the other hand the running powers, of course, were limited to the General Terminus system and did not extend to any new creations that the Caledonian Railway Company might afterwards make.

Now, the dispute in question has arisen over a certain siding, and the history of that siding seems to be this—Originally there was a long siding going to a place called Vermont Street, and from that there was a branch siding which went to serve some works that at that time—I am now speaking of the time which ended in 1865, the date of the Amalgamation Act—belonged to a gentleman of the name of Sim. Subsequently Vermont Street really went out of existence, being superseded by a large depot known as the Kinning Park Depot, and accordingly part of the siding that went to Vermont Street was entirely abandoned, and the portion that went into Sim's works was still continued, although the actual direction of the rails was a little altered—in particular, instead of being only one branch, it was bifurcated and made into two branches, and these two branches were prolonged into the works themselves, Sim having been succeeded by the Birkenshaw Coal Company. That was the state of affairs in 1895. In 1901 the Birkenshaw Company left the ground, and they were eventually succeeded by Messrs Slater, Roger, & Company, who seem to have taken possession in 1903, and who are the present possessors of the ground. During the period after the Birkenshaw people left and Slater, Roger, & Company came in, the siding was so far altered. The Birkenshaw Company took away the rails in so far as they were within their own ground, and the siding therefore became a sort of bifurcated end which approached the ground without actually entering into it. There seemed to be a little dispute between the parties as to whether this bifurcated end was actually used for the purpose of taking goods which went into the ground or taking anything away from the ground, but in the view I take of it it really does not make any difference.

I think the whole question is whether there really is identity of subject. I think it is perfectly clear that the question of who the private person was who used the siding is neither here nor there. All sorts of people would use the sidings on the general terminus system, and the running powers were not given merely so long as these sidings were used by the same people; they were given so long as there was identity of subject. I come to the conclusion without any difficulty that here there is in the fair meaning of the words identity of subject. I do not think that the fact, if it be a fact, that for a short period the siding was so to speak disused really alters the question. The siding now is what it originally was, namely, a siding for the use of those particular works connecting with the Caledonian Railway system at that point. I do not think it has lost its proper identity at all, and accordingly I think the conclusion the Lord Ordinary has come to is right.

LORD M'LAREN — I am of the same opinion, and have nothing to add.

LORD KINNEAR—I quite agree. I agree with the final sentence of the Lord Ordinary's opinion in which he says the siding in question is in his judgment a renewal of the siding which existed in the same place and substantially in the same position in 1865.

LORD PEARSON—I am of the same opinion.

The Court adhered.

Counsel for the Defenders (Reclaimers)—Clyde, K.C.—Hon. W. Watson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Pursuers (Respondents) — Hunter, K.C. — Macmillan. Agent — James Watson, S.S.C.

Wednesday, October 30.

SECOND DIVISION.

[Lord Ardwall, Ordinary.

M'KECHNIE *v.* M'KECHNIE'S TRUSTEES.

Succession—Will—Reduction—Undue Influence — Confidential Relationship — Paramour—Testamentary Provisions in favour of Paramour and her Child to Detriment of Legitimate Children.

A testator whose wife was in an asylum left the great bulk of his property to his mistress (to whom he had previously made large gifts) and their illegitimate son. A legitimate son brought an action of reduction. Facility was not proved.

Held that the relationship existing between the testator and his mistress was not such that the natural and legitimate consequence was trust and confidence on the one side and influence on the other, as in the case of client and lawyer, and that accordingly there was no room for the plea of "undue influence."

George Turnbull M'Kechnie, youngest lawful son of the deceased John M'Kechnie, raised an action of reduction of his father's trust-disposition and settlement dated 11th January 1904, and a codicil thereto dated 16th September 1904. The defenders were Miss Jemima White (otherwise known as Mrs M'Kechnie) and others, the trustees acting under the said settlement, and the said Miss White as an individual.

The pursuer pleaded—"(1) The said trust-disposition and settlement and the codicil thereto not being the deeds of the testator, decree of reduction should be pronounced. (2) Or otherwise, the pursuer is entitled to reduction as concluded for, in respect that at the time of executing the said trust-disposition and settlement and the said codicil thereto the said John M'Kechnie was weak and facile in mind and easily

imposed upon, and that the defender Jemima White, taking advantage of his said weakness and facility, obtained the said deeds from the said John M'Kechnie by fraud and circumvention, to the lesion of the pursuer. (3) Or otherwise, the pursuer is entitled to reduction as concluded for in respect that the said trust-disposition and settlement and the said codicil thereto were procured from the said John M'Kechnie by the defender Jemima White by undue influence, to the lesion of the pursuer." [At the conclusion of the proof the pursuer, however, stated that he did not maintain that his father was of unsound mind at the date of the deeds.]

