Thursday, March 13.

SECOND DIVISION.

SINGLE BILLS.)

M'EWEN AND OTHERS *v.* STEEDMAN & M'ALISTER.

(Reported *ante*, 1912 S.C. 156, 49 S.L.R. 136.)

Expenses—Interdict—Nuisance—Remedial Measures—Remit to Ascertain Effect—Expenses of Remit.

In an action of interdict against the continuance of a nuisance caused by the working of a gas engine which was alleged to affect injuriously an adjoining tenement, the Court held that the nuisance was proved, but allowed the defenders an opportunity of executing remedial works. The defenders lodged a note stating that they had executed remedial works which had resulted in the removal of the nuisance. The pursuers, although they were advised by an expert of their own that the nuisance was removed, maintained that it had in no way abated, in respect of a statement to that effect made to them by the factor and tenants of the tenement, and the Court remitted to a man of skill who reported that the nuisance had been removed.

The Court in *dismissing* the petition for interdict found the defenders entitled to the expenses of the remit.

Mrs Mary Gibb or M'Ewen, wife of Charles M'Ewen, hosier, Hillhead, Glasgow, and others, *pursuers*, brought an action of interdict against Steedman & M'Alister, cork manufacturers, Glasgow, *defenders*, with regard to a nuisance resulting from vibration caused by the working of a gas engine belonging to the defenders which the pursuers alleged injuriously affected an adjoining tenement belonging to them.

On 22nd November 1911 the Second Division of the Court found in fact that the nuisance was proved, and found in law that the pursuers were entitled to be protected against its continuance, but allowed the defenders an opportunity of taking such remedial steps as they might be advised for its removal. Thereupon the defenders executed remedial works, and the pursuers' law agents entered into correspondence with the defenders' law agents thereanent, in the course of which, on 30th January 1912, the pursuers' law agents wrote to the defenders' law agents admitting that an expert who had visited the tenement on the pursuers' behalf had "found little or nothing to complain of," but stating that the factor of the tenement had informed them that "the vibration continues just as before," and stating further that all the tenants of the tenement had signed a memorandum to the effect that "the vibration is in no way abated." On February 15, 1911, the defenders presented a note to the Court in which they averred that they had executed remedial works which had resulted in the removal of the vibration, and moved the Court to find that the remedial works were satisfactory, and that in respect thereof it was unnecessary to grant interdict. The pursuers' counsel opposed the motion and maintained that the nuisance had in no way abated. On February 21, 1912, the Court remitted to Professor Hudson Beare, Edinburgh, to examine the remedial works and to report.

On March 12, 1913, Professor Hudson Beare reported that the remedial works were effectual, and on the same date the defenders lodged a note to the Lord Justice-Clerk craving his Lordship to move the Court to hold the defenders' remedial works satisfactory, and in respect thereof and of Professor Hudson Beare's report thereon to find it unnecessary to grant interdict, and to find the defenders entitled to the expenses of the remit, and of the procedure in regard thereto incurred by them since 22nd November 1911.

On March 13, 1913, the Court, which consisted of the LORD JUSTICE-CLERK, LORDS DUNDAS, SALVESEN, and GUTHRIE, after hearing counsel in the Single Bills on the question of expenses, when counsel for the pursuers referred to *Dodd v. Hilson*, February 25, 1874, 1 R. 527, without delivering opinions pronounced this interlocutor—

"Hold the defenders' remedial works satisfactory in terms of the report by Professor Hudson Beare: Find it unnecessary to grant interdict: Dismiss the crave of the petition, and decern: Find the pursuers entitled to additional expenses up to 21st February 1912, and the defenders entitled to expenses since that date, including the expense of and incident to the said report, and remit the accounts," &c.

Counsel for the Pursuers—Sandeman, K.C.—Hon. W. Watson. Agents—Cumming & Duff, S.S.C.

Counsel for the Defenders—Wilson, K.C. —Paton. Agents—Graham, Miller, & Brodie, W.S.

Friday, March 14.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

M'FEETRIDGE *v.* STEWARTS & LLOYDS, LIMITED.

Foreign—Contract—Minor—Capacity to Contract—Lex loci contractus or Lex domicilii.

An Irishman under twenty-one years of age, whose father was in Ireland, took a situation as a labourer in Scotland, and having been injured in the course of his employment, agreed, without his father's consent, to accept compensation. *Held* that his capacity to enter into the contract fell to be determined by the *lex loci contractus*.

Parent and Child — Minor — Contract — Minor in Scotland with Father Resident in Ireland—Enorm Lesion.

A minor whose father was resident in Ireland, and who while employed as a labourer in Scotland had been injured by an accident arising out of and in the course of his employment, agreed, without consulting his father, to accept compensation in ignorance of the fact that he had a ground of action for damages at common law against his employers. *Held* (1) (*rev.* judgment of Lord Ormidale, Ordinary) that the minor, being forisfamiliated and with his father resident abroad, was entitled to enter into the agreement to accept compensation, but (2) that he was entitled to reduce the agreement on the ground of enorm lesion.

Opinion (*per* Lord Salvesen) that even if contracts made by a minor which were incident to his employment might be good, the agreement in question was not incident to his employment.

Res judicata—Decree in Arbitration under Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58)*—Claim for Damages at Common Law—Capacity to Contract.*

In an arbitration under the Workmen's Compensation Act 1906 the arbitrator held that the workman had agreed to accept compensation. The workman subsequently brought an action against his employers for damages at common law, and sought to have the agreement as thus affirmed by the arbitrator set aside on the ground of minority and lesion. *Held* that the agreement to accept compensation as affirmed by the arbitrator was not *res judicata.*

Process—Proof or Jury Trial—Action of Damages at Common Law by Workman against Employers for Personal Injury—Reduction of Agreement to Take Compensation under Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58).

In an action of damages at common law by a workman against his employers for personal injury, where the workman sought to set aside on the ground of minority and lesion an agreement to take compensation under the Workmen's Compensation Act 1906 as affirmed by the Sheriff-Substitute acting as arbitrator, the Court *allowed* a proof before answer.

Gilbert M'Feetridge, labourer, Whifflet, with the consent and concurrence of his father Benjamin M'Feetridge, as his curator and administrator-in-law, *pursuer,* brought an action against Stewarts & Lloyds, Limited, Glasgow, *defenders,* for payment of the sum of £500 damages in respect of personal injury sustained by the pursuer through the fault of the defenders, and for reduction, if necessary, of a decree dated 13th November 1911 pronounced by the Sheriff-Substitute at Glasgow (GLEGG) acting as arbitrator in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between the pursuer and the defenders in which the arbitrator found that the pursuer had agreed to accept compensation under the Act at the rate of 10s. 3d. per week.

The pursuer averred — "(Cond. 1) The pursuer is a labourer, and is at present residing at 33 Miller Street, Whifflet. He is a domiciled Irishman, and is 16 years of age. By the law of Ireland minors have not capacity to enter into binding contracts. . . . (Cond. 2) The pursuer was for some time employed as a labourer by the defenders at their said iron works at Coatbridge. On or about 19th April 1911, while the pursuer was working at a part of defenders' works near a heavy turning lathe, his right hand was caught in the pinion wheels of the said lathe, and his little finger and part of his thumb were severely crushed and had to be amputated. (3) . . . Immediately below the pinions, and close to where the pursuer was standing before the accident, there was a sunk hole in the floor, about 3 feet long by 18 inches broad by 8 deep. . . . The pursuer, who was unaware of the existence of the said hole, put his foot into it, which caused him to stumble, and on reaching out to save himself from falling his hand came into contact with the gearing of the said machine. . . . (Cond. 4) The said injuries to the pursuer were caused solely by the fault of the defenders in failing to fence the wheels of the said turning lathe, and in permitting the said hole in the floor to remain uncovered while the machine was at work. The said machine was of a highly dangerous nature, and such as is usually fenced or guarded for the protection of persons working in the vicinity. The defenders' works are a factory within the meaning of the Factory and Workshops Act 1901 (1 Edw. VII, cap. 22), and it was the duty of the defenders, in terms of section 10 of the said Act, to fence the said machine and to maintain the fencing in an efficient state, but they entirely neglected that duty. . . . (Cond. 6) On or about 8th May 1911 an agent who represented the defenders called upon the pursuer and informed him that he was entitled to compensation. The pursuer's wages at the time of the accident were £1, 0s. 6d. per week, and the said agent stated to him that he was entitled to receive 10s. 3d. per week from his employers while he was disabled, and discussed with the pursuer whether he would accept a lump sum in full of the said weekly payment. The said agent did not inform the pursuer, and the pursuer was entirely ignorant of the fact, that he had any rights at common law, or that he could possibly have any claim in respect of his injuries except what was offered by the said agent. The pursuer had no legal advice, and the said agent did not suggest to him that he should take any. At said interview the pursuer stated that he would consult with his brother who was coming from Ireland as to whether he should take a weekly payment or compound same for the lump sum. He accordingly consulted with his brother, a boy of about 18 years

