprietor of K that it would not be interfered with during his lifetime. A short stretch of road was also formed through the entailed lands connecting the north end of the bridge with the county road. Prior to the erection of this bridge the traffic from G had crossed the river nearly at the same point by a ford. There was, however, no public right of way to or across this ford. Shortly after the date of the erection of the bridge the proprietor of G became tenant of the shootings on the estate of K. In 1885 he assigned the unexpired period of his lease of these shootings to W.

In an action raised in 1886 at the instance of W along with a succeeding proprietor of the lands of K, which had been disentailed in 1884, for declarator that they were entitled to shut up the bridge—*held* that a right of property in or servitude over the part of the estate of K, on which the bridge and its connection with the county road was formed, could not have been acquired except for a valuable consideration, because the estate was entailed; that the right gratuitously conferred on the proprietor of G was merely a use by tolerance during the granter's lifetime; and that therefore the pursuers were entitled to close the bridge against traffic.

Road—Right of Way—Expenditure of Public Money—Public Place.

In an action of declarator of a public right of way along a highland road, which the pursuer averred ran from one public place to another, which right was alleged to have been acquired by prescriptive use, the Lord Ordinary found that there was a right of way along a section of the road in question. Considerable sums had been expended upon this section of the road by the county and district road trustees between 1814 and 1858, but since 1860 it had formed part of a private avenue, and no public money had been spent on it after that date, and it was not