John M'Kechnie, the testator, was born in 1848 and died on 16th October 1905. In 1873 he married Elizabeth Turnbull, from whom he separated in 1884 under a contract of separation, and who became an inmate of an asylum in 1895 and was still alive and in an asylum at the date of this case. Four children were born of the marriage—John, Jane (subsequently Mrs M'Lelland), David (who predeceased his father), and George, the pursuer. In 1896 the testator took up house with the defender Miss White, and they resided together thereafter as man and wife at Westminster Terrace in Glasgow and afterwards at Shawfield in Pollokshields and elsewhere. One son, C. J. D. M'Kechnie, was born to them on 10th January 1897.

In 1881 the testator had entered into partnership with a Mr Wight in a ladies' dressmaking and drapery business, and in 1882 Miss White had entered M'Kechnie & Wight's employment as a dressmaker. M'Kechnie & Wight dissolved partnership in 1888, and the testator opened a shop in Princes Street, Edinburgh, and Miss White subsequently applied for and obtained the situation of manageress of that shop, the subsequent prosperity of which was apparently due to her, and there was evidence that the testator was strongly of that opinion. Subsequently the testator acquired other shops in Edinburgh and Glasgow. In 1898 the son John came at the testator's request from a situation in Birmingham and was introduced in the Princes Street shop as a future partner, but two days later he was told by his father that he, the father, had understood Miss White was not coming back to manage the business, that he had made a mistake and that she was coming back. The testator offered him, however, a position in the business equal to hers, which John declined. John, however, was in 1902 given the management of a shop in Glasgow, and in 1903 the business of one shop in Glasgow was handed over to him. In 1898 Alexander M'Kechnie, the testator's brother, and in 1902 the son George, the pursuer, entered the testator's employment, but in April 1904 the latter left after a disagreement with his father though they continued regularly to correspond.

On 6th March 1903 the testator, who was then possessed of property of over £12,000 in value, executed a trust-disposition and settlement, the effect of which, roughly speaking, was to divide his estate between his legitimate family on the one hand and Miss White and her son on the other, Miss White receiving legacies of £1500 and £2000 (the latter, however, subject to a liferent to the brother Alexander), her son receiving a legacy of £2450.

On 28th November 1903 the testator, who in May had had a serious illness, the effect of which is dealt with in the Lord Ordinary's note (*infra*), after previously in that year getting a written statement from his lawyer as to the legal rights of his children, made over to Miss White by letter the whole of his furniture, in value about £700; and on 11th January 1904 he executed the trust-disposition and settlement under reduction. On 3rd August of the same year the testator executed a contract of copartnery with Miss White, giving her over as a free gift the half of the capital in the businesses as from 1st March 1904, the value of this gift being about £2000. On 16th September the codicil under reduction was executed under the circumstances set forth in the Lord Ordinary's note (*infra*). The effect of this codicil was to revoke a bequest to the brother Alexander of the fee of a certain property, in value about £420. By the gift of furniture, the taking into partnership of Miss White, and by a transference of £1000 from the credit of the testator to that of Miss White, (though it did not clearly appear whether this was a gift or the repayment of a loan), the testator's estate was reduced from about £12,100 to about £8400. Of this the illegitimate son was, by the disposition under reduction, given properties amounting to over £6200 in value, Miss White receiving liferents of two of these properties amounting to about £90 a-year, while the widow and legitimate family only received between them about £1000, the remainder going to pay estate duties, &c., and a legacy of £650 to a sister of the testator.

In October 1904, a few days before his death, the testator had dictated to Miss Peter, his cashier, detailed jottings for a new settlement, but he died before this was executed. Roughly speaking, the effect of the alterations would have been (1) to make Miss White fiar of the properties which under the 1904 disposition were to go to her son, while he was merely to have liferents of certain of them, in value about £320 a-year, and (2) to make a gift to Alexander of the fee of certain property about equal in value to the former bequest to him cancelled by the codicil as mentioned above.

On 2nd February 1907 the Lord Ordinary (ARDWALL) pronounced this interlocutor—"Reduces, decerns, and declares in terms of the conclusions of the summons for reduction in so far as regards the pretended codicil to the trust-disposition and settlement of John M'Kechnie, warehouseman, No. 99 Princes Street, Edinburgh, now deceased, and bearing date 16th September 1904: *Quoad ultra* assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defender Jemima

White liable to the pursuer in one-half of his expenses of process," &c.