of age, and thereafter he called at the defenders' works on or about 12th May 1911 and stated that he would accept the said weekly payment. The pursuer received payment of the said weekly sum of 10s. 3d. for the period from 19th April to 30th June 1911, and on the occasion of each payment he signed a receipt therefor in the terms presented to him. (Cond. 7) On or about 9th August 1911 the defenders presented an application to the Sheriff-Substitute of Lanarkshire at Airdrie, under section 16 of the first schedule to the Workmen's Compensation Act 1906, in which they craved an order ending or diminishing the said weekly payment. On the said application being served on the pursuer he for the first time consulted a solicitor, and, on inquiry being made into the facts, he was informed that he had a claim for compensation at common law. The pursuer accordingly lodged a defence to the said application, in which he maintained, *inter alia*, that it was incompetent for the Sheriff to decide that he had agreed to accept compensation under the Workmen's Compensation Act; that he had never made any agreement to accept such compensation; and that in any event the alleged agreement was not binding on him in respect he was in minority and his curator did not give his consent to the acceptance by the pursuer of the said weekly payment as a discharge of all claims competent to him. After proof in the said application the Sheriff-Substitute on 13th November 1911 found that the defenders had agreed to pay, and the pursuer had agreed to accept, compensation at the rate of 10s. 3d. per week, and in respect the appellant was no longer wholly incapacitated as the result of the said accident reduced the compensation payable to him to 2s. per week. The pursuer presented an appeal by way of Stated Case to the Court of Session against the said findings, and on 22nd December 1911 the Second Division of the said Court refused said appeal, without prejudice, however, to pursuer's rights to establish a claim at common law if he should decide to do so. (Cond. 8) As already mentioned, the pursuer when he agreed to accept the said weekly payment was in total ignorance of his legal rights. In particular, he did not know and was not informed that he had any rights at common law, or that by accepting compensation under the Workmen's Compensation Act he might be held to have waived his common law claim. In point of fact he never elected as between his rights under the Workmen's Compensation Act and his rights at common law, and was never in a state of knowledge which made it possible for him so to elect. He never agreed to accept compensation within the meaning of the said Workmen's Compensation Act. Further, the pursuer being in minority could not without the consent of his curator at law validly elect between his different rights, and he could not and did not elect to accept compensation under the said Act to the exclusion of his common law claim . . ."

The pursuer pleaded, *inter alia* — '(1), The pursuer having been injured by the fault of the defenders, and the sum sued for being reasonable, decree should be pronounced in terms of the petitory conclusion of the summons, with expenses. (2) The pursuer having been a minor, and having become a party to the alleged contract referred to in cond. 6 without the consent of his curator, is not bound by the said contract. (3) The pursuer is entitled to set aside the said alleged contract on the ground of minority and enorm lesion."

The defenders pleaded, *inter alia*—"(1) The averments of the pursuer being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (2) The pursuer having accepted of compensation under the provisions of the Workmen's Compensation Act 1906 in respect of the injuries sustained by him the present action is incompetent, and the defenders should be assoilzied. (3) The agreement of the pursuer to accept compensation having been judicially affirmed by the said judgment of the Sheriff-Substitute, and in the consequent proceedings no relevant grounds for reduction of said judgment being stated, the matter is *res judicata*, and the present action so far as it concludes for damages is incompetent. (4) *Separatim*, the petitory conclusions of the summons being incompetent while the agreement to accept compensation stands unreduced, the pursuer's averments in support of these conclusions should not meanwhile be remitted to probation pending the issue of any competent proceedings for reduction of the agreement. (5) The pursuer having, while employed as a labourer in Scotland, entered into a contract made and to be performed in Scotland which was incidental to and arising out of such employment, the validity and effect of said contract fall to be decided by the law of Scotland."

The following is a specimen of the receipts granted by the pursuer for payment of compensation :—

"Received this twelfth day of May 1911 from Stewarts & Lloyds, Limited, British Tube Works, Coatbridge, the sum of One pound, fifteen shillings and elevenpence, being weekly compensation to date under the Workmen's Compensation Act 1906, under which Act I elect to claim for personal injury by accident sustained by me on or about the 19th day of April 1911.

"*Signature*, Gilbert M'Fetridge.
"*Occupation*, Labourer.
"*Address*, 13 North Bute St.
"*Witness*, Chas. J. Smith.
"*Witness*, George Kerr."

On 2nd January 1913 the Lord Ordinary (ORMIDALE) repelled the second, third, and fourth pleas-in-law for the defenders, and fixed a diet for the adjustment of issues.

"*Opinion.*—This is an action raised by a minor with the consent of his curator concluding for a sum of damages in respect of injuries alleged to have been received by the pursuer through the fault of the defenders.

"The defenders plead—'. . . [*quotes* de-

fenders' plea 2] . . .' In answer to this plea the pursuer, *inter alia*, maintained that he exercised his option to claim compensation under the Act and not to take proceedings independently of the Act without the consent of his father, who is his curator, and that, accordingly, the agreement so to do is null and void and therefore no bar to the present proceedings.

"The general rule is that deeds granted by a minor having a curator without the curator's consent are null.

"There is nothing in the Workmen's Compensation Act 1906 which modifies the common law in regard to a minor's capacity to contract—*Stephens* [1904] 2 K.B. 225.

"There are, however, certain exceptions to the general rule, and the exception on which the defenders rely is this—that a minor who is engaged in a business can enter into contracts in the line of that business. It is thus expressed by Erskine, Inst., i, 7, 38—'A minor who betakes himself to any business or profession as trade, manufacture, law, &c., cannot be restored against deeds granted by him in relation to that employment.' See also *Galbraith*, M. 9027; *M'Donald*, M. 9038; *Heddle*, June 5, 1910, F.C.; *Campbell* v. *Baird*, 5 S. 335; *Argo* v. *Smarts*, Irvine, Just. Cases, i, 250; *Stevenson*, 19 Macph. 919; *Dennistoun* v. *Mitchell*, 12 D. 613.

"It was mentioned that the agreement in question was, within the meaning of this exception, incidental to the business in which the pursuer was engaged, viz., that of a workman or labourer.

"I am unable to give effect to this contention. In the first place, I think it is extremely doubtful whether the occupation of a general labourer can be regarded as a business or profession to which a person can be said to have betaken himself in the sense of the passage I have quoted from Erskine, for in the ordinary case, beyond the initial contract of service, no occasion arises in the relation of master and servant for the workman in the regular course of his work to enter into any further or other agreements either with his employer or anyone else. In the second place, the agreement in question had, in my judgment, nothing whatever to do with the proper business of the pursuer, which was simply to contribute certain labour in return for an agreed-on wage. It was quite foreign to the scheme or intention of the contract of service and was really independent of it, although the accident which gave rise to the necessity of a new contract or agreement being entered into occurred in the course of the pursuer's employment. But the new contract was not like an order given for goods by a trader, an act performed in the natural and ordinary course of his business and with a view to promote that business. It was concerned with a totally different subject-matter, viz., the ascertainment of compensation. The situation which gave rise to the agreement was unexpected and novel, and it necessitated the exercise of a very different kind of judgment to that which the pursuer had to bring to bear on his day-to-day occupation. Looking to the different results, when measured in money, which might follow according to the way in which the option was exercised and the many considerations which required to be taken into account when weighing the possible advantages of the alternative courses, it was pre-eminently a position in which a minor was entitled, if he had a curator, to get his assistance. Here the pursuer had a curator but did not get his assent to the course he elected to follow. It appears to me a typical case for the application of the rule of Scots law, and that the defenders cannot hold the pursuer to the bargain or agreement entered into by him in the exercise of his own unaided judgment.

