feus are concerned, I confess I cannot see the difficulty. The duty of the feuars is to make this payment for the water they got from the entailed estate; their right is a servitude over that estate for that supply of water. I have never understood why a servitude should cease to be a servitude because it is paid for, and I am just as little able to see any difficulty in constituting a servitude in favor of a feu over the estate of the superior as the servient tenement. That being so, it is abundantly clear that the owner of the servient tenement is entitled to payment for the right exercised over his estate by the dominant tenement, and to which he has to submit. I am of opinion that the cases that arise before the excambion are clearer than those that arise after it; that is the only point in which I differ from the Lord Ordinary.

Now, let us see what was the state of matters after the excambion. The deed of excambion bears nothing about the water-rates; it gives one parcel of land as an equivalent for the other, and leaves the rights of the feuars where they were before. This conveyance by Sir William Steuart to himself could never either prejudice or improve their position. But then Sir William granted additional feus after he was fee-simple proprietor of Inchewan, and in these cases he gives a right to the water supply. That he could not do. He could create no right against the entailed estate in favour of a feuar on a fee-simple estate which might, as far as legal considerations go, have as well belonged to a stranger. When he attempted to give this right to these feuars he was acting illegally, and yet the defender now asserts his right as Sir William's disponee to the water-rate payable in respect of the servitude these feus are supposed to have over the entailed estate. If the feuars are to get this water, they must arrange with the heir of the entailed estate; with that we have nothing to do. One thing is abundantly clear, viz., that the defender cannot by the illegal proceedings of Sir William have any right to the payments he claims. It will be quite sufficient, and more satisfactory, as the feuars are not represented here, to find merely that the defender has no right to the water-rates.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for Franc Nichols Steuart against Lord Rutherfurd Clark's interlocutor of 13th February 1877, Recal that interlocutor: Find that the defender has no right to any water-rate or other annual consideration payable by the owners of the feus upon that portion of the lands of Inchewan included within the brown line on the plan, No. 20 of process, formerly part of the entailed estate of Grandtully and others, in the summons mentioned, and now the property of the defender, the said Franc Nichols Steuart, which were granted by the late Sir William Drummond Steuart, Baronet, in respect of water introduced by the said Sir William Drummond Steuart, as heir of entail of the said entailed estates, from another part or other parts of the said estates, and at the expense of the entailed estate and the heirs of entail: To that extent and effect declare and decern in terms of the conclusions of the libel: Find the pursuer entitled to expenses," &c.

Counsel for Pursuer—Asher—Mackay. Agents—Dundas & Wilson, C.S.

Counsel for Defender — M'Laren — Murray. Agents—Tods, Murray, & Jamieson, W.S.

Friday, July 6.

FIRST DIVISION.

[Lord Craighill, Ordinary.

SYMINGTON *v.* SYMINGTON.

Husband and Wife—Judicial Separation—Decree, Execution of—Expenses.

A wife obtained decree of judicial separation against her husband, and was found entitled to the custody of the children. On the eve of judgment the defender, taking the children with him, left Scotland for England, and from that went abroad. Four days after judgment was pronounced an appeal was taken to the House of Lords. Thereafter the pursuer presented a petition to the Court for interim execution, which was granted. She then proceeded to enforce the decree by seeking out the defender and taking proceedings to remove the children from his custody. In an action at her instance against the defender for payment of expenses so incurred—*held* that the pursuer was entitled to recover these from the defender in so far as they were reasonable and proper for carrying into execution the orders of the Court.

This was an action resulting from the previous case of separation and aliment between the parties (March 20, 1874, 11 Scot. Law Rep. 369, 1 R. 871; June 11, 1874, 11 Scot. Law Rep. 579, 1 R. 1007; H. of L. 2 R. 41). It was brought by Mrs Symington against her husband, from whom she had obtained decree of separation on the ground of adultery, for payment of £633 in name of expenses incurred by her in carrying into execution the decree of the Court in that action.

On the day previous to judgment being pronounced by the Inner House the defender had left this country, and had taken the children, five in number, with him. Mrs Symington thereupon took means to have him traced and found, with a view to the recovery of the children. He was followed to several places on the Continent, and latterly to America, where legal proceedings were instituted on Mrs Symington's behalf, and she eventually obtained possession of the children. The sum sued for was the amount of the expenses incurred.

The pursuer pleaded that the defender was liable, as the debts were incurred (1) for necessary purposes; and (2) in consequence of the wrongful proceedings of the defender.

The defender pleaded, *inter alia*, that he was not liable, in respect that the principal judgment

in the process of separation was suspended and was in abeyance till the disposal of the appeal to the House of Lords, and further that he was not liable for any part of the expense incurred in carrying out interim execution.

A proof was allowed and took place, and thereafter the Lord Ordinary pronounced an interlocutor in which, after certain findings of fact, he further found "as matters of law—(1) That the facts being as above set forth, the pursuer was not entitled to use or impledge the credit of the defender in the proceedings which resulted in the expenses that are now the subject of suit, as for as necessary; and (2) that the expenses, so far as incurred under or in relation to the order for interim execution, are not recoverable from the defender, as the application for and the use of that order was a privilege which she used at her own risk: Therefore sustains the defences, assoilzies the defender, and decerns: Finds no expenses due either to or by either the pursuer or the defender, and decerns.

