necessary being left to the judgment of Mr Joseph Hutchison: Finds that Mr Hutchison has deponed, when examined as a witness *in causa*, 'I received instructions from the trustees to supply defender with stob and rail to repair the fences. I did so punctually. The supply was ample for the purpose —a great deal more than ample. I don't think it was all used for fences. I think there are plenty of them on the ground yet. The defender never applied to me for more stob and rail; there was plenty of wood on the farm for the purpose:' Finds that it is no answer to this evidence for the defender to prove that the fences were in some places deficient and in bad repair, it being his own fault if he did not make proper use of the material supplied: Finds, farther, that the defender was upwards of a year in the farm before he wrote the letter, No. 19/8, in which he for the first time asked for a supply of stob and rail; and, according to the evidence of the party Hutchison, to whom the amount of the supply was 'to be left,' he subsequently obtained what would have been abundant if properly used: Finds that, even if the supply had been insufficient, the defender should have made up the deficiency at his own cost, in the first instance, and debited the pursuers with it, instead of claiming a random sum of consequential damage: Finds, in the whole circumstances, *sibi imputet*, if the defender failed to make the fences sufficient, he is not entitled to the deduction of £40 allowed him under this head by the Sheriff-Substitute," and recalls accordingly. Having considered all the evidence applicable to this part of the case, I am of opinion with the Sheriff-Substitute. I think the obligation of the landlord, as it was to be performed by Mr Joseph Hutchison, was an obligation the performance of which the landlord or some one in his behalf was bound to attend to. On the other hand, I am not disposed to throw out of view the consideration that the tenant was bound to look after his own interests in this matter, and not to allow his claim to be forgotten, and then raise a claim of damages. I think there was some negligence on the part of the tenant down to 1864, three years before his removal; but I think that in that year he made a very formal and distinct demand in writing on this matter, and continued to repeat that demand from time to time, and to complain energetically that his application had not been attended to. Therefore I think that for the last three years the tenant is entitled to some damages for the failure to implement this obligation. But while I hardly see my way to give an allowance as the Sheriff-Substitute has done, I think the result at which he arrives is not inappropriate, and therefore I am inclined to suggest to your Lordships that we ought to restore the finding of the Sheriff-Substitute, and allow the tenant £40.

As to the claim of damage for the road, I agree with the Sheriff-Depute. I don't think the tenant has made out that part of his claim. I have some hesitation in believing that there was any damage at all, but if there was any it was of the most trifling description. But, apart from that, I think the making this road is not an act for which the landlord is liable. No doubt this mineral tenant is tenant of the minerals under the same landlord as the agricultural tenant, and of course the landlord would be answerable for any wrong done by the mineral tenant within the powers of his lease. But this was not done by him under the powers of his lease. This appears to be a road made by the mineral tenant for access for his colliers to a bit of mineral working on a different estate; and whether it was for that separate mineral working or not, it was one which he had no authority from the landlord to make. Therefore I cannot hold the petitioners liable for this damage.

The other Judges concurred.

Agent for Advocator—W. B. Glen, S.S.C.

Agents for Respondent—MacGregor & Barclay, S.S.C.

Friday, December 18.

MILNE, PETITIONER.

Heritable and Moveable—Parish Church—Church Seats. Seats in a parish church, which were not specially destined, *held* heritable.

In the accountant's report in this case, a question arose as to certain seats in the parish church of Montrose. The heir claimed them as heritage, while the accountant held them to be moveable.

The parish of Montrose is partly landward and partly burghal. The church was originally a mensal church of the Bishop of Brechin, and was given over to the magistrates at the Reformation. The stipend of the clergyman is paid partly from the teinds of the parish, and partly from an annuity-tax levied on the whole inhabitants.

In 1791 the church was rebuilt, and the expense was defrayed, one-fourth by the landward heritors, and three-fourths by the owners of sittings in the old church. The area of the church was apportioned in the same manner, and the seats in dispute are in that portion of the church not belonging to the landward heritors.