"The averment of the defenders that the pursuer's father had written through solicitors in Ireland does not, as I read the averment, infer the father's consent to or homologation of the option exercised by the pursuer, and accordingly I am prepared to hold, without further inquiry, that the pursuer is not barred by his election to take compensation under the Act from insisting in the present action.

"Apart from his incapacity as a minor to enter into the agreement, I should have been prepared to hold that, in the admitted circumstances the acceptance of the weekly payments for ten weeks does not bar the pursuer from proceeding to recover damages at common law. I come to this conclusion on the ground that, because of his extreme youth and inexperience and the ignorance of his rights thence resulting, the meaning and effect of his accepting the weekly payments made to him was not understood by the lad, and that he was quite unaware that he was exercising an option under the Workmen's Compensation Act. What he was asked by the defenders' clerk or agent to do was to make up his mind between taking compensation in a lump sum or by weekly payments, and that was what he desired to consult and did consult his brother about. It is quite true that, so far as I can see, there was no attempt to rush him into any decision on the matter discussed. It is also true that the receipts signed by him described the payments made to him as weekly compensation under the Workmen's Compensation Act 1906, 'under which Act I elect to claim for personal injury by accident sustained by me.' But the meaning of this statutory election was not brought home to the pursuer. Indeed, the possibility of his having any right to compensation independently of the Act was not brought before him at all. What was discussed with him was 'lump sum or weekly payments.' All that the defenders say is, that their clerk had a long talk with the pursuer as to the compensation payable to him, and, again, that it was made quite clear to the pursuer that it was compensation under the Act that was being discussed, and that it was explained to him that if he accepted a lump sum it would terminate his right to receive any further payments, whereas if he took weekly

payments he could arrange for having them redeemed afterwards for a single payment. The defenders do not suggest, far less distinctly aver, that they explained to the pursuer that he had any option between accepting compensation under the Act and taking proceedings independently of the Act, or that they satisfied themselves otherwise that he was aware of it. I read their statements as in no way contradicting the pursuer's averments to the effect that what was exclusively the topic of conversation between their clerk and the pursuer was, as I have said, 'lump sum or weekly payments.' Now it may be that an employer owes no duty towards an employee of full age and ordinary experience to see that he fully comprehends what he is contracting about, but it seems to me to be otherwise in the case of a boy of sixteen, and that a bargain, the effects of which he could not be expected to appreciate without the aid of someone, be it his employer or some third party, ought not to be held to bar him from seeking redress at common law. The result of the decisions in this branch of the law appears to me to be, that if the Court is satisfied that the transaction was not a fair one it may be ignored, and that the transaction cannot be held to be a fair one when one of the parties to it, through no fault of his own, was honestly in ignorance of his full legal rights. That, in my judgment, giving effect to all that the defenders say on record, was the position of the pursuer in the present action. He was in a position very similar to that of the foreign workman in the case of *Valenti*, 1907 S.C. 695. The pursuer in that case, it was held, being a foreigner, was not in the ascertained circumstances in a position validly to exercise the option which he had. Here I think that the pursuer owing to his youth and inexperience was not, in the circumstances disclosed and admitted by the defenders on record, in a position to intelligently exercise the option. Had he been a workman of full age and ordinary experience, the receipts would have brought home to him the nature and effect of what he was doing, but the pursuer being only a lad of sixteen, and the discussion had by him with the defenders' clerk antecedent to his granting the receipts having been concerned only with the matter of lump sum or weekly payments, the receipts themselves cannot, in my opinion, be taken as conclusive evidence of a deliberate and intelligent resolution to forego any right the pursuer had to take proceedings under the Act.

"It is said, however, that the matter is *res judicata* in respect of the decree or order of the Sheriff dated 13th November 1911. The curator was not a party to the arbitration, and I do not read the order as dealing with the question of the pursuer's capacity to contract at all. It is true that the second question of law stated by the Sheriff for the opinion of the Court is—'Was the agreement binding on the appellant without the consent of his curator?' That question, however, is not specifically determined by the findings which he pronounced, and the Court by their interlocutor of 22nd December 1911, while dealing with the first and third questions stated for their opinion, expressly declined to answer the second question. In these circumstances I hold that the matter is not *res judicata*.

"If I am right in so holding, then it appears to me to be unnecessary to pronounce a decree in terms of the reductive conclusions of the summons.

"As I hold that the pursuer being a minor had not, under Scots law, capacity to enter into the agreement without his curator's consent, it is not necessary for me to decide the question which was raised as to Irish law, but I may say that in my judgment (first) the law is not sufficiently ascertained by the decision in *Cooper* v. *Cooper* to warrant me in holding that under that law the contract in question was void on the ground of incapacity, and (second) that, assuming that the law is as stated by the pursuer when the contract is executed in Ireland, the application of the law of a foreign domicile is recognised in our practice as universal in all circumstances, and does not fall to be given effect to in a case like the present where the contract is executed and falls to be performed in Scotland, and does not in any way affect the personal or domestic relations of the minor. I think that to hold otherwise would be against the interests of minors themselves seeking work in this country, and would be unjust to Scotsmen contracting with them when in *bona fide* ignorance of the foreign law and when the circumstances were not such as to lay on them any duty to inquire into the matter.

"I shall repel the second, third, and fourth pleas-in-law for the defenders and order issues. I shall find the pursuer entitled to the expenses of the discussion in the procedure roll, and grant leave to reclaim."

The defenders reclaimed, and argued—(1) The question whether the pursuer was entitled to compensation was finally determined in the Workmen's Compensation case, and the decision of the Sheriff-Substitute therein was *res judicata* and could not be questioned now. The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) attributed finality to proceedings under it whether in fact or law—Schedule II, secs. 4 and 17. In *Johnstone* v. *Spencer & Company*, 1908 S.C. 1015, 45 S.L.R. 802, it had even been held that a sheriff-substitute in certain circumstances was bound to determine a question of status. If the objections now stated were not pleaded, then they were competent and omitted—*Southhook Fireclay Company, Limited* v. *Laughland*, 1908 S.C. 831, 45 S.L.R. 664; *Nelson* v. *Summerlee Iron Company, Limited*, 1910 S.C. 360, 47 S.L.R. 344. (2) On the question of capacity, the law to be applied was the law of the place of contract, viz., Scots law. The status of minority might be settled by the law of the domicile, but the capacity to contract must be settled by the law of

