*Thursday, July 5.*

## FIRST DIVISION.

[Lord Adam, Ordinary.

### LITTLE *v.* NORTH BRITISH RAILWAY CO.

*Process—Reclaiming Note—Competency—*31 *and* 32 *Vict. c.* 100, *sec.* 28.

In an action brought against a railway company for damages for personal injury, the railway company pleaded that they were not liable, in respect that there was no contract of carriage between them and the pursuer at the time the accident occurred. The Lord Ordinary repelled this plea "in so far as directed to the relevancy of the action, and appoints the pursuer to lodge such issue or issues as he proposes within six days." The defender reclaimed without obtaining leave. The pursuer objected to the competency of presenting a reclaiming note without leave at this stage. The Court *held* that this was an interlocutor "importing an appointment of proof" in the sense of the Act of Sederunt of 10th March 1870, sec 2.

Counsel for Pursuer—J. C. Smith. Agent—Thomas Lawson, S.S.C.

Counsel for Defender—Darling. Agent—Adam Johnstone, L.A.

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*Thursday, July 5.*

## FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

### STEWART *v.* STEUART.

*Entail—Servitude—Feu-contract—Implied Grant.*

A proprietor granted various feus on one portion of his entailed estates, under authority of the Court, with a supply of water from another portion of the entailed estate, supplied at a certain rate per pound of rental. Thereafter he, by a contract of excambion, acquired in fee-simple that portion of the entailed estate whereon the feus were. Thereafter he granted more feus, with right to the same water supply from the entailed estate. In a question between the succeeding heir of entail and a disponee succeeding to the superiority of the feus,—*held* that the heir of entail had right to the water-rate payable both by those feuars who had feued before and by those who feued after the excambion.

This was an action against Franc Nichols Steuart, proprietor of the estate of Inchewan, at the instance of Sir Archibald Douglas Stewart, heir of entail in possession of the Grandtully and Murthly estates, for declarator that, as heir of entail foresaid, he had sole and exclusive right to the water assessment paid by the owners of feus in the lands of Inchewan, and that the defender had no right thereto.

The circumstances of the case were narrated by the Lord Ordinary in his note, as follows:—"The late Sir William Steuart was heir of entail in possession of the estate of Grandtully, and in that capacity he obtained power to feu the lands of Inchewan. In the exercise of that power he granted several feus, according to the form prescribed by the Court. In the earliest charters it was contemplated that a supply of water might be introduced by Sir William or the heir in possession, and the vassal was taken bound 'to take his supply of water for the use of his dwelling-house on the same terms and conditions as the other feuars.' Thereafter Sir William brought in a supply of water for the general use of the feuars, and in the subsequent charters the vassals were taken bound 'to take and pay for the same at the same rate as the other feuars, any assessment for said water not to exceed the rate of one shilling per pound on the yearly rental.' But it was declared that 'the vassals should have no claim against me or the heirs of entail for any deficiency in the supply of water.'

"The water was brought from the lands of Grandtully other than those of Inchewan. It was collected in a reservoir on the entailed estate, and carried by pipes to the feus. It is certain that a part of the cost of introducing the water was charged on the entailed estate. But it does not appear whether the whole cost was so charged or not.

"In 1864 the lands of Inchewan were excambed for the lands of Stenton. After the date of the excambion several feus were given off. The form of the charter was considerably changed. Before the excambion the granter was described as heir of entail in possession of the entailed estate of Grandtully and others. After it he is described 'as heritable proprietor of the piece of ground hereinafter disponed,' but the charters contain an obligation on the vassals to take and pay for the water.

"By a general disposition *mortis causa* Sir William Steuart conveyed his whole estates to the defender, including the lands of Inchewan. The pursuer succeeded Sir William as heir of entail in the entailed lands.

"The vassals on the lands of Inchewan are willing to pay their water-rate either to the pursuer or defender. But a question has arisen to which of them it is payable. Hence this action."

The defender pleaded—"(2) The defender being superior of the several subjects contained in the feu-charters founded on by the pursuer, and as the whole obligations contained in these charters must run between the superior and the vassals or proprietors of the *dominium utile* of the subjects, and as the water-rates in question are payable under obligations in these charters, it follows that the defender, as the superior, is entitled to payment of those water-rates. (6) The defender is entitled to the water-rates in question, either as superior foresaid or as general disponee and sole executor of the deceased Sir W. D. Steuart."

The Lord Ordinary gave decree against the defender in terms of the conclusions of the summons.

"*Note.*—[*After the narrative given above*]—The question presents itself in a different form as regards the feus granted after the excambion and those granted before it. For, while the pursuer contends that it was beyond the power of Sir William Steuart to communicate to the former class

of feuars the benefit of a water supply derived from the entailed estate, he does not maintain that it was not within his power to confer that privilege on the latter class. With respect to the former, his case is that he is entitled to stop the supply, but that as he is willing to continue it he is entitled to the rate. As regards the latter, he says that as the supply is taken from the entailed estate, the right to exact the rate was, according to the true and equitable construction of the feu-charter, reserved to the heirs of entail, and not to the superior of the ground which was feued.

