nesses I should give his evidence small credence. But I see no reason to suspect the honesty of the pursuer Mrs Cumming. She states very distinctly that she advanced the sums, and produces two acknowledgments which she says she received from George Henry, and which are signed by him, which may mean either George Henry the individual or George Henry the firm, his being the firm name. If he represented to Mrs Cumming that he borrowed for partnership purposes, and she advanced money on the faith of that, "George Henry" must be held to be the firm name; and if so, we have here an acknowledgment of money advanced which is signed by the firm. That question depends on the credit to be given to Mrs Cumming and to George Henry, in so far as supported by her evidence. Now, I see no reason to doubt Mrs Cumming. One important point is this—she was in that condition of life in which she would not be presumed to have that money at hand; but when she is asked to explain how she was possessed of the money, she says it belonged to her son, who was abroad with his ship—that the first sum advanced consisted of his wages deposited in her hands, and the second was part of £50 which he sent her in a bill of exchange. The son is examined, and confirms his mother's statement; and we have further this important piece of real evidence—that the bill is produced, and was discounted at the bank, just at a time which would account for her being in possession of money at the date of the second advance.

Taking all these considerations together, I think we must hold that the money was advanced by Mrs Cumming, and for the purposes of the partnership which she knew George Henry was carrying on. I am satisfied with the result of the Sheriff-Substitute's interlocutor, though I am not disposed to agree with his finding that the defenders "have failed to prove that the sum was borrowed for any other purpose than the business of the firm." I think it fell on the pursuer to prove that she advanced the money to the managing partner for the purposes of the firm, and if that is established, it is sufficient for the pursuer's case.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court therefore refused the appeal.

Counsel for Pursuer (Respondent)—Mackintosh. Agent—A. Morison, S.S.C.

Counsel for Defenders (Appellants)—Trayner—Lorimer. Agent—C. S. Taylor, S.S.C.

Thursday, December 4.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

MARTIN (HERON MAXWELL'S JUDICIAL FACTOR) *v.* STOPFORD BLAIR'S EXECUTORS.

Jurisdiction—Forum non competens—*Trial of Questions Arising in an Executry Estate under Chancery Administration at Time.*

Certain questions were raised in the administration of an executry estate regarding (1) the apportionment of rents upon a Scotch estate as between heir and executor, and (2) a balance of accounting arising upon West Indian property which had belonged to the deceased. The executry estate had been put under an administration suit in Chancery, which was still in dependence. The executor having questioned the jurisdiction of the Court of Session, *held* that both Courts had jurisdiction to try the questions, but that the matter of apportionment depending on Scotch law only, the *forum conveniens* as regarded that point was the Court of Session.

Colonel W. H. Stopford Blair died on 20th September 1868, at which date he was heir of entail in possession of the estate of Penninghame, in Wigtownshire, and also proprietor of certain unentailed lands in Scotland and Ireland, and of an estate in the West Indies. By his last will and codicils one-half of the residue of his personal estate, which was very large, was destined to his only daughter Mrs Heron Maxwell, and the other half to his son Mr E. J. Stopford Blair, one of the defenders. The said defender was also one of his father's executors, his heir of entail, and heir in the fee-simple estates, and a trustee under the marriage-contract of his sister Mrs Heron Maxwell. Upon the trust-estate created under that marriage-contract (dated October 14, 1847), by which Mrs Maxwell *inter alia* assigned in trust the whole property and estate, real and personal, then belonging to her or which she might acquire during the subsistence of the marriage, the pursuer had been appointed judicial factor on 21st July 1874; and it was in connection with the management of that estate that the present action was raised.

Two main questions had arisen between the judicial factor and the executors of Colonel Blair. The first was as to the apportionment of the rents of Penninghame as between heir and executor, involving a dispute as to forehand payment and the previous usage on the estate. The other was in connection with the West Indian property belonging to the testator. The factor claimed a large balance from the profits and produce up to 31st Dec. 1868, the date of an arrangement entered into between the parties.