where the contract was made. More especially was this the case where the person incapacitated by the law of his domicile went to another country and engaged there in business—Fraser, Parent and Child (3rd ed.), pp. 720-725; Dicey, Conflict of Laws (2nd ed.), pp. 534, 538; *Cooper* v. *Cooper's Trustees*, January 9, 1885, 12 R. 473, 22 S.L.R. 314. (3) If Scots law fell to be applied, then the pursuer was not entitled to reduction. He was either in the position of a minor without curators or he must be regarded as forisfamiliated, and in either case his contracts were good. According to Scots law a father was the natural curator of his son, but if the father were abroad the want of his consent would not be regarded as creating a nullity—*Wilkie* v. *Dunlop & Company*, February 28, 1834, 12 S. 506; Fraser, Parent and Child, (3rd ed.), p. 452. As a general proposition, it was true that a minor who had curators could not act without their consent; but this rule did not apply to contracts incident to the trade or business into which a minor might have entered, even where such contracts were to his enorm lesion—Erskine, i, 7, 38; Mackay's Manual of Practice, p. 395; *Heddel* v. *Duncan*, June 5, 1810, F.C.; *Galbraith* v. *Leslie*, 1676, M. 9027; *M'Donald*, 1789, M. 9038; *Argo* v. *Smart*, June 16, 1853, 1 Irv. 250; *Stevenson* v. *Adair*, July 5, 1872, 10 Macph. 919, 9 S.L.R. 168. In England the test was whether the contract was for the benefit of the minor—*Stephens* v. *Dudbridge Ironworks Company, Limited*, [1904] 2 K.B. 225; *Cribb* v. *Kynoch, Limited* (No. 2), [1908] 2 K.B. 551; *Mullholland* v. *Whitehaven Colliery Company*, [1910] 2 K.B. 278; *Gadd* v. *Thompson*, [1911] 1 K.B. 304. The agreement to take compensation was a contract incident to the trade or business into which the minor had entered. It was the primary interest of minors to get work by which they could maintain themselves, and it was not the policy of the law to empower minors to upset contracts thus made. In any event there was no relevant averment here of facts showing lesion, but only a plea-in-law, and some averment of lesion was necessary—*Robertson* v. *S. Henderson & Sons, Limited*, June 2, 1904, 6 F. 770, 41 S.L.R. 597. There was, further, no averment of misrepresentation in this case or of concealment of any fact that was solely in the knowledge of the defenders, and it was not the defenders' duty to put before the pursuer his common law claim—*Valenti* v. *William Dixon, Limited*, 1907 S.C. 695, 44 S.L.R. 532; *Mackay* v. *Rosie*, 1908 S.C. 174, 45 S.L.R. 178. The action was further incompetent in that it did not conclude for reduction of the receipts which the pursuer had granted for his compensation.

Argued for the pursuer—(1) The case was not *res judicata* in respect of the judgment in the Workmen's Compensation case. That judgment merely decided that there was an agreement, leaving it open to the pursuer to reduce it at a future date if he desired, and the Court of Session on appeal had expressly declined to decide whether the agreement was valid without consent of the pursuer's curator. (2) The pursuer's domicile was Irish, and his capacity to contract fell to be decided by the law of his domicile—*Cooper* v. *Cooper*, February 24, 1888, 15 R. (H.L.) 21, *per* Lord Watson at p. 29, and *per* Lord Macnaghten at p. 30, 25 S.L.R. 400, 13 A.C. 88; *De Virte* v. *Macleod*, January 12, 1869, 7 Macph. 347, 6 S.L.R. 236; *Sottomayor* v. *De Barros*, 1877, 3 P.D. 1. By Irish law the pursuer was an infant and was incapable of entering into such an agreement. If, however, Scots law applied, then a minor who had a curator, as the pursuer had, and bound himself without the curator's consent was entitled to resile—Stair, i, 6, 33; Bell's Com., 7th ed. pp. 129 and 130; Bell's Prin., section 2088; *Kincaid*, May 20, 1561, M. 8979; *Robertson* v. *Oswald*, January 1584, M. 8980; *Bell* v. *Sutherland*, January 1728, M. 8985; *Thomson* v. *Pagan*, July 3, 1781, M. 8985; *M'Gibbon* v. *M'Gibbon*, March 5, 1852, 14 D. 605; *Stevenson* v. *Adair*, *cit. sup.* A deed granted by a minor with curators was *ipso jure* null, lesion being presumed for it. In the present case the pursuer had a father and therefore a guardian, and it did not matter that he was out of the country—More's Stair, Note D, section 18; *Scoffier* v. *Reid*, 1783, M. 8936; *Morison* v. *Stewarts*, 1747, M. 8972; *Hay* v. *Grant*, 1749, M. 8973; *Kirkman* v. *Pym*, 1782, M. 8977. There was further no averment or plea that the pursuer was forisfamiliated, and forisfamiliation did not do away with the necessity for the curator's consent—*Dundas* v. *Allan*, 1711, M. 9034; *Anderson* v. *Anderson*, November 15, 1832, 11 S. 10; Fraser on Parent and Child, 3rd ed. p. 499. Further, even if contracts ancillary to trade fell to be excepted from the general rule, this was not a contract ancillary to the boy's trade—Ersk. i, 7, 38. Erskine there wrote of things strictly incidental to the employment as illustrated by the case of *Heddel* v. *Duncan*, *cit. sup.*, and not of contracts affecting the whole future life. The test was—Did the agreement arise out of the contract of service? In the present case it arose rather from the negligence of the master—*Dennistoun* v. *Mudie*, January 31, 1850, 12 D. 613. In any event pursuer was entitled to reduction on the ground of enorm lesion. Pursuer could not be said to have elected to take compensation, as he was ignorant that he had a common law claim—*Stewart* v. *Bruce's Trustees*, June 10, 1898, 25 R. 965, 35 S.L.R. 780; *Dawson's Trustees* v. *Dawson*, July 9, 1896, 23 R. 1006, 33 S.L.R. 749; *Fowler* v. *Hughes*, January 23, 1903, 5 F. 394, 40 S.L.R. 321; *Little* v. *P. & W. MacLellan, Limited*, January 16, 1900, 2 F. 387, 37 S.L.R. 287. It was not necessary to make any specific averments of lesion, as lesion was obvious from the record. Further, it was not necessary to reduce the receipts, as these were merely *prima facie* evidence of an agreement and were not probative documents—Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), section 38; *Rhind* v. *Commercial Bank of Scotland*, February 24, 1857, 19 D. 519, *revd.* 3 Macq. 643; *Crawford* v. *Bennet*, June 19, 1827, 2 W. & S. 608.

There was here no mixed question of fact and law, and therefore the pursuer was entitled to have the case sent to a jury—*Campbell* v. *Caledonian Railway Company*, June 6, 1899, 1 F. 887, 37 S.L.R. 34.

At advising—

LORD JUSTICE-CLERK — The circumstances which have led to the present summons are peculiar in several aspects, and the way in which the case was originally and in which it is now presented, after amendment, is also most peculiar. The pursuer is said to have been a lad of sixteen at the time of his alleged injury. He is Irish and his father lives in Ireland. The circumstances out of which the injury to him arose were simple enough. He was working as a labourer in the defenders' premises beside a mechanically-driven turning lathe. His account of what happened is that below the pinions of the machine, which were about 3 feet from the ground, there was a place hollowed out, which was 8 inches deep and measured 3 feet long by 18 inches broad, that he did not know of this hole and accidentally he put his foot into it and stumbled, and throwing out his right hand to save himself it was caught by the pinions and so injured that he lost the little finger and part of the thumb, which were so crushed that they had to be amputated. His averment is that in breach of the Factory Act 1901 the defenders had failed to fence the pinions, and that it was by the fault of the defenders that he was so injured.

After he received his injury he was visited by an agent for the defenders, and he avers that the agent informed him that he was entitled to compensation, and that the sum he could claim was 10s. 3d. a-week, being half of the wages he was earning, as long as he was disabled from work. He states that he was not informed that he had any right to make a claim at common law, that he had no legal advice, and that the alternative put to him was to accept the sum offered or to agree with the agent for a lump sum. After consulting his brother, who is a lad of eighteen, he intimated that he would accept the weekly payments. Accordingly he received weekly payments of 10s. 3d. for more than two months, and signed the receipts presented to him by the agent. He does not state what the terms of the receipt were, but there is no doubt as to their terms, and unless they can be set aside on some legal ground relating to the circumstances of their being obtained from him, or unless they are not binding on him because of his minority, they could only be set aside on proof that they were to his enorm lesion if the case falls to be dealt with under the law of Scotland.

In August 1911 the defenders applied to the Sheriff-Substitute of the jurisdiction for an order under the Workmen's Compensation Act ending or diminishing the weekly payment, and to this the pursuer lodged a defence in which he maintained that it was incompetent for the Sheriff to decide that he had agreed to accept compensation under the Act, that he had never done so, and that being in minority, and there being no consent by his curator to the compensation paid being in discharge of all claims competent, the Sheriff could not act upon the footing of agreement. The Sheriff-Substitute, after proof, found that there was an agreement, and that as the pursuer was no longer totally incapacitated the compensation must be reduced, and fixed 2s. a-week as the sum to be paid. Against this the pursuer appealed to this Court. The Court dismissed the appeal.

