

—bridges, fences, breakwaters, or whatever they may be—and, according to the argument legitimately carried out, at whatever distance from the spot. The statutory line is a short one; but, according to the argument, the company would equally be entitled to take freestone for works carried on at the other end of a line 50 or 100 miles long. And all this by virtue of a purchase of a piece of ground *reserving the minerals*, without any further contract or consideration.

“The Lord Ordinary feels it impossible to give effect to this contention, which he thinks at variance both with principle and equity.”

The respondents reclaimed.

When the case was put out for discussion no appearance was made for the reclaimers, and the following interlocutor was pronounced:—“The Lords having considered the reclaiming note for the North British Railway Company, No. 32 of process, in respect of no appearance for the reclaimers, refuse the said reclaiming note, and adhere to the interlocutor of the Lord Ordinary reclaimed against: Find additional expenses due, and remit,” &c.

SHAND and BALFOUR for complainer.

YOUNG and LANCASTER for respondents.

Agents for Complainer—Dundas & Wilson, C.S.

Agents for Respondents—Hill, Reid, & Drummond, W.S.

(Before Lord Barcople.)

BELL v. BAILLIE.

*Parent and Child—Aliment—Husband and Wife—Separation—Agreement.* Circumstances in which held (by Lord Barcople, and acquiesced in)—(1) that a daughter who from the death of her father until her marriage resided with her mother, the mother acting as executrix of the deceased and carrying on his business under a family arrangement, was not entitled to interest on her share of her father's succession prior to her marriage, nor, on the other hand, was liable in repayment to her mother of the expenses of her education and maintenance prior to that date. Held (2) that the mother was not entitled to deduct from the daughter's share in said succession, certain sums advanced by her to her daughter after marriage, and when she was living separate from her husband, there being no proof that the daughter was deserted by her husband, or that the mother had reasonable cause to believe that she was so deserted.

This was an action of count and reckoning against Mrs Baillie, as executrix of her late husband, James Baillie, at the instance of her daughter Mrs Bell and her husband. The conclusions were for count, reckoning, and payment of the daughter's share of the moveable estate of her late father, who died in 1848. The defences were (1) that the mother had expended more than the share claimed on her daughter's maintenance and education between the father's death and her marriage in 1860, up to which time she had resided with her mother; and (2) that the mother had advanced certain sums to her in 1864 for alimentary purposes when she was separated from her husband, who was then in London. The answer was, that the mother, who had been infett in a liferent of the heritage belonging to the deceased, had, under a minute entered into and signed by those of the family who

were of age in 1850, and afterwards acted on, carried on her husband's business in Musselburgh for behoof of the family, including the female pursuer, who had been alimanted and educated from the profits; that the sums so expended by the mother were to be regarded as a donation by the mother; and that, at least after 1854, the pursuer's services in her mother's shop and house, for which she never got wages, were equivalent to the expenditure on her maintenance. As to the advances alleged to have been made in 1864, it was contended that no legal claim could be sustained against the husband, who was able and willing to support his wife, and who had given her no cause for deserting him.

After a proof the Lord Ordinary pronounced this interlocutor:—“Finds that the free residue of the intestate moveable estate of the defender's husband, the deceased James Baillie, after deducting the defender's *jus relictæ*, amounts to £312. 16s. 10d., from which there falls to be deducted £3, 11s. of legacy-duty paid thereon: Finds that the pursuers state on record that they are willing that the accounting shall be on the footing that collation is to take place, reserving their claims to a share of the proceeds of the heritage if collated, or to a further share of the moveable estate, if it should be found that Isaac Baillie, the eldest son of the said James Baillie, is not bound by the minute by which the defender alleges that he agreed to collate the heritage: Finds that on that footing the share of the said moveable estate, after deducting as aforesaid, to which the pursuer Margaret Baillie or Bell is entitled as one of the six children of the said James Baillie is £51, 10s. 11d.: Finds that, having regard to the arrangement embodied in the minute, No. 20 of process, and to the whole circumstances of the case, it must be held that all disbursements by the defender on the maintenance and education of the female pursuer, down to the time of her marriage, were made out of the income derived from the property and funds belonging to the entire family, which were under her management, and the profits of the business carried on by her, without any claim for repayment; and that, on the other hand, the female pursuer having been so maintained and educated, she has no claim for interest on her share of her father's succession prior to her marriage: Finds that the female pursuer's said share of her father's moveable succession passed to the pursuer William Bell by their marriage: Finds that it is not proved that the pursuer William Bell deserted his wife, the other pursuer, or agreed to separate from her, or that the defender had reasonable and sufficient cause to believe that he had done so: Finds that, in these circumstances, the defender is not entitled to deduct or set off any portion of the sums advanced to the female pursuer after marriage, in accounting for said share of her father's moveable succession now belonging to her husband, the other pursuer: Decerns against the defender, as executrix of her said husband, to make payment to the pursuers of the said sum of £51, 10s. 11d. sterling, as the said Margaret Baillie or Bell's share of the moveable estate of the said James Baillie, on the footing of collation taking place, with interest thereon, at the rate of five *per centum per annum* from the 23d day of April 1860, being the date of the pursuer's marriage; reserving to the pursuers all claims they may have to a share of the heritage which belonged to the said James Baillie, if collated; or to a further share of the moveable estate if it shall be found that the heir is not bound to collate, and collation shall not take

place: Finds the defender liable in expenses, &c.