Opinion.—[*After narrating the facts in the case his Lordship proceeded.*]—"The next point to be considered is the state of Mr M'Kechnie's health after his illness in May 1903 . . . [*His Lordship here dealt with the details of the illness.*] . . . It is, I think, pretty clear that after his illness there was a great apparent loss of physical energy on the part of Mr M'Kechnie, partly due, no doubt, to the change wrought in him by his illness, but still more due to the fact that having been seriously alarmed as to the state of his heart, he took much greater care of himself, and this was, of course, accentuated by the defect in his eyesight, which seems to have troubled him more or less for a considerable time. His weakened physical condition undoubtedly would affect his disposition more or less, and might make him more amenable to pressure on the part of others, and especially of Miss White, who was constantly with him, and whose presence and assistance were invaluable to him in his impaired state of strength.

"As to his mental capacity, I do not think it has been proved that that was impaired in the sense that he was less capable of understanding business of any kind, although it is possible that he may have been unable to seize ideas as rapidly as he had done before, or to carry them out as promptly and energetically. But the evidence . . . I think proves that he was perfectly intelligent and able to attend to business matters to the end of his life. But the strongest evidence upon this I consider to be the evidence of Miss Peter, which is completely borne out by the documents, and which shows how capable he was up to within a few days of his death of making a settlement of his affairs, to meet certain main ideas which he had himself jotted down in his own hand, and wished to carry out. The conclusion I arrive at, therefore, as to his mental condition is that possibly owing to failing bodily strength and the condition of his heart he may have been less able to resist any pressure brought to bear on him by others than he was before his illness, yet I cannot say that it is proved that generally he was weak and facile in mind, although it is possible that he might be more or less facile in the hands of a person who had very strong influence over him.

"This leads me to the consideration of the question as to alleged undue influence of Miss White over the testator.

"Miss White, as the whole of her history in this case shows, is an exceedingly capable, clever, and managing woman, and I have little doubt that Mr M'Kechnie spoke the truth when he said, as he repeatedly did, that he owed his success in business very much to her. His business was one in which a great many young women were employed, both in the dressmaking department and in the shop, and the principal customers were ladies. In a business of that kind, accordingly, it was all-important to have a capable managing lady both to look after the employees and to interview customers. Miss White was, owing to her ability, experience, and tact, in a position of commanding influence in relation to Mr M'Kechnie as regarded his business. But besides that, she was really in the position not merely of a mistress but of a wife, and possessed the influence attached to both these positions, because while she managed his household, looked after himself, and was his companion at bed and board, just as a wife would have been, she was, as being only his mistress, in the position of being able to leave him whenever she liked, being under no legal obligation whatever to remain with him longer than she chose. I think that she only spoke the truth when she signified to two or three of the employees who speak to the matter that she could twirl Mr M'Kechnie round her little finger, and from various things that she is reported, I think truly, to have said at different times, it is apparent that she was quite conscious of the influence she had with Mr M'Kechnie, either to prevent him doing what she did not want done or to do what she did want. I attach no importance to her denials of what these witnesses say, for while she struck me as a very clever witness, I observed that when a crucial question was put to her she several times either pretended that she did not hear it or did not understand it, while she was thinking hard all the time what answer it would be best for her case to give. In short, she conveyed to my mind the impression that she was a very clever witness but not a very reliable one.

"But however strong an influence one person may possess over another, especially when holding such close personal relationship as Miss White did to Mr M'Kechnie, that will not suffice to reduce a will unless it is proved that that influence was exercised unduly in order to impetrate the will from the testator, or, failing such evidence of connection between the person possessed of such influence and the preparation or execution of the deed complained of, it would require to be shown that the will was so outrageously against the presumed intentions or clear moral duty of the testator as to make it incredible to suppose that it could have been executed except under the pressure of undue influence on the part of those who were taking the principal interest under it. Now there is not a particle of evidence to show that Miss White had anything whatever to do with the giving of the instructions for the preparation of the deed under reduction or the execution of it. The will under reduction was prepared by Mr Geddes, solicitor, Edinburgh, who is a witness in the case. It seems the will under reduction began first to be discussed about the beginning of August 1903, when the testator told Mr Geddes that he was proposing making codicils to his will, and gave him directions. Mr Geddes advised him that a new will should be drafted, as the codicils would not fit in very well. Mr Geddes seems to have thought throughout that Mr M'Kechnie was giving too much to Miss White and

