

any way deceived or misled in executing this deed. Now, my Lords, to pronounce any general opinion as to whether these three circumstances in combination would in any case be a sufficient ground for setting aside a deed, would, I think, be dangerous; because I am not quite sure whether parties in the course of this argument, and in the course of the judgment we have been delivering, are always using this term, "undue influence," in the same meaning. It is a very vague term; it may mean fraud, or it may mean something greatly short of fraud, and therefore I cannot say, without a more perfect definition of the term, whether the three circumstances which I have mentioned in combination will or will not afford a sufficient ground for reducing a deed. But allow me to observe that the element of gross inadequacy, while it is unquestionably of very great importance, is one about which, also, I think there may be a good deal of misunderstanding. We are all agreed that inadequacy of consideration, however great, is not of itself sufficient for setting aside a transaction. We are also, I think, all of opinion that, in a question of fraud as a ground of reduction of a deed, inadequacy of consideration is an element of great importance, and the more inadequate the consideration the more important the element becomes. But why is inadequacy of consideration an important element? Why is it, as my brother Lord Ardmillan says, a strong presumption of fraud? Is it not because it goes far to show that the party who executed the deed to his own loss and injury did not very well understand what it was about? That is the reason why inadequacy of consideration affords a presumption of fraud; but if it is obvious otherwise—from evidence—that the party who signed the deed knew perfectly well what he was about, the importance of this element very nearly disappears altogether. Again, inadequacy of consideration presents itself as a very important element to the mind of a Court in dealing with a case of this kind, because they are able to contrast the proportion which exists, as they see it, between the consideration and the right surrendered—to contrast that proportion, as they see it, with the proportion which the party executing the deed thought he saw at the time between the consideration and the right surrendered. But are we in that situation? I confess to your Lordships that at this moment I am not so well able to compare the consideration and the right surrendered as the pursuer was when he executed that deed. I have not the same means of knowledge; I never can have the same means of knowledge; I never can put myself in so full possession of the whole circumstances and motives of the pursuer as he was in himself when he executed that deed. I cannot tell of how great importance it was to him then to be relieved from impending insolvency. It is impossible for me to tell that. I cannot tell even how much, as a matter of feeling, that might be a matter of consequence to him. But I can tell that he then knew better than anybody else what he was surrendering; he also knew better than anybody now can know what the value of the consideration was that he obtained. For these reasons it appears to me that the inadequacy of consideration, as it is called here, is an element of much less importance than it has been represented to be in the course of the argument. The undue influence which was exercised to the effect of inducing this gentleman to execute the deed seems to have been, if I understand it rightly, parental authority in

the first place; the influence arising from the relation of partnership, in the second place; and, in the third place, the taking advantage of the state of embarrassment in which the pursuer was placed. Now, assuming that the father of the pursuer had some influence with him—the influence which a father commonly has—assuming, also, that there was a very confidential relation subsisting between this family as co-partners in this business; and assuming, further, that the father and brother did take advantage in one sense of the embarrassments of the pursuer—that is to say, because of those embarrassments desired to get rid of him, on the one hand, and, because of those embarrassments, had the power of inducing him or tempting him to resign his partnership by offering to pay his debts—assuming all these things, is there deceit or influence of a kind which makes the execution of this deed anything short of the deliberate and intelligent consent of the pursuer to the transaction which was then executed? I think not; and therefore it is quite impossible for me to hold that the combination of those elements which have been represented as existing in the present case—namely, the inadequacy of the consideration given, the undue influence exercised arising from the relation of the parties, and the great benefit ultimately accruing to those represented by the defenders from this deed, can afford—according to any view of the law of Scotland with which I am acquainted—a sufficient ground for setting it aside. In these circumstances I entirely concur with the majority of the Court in the judgment which is proposed, and I think it is quite unnecessary to add anything in the way of exposition of the facts and the evidence in the case, after what has fallen from my brothers on the bench.

The Court accordingly repelled the reasons of reduction, sustained the defences, and assolized the defenders from the whole conclusions of the conjoined actions.

Agent for Pursuer—Adam Morrison, S.S.C.

Agents for Defenders—Maitland & Lyon, W.S., and Campbell & Smith, S.S.C.

Friday, May 22.

MUIR, PETITIONER.

Summary Warrant—Nobile Officium—Custody of Pupil—Factor loco tutoris—Foreign. On petition by factor *loco tutoris* for summary warrant to remove the pupil from the custody of his mother, who, the petitioner alleged, was not a fit person to retain the custody, and was about to go abroad with the child—warrant granted; and recommendation given to foreign authorities to aid the officers of the law in the execution of the warrant.

Muir, factor *loco tutoris* to Robert Kerr, petitioned the Court for warrant to remove the pupil from the custody of its mother, alleging that the mother was behaving in such a way that she ought not to be allowed any longer to have the custody of the child. Answers were lodged, and thereafter the Court remitted to the Sheriff of Ayrshire to inquire into the circumstances of the case and report; remitted the petition to the Lord Ordinary on the Bills during vacation, with power to him to pronounce any interim order that the circumstances of the case might seem to render necessary; and

authorised the Sheriff, if he should see cause, to report *ad interim* to the Lord Ordinary.