This case is now brought to enforce a claim at common law as for fault, and the pursuer maintains that he is entitled to reduction of the judgment pronounced by the Sheriff-Substitute or to have it set aside by exception. When the summons was served only two pleas-in-law were stated by the pursuer, one to the effect that the sum claimed being reasonable decree should be given, the other that "if necessary to give effect to the petitory conclusion, the pursuer is entitled to decree of reduction." These pleas, it was evident, were not such as could raise more than one of the questions which were vital to the case, and amendment was made adding a plea of incapacity of the minor to contract without consent of his curator, and a second plea based on the ground of enorm lesion.

The Lord Ordinary by his interlocutor has repelled three of the defenders' pleas—the second plea, which attacks the competency of the action on the ground that the pursuer had accepted compensation under the Workmen's Compensation Act, the third plea, which proceeds on the contention of *res judicata*, and the fourth plea, which is directed to exclude proof under the petitory conclusions of the summons pending reduction of the agreement. He has ordered issues.

These being the circumstances under which the case comes up upon reclaiming note, the Court has had from the Bar a very learned and elaborate argument upon several questions, and very numerous authorities have been quoted. Many of these might have an important bearing upon the case at a later stage if it is to be allowed to go to inquiry upon the facts. And that is really the question for present consideration.

I think it is impossible to doubt that at the time of the accident there was a contract of service between the pursuer and the defenders. He came to them for employment as a labourer, and received employment and accepted wages for his work. He had left his father's house and come to Scotland to take employment upon his own footing, if he could get it, just as any lad may do, without there being any question whether he may go out as a worker without his father's consent. He left the position of a dependent and left his home to come to Scotland and to make his own way in the world, just as lads of his age are doing every day. He obtained employment, he drew the earnings of the employment, and those who employed him paid him the price of his service. As regards

that matter no question of difficulty arises. Any claim the pursuer can possibly have is and must be based upon the fact that the relation of employer and employed existed between the pursuer and the defenders. The questions which arise do so when the abnormal thing has happened—something which, to use the words of the Workmen's Compensation Act, arises out of and in the course of the employment—a thing which is not within the work of the employment, but as Lord Macnaughten called it, is something "untoward," raising up a claim not for work done but for injury suffered when engaged at the work of the employment. It is as being a servant at the time of the accident that any claim, whether at common law or under the Employers' Liability Act or the Workmen's Compensation Act, is open to the pursuer. If he was not employed he had no business to be where he was, doing work in the defenders' premises.

But there are several questions raised which are outside the mere question of employment, and of accident occurring in the employment. There is the question whether the pursuer being a minor could contract to accept compensation on a particular footing as under the rules of Scots law. Then there is the question whether, if he could contract under the law of Scotland, he, being of Irish parentage, is entitled to found upon the law of Ireland, which it is said makes a person under twenty-one years of age incapable of contracting. There is the question, whether, if the law of Scotland applies, the pursuer is entitled to set aside a contract made by him, on the ground that it is to his enorm lesion. Lastly, there is the question whether the judgment of the Sheriff, against which an appeal was rejected by this Court, must be held to be *res judicata* against the pursuer. As regards this last, my opinion is clear that there is no ground on which the plea of *res judicata* can be maintained, and that the Lord Ordinary was right in refusing to give effect to it. The pursuer impugns the initial procedure out of which the petition of the defenders to the Sheriff-Substitute as arbitrator took its origin. The arbitration proceeded on an agreement which undoubtedly was entered into by the pursuer, but the pursuer is quite entitled to have that agreement, and the consequent deliverance of the Sheriff, set aside, and the whole question of his right to damages at common law opened up, if he can establish grounds for setting aside the agreement by reduction. What has been done in the proceeding before the Sheriff can form no bar to the present summons on the plea of *res judicata*.

Upon the question whether the pursuer could contract without consent of his curator to take employment, it does not appear to me that there can be any doubt. Such a contract is not void. It has not only been held good, but there are cases in which it has been enforced at law against the minor at the instance of the employer. I shall refer to two such cases. One is the case of *Heddel* (5th June 1910, Faculty Collection). In that case a minor who had engaged himself as a sheriff-clerk-depute, and into whose hands some money had come, applied these, as he had no right to do, on the direction of the Sheriff-Substitute, with the result that they were lost by the bankruptcy of a party to whom they were handed over. The minor was sued for the amount by the sheriff-clerk, and the plea was set up for him that the pursuer could not succeed as against a minor. The Court, however, held that it was an established rule of law "that a minor, whenever he undertakes an employment by which he gains a part of his livelihood, becomes responsible . . . for all his acts done in that situation. If the rule were otherwise it would be most hurtful to minors, because if they were free from responsibility nobody would employ them, and they would be shut out from many situations and offices the duties of which they now discharge." Thus in that case the contract was upheld against the minor to fix responsibility upon him, notwithstanding that there was no consent of curators. The contract was enforced against him. The other case is that of *Argo* v. *Smart* (1 Irv. 250), where the Lord Justice-Clerk laid it down that "where a contract is entered into by a young man of seventeen years of age, and withal so skilful a workman that he earns 20s. a-week in Glasgow, it cannot be said that such a protection"—viz., of curators—is necessary. That was a case in which the Court held him so sufficiently bound by his contract that he could not escape from imprisonment for desertion of service, the law at that time allowing such imprisonment. Thus in these cases the contract was held binding on the minor, being a contract of service. But if such a contract is binding on the minor to the effects disclosed in these cases, it plainly cannot be maintained that in such a case as this the pursuer shall not be dealt with as capable of contracting.

Next comes the question whether the pursuer, being an Irishman, the questions between him and the defenders fall to be dealt with according to the law of Scotland or according to the law of Ireland, upon the footing that his domicile is Irish. In other words, is the law of the place of the contract to prevail or the law of the domicile? Upon this question we had a learned and able argument. The opinion at which I have arrived is that the law of the place of the contract must rule. To me it appears that to apply the law of a foreign country in a case of contract for hire of labour would be to relegate such cases to the most inconvenient forum. An employer of labour is not called on to investigate where those who ask him to engage them have their domicile. He engages them because they desire to work in his country, and he is certainly not called on to ascertain what their domicile is and to inform himself as to the law of that domicile. If it were otherwise it would hamper persons coming from other parts of the kingdom in their efforts to

obtain employment, for employers would be slow to engage a worker who if an accident happened to him could compel his master to accept an alien law which might be detrimental to his interest. But there is good authority for holding that if such a labourer desires to assert a claim against his employer he must assert it in the courts of his employer's country and obtain it under the rules of law of that country. Nothing can be imagined more contrary to reason than that he should be entitled to insist that the law of the country he comes from should be applied against the employer who has no relation to him as regards nationality, the relation being only one of employment to do work for the master who is willing to pay him workmen's wages. It would require very clear legal *dicta*, laid down by high legal authority, to induce one to hold that a foreign law was to bind the employer because his servant happened — though coming to this country in order to do business here by taking employment — not to have lost his domicile. This is not like a case of a son living with his father, or the case of a father being a party to the contract entered into, as where a father enters into a contract of apprenticeship for a son. In the first case the place of the domicile and the place of employment would be the same, and in the second there is much to be said for the law of domicile being applied to any legal questions arising out of or following on the contract. In the case of his living at home with his father there can be no question. In the case of apprenticeship by the father it is known to the employer that the apprentice's position is that of one still under the protection and supervision of his parent — his natural guardian. The employer accepts the father as an Englishman or an Irishman as the case may be, as making or being a party to the making of a contract for his own unforisfamiliated son. In such a case it may fairly be said to be reasonable that he should be held entitled to found upon the law applicable to him as a contracting party. He presumably is an actor in the transaction. The contract is not one made by the lad himself for his own ends and apart from his father.