The present action was accordingly raised by the pursuer as judicial factor against Mr E. J. Stopford Blair and Mr Macnaughten, as the executors of Colonel Stopford Blair, and against the said Mr E. J. Stopford Blair as an individual, and the summons concluded for an order on the executors to exhibit and produce a full and particular account of their whole intromissions, and for payment with interest of such balance as should be found due by them to the pursuer as factor foresaid. The defenders explained in their statement of facts that a bill of complaint, of date 1st July 1869, having been filed in Chancery by the children of Mr and Mrs Heron Maxwell (as ultimate beneficiaries in the marriage-trust represented by the pursuer) against the present defenders and Mr and Mrs Maxwell and their marriage-contract trustees, Vice-Chancellor Sir J. Stuart gave decree on 24th July 1869 in terms of the prayer, and directed, *inter alia*, that so far as necessary the trusts of the marriage-contract and also of Colonel Blair's will and codicils should be carried into execution

under direction of the Court of Chancery. The Chancery suit was still in dependence.

The defenders pleaded—"(1) *Forum non competens.* (2) *Lis alibi pendens.* (3) The accounts in question having been adjusted and settled, the pursuer is not entitled to open up the same. (4) The pursuer or his authors having duly received full and correct accounts of the executry estate, the defenders are entitled to absolvitor."

On October 16, 1879, the Lord Ordinary (CURRIEHILL) pronounced an interlocutor repelling the 1st and 2d pleas-in-law for the defenders, and before further answer appointing the defenders to produce the leases of the Penninghame estate current at the death of the late Colonel William H. Stopford Blair, the whole executry accounts, including those in connection with the West Indian estates belonging to Colonel Blair, and the correspondence, &c.

The defenders reclaimed, and argued—Pleas (1) and (2) must be read together as one plea. The Court of Chancery having been first seised of this process, this Court was barred by comity from interfering, and even though it were likely that the questions arising to be tried would involve Scotch law, that would not prevent the English Court from accepting jurisdiction (see case of *Parken*). A Chancery administration suit, like a multiplepoinding, was vested *in manibus curiæ* independently of the nature of the questions which might arise in it (*Thomson's* case). In the circumstances of this case Chancery was the *forum conveniens*, the estates being mainly English and the executors residing mostly there.

Authorities—*Wilmot* v. *Wilson*, March 6, 1841, 3 D. 815; *Thomson (Fleming's Trustee)* v. *N. B. & Mercantile Assurance Coy.*, Feb. 1, 1868, 6 Macph. 310; *Clements* v. *Macaulay*, March 16, 1866, 4 Macph. 583; *M'Morine* v. *Cowie*, Jan. 16, 1845, 7 D. 270; *Parken* v. *Royal Exchange Assurance Coy.*, Jan. 13, 1846, 8 D. 365.

The pursuer replied—This Court had undoubted jurisdiction, and the questions of the case might conveniently be tried here. That of the forehand rents, indeed, could not be tried in Chancery, as it depended entirely on Scotch law, and the English Court would have to send down a case, as they did once before in connection with this very administration (*Stopford Blair and Others'* case). The pursuer's demand was a limited and perfectly reasonable one, and was necessary to enable him to see the estate under his charge properly administered.

Authorities—*Lord Melville* v. *Lady Baird Preston*, Feb. 18, 1838, 16 S. 472—*reversed* March 29, 1841, 2 Robinson's App. 88; *Hawkins* v. *Wedderburn*, March 9, 1842, 4 D. 924; *Carron Company* v. *Stainton*, Jan. 27, 1857, 19 D. 318; *Carron Company* v. *M'Laren and Ors.*, 5 Clark (H. of L.) 416; *Herries* v. *Maxwell's Curator*, Feb. 6, 1873, 11 Macph. 396; *Stopford Blair and Ors.* v. *Maxwell*, May 31, 1862, 10 Macph. 760.