The Sheriff reported in favour of the petitioner, the report being boxed to the Court on 12th May, and on the same day the petitioner boxed a note craving the Court to grant warrant for taking possession of the child. The agents for the respondent having ceased to act for her, the Court appointed the report and note to be intimated to the respondent personally, and sent the case to the Summar Roll. Intimation was accordingly made to the respondent.

The factor now presented a note to the Court, stating that the house recently occupied by the respondent and Milligan, to whom she had been recently married, had been shut up for some days; that they had not been seen lately; and that it was supposed they were on their way to Liverpool, with the view of going to America and taking the child with them. He therefore craved the Court to grant warrant to messengers-at-arms and Sheriff-officers to remove the pupil from the custody and charge of the respondents; to dispense with the reading of the order in the minute-book; and to authorise the warrant to be executed upon a copy of the order certified by the clerk of Court; or to decern *ad interim*; or to do otherwise, &c.

CLARK, for petitioner, cited the case of *Earl of Buchan v. Lady Cardross*, 27th May 1842, 14 Jur., 415.

The Court pronounced this interlocutor:—

Edinburgh, 22d May 1868.—The Lords having considered the note for William Muir of Mains Beith, factor *loco tutoris* to Robert Kerr of Auchengree, son of the late Bryce Kerr of Auchengree, No. 21 of process, along with the report by the Sheriff of Ayrshire, No. 17 of process, and whole proceedings, grants warrant to messengers-at-arms and other officers of the law to take the person of the said pupil Robert Kerr into their custody wherever he may be found, whether in the custody of Mrs Marion Kerr or Milligan and Joseph Milligan, her spouse, or in any other custody, and to convey and deliver the said pupil into the custody of the petitioner William Muir, to be kept by him till the farther orders of the Court; and authorise all Judges Ordinary, and their procurators-fiscal in Scotland, to aid said messengers and officers in the execution of this warrant; and recommend to all magistrates in England and elsewhere to give their aid and concurrence in carrying this warrant into effect: Farther authorise execution hereof to pass, on a copy hereof certified by the Clerk of Court."

Agents for Petitioner—M'Ewen & Carment, S.S.C.

Friday, May 22.

SECOND DIVISION.

LANG v. LANG.

Husband and Wife—Separation and Aliment—Sævitia. Circumstances in which the Court pronounced decree of separation and aliment.

This is an action of separation and aliment at the instance of Mrs Elizabeth Pettigrew or Lang, residing in Glasgow, against her husband, insisted in on the ground of abuse and maltreatment.

The Lord Ordinary (JERVISWOODS), on advising a proof, pronounced the following interlocutor:—

Edinburgh, 20th March 1868.—The Lord Ordinary having heard counsel, and made avizandum, and considered the record, with the proof adduced, and whole process—Finds it proved, as matter of fact, that the defender has been guilty of grossly abusing and maltreating the pursuer, his wife: Therefore finds that the said pursuer has full liberty and freedom to live separate from the said defender, and decerns and ordains the defender to separate himself from the pursuer, *a mensa et thoro*, in all time coming; and, with reference to the conclusions of the summons for aliment, appoints the cause to be enrolled, with a view to further procedure.

Note.—The Lord Ordinary, in pronouncing the present interlocutor, has adopted and followed the form which has for a long period been in use in consistorial causes of the class to which it belongs; and he has done so not only in respect of that usage, but because mere findings of prominent facts in a case of this complexion would altogether fail to convey an adequate or just impression of the real habits and conduct of the parties in their respective relations as husband and wife, and it would therefore still be necessary to have resort to an examination of the whole evidence in detail.

"The Lord Ordinary heard that evidence, with a minor exception, and he has since considered the case with anxiety, increased by the feeling, that, comparing the proof adduced on the part of the pursuer, with the statements on record which were admitted to probation, there appears to be a certain amount of exaggeration and high colouring in the latter, which tends to lower the estimate of their value.

"Still, the Lord Ordinary cannot but feel that the conduct of the defender to his wife, as proved in evidence, was on many occasions such as no person in her position could be bound to submit to. A blow might be pardoned, if given in sudden heat, and without premeditation. But, as the evidence strikes the Lord Ordinary, there is proof of a considerable course and amount of actual maltreatment, accompanied by conduct of that contumelious and overbearing character which, more than a sudden blow in passion, is calculated deeply to wound the feelings of the pursuer, or of any other female of ordinary sensibility.

"The Lord Ordinary assumes that, without proof of actual violence, the pursuer cannot prevail here. But in judging of the weight to be attributed to the acts proved, the Lord Ordinary is of opinion that he is entitled and bound to have regard to the whole history of the daily life of the parties as disclosed in the evidence.

"A suggestion of some plausibility was made in course of the argument on the part of the defender as affording in his view an explanation of the conduct of the pursuer in now insisting in this action, to which it may be right that the Lord Ordinary should shortly advert.

"This was founded upon the fact, as spoken to by Robert Lang, the eldest son of the defender, that the pursuer, Janet, and John Lang, are now residing with him, and it is said that this action is truly the result of a design on the part of Robert to obtain means from his father to keep up a separate residence. The Lord Ordinary is not inclined to adopt this view. But his impression is rather that the fact referred to did open up to the pursuer a prospect of escape from the treatment she had received from the defender, and so may have encouraged her to seek redress. But if the facts be truly