The seats have been for a long time treated as moveable, being included in the personal inventories of deceased owners, and transmitted frequently by simple receipts for the price.

BIRNIE, for the heir, referred to the cases of *Watson* v. *Watson* (M. 5431) and *Telfer* v. *Fulton* (Hume's Dec., 192).

MAIR for the judicial factor.

The Court held the seats to be heritable.

Agents for Heir—Henry & Shiress, S.S.C.

Agent for Factor—W. Officer, S.S.C.

OUTER HOUSE.

(Before Lord Kinloch.)

JAMIESON (DUNDAS' TRUSTEE) *v.* NORTH BRITISH RAILWAY COMPANY.

Railway — Edinburgh and Glasgow (Queensferry) Act 1863 — *Railway Clauses Consolidation (Scotland) Act* 1845—*Disposition—Minerals—Interdict. Held* (by Lord Kinloch, and acquiesced in) that a Railway Company, having a right to a certain piece of ground for the purposes of their Act, but having no conveyance of the minerals, and therefore, under section 70 of the Railway Clauses Consolidation (Scotland) Act 1845, not being entitled "to any mines of coal, ironstone, slate, or other minerals" under their land, "except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the works" authorised by the Act, were not entitled to work a bed of freestone under the land by means of an open quarry, and use the same in constructing works authorised by the

Act, but not situated locally on the piece of ground; and interdict granted.

The respondents, the North British Railway Company, have right, for the purposes of the works authorised by the "Edinburgh and Glasgow Railway (Queensferry) Act, 1863," to a certain piece of ground on the estate of Dundas, conveyed to them by disposition in 1865.

Section 70 of the Railway Clauses Consolidation (Scotland) Act, 1845, provides that "the Company shall not be entitled to any mines of coal, ironstone, slate, or other minerals, under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the works, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein, and conveyed thereby."

The disposition in the present case contained no conveyance of minerals.

Jamieson, trustee on the Dundas estate, presented this note of suspension and interdict, asking interdict against the respondents excavating, quarrying, and carrying away the bed of freestone underneath the portion of the estate conveyed to them, at least except in so far as such excavations were necessary in the course of the ordinary operations on the surface, required for making the lines of railway authorised by the Act. This prayer proceeded on the allegation that upon a part of the land in question "no works of any kind are being formed, but the respondents have recently opened therein a quarry, from which they have excavated and carried away a large quantity of very valuable building freestone, the property of the complainers. The said freestone forms a stratum or bed of great thickness, and is on an average from 8 to 14 feet, and at some parts 18 feet below the surface of the ground. The area already excavated by the respondents is at some parts nearly 50 feet in depth, and is about 300 feet long, by about 150 feet in breadth. The complainers have called on the respondents to desist from further excavation of said stone, but they refuse to do so, and are extending their operations laterally, as well as by deeper sinking. The stone is of great value, and well fitted for building purposes of the highest kind,"

The respondents pleaded that the interdict craved ought to be refused in respect—"1. The reservation in section 70 of the Railway Clauses Act applies only to mines of minerals—that is, to minerals workable by mines or underground workings, and does not apply to stone like that in question. 2. Such reservation is exclusive of so much of the said minerals as it is necessary to use, or dig, or carry away in the construction of the works. 3. Freestone or building-stone does not fall within the reservation. 4. The respondents, under the Edinburgh and Glasgow Railway (Queensferry) Act and incorporated statutes, have right to use the land acquired under that Act, and all the materials and substances in such lands, for the purposes of the works thereby authorised.