"In regard to the feus granted after the excambion, the Lord Ordinary is of opinion that the pursuer is right. He thinks that Sir William had no right to give to the feuars a water supply from the entailed estate. The water had been legitimately introduced for the benefit of the previous feus, and the vassals obtained a valid right to it. But when the lands of Inchewan were separated from the entailed estate, Sir William could not, as proprietor, obtain a benefit to himself and his heirs-general which was derived from the entailed estate. If the feus had been granted by the defender as his successor, the pursuer would, it is thought, have been entitled to refuse any further supply of water than was necessary for the feus granted before the excambion. Sir William cannot, in this question, be in a better position than his successor, and therefore, in the opinion of the Lord Ordinary, he had no power to communicate the water supply to the feuars.

"The result, in strictness, would be that the pursuer should take measures to cut off the water supply from the feuars. But, as he is willing to give it, and they are willing to take it, the pursuer seems entitled to the declarator which he asks as in a question with the defender.

"The question in regard to the feus granted before the excambion is more difficult, inasmuch as it is not maintained that the water supply was legally given to them. The defender contends that the obligation to pay the rate is contained in a feu-charter under which he is superior, and with which the pursuer has no connection. The argument is forcible, but the Lord Ordinary has come to be of opinion that it is not well founded.

"At the time when the charters were granted Sir William held the lands as heir of entail, and it follows that whatever benefits were stipulated in favour of the superior were stipulated in favour of the heirs of entail. There is a feu-duty stipulated for the lands themselves, and a water-rate for the supply of water derived from another part of the entailed estate. When the separation takes place it is, in the opinion of the Lord Ordinary, the fair construction of the charter that what is paid for the lands shall be payable to the superior, but what is paid for the water supply shall be payable to the owner of the estate from which it is derived. If there had been a slump payment for all the benefits granted to the feuar, it might have been difficult to make a separation. But as the separation has been made in the feu-charter itself, there seems no reason why the different owners should not be entitled to enjoy the benefit derived from their separate estates.

"The pursuer produced documents to show that in settling the excambion the feu-duties were taken as the value of the lands. The Lord Ordinary doubts whether this case can be taken into account when the excambion is itself unchallenged. But, taken along with the fact that the cost of procuring the supply of water was in part, and probably in whole, charged on the entailed estate, it goes far to satisfy him that his judgment is in accordance with substantial justice."

The defender reclaimed, and argued—The value of the lands of Inchewan is estimated as that of lands suitable for feuing purposes in the contract of excambion. A water supply is an essential for feuing purposes. It must therefore be taken that in acquiring the lands of Inchewan in fee-simple by means of that excambion Sir William acquired them with the water supply, and that right he transmitted to the present defender, The right here is analogous to the rights that have been held to go with lands that are feued out, as being *inter naturalia*. Then, too, by the doctrine of implied grants, viz., that where part of an estate is conveyed, all that is necessary for the convenient enjoyment of that part is held to be conveyed with it, and is constituted a servitude over the rest of the estate if necessary, is applicable here. If Sir William feued land for these houses, it must be held that he thereby constituted a servitude over his own entailed estates for a water supply.

The pursuer argued—The capitalised value of the feu-duties is the value that is taken as the value of these feus in the contract of excambion; the water-rates are not mentioned. As to the doctrine of implied grants, founded on the case of *Ewart* v. *Cochrane*, March 22, 1861, 4 Macq. 117, that does not apply here, for it is plain that the severance of an estate which the Lord Chancellor had in view was not such an one as has occurred here, viz., of an entailed estate from a fee-simple estate. What is spoken of there is what is necessary for the beneficial enjoyment of an estate. That is not the question here. There is no question with the feuars about cutting off their water supply; the sole question is as to the right to the water-rates, a right which is not essential to the beneficial enjoyment of the estate of Inchewan.

At advising—

Lord President—I am quite satisfied with the grounds of the Lord Ordinary's judgment, although it may perhaps be necessary for safety to express the interlocutor in somewhat different terms. The history of the case is very simple—In 1857 Sir William Steuart, who was then heir of entail in possession of the entailed estate of Grandtully, obtained leave from the Court to feu part of that estate, viz., the lands of Inchewan. He accordingly proceeded to feu in terms of the feu-charter approved by the Court, and therefore the feu-charter was one of the conditions, so to say, of the power given him. This feu-charter contained clauses about water, which was to be supplied from other parts of the entailed estate by means of pipes running through parts of that entailed estate. Sir William did therefore in effect create a right in each feu to a water supply conveyed from the entailed estate and passing through it. In return he stipulated for a payment at the rate of one shilling per pound of rental. In so far as these

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.

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*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