her child, and warned him that there might be trouble about it; but Mr M'Kechnie, who seems to have had a strong will of his own, determined to have his own way, and gave Mr Geddes the reasons for his settlement. The jottings he left with Mr Geddes were in his own handwriting, and he instructed him perfectly intelligently, and told him to send him a statement in black and white setting forth the legal rights of his widow and children, which Mr Geddes did. The draft accordingly was made out as he had instructed, and he was so anxious that it should be his settlement that when it was brought back for engrossment he had the draft executed as a will, so that it would serve as a will till the engrossment was made out and duly signed. All this was done in Edinburgh, and outwith the presence of Miss White. The draft bears out what Mr Geddes says, to the effect that Mr M'Kechnie thoroughly understood the terms both of the draft and of the will, and I have no doubt he did. It was signed at Edinburgh on 11th January 1904, before Miss Peter and a dressmaker in the shop. Mr Geddes says that Miss White had nothing whatever to do with any of the deceased's testamentary writings, and certainly it is not proved that she had.

"It is always of importance in a case of this sort to consider the terms of the deed itself, and if, as I have already said, the terms of such deed are in conflict either with the known or presumed intentions of the testator, or are so entirely contrary to ordinary moral obligations as to make it incredible that it should have been executed by him voluntarily, that may have the effect of opening the door for the plea of undue influence.

[*After examining in detail the provisions of the will of* 1904 *and its effect as compared with earlier wills the Lord Ordinary proceeded*]—"On the whole I cannot say that the will is either an irrational or absurd one, or one the terms of which, looking to the history of the family, was not consistent with what may be presumed to have been the wishes and intentions of the testator; nor is it a will which ignores his obligations to his lawful wife and family, and even his collateral relations. I need hardly say that, granting all this, I consider that it was, when taken along with the contract of copartnery and other deeds, a most unfair disposition of his property as regarded his lawful children.

"While, therefore, I think there is no evidence to justify me in reducing the will on the ground that it was impetrated by undue influence on the part of Miss White, I think the matter is different with regard to the codicil under reduction. That codicil deprives Alexander M'Kechnie, the testator's brother, of the fee of the property 13 Annandale Street, and gives it to C. J. M'Kechnie. I regard this codicil as being directly the work of Jemima White and her alone. The incident out of which the matter arose was a sufficiently absurd one. Miss White, on her way to Edinburgh one morning, had requested Alexander M'Kechnie to get a cap for her boy, and to send it by the porter to the Pollokshields train along with other parcels in the afternoon. In the bustle of business Alexander M'Kechnie forgot this commission till the porter had started with the parcels for the train. On recollecting this he rushed out and bought a cap, and sent one of the shop girls down to the train with it, telling her to give it to Miss White. I must here notice that Miss White was known by that name in all the shops, but at Westminster Terrace and at Shawfield she was known as Mrs M'Kechnie, and was visited by a number of people, including the Free Church minister and his wife, who supposed her to be Mr M'Kechnie's wife. When the girl got to the station Mr M'Kechnie and Miss White were seated in a carriage for Pollokshields, and in the same carriage was a gentleman from Pollokshields who lived right opposite them, and who had known and visited them as Mr and Mrs M'Kechnie. The girl, when she saw them, rushed forward with the parcel, and said loudly, 'Here's a parcel for Miss White,' to whom accordingly it was handed. Mr M'Kechnie and Miss White, but I expect especially the latter, were much disconcerted, it is said, by this occurence. Miss White says that Mr M'Kechnie was very angry at Alexander, and on getting home resolved to dismiss him from the shop, and sent her in to tell him so; that she, after getting her tea, went back to Glasgow to the shop and did not dismiss Alexander from the shop as she had been told to do, but talked a lot to him and told him how angry his brother was. Alexander says about Miss White when she came into the shop—'She told me that I had a lot of consideration for her and she would have as much consideration for me, and would pay me back and make me suffer for it.' Miss White denies this, but I believe Alexander M'Kechnie, who appeared to me to be an exceptionally candid and honest witness, and I do not believe Miss White's denial, and I further believe that it was entirely due to her influence that Mr M'Kechnie on the 16th September 1904 made the codicil he did. I do not believe Miss White's story. I have the gravest doubts whether Mr M'Kechnie told her to dismiss Alexander, but if he did I think that, with her usual acuteness in business matters, she thought Alexander was very useful where he was in the Argyle Street shop, and where, I may observe, he still remains under Miss White's management, and that she thought a better way of punishing him would be to get him taken out of the will and her own son substituted. I do not think Mr M'Kechnie would have done this himself. It was much more like a woman's trick, and not what Mr M'Kechnie would have done of his own free will when he heard how innocent his brother Alexander had been in the matter, which was a pure accident so far as he was concerned. I am confirmed in this view by the fact that in the jottings which represent Mr M'Kechnie's last intentions he again makes a bequest to Alexander, though not of the same nature as formerly. It is also