"*Note.*—Even had the Lord Ordinary sustained the grounds of action, he could not have sanctioned the incurring of all the expenses which is covered by the conclusions of the summons. The pursuer's anxiety may so far be excused; but there is a measure of moderation which must be exacted even from those the circumstances of whose position rather stimulate zeal than impose discretion: As, however, the defender has upon far wider grounds been assoilzied, it is unnecessary to analyse the accounts for the purpose of pointing out what was properly and what was improperly incurred. As the pursuer was separated judicially from the defender, she was not entitled to use or to pledge his credit in the incurring of the debt in which the action has originated: Aliment she had; action on the judgment of the Court was suspended by the appeal to the House of Lords; and the interim execution was a privilege, and not a necessity. To say otherwise would be in effect to say that it is necessary to act upon a judgment which in the Court of last resort was found to be so far erroneous, and which for that reason was so far in this case to a material extent varied.

"The Lord Ordinary is aware of no authority for throwing the expense of proceedings on an order for interim execution upon the party against whom these have been used. And so to do in a case in which the judgment in furtherance of which that order had been granted was to a material extent varied would, he thinks, violate the principle upon which orders for interim execution are obtained, and inflict unmerited hardship on those who were forced to fulfil a judgment before it was final."

The pursuer reclaimed, and argued that she was entitled to succeed (1) as in a case of wife *v.* husband; (2) as a successful litigant carrying out the orders of the Court. The defender had been guilty of contempt of Court in removing the children.

Authorities—*Cardross* v. *Lord Buchan*, December 17, 1842, 5 D. 343; *Clark* v. *Henderson*, February 6, 1875, 2 R. 428; *Paul* (*Petitioner*), March 8, 1838, 16 S. 822; *Necredy* v. *Taylor*, June 7, 1873, 7 L.R. (Irish), C.L. 256; *Bazeley* v. *Forder*, July 3, 1868, L.R. 3 Q.B. 559; *Wilson* v. *Ford*, January 23, 1868, L.R. 3 Exch. 63; *Brown* v. *Ackroyd*, January 16, 1856, 25 L.R. Q.B. 193; *Patrick* v. *Shedden*, April 29, 1853, 22 L.J. Q.B. 283; *Paul* v. *Roy*, February 12, 1852, 21 L.J. Ch. 361.

At advising—

Lord President—I am not able to concur with the Lord Ordinary in his findings in law in this case. I think the action must be sustained. To what extent the pursuer may be entitled to recover the sums concluded for, or how far the accounts which have been lodged in process represent expenses that can be reasonably and properly charged against the defender, remain for further consideration. The observation which the Lord Ordinary makes at the beginning of his note is reasonable and right. How far these expenses are chargeable against the defender remains for after consideration. But the question with which we have to deal is, whether any part of them can be recovered as being necessary or proper in an action of this kind? I think the Lord Ordinary makes a mistake in matter of fact. He says that as the pursuer had been judicially separated from the defender "she was not entitled to use and impledge his credit in the incurring of the debt for which the action had originated." But the pursuer had not been judicially separated from her husband at the time when these expenses were incurred. No doubt decree was granted, and most of the expenses were incurred after our judgment had been pronounced, but within four days an appeal was taken to the House of Lords. So long as the appeal depended the effect of the judgment was suspended, and no judicial separation could be said to be in existence. Even if there had been a judicial separation, I am by no means sure that the Lord Ordinary is right in the very sweeping conclusion which he draws from that fact, that the lady could under no circumstances be entitled to impledge the credit of her husband. Then the Lord Ordinary says further that the obtaining of an enforcement of the order for interim execution was not a thing that the pursuer was entitled to do; that it was a sort of luxury in which she might indulge if she pleased, but if she did so it must be at her own risk and at her own expense. That again appears to me to be an extravagant view of an order for interim execution. The question, under an application for interim execution, for the Court to consider is, whether it is reasonable in the circumstances that the judgment of the Court which has been taken to appeal shall be carried into execution pending the appeal? and if the Court came to be of opinion that it should be carried into execution either in whole or in part, it seems to me to be the right of the party applying for that interim execution to have it, just as much as it was his right to obtain the original judgment if it was well founded on the merits of his case. Therefore, upon both these grounds I must differ from the Lord Ordinary, but I am not disposed to go further. I think that under this summons the pursuer is entitled to recover from the defender all reasonable and proper expenses incurred by her in carrying into execution the orders and interlocutors of the Lord Ordinary or of the Court regarding the children of the marriage.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court accordingly recalled the Lord Ordinary's interlocutor, and found under the conclusions of the summons that the pursuer was entitled to recover from the defender a reasonable sum in name of expenses, and they made a remit to the Auditor to examine the whole accounts and report. The question of expenses was reserved.

