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 decerned 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 decerned 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

how the pursuer's claim, which is in itself liquid and undisputed, can be resisted or defended on the ground of compensation. Neither can the Lord Ordinary, having regard to the defender's obligation, in virtue of which the pursuer's claim arises, see how the defender can resist or oppose it on the ground of retention. By that obligation the defender expressly binds himself to pay the £500 in question to the pursuer, in cash, at a specified time, which was come and bygone before the present action was raised. There are, no doubt, other stipulations in the agreement, one being to the effect that the pursuer undertakes to pay to the defender a proportion of certain debts, but this undertaking is made dependent and contingent on circumstances about which the parties are not only not agreed, but are now in litigation with each other; and the defender does not say that the pursuer is bankrupt, or *vergens ad inopiam*, or that his circumstances and responsibility are different now from what they were when the agreement was entered into.

The result is, that according to the Lord Ordinary's reading of the agreement of the parties, the defender came under a direct and unqualified obligation to pay, within six months of its delivery to the pursuer, the £500 now sued for, irrespective of any disputes or questions that might arise in regard to the other stipulations on which the defender now founds. And it was not unreasonable that this should be so, as the defender came at once, in virtue of the agreement, into the full and exclusive possession of the copartnery business, with power to collect the copartnery debts. The Lord Ordinary, therefore, does not think that the terms of the agreement are sufficient in themselves to afford to the defender a right of compensation or retention. Nor does he think that the defender has made any allegations otherwise relevant and sufficient to found either of these rights."

The defenders reclaimed.

ASHER was heard for them.

MILLAR, Q.C., and BURNET, for the pursuer, were not called on.

The Court adhered; the pursuer to find caution as offered by him. It was observed by the Judges that it was of the utmost importance to the law to preserve the distinction betwixt liquid and illiquid claims. The only exception to the rule that a liquid claim could not be compensated by one which was illiquid was where the party suing for the liquid claim is *vergens ad inopiam;* but there was no room for saying so in this case, because the pursuer had offered to find caution.

Agent for Pursuer—William Mason, S.S.C.

Agent for Defenders—Alex. Duncan, S.S.C.

Wednesday, December 9.

ALLAN'S TRUSTEES *v.* DIXON'S TRUSTEES.

Superior and Vassal—Feu-Disposition—Conditions as to Building. Circumstances in which *held* that certain conditions in a feu-disposition were not merely for the benefit or protection of the superior, but of the body of the feuars also; and that the superior, having undertaken to insert them in every feu-charter, could not dispense with them at his own hand. But action *reserved* to superior to establish, in an action of declarator, that the enforcement of the conditions at the instance of a particular feuar would be nimious, and therefore not binding on the superior.

The suspenders in this action are the trustees of the late James Allan, manager of Govan Colliery, Glasgow, and the respondents are the trustees of the late William Dixon of Govan Colliery, Glasgow. The suspenders make the following statements—"(1) The late William Dixon, Esquire, of Govan Colliery, near Glasgow, by his trust-disposition, dated 10th and registered in the Books of Council and Session at Edinburgh the 16th days of October 1854, nominated and appointed William Johnston, agent at Glasgow for the Commercial Bank of Scotland, to be trustee for the ends, uses, and purposes therein specified; and as such trustee the said William Johnston stood heritably vested in All and Whole the lands of Corsehill or Crosshill, lying within the parish of Cathcart and sheriffdom of Renfrew. (2) By disposition, dated 22d May 1855, the said William Johnston, as trustee foresaid, with the consent and concurrence of the committee of advice therein named (appointed by the said trust-disposition), and in consideration of the sum of £922, 17s. 6d. paid to him by the said deceased James Allan, thereby sold, alienated, and disponed, with consent and concurrence of said committee of advice, to and in favour of said deceased James Allan, and his heirs, assignees, and disponees whomsoever, heritably and irredeemably, All and Whole, ... (3) The foresaid disposition was granted under the following conditions, provisions, and declarations, viz:—'But these presents are granted and accepted, and the subjects hereby conveyed are disponed, with and under the following conditions, provisions, and obligations, viz.:—That the said James Allan and foresaids shall be bound to erect upon the said piece of ground a neat dwelling-house or separate dwelling-houses or villas or cottages, which shall cost at least £300 each, exclusive of the ground; that each dwelling-house or cottage shall have stone fronts, to be polished or droved, or otherwise tastefully finished, and shall be built with lime and covered with slates, I and my successors having the option to allow the fronts of the said houses or villas to be erected to be of fire-bricks, but in the event of such consent being given, to make the fronts of fire-bricks of the best quality only; that no buildings shall be erected nearer the side of any of the said two roads or streets of 50 feet in breadth before mentioned than 25 feet; that the inclosures in the fronts of the said houses or cottages shall be of brick or stone dwarf-walls, with a cope and railing; that I, as trustee foresaid, and my successors, shall be bound and obliged, so soon as required by the said James Allan or his foresaids, to cut and form the said two roads or streets of 50 feet in breadth on the south and north, so far as the plot or piece of ground hereby disponed is thereby bounded; that the said James Allan shall be bound and obliged, as soon as the said roads or streets are cut and formed as aforesaid, to make and complete the said roads or streets; that the said James Allan and his foresaids shall also form and make in the said two roads or streets, so far as surrounding the plot or piece of ground hereby disponed, common sewers to carry off the water from the ground hereby disponed, and to be at the expense of carrying such sewers across the turnpike road and join the same with sewer in lands belonging to me as trustee foresaid; that the said James Allan, by acceptation hereof, binds and obliges himself and his foresaids to maintain and uphold the said two roads or streets, so far as surrounding the piece of