noticeable that Miss White knew what had been done by Mr M'Kechnie, for she told Alexander the moment he went out to the house after Mr M'Kechnie's death that he had been cut out of the codicil in consequence of the incident above referred to. On the facts, therefore, I am of opinion that Miss White, being very much enraged with Alexander M'Kechnie, though with no good reason, exercised the strong influence she had with Mr M'Kechnie in order to carry out her threat to pay Alexander back and 'make him suffer for it.' We have here the position which is familiar in criminal law of an evil threatened and an evil perpetrated, the person who made the threat having it in her power to accomplish the perpetration by the hand of another person. I am of opinion that in such circumstances a judge or jury is entitled to infer that the person who made the threat was the person who truly carried it out.

"I accordingly propose to grant decree of reduction of the codicil, on the ground that it was impetrated by undue influence on the part of Miss White, Mr M'Kechnie being at the time facile in mind in relation to her, in consequence of the commanding influence she had obtained over him and his entire dependence upon her.

"With regard to expenses, the pursuer has been successful in reducing the codicil, and although that is merely part of the directions as to the succession of the deceased, yet it could not have been obtained without evidence bearing on the whole history of the deceased and his relations to Miss White. Accordingly, I think the pursuer is entitled to some expenses, but as he has failed in reducing the deceased's will I think these may be modified to the extent of one-half. The trustees will be entitled to take out of the trust estate the amounts strictly expended by them in defending the will, but they must not take out of the trust estate any part of Miss White's expenses, which she herself must meet out of the very ample provisions she has secured out of the deceased's estate."

The defenders reclaimed, and argued—(1) There was no evidence of either facility or circumvention. The Lord Ordinary had erred in reducing the codicil. There was no ground for setting it aside any more than the will. (2) In any case, standing the will, the pursuer would take no benefit from the reduction of the codicil, and accordingly had no interest or title to reduce it—*Swanson* v. *Manson*, 1907, S.C. 426, 44 S.L.R. 312; *Gilchrist* v. *Morrison*, February 28, 1891, 18 R. 599, 28 S.L.R. 441; *Duncan* v. *Duncan*, December 14, 1892, 20 R. 200, 30 S.L.R. 167. (3) Undue influence only formed a ground of reduction of a will when the person alleged to have unduly influenced the testator occupied some such fiduciary relation towards him as that of agent to client — *Harris* v. *Robertson*, February 16, 1864, 2 Macph. 664; *Weir* v. *Grace*, December 13, 1898, 1 F. 253, 36 S.L.R. 200—or possibly as that of priest to penitent or medical man to patient—*Munro* v. *Strain*, February 14, 1874, 1 R. 522, 11 S.L.R. 254—but not apparently where the relationship was that of nurse to patient — *M'Callum* v. *Graham*, May 30, 1894, 21 R. 824, 31 S.L.R. 690—and certainly not where, as here, it was that of mistress to paramour—*Hargreave* v. *Everard*, 1856, 6 Ir. Ch. Rep. 278. To reduce a deed, whether unilateral or bilateral, there must be some element of deceit or absence of confidence —Bell's Prin., 14 B—and the principles expressed in *Gray* v. *Binny* (*cit. infra*), relied on by the pursuer, had not been extended to unilateral deeds.

Argued for the pursuer—(1) There was no plea to title to sue. Moreover, if necessary, Alexander would be tendered as pursuer. (2) It was not necessary to show general facility. Facility was made out if it were shown that the testator could not resist the persuasion of Miss White—*Clunie* v. *Stirling*, March 11, 1854, 17 D. 15; *Munro* v. *Strain* (*cit. sup.*) (3) Reduction on the ground of undue influence did not depend on any set relationship; it was sufficient if the relationship gave rise to trust and confidence on the one side and influence on the other, and if the influence so obtained were betrayed by undue or excessive exercise—*Gray* v. *Binny*, December 5, 1879, 7 R. 332, 17 S.L.R. 210; *Harris* v. *Robertson* (*cit. sup.*); *Fearn* v. *Cowpar*, March 14, 1899, 1 F. 751, 36 S.L.R. 593; *Morley* v. *Loughran* [1893], 1 Ch. 736.

LORD JUSTICE-CLERK—We have had a very full and elaborate debate in this case. There are two questions involved. The first question is with regard to the will, and the second question is with regard to the codicil. As regards the will, the Lord Ordinary has held that the pursuer has no case for reducing it, and in that opinion I entirely concur. I do not think it is necessary, because it is very much a matter of verdict, to enter into the question at length. All I say is this, that the pursuer has failed to prove any case entitling him to a verdict upon the facts. That being so, I am for affirming the Lord Ordinary's interlocutor as regards that part of the case.