The Lord Ordinary (KINLOCH), on 3d June 1868, pronounced this interlocutor:—"The Lord Ordinary, having heard parties' procurators, and made avizandum, and considered the process, proof, and productions—Finds it proved, in matter of fact:—1st, That by disposition, dated 24th and 25th November 1865, Mr Donald Lindsay, the preceding trustee to the suspender Mr George Auldjo Jamieson in the estate of Dundas, with consent therein mentioned, conveyed to the respondents, the North British Railway Company, a certain piece of ground on the said estate for the purposes of the Edinburgh and Glasgow Railway (Queensferry) Act, 1863; 2d, That across the said piece of ground it was originally contemplated that a line of railway should be constructed, but this design was afterwards abandoned; 3d, That for the intended construction of the said line it was not necessary that there should be any cutting into the soil, the line of railway being intended to run on the surface, or partly on embankment; 4th, That beneath the surface of the said piece of ground there lay a mass of freestone, capable of being worked by means of an open quarry, but also capable, if necessary or expedient, of being worked by mining underground; 5th, That the respondents, the said North British Railway Company, commenced and continued and still continue to work the said freestone by means of an open quarry, and to carry away the same, in order to use it in the construction of bridges, fences, and a pier or breakwater, forming part of the works authorised by the said Act of Parliament, but which works are not locally situated on the said piece of ground, but at a greater or less distance therefrom: Finds, in point of law, that the respondents were not, and are not legally entitled to work and carry away the said freestone as aforesaid; suspends the proceedings complained of; interdicts, prohibits, and discharges, in terms of the first alternative prayer of the note of suspension and interdict; declares the interdict perpetual, and decerns: Finds the suspenders entitled to expenses," &c.

"*Note.*—It appears to the Lord Ordinary that by much the greater part of the proof which has been led is irrelevant to the true question at issue; which lies within a narrow compass.

"The respondents have right, for the purposes of the works authorised by the Edinburgh and Glasgow (Queensferry) Act, 1863 to a certain piece of ground on the estate of Dundas, conveyed to them in 1865. The disposition contains no conveyance of minerals; and, by virtue of the 70th clause of the Railway Clauses Consolidation (Scotland) Act 1845, these were reserved to the proprietor. The enactment is:—'The Company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug, or carried away, or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein, and conveyed thereby.'

"The respondents have stirred the question whether freestone is included in 'mines of coal, ironstone, slate, or other minerals;' and they maintain the negative of the proposition. It is the opinion of the Lord Ordinary that it is so included. Freestone is, in correct language, a mineral; it is certainly neither an animal nor a vegetable. The object of the enactment is pretty clearly to give the railway company right to nothing but the surface, and so much of what is below as it may be necessary to dig out in the construction of the line; and to reserve to the proprietor all beneath the surface that is valuable, and capable of being raised and disposed of. The word 'minerals' is, no doubt, a term of some flexibility,

and it may have a larger or more restricted meaning according to the nature of the transaction in the course of which it is used. The term may be construed, and has been construed, differently in different deeds. But in the case of a railway company buying land under the provisions of the Railway Clauses Act, it appears to the Lord Ordinary that the most extensive signification is to be given to it. Freestone appears to the Lord Ordinary to have its place in the reserving clause quite as much as slate, which is expressly mentioned; or as lime, which is not mentioned; but, it is presumed, would be held equally reserved. In more than one English authority freestone has been held a mineral; and it does not appear to the Lord Ordinary that there is any good ground, scientific or other, on which it is to be held a mineral at one end of the island, and not a mineral at the other—*Rosse* v. *Wainman*, 14 Meeson and Welsby, 859; *Micklethwaite* v. *Winter*, 20 Law Journal, N.S., Exch. 313.

"The argument mainly urged by the respondents, and to support or controvert which a good deal of the proof was led, was that by using the word 'mines' the statute intended to except only such minerals as might be and were usually wrought by mining operations underground, and not such as might be and were usually worked in an open quarry; and they maintained that freestone, being of the latter description, was out of the exception. The Lord Ordinary can by no means give effect to this contention. He thinks the word 'mines' was by no means intended to be used in this restricted sense, but was employed in what is both a popular and scientific meaning, as simply importing a subjacent bed or mass. The argument involves this absurdity, that the exception is not to be ruled by the nature of the substance, but by its mere mode of working; and the mineral is excepted or not according to the way in which its working is or can be best carried on. The fact is that most minerals can be worked either in the one way or other, according to what is most expedient or economical. The proof shows that in the case of freestone the practical question is, Whether the expense of *tirring*—that is, of removing the superincumbent surface—or that of mining underneath, is greater? The conclusion is usually in favour of the open quarry. But instances of the other mode were cited. Even, therefore, according to the theory of the respondents, freestone, being capable of mining, is within the clause of exception. The case, however, must be decided, as the Lord Ordinary thinks, on broader considerations than these.