The circumstances of this case are entirely different. The pursuer left his father's house and his own country and came to Scotland and proffered his services as a labourer to a Scottish employer. He accepted for himself a stipulated sum of wages, by which he supported himself, freeing his father from any burden for his living. Can it be doubted that by so acting he became forisfamiliated, and if forisfamiliated that the *lex loci* must apply to his contractual relation with his master? Were there no authority to be quoted in favour of this view I should hold it without hesitation unless some clear authority could be brought forward in support of the opposite view. But in my opinion there is authority in the matter. Lord Fraser, in his work on Parent and Child, states the law thus (3rd ed., p. 720) — "A foreign minor in Scotland can receive here no further or other protection than is accorded by our laws to native minors." And while he says that the importance or character of a proposed contract may reasonably put a party on his inquiry, in case of one appearing to be a minor, that any deference which may be paid to the *lex domicilii* "does not necessarily exclude the *lex loci contractus* from some of the most ordinary contracts of everyday life" (p. 723)—an expression plainly applicable to a contract for ordinary manual labour.

Perhaps as strong a case as can be brought forward in support of this view is one which was not quoted in the debate, but has been brought before us by Lord Salvesen—the case of *Male* v. *Roberts*. In that case the question arose very sharply, as the circumstances were that a young Englishman being in Edinburgh induced a friend to supply money to pay a debt for which he was being arrested as *in meditatione fugæ*. The lender sued him for repayment, and he pleaded that being an Englishman and not major he was in law an infant and could not contract. This contention was rejected by Lord Chancellor Eldon, holding that as the contract took its rise in Scotland the law of that country must govern the contract. The case is the more striking because the infant debtor was not in the position of having taken up his residence in Scotland. He was a circus performer, and therefore one who moved about with the circus company. It may be that there are certain classes of contracts, such as contracts affecting status, as the contract of marriage or cases of importance relating to heritable estate, or other important contracts such as Lord Fraser refers to, where the rule above expressed may not apply. But in a simple ordinary contract to serve a master in his business the circumstances present no difficulty in applying the law as it has been laid down. If the case is to be dealt with according to Scots law, the next question is whether the contract is to be held null and void on the bare ground that the pursuer was a minor. The Lord Ordinary has so held, in respect that there was no concurrence of the pursuer's curator. This might be sound if it could be maintained that he had a curator whose consent should have been obtained, namely, his father. But his father was resident in a different country; he was not in a position to exercise and was not exercising any protective position of control over him. Persons entitled to the office of curator who are in other lands cannot give their aid to the minor, and there may be no knowledge of their existence on the part of the contracting party. There seems to be no authority for holding that in such circumstances an agreement between employer and employed can be held to be null and void because entered into without a curator's consent. Apart from this is the fact that the pursuer is, as I hold, forisfamiliated, and that this implies the practical extinction of the curatorial position of his parent. I differ, therefore,

from the Lord Ordinary when he holds *de plano* that the pursuer is entitled to decree.

The last question is, whether it is open to the pursuer, when an agreement has been made by him as a minor, to impugn that agreement on the ground that it is to his enorm lesion. It is difficult to see any ground on which he can be held to be excluded from taking up such a position. If he is held bound to submit himself to the law of Scotland as regards the contract of service into which he entered, can he not take advantage of the law of Scotland in so far as it protects minors from being held bound by agreements which can be impugned on the ground of lesion. Here the pursuer's contention is that he has a claim at common law against his employer for fault causing him injury, and that an agreement by which he accepted compensation under the Workmen's Compensation Act was to his enorm lesion. His right to have that allegation inquired into seems to admit of no doubt.

There must therefore be an inquiry. The pursuer desires to have that inquiry by a jury trial, which, in the ordinary course of a trial for injury by fault, would be the appropriate mode. But in the present case I am of opinion that the Court should exercise the power it possesses to send cases to proof instead of to jury trial. The fact that it is not merely a case of damages, but that it involves inquiry into a question relating to the setting aside of an agreement as preliminary to the consideration of the question of fault and damages, appears to me to make it a case not appropriate for being tried upon issues before a jury. And although it is a case which may in the end involve a question of *quantum* of damages, that is in the present case a very simple matter. There has been complete restoration to health, and the only question could be what is the diminution of capacity for labourer's work caused by a loss of a part of one hand. This is a very simple matter dealt with every day by judges in the Sheriff Court and by this Court in review of Sheriff Court cases.

My opinion therefore is that the interlocutor of the Lord Ordinary should be recalled, that the second and third pleas of the defenders should be repelled, and that a proof before answer should be allowed.

LORD DUNDAS—Various questions were argued to us at the discussion. I shall content myself with stating briefly the conclusion I have reached in regard to each of them.

1. The defenders plead *res judicata* in respect that on 13th November 1911 the arbitrator in an application at their instance under the Workmen's Compensation Act found, *inter alia*, that they agreed to pay, and the pursuer agreed to accept, compensation at the rate of 10s. 3d. per week. In a case stated to this Division a question was (among others) put to us—"Was the agreement binding on the appellant" (pursuer) "without the consent of his curator?" We declined to answer that question. We considered that the arbitrator had not decided that the agreement was valid; that it was not for us, in disposing of the Stated Case, to determine whether it was valid or invalid; and that that question would be open for decision in the action which we were then informed the pursuer was in course of raising against his employers for damages at common law. In these circumstances it seems to me plain that the defenders' plea of *res judicata* must be repelled.

2. The pursuer, a minor, avers that he is a domiciled Irishman, and that by the law of Ireland minors have not capacity to enter into binding contracts. The defenders say that, assuming the law of Ireland to be as stated, it is not applicable to the circumstances of this case. I think the defenders are right. The pursuer's domicile was in Ireland, but the contract was entered into and performed in Scotland. In these circumstances I think Scots and not Irish law must rule the case. Good sense and expediency point strongly to that conclusion; and cases to which Lord Salvesen has referred me—they were not cited at the bar—satisfy me that it is correct and sound in law.

3. The pursuer argued that, assuming Scots law to be applicable, the contract was null as being entered into by a minor without consent of his curator. The general rule of law to that effect was not disputed, but there are exceptions to it upon which the defenders founded. They relied (1) on the statement of Erskine (Inst. i, 7, 38), supported by many decisions, that "a minor who betakes himself to any business or profession, as trade, manufacture, law, etc., cannot be restored against deeds granted by him in relation to that employment"; and (2) on the fact that the pursuer, at and prior to the date of this contract or agreement, was forisfamiliated, residing in a different part of the United Kingdom from his father, and earning his own livelihood. I am not satisfied that the receipts produced might not reasonably be regarded as deeds granted by the pursuer in relation to his employment; but I find it unnecessary to decide that question, because I consider that the defenders' second point, based on forisfamiliation, is well founded, and ought to be given effect to.

4. The defenders argued that the summons is radically defective and incompetent, because the pursuer does not ask for reduction of the receipts, but only of the decree or finding by the arbitrator. I do not think this objection can be sustained. It is, or was, certainly quite common for careful pleaders to crave reduction (if and in so far as necessary) of such documents as these receipts; but I do not think it is strictly obligatory to do so.

5. The next question is whether or not the pursuer is entitled to prove enorm lesion. It is said with considerable force that though he has a plea-in-law based on lesion, he has no averments to support it. The pursuer should have made his condescendence specific on that head. But I am not prepared to throw the case out on this

ground — there are, I think, sufficient (barely sufficient) indications on the record of the pursuer's case of lesion, though it may be a very difficult one for him to establish. Assuming the relevancy of his averments, I see no sufficient reason why he should not be allowed an opportunity of endeavouring to establish it.

6. I think the Lord Ordinary has gone altogether too fast in practically deciding the case, so far as the grounds for reduction are concerned, upon the record. There must, in my judgment, be inquiry into the facts. Here we are confronted with a question of some difficulty in regard to procedure. It was, I think, admitted that the pursuer has stated a relevant case for damages, if he is entitled to go into that matter; and the questions as to the defenders' liability, and the amount of damages if liability were established, would in ordinary course be referred to a jury. The preliminary questions raised by way of bar would, on the other hand, be ordinarily disposed of by a proof. But these cannot, so far as I see, be expiscated, in the peculiar circumstances of this case without necessarily raising and determining the questions as to liability and (if liability be proved) damages. The pursuer's case of lesion would fail entirely if the defenders are not liable in any damages for fault or negligence at common law, and it might equally fail unless the damages were assessed at a pretty substantial figure. The whole parts of the case must therefore, I apprehend, be tried together. It would, I think, as a whole, be one obviously unsuited for jury trial. The alternative, and I consider in the circumstances the preferable course, is that the whole case should go to proof before the Lord Ordinary.