At advising—

LORD PRESIDENT—The object of this action seems to be twofold—*first*, to determine a question as to the apportionment of certain rents of Penninghame between the heir and executors of the late Colonel Stopford Blair; and *secondly*, to settle the question referring to the settlement of the profits and produce of a West Indian estate which forms part of the executry of the late Colonel Blair.

It was brought under our notice that the administration of Colonel Blair's executry estate is in the Court of Chancery in England, under a bill which was laid before us, and in these circumstances the executors pleaded in defence (1) *forum non competens*, and (2) *lis alibi pendens.*

As to the second of these pleas, it has clearly no application to the circumstances of this case, for, in the first place, the questions here raised have not been raised in the Chancery suit, and, in the second place, proceedings in a foreign court do not constitute *lis alibi pendens* in its proper sense.

The first plea is more important and more difficult. The defenders concede that it is much more expedient that the question as to the apportionment of the Penninghame rents should be tried by this Court, which is really an admission that the English *forum* is not a good one as to that point; but they maintain that to all other effects, the executry estate being administered in England, all questions as to it should be determined there. I understand that your Lordships are of opinion that as to this latter point the plea is well founded, and that it is expedient that all the questions raised in this summons, except that of the Penninghame rents, should be tried in England, and in that opinion I concur. The plea really means that of two Courts, both having jurisdiction to try a question, it is more expedient to try it in one than the other. I am for sustaining the plea as regards all matters subsequent to the Penninghame apportionment.

LORD DEAS—I am of the same opinion. The whole of the West Indian property—which is the main thing referred to here—is, of course, to be regarded as situated in England to the effect of jurisdiction. That being so, I think this case is expressly ruled by the decision of the House of Lords in the case of *Lady Baird Preston* (2 Robinson's Apps. 88), reversing the judgment of the Court of Session. The rule of practice in such cases is there laid down by the Lord Chancellor thus:—"The domicile regulates the right of succession, but the administration must be in the country in which possession is taken and held, under lawful authority, of the property of the deceased.' For a similar reason, however, it follows that the rents of the Scotch estate must be dealt with in Scotland, which is the "country in which possession has been taken and held under lawful authority."

LORD MURE concurred.

LORD SHAND—There is no question in this case that the defenders are liable to the jurisdiction of this Court. They are Scotch executors, and confirmed in Scotland; one of them has a Scotch estate and resides a good deal in Scotland. But the question is, Which is the convenient Court? As to one of the matters in dispute—that of the forehand rents—it is clear it must be settled by reference to Scotch law; and if we were to send the parties to England it is equally clear the Court of Chancery would have to adjust and send down a case for our opinion—a roundabout and undesirable mode of procedure. Having

jurisdiction, I am of opinion we should exercise it. The other question involves opening up the executry accounts. Now, the executry estate is in England, and to some extent subject to the Court of Chancery. Mr Martin's demand—a very reasonable one, as it seems to me—is to a limited effect only, viz., that he shall be enabled to see the accounts and vouchers which are in the executor's hands, in order to secure, as judicial factor under the marriage-contract trust, that the arrangement made with Mr Stopford Blair is properly carried out. This demand infers production of the executry accounts. Now, as Lord Deas has observed, the executry estate is mainly in England, and is administered there, and the convenient and proper Court for this purpose is the Court of Chancery. Mr Martin's request is a strictly limited one, and I hope the executors will not find it necessary to require judicial proceedings even in England, but will reconsider the matter. It is one which would be much better settled by arrangement than by litigation, but if there must be litigation in reference to the accounts it should be the Court of Chancery. On these grounds I agree with the judgment proposed by your Lordships.

The Court repelled the defenders' second plea, and the first also as regarded the Penninghame rents, and *quoad ultra* sustained it and remitted to the Lord Ordinary.