As regards the codicil, I confess I do not quite appreciate what the Lord Ordinary has done, or the reasons he has given for doing it. We have had an argument upon the law as applicable to such a case. I am not of opinion that the cases which are founded upon by the pursuer—the cases of *Strain* and other cases of a similar class—have any bearing upon this case whatever. These are cases of persons who having, from an official position towards another person, some capacity for influence over him, misuse that position for the purpose of inducing him to do, or abstain from doing, something that he has right to do, or abstain from doing, in the exercise of his rights as regards his own property. The essence of the matter is that the persons in that official position, such as clergyman or doctor or lawyer, are people who have not only a duty but a right to advise and urge those with whom they have to deal, in certain directions; and it is natural and right that a person who is so dealt with should give effect to or at least be greatly influenced by

the advice of those persons, and what is urged upon him by those persons. Therefore the person who has that influence, and ought to have it, in dealing with a person who ought to be influenced by it, must take the greatest possible care that he does not outstep the bounds of his official position and endeavour to get other things done, under that influence which he has, with which he has no right whatever to interfere. The clergyman and the doctor may have cause to strongly advise a person with whom they have to deal officially, but their advice must not be tainted by any motive not within their own border. As regards the lawyer, in a question of property, the position is somewhat different from the position of a clergyman or the position of a doctor, because it may be his duty to advise his client, and even sometimes to urge his client, in a particular direction when the client desires to make a disposal of his affairs; and if in doing so he urges anything in his own favour, or urges anything in favour of a particular individual who gets him to do it, then of course he is in a corrupt position, in which anything that is done under his influence cannot receive effect. These cases are clear enough. Most of these cases do not turn either upon the question whether a person has capacity to make his will or not, or upon the question whether he is weak and facile. Of course, if there is anything of the nature of weakness or facility in such cases, the weakness or facility will make it much more easy to hold that a person acted under undue influence. But as regards the relatives of a man, and particularly as regards the people who are living in close relationship, practically of husband and wife, such rules do not apply. Such persons are entitled to use influence to induce the man to do what he may be expected to do himself, namely, to make provision for those whom he has placed in the position of being dependent upon him, and particularly in the case of a person who is placed in the position of being the mother of his child. In such circumstances there may be grounds for setting aside a will made by a person if, being on the face of it an absolutely unjust and wrong will, it can be proved that he had not the mind to make a will, or if it can be proved that his mind had got into a weak and facile condition, so that he was a person who could be easily imposed upon, and the person accused, taking advantage of his weakness and facility, did impose upon him, and impetrated from him the deed which is complained of.

Now, that matter again is a question of fact. Two questions of fact are involved. First, was the late Mr M'Kechnie weak and facile and easily imposed upon? If that question be answered in the affirmative, then we must consider the second question, whether advantage was taken of his condition, and whether he was imposed upon. Now, as regards the first question, giving the best consideration to the evidence which has been put before us and to the argument upon it, I am unable to say on the jury question that I can find that he was weak and facile and easily imposed upon. I find no evidence of that. There is no doubt that after he had a certain illness he was weaker than he was before. His body had suffered, and to a certain extent his sight had suffered. But I think the evidence read fairly leads to the conclusion that he was quite as capable of making up his mind about his own affairs as he ever had been in his life. I come without any difficulty to the conclusion that he was not a man who was weak and facile or easily imposed upon. That being so it is unnecessary to go any further, because the first answer to that part of the issue applicable to such a case must be in the negative. But I shall assume that influence was used for the purpose of obtaining this deed. I confess I agree with the view that was taken by the solicitor that what he was doing was going too far in the direction of providing for this woman with whom he was living, and to whom he had been attached for many years, and for the child whom she had borne to him. On the other hand, I think it was a case in which he himself was of opinion, and I assume rightly of opinion, because it is not said that later in life he had ceased to have the opinion which he had held for so long, that to a very great extent his success in life and the fortune he had accumulated was due to the energy of this defender with whom he lived. I assume also that when he was spoken to about it by the solicitor, the solicitor did impress upon him the importance of what he was doing in the way of dealing with his property. He seems to have made up his mind distinctly to do what he had expressed his desire to do before his agent urged him in the opposite direction, and he carried that out. I think in doing so he carried out his own will. It is not to be left out of view that he was not a man who rushed into these matters wildly, but that he was giving consideration to them from time to time. That is I think conclusively proved by the pencil jotting we have in the large print of the proof. We have ascertained from an unimpeachable witness, namely, Miss Peter, that that was a pencil jotting made to his dictation in which he showed a perfect knowledge of his own affairs, and was jotting down his own note as to what he meant to do. Death prevented his doing anything to complete his intentions as indicated in these jottings.