*Note.*—The evidence throws no satisfactory light upon the circumstances under which the female pursuer left her husband, and the appearances may have been such as to make it natural that her mother should think it necessary to make advances for the support of her and her child out of her share of her father's succession. But the Lord Ordinary does not think she has a legal defence against the present claim.

The female pursuer's share of her father's moveable succession passed to her husband by the marriage, and ought to have been paid to him then. It was demanded, but payment was withheld without any reasonable ground for delay. The defender may have thought that the arrangement made by her and her three eldest sons should continue to take effect as to her daughter's share notwithstanding of her marriage. But she had no legal right to insist on that. The defender is clearly bound to pay her daughter's share of the moveable estate, which is now the property of the husband, with interest from the time of the marriage. The question is, whether she is entitled to set off against that claim the advances made by her to the female pursuer in 1864 and 1865? That depends upon whether the husband is liable for them, as proper and necessary alimentary advances to his wife and child. Holding it not to be proved that the female pursuer was induced by the defender to leave her husband, the *onus* still lies upon the defender of shewing that these advances were made in such circumstances as to create a legal claim for repayment against the husband. The fact that the defender had funds belonging to the husband in her possession could not entitle her to apply them to making or repaying these advances, if she would not have had a good claim for repayment against him if no such fund had existed. The Lord Ordinary thinks that no grounds have been established for such a claim. The defender may possibly have been led by her daughter to believe that her husband had deserted her, and caused her to leave him; but clearly that is not proved to have been the true state of matters. The defender was not entitled to assume, on the mere statement of her daughter, that she was justified in living separate from her husband. However natural it was that in the circumstances she should assist her, she could have no claim against the husband except by proving that his wife's absence from him was necessary and justifiable.

“Some portion of the advances were not of a properly alimentary nature, and rather indicate the intention to pay over the daughter's share of the estate to herself, in the expectation that her husband would not appear to demand it. In the view, however, which the Lord Ordinary takes of the case, it is not necessary to inquire into the nature of the different advances.

“The Lord Ordinary thinks that the female pursuer having been supported by her mother until her marriage, there is clearly no claim for interest on her share of the succession. On the other hand, he is of opinion that she must be held to have been supported under the arrangement by which the mother made up a title as executrix, and administered the family property, out of the income derived from the property and the business, without any claim being kept up against her. Her services must latterly have been of value to her mother.”

The defender acquiesced.

GUTHRIE for pursuer.

MAIR for defender.

Agent for Pursuer—George Andrew, S.S.C.

Agent for Defender—James Finlay, S.S.C.

Thursday, December 10.

## SECOND DIVISION.

SIM v. LUNDY AND BLANSHARD.

*Compensation — Retention — Liquid and Illiquid.*

Claim under an agreement which held to be liquid; and defences of compensation and retention in respect of an illiquid counter claim repelled.

The pursuer and the defender Lundy carried on business in Leith, as partners, under the firm of the North British Colour Company. In 1867 they agreed to dissolve partnership. By this agreement Lundy was to pay Sim £6000, and the other defender, Blanshard, became cautioner for the payment of this sum. The offer by Lundy, which was accepted by Sim, contained the following clause, viz.:—“The £6000 referred to, to be paid as follows, viz., £5000 in four equal instalments by bills at three, six, nine, and twelve months, and the remaining £1000 in cash by two equal instalments at six and twelve months. Any debts owing by the North British Colour Company not appearing in the statements and balance books at 31st December 1866, you will have to pay to me your share of, the above offer being made upon the assumption that the balances at 31st December 1866 are correct in the ledgers and balance books, &c.”

Bills were granted for the £5000, which were paid; but when the first instalment of the remaining £1000 became due on 10th December 1867 the defenders refused payment, and this action was raised. The defence was, that the defenders were entitled to withhold payment until the amount of the debts owing by the Company at 31st December 1866, and referred to in the offer, was ascertained. For this purpose a counter action is in dependence. The pursuer replied that the sum sued for was liquid, and that the defenders were not entitled to plead compensation or retention in respect of the other claim, which was illiquid and disputed. He offered, however, to find caution if required, but this offer was not accepted.

The Lord Ordinary (ORMIDALE) repelled the defences, and decreed in terms of the libel.

He added the following note:—“It is not disputed that the defender came under an obligation to pay the pursuer the £500 now decreed for. The only defence set up is rested on an alleged counter claim which it is said affords to the defender a right of compensation or retention, sufficient to meet the pursuer's claim. The Lord Ordinary does not think this plea of compensation or retention well founded. The pursuer's claim is liquid, and in itself indisputably resting-owing; but the defender's counter claim is illiquid and disputed. He has raised an action to have it constituted, and that action is now in dependence. What may be the result of it cannot at present be foretold or anticipated; but it is obvious enough that no result at all can be arrived at without a count and reckoning and inquiry, which must take up a considerable time. As, therefore, the defender's counter claim is neither liquid nor capable of being immediately made liquid, the Lord Ordinary is unable to see