Counsel for Pursuer (Respondent)—Kinnear—Low. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Defenders (Reclaimers)—Mackintosh—Murray. Agents—Tods, Murray, & Jamieson, W.S.

Friday, December 5.

FIRST DIVISION.

[Lord Young, Ordinary.

GRAY *v.* BINNY (GRAY'S TRUSTEE).

(*Ante*, May 24, 1878, vol. xv. p. 571, 5 R. 820.)

Entail — Disentail — Reduction — "Undue Influence" as a Ground of Reduction.

Where a son who had given his consent to a disentail on considerations admittedly far below the true value of his interest, pleaded as grounds for reducing the proceedings that he had been "unduly influenced" by his mother and the family solicitor, the former of whom had benefitted largely by the transaction, while he had had no independent legal advice—*held* that in the circumstances he was entitled to reduction as craved.

Opinion (*per* Lord President) that the pursuer in such a case might prove not only inadequacy of consideration and his own ignorance of the full circumstances of the case, but also some fraud or deceit on the part of the defender, the amount of such fraud or deceit necessary for reduction being to be measured by the nature of the relations subsisting between the parties in each case.

Opinion (*per* Lord Shand) that "undue influence" may be instructed as a sufficient ground of reduction without inferring "fraud" in the full sense, where the parties stand in a relation of mutual confidence, and one of them has a natural dominance or ascendancy over the other.

Observations (*per* Lords Deas and Shand) on the form of issue under which such a case might appropriately have been tried before a jury.

This case has been reported in a previous stage, of date May 24, 1878, vol. xv. p. 571, 5 R. 820. The action was at the instance of Charles William Gray, and was brought against the trustees under the trust-disposition and settlement of his mother Mrs Carsina Gray, heiress of the estate of Carse Gray, in Forfarshire, viz., Mr Graham Binny, W.S., and Mr James Webster, S.S.C. It concluded for reduction (1) of a deed of consent to the disentail of the estate of Carse Gray, granted by the trustees on 18th August 1875; and (2) of a trust-disposition and settlement by Mrs Gray, which, *inter alia*, conveyed the disentailed lands to her trustees. Mr Binny was now the sole surviving trustee.

The other circumstances of the case will be found in the previous report, vol. xv. p. 571. The Lord Ordinary then held that a plea stated by the defenders to the effect that the destination in the original entail had been evacuated by the trust-disposition fell to be given effect to, and to that extent the Lord Ordinary had assoilzied the defenders. The Court had affirmed that judgment, and the case was then remitted to the Lord Ordinary for further procedure and the disposal of the remaining pleas-in-law. These were, for the pursuer—"(1) The pursuer having been induced to execute the said deed of consent by fraudulent misrepresentations and concealment, and *separatim*, having executed it under essential error caused as aforesaid, the said deed and all that has followed thereon ought to be reduced. (2) The said deed ought to be reduced in respect that the transaction which it embodied was exorbitant and unconscionable, and *separatim*, it was a catching bargain with an expectant heir. (3) The said deed ought to be reduced in respect that it was impetrated and obtained by parental influence unduly used by the pursuer's mother for her own benefit and to the pursuer's lesion."

The defenders pleaded—"(2) The pursuer cannot insist in the action in respect that he has homologated the said deed of consent. (3) The action cannot be maintained in respect the arrangement, of which the deed of consent was a part, has been carried into effect, and matters cannot be restored to the position in which they were prior to the granting of the said deed. (3) The averments of the pursuer are not relevant to support the conclusions of the summons or any of them. (7) The averments of the pursuer being unfounded in fact, the defenders are entitled to absolvitor."

A proof was led, the general result of which, including the whole material facts of the case, are fully stated in the Lord Ordinary's judgment and in the opinion of the Lord President.

On 16th April 1879 the Lord Ordinary (YOUNG) pronounced an interlocutor repelling the defences, sustaining the reasons of reduction in so far as not already disposed of by previous interlocutors, and reducing, decerning, and declaring in terms of the conclusions of the summons.