As regards the codicil, I have no doubt that that codicil was granted at a time when he was in an irritated state, perhaps not wisely, for people get very irritated sometimes about small matters. This was in itself a small matter, but most certainly very trying to the parties concerned, namely, that owing to the blunder of Alexander this mistake had been made in exposing the nature of the relations between Miss White and him, at the railway station. He acted upon that, but he was evidently considering the matter later in a calmer state of mind, as is shown by the pencil jotting, and it was because of the unfortuuate circumstance that he died

before giving effect to that jotting, that matters are in their present state. On the whole matter I find myself unable to say that I am satisfied with the grounds of the Lord Ordinary's judgment. I think he has drawn inferences which were not justified, and that therefore his interlocutor must be recalled in so far as it reduces the codicil. The only remaining question is the question of expenses, and I think the trustees should be found entitled to their expenses, but only to one set of expenses for both defenders.

LORD STORMONTH DARLING—I agree with your Lordship. This case has been very fully and carefully argued. There can be no doubt, I think, that the pursuer of the action, who was the youngest son of the testator, has, as indeed all the family had, good reason to complain of the deeds which he here challenges, because the provision which the testator made as between his legitimate family, and his paramour and the child which she bore him, was most disproportionate and unfair. But that, I need hardly say, is no reason for reducing a settlement. That can only follow if, in the first place, it is a case of testamentary incapacity, which is not here alleged, or if it can be brought under the category of facility and circumvention, coupled with impetration by some person who takes advantage of that facility. This case is brought alternatively on that latter head, and on the further head, which I rather think is the real ground of action, of undue influence exercised towards the testator by the person who impetrates the will. I admit that that is a third ground of reduction, which has in some cases been held sufficient to warrant reduction, though I rather think no instance exists of such an issue being sent to a jury. But I agree with your Lordship that that principle has only been hitherto applied to cases either of transaction, of which *Gray* v. *Binnie*, 7 R. 332, is an example, or in the much rarer case of wills, where a position of trust and confidence is held by the person, who impetrates the will, towards the testator, and where that position of trust and confidence has been abused. The only illustrations which Mr Mair, in his exhaustive examination of the evidence and authorities, was able to give us were cases of the well-known categories of such trust and confidence being reposed in law agents, or doctors, or clergymen, or some person in a position of being trusted by the testator himself—that is to say, trusted that they would not ask him to do anything inconsistent with his duty, or anything wrong in itself. I need hardly say that is not the case here. Mr Mair, with all his ingenuity, was not able to adduce a single instance of undue influence exercised by a paramour towards the man with whom she was living, and for the very good reason, I think, that she is not in the position of owing any duty towards him or, so far as I can see, towards anybody but her own child. I quite agree with the Lord Ordinary where he says that Miss White did possess very considerable influence over this testator, but then I thoroughly agree with the Lord Ordinary when he goes on to say—"However strong an influence one person may possess over another, especially when holding such close personal relationship as Miss White did to Mr M'Kechnie, that will not suffice to reduce a will unless it is proved that that influence was exercised unduly, in order to impetrate the will from the testator; or failing such evidence of connection between the person possessed of such influence and the preparation or execution of the deed complained of, it would require to be shown that the will was so outrageously against the presumed intentions or clear moral duty of the testator as to make it incredible to suppose that it could have been executed except under the pressure of undue influence on the part of those who were taking the principal interest under it. Now there is not a particle of evidence to show that Miss White had anything whatever to do with the giving of the instructions for the preparation of the deed under reduction or the execution of it." I quite agree with that passage. There is not a particle of evidence, literally not a particle of direct evidence, to show that Miss White took any part in the preparation or execution of this will; and the whole evidence of the pursuer consists of inferences, which he asks us to draw from the relationship of the parties towards each other. I find myself wholly unable to draw that inference without a great deal more than there is in this proof. The influence was undoubted, but it fails altogether in the necessary requisite of being undue—that is to say, it was just what might be expected, and what the testator was bound to expect, from the relationship of the parties. It was a very strong interest no doubt, but interest by itself is not enough in a case of undue influence, because there is no cause where it could be said that confidence has been betrayed. The actual facts being as they are, I agree with your Lordship that there is nothing to justify us in drawing the inferences which we are asked to make. I further think, differing from the Lord Ordinary, that there is no reason for making a distinction between the will and the codicil, and I do so for the reasons which your Lordship has given. I also agree with your Lordship's proposal as regards the expenses of the case.