On these grounds I am for recalling the interlocutor reclaimed against, repelling the defenders' second and third pleas-in-law, and sustaining their fifth plea, and *quoad ultra* remitting to the Lord Ordinary to allow the parties a proof before answer of their respective averments in ordinary form.

LORD SALVESEN—The most interesting question in this case is—By what law does the contract between the pursuer and defenders, under which they agreed that he should receive compensation under the Workmen's Compensation Act, fall to be governed? The domicile of the pursuer is said to be Irish, but the contract was entered into in Scotland and fell to be performed there. According to the law of his domicile it would appear—and at all events it is averred—that the contract was a nullity. According to the law of Scotland, on the other hand, a minor has a certain capacity to contract, and his contract is not necessarily a nullity. There is an almost infinite divergence of opinion amongst the writers on international law on this subject. As I read them, however, there seems to be a general agreement between the tribunals of Scotland, England, and America, that the law of the place where the contract was made must prevail. The considerations which support this view are mainly those of good sense and expediency. A foreigner who contracts in Scotland with a native of that country must *prima facie* be held to intend that the law of Scotland shall be held to apply to the transaction. The Scotch contracting party cannot be presumed to know the law which regulates the capacity of the foreigner with whom he contracts. Indeed he has no reason to know that the foreigner has not become domiciled in Scotland, for if he is resident there this is a matter which may be known only to himself. In the case of a minor the reasonable view seems to be that he should have such protection in respect of his minority as the country in which he contracts would extend to a native, but that he should have no higher or different rights. In an early case in England (*Male* v. *Roberts*, 6 Revised Reports 823, 3 Esp. 163) the identical question which we have to consider here came under the notice of Lord Eldon. There the plaintiff and defendant were performers at the Royal Circus. While performing in Edinburgh the defender had become indebted to a Scotch creditor for supplies. He was arrested *in meditatione fugæ*, and being unable to pay induced the plaintiff to pay the account for him. An action was afterwards brought to recover the money so paid as money paid to his use. The defence relied on was that he was an infant when the money was so advanced. It was contended on his behalf that the contract fell to be governed by the law of England, but this view was set aside. Lord Eldon said—"The law of the country where the contract arose must govern the contract." This case was referred to with approval in *Sottomayer* v. *De Baros* (5 P. D. 94) by Sir James Hannen. The same rule applies in America, or at least in certain of the states of that country (see Story, Conflict of Laws, Chapter iv), and while in Scotland it does not seem to have been laid down in such absolute terms the general trend of the decisions is in the same direction (see *Scoffier* v. *Read*, M. 8936, where the minor son of an Englishman who contracted in Scotland was found entitled to restitution on the ground of minority and lesion). The case of *Cooper* v. *Cooper* (15 R. (H.L.) 21) affords little guidance because there the law of the domicile and of the contract was one and the same, and it was held that the validity of the contract fell to be regulated by that law, especially as it could not be predicated that the contract (being one of marriage) was necessarily to be performed in another country. In modern times when so many foreigners have taken up their residence in Scotland for the purpose of making their livelihood, although they may retain their original domicile for purposes of succession or the like, it would be highly inconvenient both for them and for Scotchmen with whom they contracted if contracts could not be made as freely with them as with natives. I have accordingly reached the conclusion that the law of Scotland is the

law which applies to the capacity of the pursuer in this case.

The Lord Ordinary, proceeding on this assumption, has held that the contract which the pursuer made was null because it was made by a minor having a curator without that curator's consent. If the premises be sound the conclusion is not disputed, but the question remains, Had this Irish lad of sixteen a curator whose consent the defenders ought to have obtained to the transaction? It is true his father was resident in Ireland, and would presumably have been his curator according to Scotch law if he had been resident in this country, but I cannot hold that a minor who is resident in Scotland must be treated as a minor having a curator because his father happens to be alive although resident in some other part of the world. It is of no moment in this question of law whether he is or is not easily accessible. The principle must be the same whether he is a resident in Poland or in Ireland, or his residence is not known at all. The reason why a minor who has curators cannot act without them is because he is under their protection or supervision —a fact which is presumably known to the person with whom he contracts—but curators who are absent from the country are not capable of giving any protection, nor has the person with whom the minor contracts any reason to know of their existence. The common case where the curator's consent is indispensable to validate the minor's actings is where the minor is living in family with his father, but the principle has also been applied where he was serving an apprenticeship in a town different from that in which his father lived but under a contract of apprenticeship entered into on his behalf by his father (*Anderson*, 11 S. p. 10). There is no case so far as I know where a minor's contract has been held to be null because it was entered into without the consent of a curator who was permanently absent from the country. In one case where the curators were abroad the Court appointed a curator *ad litem* to a minor—a step which would not have been competent if they had been resident within the country and not disqualified from acting.

There is another ground upon which it may well be held that this minor, according to our law, had such capacity to contract as belongs to a minor who has no curators. He had left his father's house and country, he was earning his own livelihood in Scotland, and very probably a larger income than his father. He was thus forisfamiliated, and it is a principle of our law that the curatory of a father ceases after the minor has become forisfamiliated.

Assuming, then, that the pursuer is to be dealt with as a Scotch minor who had no curators, it is quite settled that the contract into which he entered with the defenders was as effectual as if he had had curators and had acted with their consent (Erskine, i, 7, 33). The contract is accordingly not null, although it may be reducible on the ground of enorm lesion. The same remedy is granted to a minor without curators as to one who has acted with the concurrence of his curators. It was strenuously maintained by the defenders that while this is the general law it does not apply to the case where a minor has betaken himself to business or trade, but the exception does not apply to deeds which are not incident to the employment or business which the minor has embarked upon (*Mackenzie*, M. 8995). Now it is true that the pursuer could have made no claim under the Workmen's Compensation Act unless there had existed between the defenders and him the relation of employers and employed; but I cannot hold that it is incident to the contract of employment that the workmen should discharge a claim for personal injury due to the negligence of his employer, whether such discharge is express or results by operation of law from a contract which he has made. Accordingly I am of opinion that he is still entitled to set aside that contract if in fact he can show that it was to his enorm lesion. In *Robertson* v. *Henderson* (6 F. 770) the contention, which the defenders also pressed, was rejected that "the whole question of minority and lesion was excluded by the Act of Parliament, because the Act of Parliament brings the employer and the injured workman necessarily into the position of bargaining with one another, and this implies that once that bargain is made it must be carried out and receive full effect" (*per* Lord Kinnear at p. 774). In that case the transaction sought to be set aside was one in which a lump sum had been accepted in full settlement of a weekly claim for compensation. But in the case of *Stephen* ([1904] 2 K.B. 225) the material facts were the same as here, and the Court held that the Act, by including an apprentice under the general word "workman," did not alter the law in reference to contracts by infants. These two decisions seem to be conclusive on this point.

Although, therefore, I am of opinion that the pursuer is not barred from obtaining restitution on the ground of minority and lesion, I am unable to agree with the Lord Ordinary in holding that the contract which he entered into can be set aside *de plano*. Enorm lesion may be inferred without proof, as, for instance, when a gratuitous discharge has been granted by a minor of valuable patrimonial rights, or when he has entered into a cautionary obligation; but the transaction here was not of that nature. On the contrary, it may be that the minor acted with prudence and discretion in electing to take compensation under the Workmen's Compensation Act. If on the facts it turns out that his claim at common law was not well founded, or if the advantages which he secured under the Act were comparable to the amount which might reasonably be awarded him as compensation at common law, enorm lesion would obviously not be established. Parties are not agreed that the defenders would have been liable at common law, nor as to the extent to which

the pursuer's injuries have permanently unfitted him for his ordinary work. These are matters for inquiry, and are best disposed of by a legal as distinguished from a lay tribunal. I therefore agree that we should recal the interlocutor of the Lord Ordinary and remit to him to allow the pursuer a proof of his averments, excluding those relating to Irish law.