Counsel for Pursuer (Reclaimer)—Asher—Keir. Agents—J. & R. D. Ross, W.S.

Counsel for Defender (Respondent)—Fraser—Scott. Agent—John Galletly, S.S.C.

Friday, July 6.

FIRST DIVISION.

[Bill Chamber.

ROYAL BANK OF SCOTLAND *v.* BAIN (BROWN'S TRUSTEE).

Bankrupt—Preference—Diligence—Poinding of the Ground—Conveyancing Act 1874, *sec.* 55—*Bankruptcy Act* 1856, *secs.* 102 *and* 118.

Held that the effect of the 55th section of the Conveyancing Act of 1874, which repeats the 118th section of the Bankruptcy Act of 1856, is to leave the 102d section of that Act as the rule for determining the preferences of the trustee and prior heritable creditors, and that by that clause a prior heritable creditor who executes a poinding of the ground after sequestration, but before confirmation of the trustee, has all his common law rights left to him, and therefore a right to the moveables upon the ground preferable to that of the trustee.

Thomas Brown, tailor in St Andrews, was sequestrated on 10th June 1876. The Royal Bank were heritable creditors of the bankrupt, conform to bond and disposition in security (dated and recorded in April 1872) in their favour over certain heritable subjects in St Andrews. On 16th June 1876 the Bank executed a summons of poinding the ground. On 30th June 1876 Mr James Bain was confirmed trustee on the bankrupt estate. He sold the heritable subjects and the moveables thereon.

The Bank made a claim against the bankrupt estate for £1049, 3s. 11d., as the balance due on a cash-credit account kept in their books in name of the bankrupt.

The trustee pronounced a deliverance in the following terms:—

"*First*, the Bank claim to be ranked and preferred upon (1) the price of the heritable subjects in the bond after deducting all claims thereon preferable to their claim; and (2) the price of the goods and effects upon the ground, which were, it is said, legally attached by the poinding of the ground in security of the debt, but to the effect of receiving full payment of the debt, with interest at the rate of 5 per cent. 'upon £1013, 10s. 5d. thereof, being principal, till payment.'

"With reference to the first part of this claim, that is, to be ranked preferably upon the price of the heritable property, the trustee, subject to the reservations in the last paragraph hereof, admits the same to the extent of £1000, and interest thereon from 10th June 1876, and rejects it to the extent of £49, 3s. 11d. The grounds of this rejection are these:—The account made up and certified in terms of the bond of credit and disposition in security sets out that the balance due to the Bank as at 10th June 1876 is £1049, 3s. 11d. The bond is for £1000 only, and interest thereon, but the account produced, with certificate appended, shows that the interest had been added to the principal. The effect of this was to convert the whole balance due into principal, and as that balance exceeds the sum for which the bond was granted, the claim falls to be rejected, as above mentioned. See the case of *Reddie* v. *Williamson*, 9th January 1863, 1 Macph. 228.

"With reference to the second part of this claim, that is, to be ranked preferably on the price of the moveable goods and effects upon the heritable subjects in virtue of the poinding of the ground, the trustee rejects the same, for these reasons—(1) The first deliverance in the sequestration is dated 10th June 1876, while the poinding of the ground was executed upon the 17th of the same month. The trustee regards the poinding as an attempt to create a preference or security after the sequestration, and he has not been referred to and knows of no authority which renders it competent to create such a preference or security. . . . .

"*Secondly*, the claim states that 'in the event of the said prices' (that is, the prices of the heritable property and moveable goods and effects attached by the poinding of the ground) 'not being sufficient to satisfy and pay the amount of the said debt and interest as aforesaid, the said Bank claim to rank upon the said sequestrated estate for the balance of the same which may remain unpaid.' The trustee, of course, admits the claimants' right to rank upon the sequestrated estate for any balance of the said sum of £1000 which may not be satisfied and paid out of the price of the heritage, and he would also have been willing to have admitted the claimants to a ranking on the sequestrated estate for the sum of £49, 3s. 11d. above mentioned, but he considers himself precluded from doing so by the terms of the claim. It is only in the event of the prices of the heritable and moveable property being insufficient to meet the debt of £1049, 3s. 10d. that the Bank claims to rank on the sequestrated estate, and the above sum of £49, 3s. 11d. must be rejected as a preferable claim whether there is a sufficient balance of said prices to meet it or not. It will, however, be open to the claimants to lodge an additional claim, and as there is not to be a dividend paid before next statutory period, they will not be prejudiced by not being ranked in the sequestrated estate now for the said sum of £49, 3s. 11d."

Against this deliverance the Bank appealed.

They pleaded—"(2) The appellants are entitled to be ranked and preferred, in terms of their affidavit and claim, upon the price of the goods and effects situated upon or within the said heritable subjects in St Andrews, in respect of the execution of their summons of poinding of the ground on 17th June 1876, and the trustee's deliverance rejecting their claim should be recalled. (3) The appellants are entitled to be ranked and preferred as ordinary creditors for the balance of their debt remaining unsatisfied out