LORD LOW—I have felt this case not to be altogether free from difficulty, and I have listened most anxiously to the able argument which we heard on both sides. I am not surprised that the settlement in this case was challenged, because it is evidently a most unfair disposition of the testator's property so far as the claims of his legitimate children were concerned—indeed, so unfair as to suggest from its very terms either that Mr M'Kechnie, whom we know had been a shrewd man of business, and who seems to have been an affectionate parent, was not in a condition in which he was able to make his will when he executed the settlement in question, or that some

outside influence had induced him, when suffering from the effects of serious illness, to do that which he would not have done if left to the guidance of his own sense of what was right and just. Therefore there was a pretty good foundation for an action such as we have here. It seems to me, however, that the only possible issue in this case is whether the will was executed when he was in a facile condition, and easily imposed upon by circumvention on the part of Miss White. I say I think that is the issue, because the question that was raised in the record, as originally framed, whether the deed was the deed of the testator or not, has not been pressed.

It was, however, argued that the pursuer did not require to go so far as to show that the testator was facile and easily imposed upon, and that Miss White impetrated the will from him by fraud or circumvention when he was in that condition, because it was sufficient to show that she had strong influence over him which she unduly exercised. I am of opinion that this case does not fall within that category of the law at all. I think that the doctrine of what is called undue influence is confined to cases where the relationship between the two persons is such that the natural and legitimate consequence is influence upon the one side, and trust and confidence upon the other. It is quite clear that the relationship which exists between a woman and a man with whom she has lived in concubinage, is not of that kind, and therefore the issue here is the issue of facility and fraud or circumvention.

No doubt after his illness Mr M'Kechnie was not the man which he had formerly been, but the evidence, read as a whole, shows very clearly that down to the last he was fully capable of taking the management of his own affairs, and of understanding matters of business, even of a complicated nature. I am quite satisfied that there was no facility in this case. If that be so, then, as your Lordship in the chair has pointed out, there is an end of the case, because if there is no facility one part of the issue on which the case depends has not been established. Upon the whole question I have in the end come to the conclusion, I confess, without much difficulty latterly, that the pursuer has not made out his case.

In regard to the codicil I cannot think that the evidence is really different from the evidence in regard to the settlement itself, because the circumstances as regards the testator's condition are the same, and if there was no facility in the one case, there was no facility in the other. But then, if I had agreed with the Lord Ordinary that there were grounds for setting aside the codicil, which did not apply in the case of the will, I should not have thought that that entitled the pursuer to decree. When the pursuer brought his reduction of the settlement, it was, of course, quite right that he should also bring a reduction of the codicil. The two together constituted the will of the deceased. If the pursuer had been found entitled to reduce the settlement, the codicil also would necessarily have fallen, because the codicil could not stand without the settlement. If, however, it is once established that the will is not reducible, I think it is very clear that the pursuer has no interest to insist upon reduction of the codicil. If he had brought an action for the reduction of the codicil alone, I think it would have fallen to be thrown out, upon the ground that he had no interest, because he had nothing whatever to gain by setting aside the codicil. For this same reason, if the will is not to be reduced I think that the pursuer cannot insist upon reducing the codicil. On the whole matter therefore I agree with your Lordships.

LORD ARDWALL was sitting in the Extra Division.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the defenders' reclaiming note against the interlocutor of Lord Ardwall, dated 2nd February 1907, Recal the same: Assoilzie the whole defenders from the conclusions of the summons, and decern: Find the pursuer liable to the defenders John M'Kechnie's trustees in expenses, and remit the account thereof to the Auditor to tax and report; *quoad ultra* find no expenses due."

Counsel for the Pursuer (Respondent)—Morison, K.C.—Munro—Mair. Agent—J. Farquharson Macdonald, Solicitor.

Counsel for the Defenders (Reclaimers) (John M'Kechnie's Trustees)—G. Watt, K.C.—Macmillan. Agent—William Geddes, Solicitor.

Counsel for the Defender (Reclaimer) (Miss Jemima White)—G. Watt, K.C.—Macmillan. Agents—Davidson & Syme, W.S.

Thursday, October 31.

FIRST DIVISION.

[Sheriff Court at Glasgow.

TOAL *v.* THE NORTH BRITISH RAILWAY COMPANY.

Railway—Reparation—Negligence—Duty of Railway Servants to Shut Carriage Doors on Re-starting Train from a Station.

A railway passenger, who had alighted from a train, but was still standing on the platform, was knocked down on the re-starting of the train by the door of one of the railway carriages which had been left open, and received injuries. He brought an action of damages against the railway company on the ground of negligence, the negligence averred being the having set the train in motion without having closed the