On the other matters noticed in Lord Dundas' opinion, and upon which I have not touched, I agree with the conclusions at which he has arrived.

LORD GUTHRIE—The defenders plead *res judicata*. I agree with the Lord Ordinary in thinking that this plea is not maintainable either in respect of the proceedings before the Sheriff-Substitute of Lanarkshire at Airdrie, mentioned in cond. 7, or in respect of what took place in the appeal by way of Stated Case to this Division of the Court. Even if the question of the effect of the pursuer's minority could have been competently determined by the Sheriff-Substitute in an application under section 16 of the First Schedule of the Workmen's Compensation Act 1906, which I do not think it could, the points now relied on by the pursuer, founded on Irish law and on minority and enorm lesion, were not maintained before the Sheriff. The only ground on which it was said that the alleged agreement was not binding was that the pursuer was in minority and his curator did not give his consent. In this Division, the position taken up by the pursuer was the same. The second question in the Stated Case is thus expressed—"Was the agreement binding on the appellant without the consent of his curator?" But it is enough to say that the Court refused to answer this question.

If the questions raised by the pursuer are open, he maintains that he is entitled either to decree that the agreement in question was *ab initio* null, or that it is reducible on the ground of minority and enorm lesion.

He maintains that the agreement was *ab initio* null on two grounds—first, the case, he says, falls to be dealt with under Irish law, according to which minors have not capacity to enter into binding contracts; and second, if Scots law applies the same result follows, because the pursuer was in minority and his curator did not give his consent. I think the Lord Ordinary has come to a sound conclusion in rejecting the pursuer's contention founded on the applicability of Irish law, but that he has erred in affirming the second ground on which the pursuer maintains that the agreement was null.

In regard to the question of Irish law, it was maintained by the pursuer that by the law of Scotland the question of capacity on the part of a foreign minor to enter into contracts in Scotland must in all cases be determined by the law of the foreigner's domicile, even if the contract falls to be performed in Scotland; while the defenders argued that in all cases of contracts entered into between Scotsmen and foreign minors in Scotland to be performed there, the law applicable must be the law of Scotland. It does not seem to me necessary to decide this broad question. It may be that, in the case of contracts like marriage contracts affecting permanently the personal or domestic relations, the law of the domicile would be held to apply. *Cooper's Trustees*, in which an *obiter dictum* of Lord Macnaghten was expressed on which the pursuer strongly relied, was a case of that kind. In such cases it might be held that it was the duty of the Scotch party to the contract, in view of the character and effect of the contract, to inquire into and have in view the law of the foreigner's domicile. But it does not seem to me that any such difficulties arise in the present case. I think the present case falls under the class discussed by Lord Fraser in part 8 of Parent and Child, in which, while conceding "deference in general to the *lex domicilii* on the whole questions relative to minority," he considers that the law which is applicable is not the law of the foreigner's domicile but the law of Scotland. This view is in accordance with the opinion of many jurists. For instance, Froland is quoted by Story in his fourth chapter of the Conflict of Laws, section 55a—"If the question is purely as to the state of the person, abstracted from all consideration of property or subject-matter, in this case the law which first commenced to fix his condition (that is the law of the domicile of his birth) will preserve its force and authority and follow him wherever he may go. Thus, if by the law of the domicile of his origin a person attains his majority at twenty years and he goes to reside in another place where the age of majority is twenty-five years, he is held to be of the age of majority everywhere, and notwithstanding he is under twenty-five years he may in his new domicile sell, alien, hypothecate, and contract as he pleases, and *vice versa*. But when the question is as to the ability or disability of a person who has changed his domicile to do a certain thing (*à faire une certaine chose*), then that which has governed his power (that is, the law of his original domicile) fails, and fails entirely in this respect, and yields its authority to the law of his new domicile. Thus if a married woman by the law of the country of her birth is not allowed to pass property by will without the consent of her husband, and she acquires a new domicile in another country where no such restriction exists, she has full liberty to dispose of her property in the latter country by will without the consent of her husband, and *vice versa*."

But if the Scots law applies the pursuer says that the agreement in question is void, because entered into without consent of his curator. This contention implies that at the date of the agreement the pursuer had a curator, namely, his father. But this is mistake in fact, because on the admitted facts the pursuer was forisfamiliated, and the agreement must therefore be dealt with as if it had been entered into by the pursuer with consent of his curator,

that is to say, not as a null agreement but as voidable on proof of minority and enorm lesion.

If so, the defenders say that the pursuer is not entitled to inquiry under the head of minority and enorm lesion, because no such case is made on record. I think there is considerable force in the defenders' contention. It is evident that the record was originally framed on the footing of getting rid of the agreement as null on the ground that it was entered into by the pursuer, a minor, without his curator. The question of Irish law has been properly raised by amendment both in the condescendence and pleas-in-law, while the only direct reference to enorm lesion is in plea 3. But I am prepared to concur in the view taken by Lord Dundas, that, in the absence of any prejudice to the defenders, the pursuer's pleadings on the question of enorm lesion, although not satisfactory, may be allowed to pass, to the effect of entitling him to inquiry.

On the mode of inquiry I concur that this is a case peculiarly unfitted for jury trial, and in which special cause has been shown why the whole matter should be remitted to probation before a Judge.

The Court recalled the interlocutor of the Lord Ordinary, repelled the second and third pleas-in-law for the defenders, sustained their fifth plea-in-law, and remitted the cause to the Lord Ordinary to allow the parties a proof before answer of their respective averments and to proceed therein as accords.

Counsel for the Pursuer and Respondent —Sandeman, K.C. — Macquisten. Agents —Alex. Morison & Company, W.S.

Counsel for the Defenders and Reclaimers — Constable, K.C. — Roberton Christie. Agents — R. & R. Denholm & Kerr, Solicitors.

HOUSE OF LORDS.

Monday, February 10.

(Before the Lord Chancellor (Haldane), the Earl of Halsbury, Lord Kinnear, and Lord Shaw.)

FREELAND *v.* SUMMERLEE IRON COMPANY, LIMITED.

(In the Court of Session, July 5, 1912, 49 S.L.R. 841 and 1912 S.C. 1145.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (3)—*Arbitration—Competency—"Question"—Duration of Compensation.*

The employers of a workman who had been totally incapacitated by accident admitted liability under the Workmen's Compensation Act 1906, tendered the compensation due, the amount of which was not in dispute, and asked the workman to sign a receipt which stated—"At the first or any subsequent payment liability is admitted only for the compensation to date of payment. Further liability, if any, will be determined week by week, when application for payment is made." The workman, maintaining that he was entitled to an unqualified admission of liability such as he could embody in a memorandum of agreement, refused to sign the receipt, and initiated arbitration on the ground that there was a "question" as to the duration of the compensation. The employers challenged the competency of the arbitration proceedings.

Held that there was a question, unsettled by agreement, as to the duration of the compensation, and that arbitration was therefore competent.

The case is reported *ante ut supra.*

The employers, the Summerlee Iron Company, Limited, respondents in the Court of Session, appealed to the House of Lords.

At the conclusion of the argument for the appellants:—

LORD CHANCELLOR—The question in this appeal arises under section 1 (3) of the Workmen's Compensation Act 1906, which provides for recourse to arbitration in a case of dispute in the following terms:—"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the person injured is a workman to whom this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration in accordance with the Second Schedule to this Act." It is to be observed that duration is specified as one of the matters about which a question may arise, and that is not the less true because the Schedule, by Article 16, provides that from time to time there may be applications to review the amount of compensation. There may be a decision that the injury is *prima facie* of indefinite duration, that is to say, permanent; and what the schedule does is to provide machinery for the review of that matter from time to time as the question arises.

In this case the respondent, who was a workman in the employ of the appellant company, sustained injury to his right eye in the course of his employment as a miner in their colliery, and he has been totally incapacitated since the date at which the injury was received. There is no doubt as to the amount which the appellants are liable to pay, it is agreed that it is 14s. 9d. a week in respect of total incapacity in accordance with the Act. But a question has been raised, which is the subject of these proceedings, as to whether there is a dispute under the Act as to the duration of the compensation. The appellants, admitting liability to the extent which I