"The freestone being thus excepted in a general view from the conveyance, the only other question which in substance was raised was, whether the railway company could claim it under the qualification of the exception relating to minerals, importing it not to apply to "such parts thereof as shall be necessary to be dug, or carried away, or used in the construction of the works." The circumstance which raised this question was, that admittedly no portion of the line of railway was to run over the ground in which the quarry was opened up. A line was at first projected so to run, but the project was abandoned. Even had this line been formed, it is proved that it would not have required cutting, but would have run on the surface, if not actually on an embankment. The freestone is worked and carried away by the railway company for the purpose of being used in constructing bridges and fences, and more especially a pier or breakwater, part of the works authorised by their Act of Parliament, but not locally situated on the ground in question, but at some distance from that ground, greater or less. The railway company contend that so to take and use the freestone is their right under the qualifying clause.

"It appears to the Lord Ordinary that this also is an ill-founded argument in support of the company's claim. What is primarily contemplated by the clause is such substances as shall be necessary to be dug out in order to construct the line of railway running over the ground conveyed. The statute says "dug, or carried away, or used in the construction of the works;" and the respondents rely on the last of these three alternatives. The phrase is not without some ambiguity; but it may be satisfied without doing injury to the general purport of the statute, if it be remembered that, besides what is dug out and carried away in the construction of the line, there are, especially in the case of tunnels, side-pieces and archways, for which it may be indispensably necessary that the company retain the material. The statute, in express terms, only gives to the company what is "necessary" to the construction of the works. It is what is "necessary," not what is "expedient" that is given. It appears to the Lord Ordinary that this provision cannot authorise the company to take as part of the ground, and for the price paid for the ground, not merely such freestone as might be necessarily dug out in the construction of the line running over the ground conveyed, but the whole freestone under the ground, in order to apply it in the construction of their bridges, and fences, and breakwaters.

"The view taken by the Lord Ordinary receives a strong, and it may be said almost conclusive corroboration, from the circumstance that the statute contains other provisions for the acquisition of minerals to be used for such purposes. The Lord Ordinary refers to the series of clauses in the Railway Clauses Act, commencing with the 25th (and particularly the 27th), providing for the company's occupation of adjacent lands, *inter alia*, "for the purpose of obtaining materials therefrom for the construction and repair of the railway, or such accommodation works as aforesaid." The Company is, in this connection, expressly authorised "to dig and take from out of any such lands any clay, stone, gravel, sand, or other things that may be found therein useful or proper for constructing the railway." But this privilege is coupled with very stringent conditions, particularly with the necessity of giving notice of their intention some considerable time previous; and for such occupation and use, a money compensation is enacted. There is also one particular clause, the 34th, which regulates the mode of working to be employed, the statutory rubric of which is, "stone quarries, &c., to be worked as surveyor or owner shall direct."

"The railway company is now proceeding under these clauses, which provide the amplest means of their obtaining materials for their bridges and breakwaters, though involving what is not always the pleasantest condition, of notice and payment. The company does not lay its alleged right on these enactments. What is contended is, that by force of the purchase from the proprietor of Dundas, and as part of that purchase, and as paid for by the price of the ground, they are entitled to open and work a quarry, out of which already 60,000 tons of freestone have been dug and carried away, in order thereby to construct their works all round

—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 Barcaple.)

BELL *v.* BAILLIE.

Parent and Child—Aliment—Husband and Wife—Separation — Agreement. Circumstances in which *held* (by Lord Barcaple, 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 maintainance 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 infeft 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 alimented 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