fact would in other circumstances be at once sufficient to infer a loss of settlement in that parish on 18th January 1869, when the relief of which payment is now sued for by the parish of Liberton was first given to his wife. But it appears, and is found by the Lord Ordinary, that he received parochial relief as a pauper from the parish of North Leith from 30th August 1864 to 18th January 1865, the last payment of 12s. being made on 4th January 1865 for the ensuing fortnight; and that of these payments repayment was made to North Leith by Cramond, as the parish continuing liable. It is contended that this prolonged his settlement in Cramond parish down to this period of 18th January 1855, after which a new course of five years' absence commenced to run; of which four years had not elapsed on 18th January 1869. This is said to follow from the principle ruling the judgment in *Johnston* v. *Black*, 13th July 1849, 21 D. 1293.

I think a judgment may be pronounced in the present case without impeaching the soundness of the decision in *Johnston* v. *Black;* and although I think the grounds of that decision open to question, I shall assume its authority in the present case. I assume that Low's settlement in Cramond lasted till 18th January 1865. I still think that settlement was lost before the claim now in question emerged. And here I am clearly of opinion that no payments made to Low's wife in consequence of his desertion, he himself not being a pauper, can be stated as affecting his settlement one way or other. Low is proved not to have been a pauper at the period in question—on the contrary, to have been an able-bodied man, earning a sufficient subsistence. His wife required support for herself and her children in consequence of his deserting them; and the support afforded them of course gave a claim of relief against Low the husband. But Low was not himself a pauper; and his settlement in Cramond was not, either expressly or constructively, prolonged by the relief so afforded. It equally expired by the lapse of the statutory period. His absence from Cramond, which has lasted from at least 18th January 1865 down to the present date, had the effect of destroying his settlement in that parish, whether such payments were made or not. In this way his settlement in Cramond was, I think, so lost as to bar the present claim against Cramond; and to throw it entirely on Barry, the admitted parish of his birth.

The only difficulty occurring as to the matter lies in the question, Whether on the 18th January 1869 the four years had in truth not fully expired, and did not expire till the 19th January, the following day? I have no doubt that the requirement ordinarily expressed by the term of four years and a day is satisfied by the lapse of four years and any part of a day; for the principle is, that so soon as the four years are fully out and a fifth year fairly begun, it is impossible to have a whole year's continuous residence within the period of five years. Supposing that the four years did not expire till the 19th January, the whole result would be that Cramond is liable in the first aliment supplied; for before another sum of aliment became due, the four years were unquestionably gone, and the settlement in Cramond lost. There would be no anomaly in Cramond being liable for the first aliment on the ground of the settlement not being then lost, and not being liable for the second in consequence of the loss of settlement having emerged in the interval. Low, as already said, was not pauperised by the money given to his wife; and the giving of this money did not prolong the settlement then in course of being lost. So soon as the settlement was lost the claim on Cramond ceased. But I think there are sufficient grounds for holding that even this subordinate claim does not lie against the parish of Cramond. The relief afforded by North Leith on the 4th January 1865, and which, the inspector says, must have been paid between the hours of eleven and one of the day, is, I think, fairly to be held to have been given for the 4th itself as much as for the subsequent days. The fortnight's aliment was therefore out and exhausted by midnight of the 17th January. The four years expired at midnight of the 17th January 1869; and on 18th January, when the first aliment sued for was given, four years and more had elapsed.

On these grounds, I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

The Court adhered.

Agents for the Parish of Liberton—Keegan & Welsh, S.S.C.

Agents for the Parish of Cramond—W. & J. Burness, W.S.

Agent for the Parish of Barry—John Galletly, S.S.C.

Friday, June 16.

GRIGOR OR FORSTER *v.* FORSTER.

(*Ante* vol. vi, p. 519.)

Petition—Appeal—House of Lords—Interim Execution—Declarator of Marriage—Aliment. Circumstances in which the pursuer of a declarator of marriage, who had obtained judgment in the Court of Session declaring the marriage, and decerning for aliment in the event of non-adherence, was allowed interim execution pending appeal to the House of Lords, without caution, to the effect of enabling her to recover arrears of aliment due before the appeal was presented.

This was a petition for execution, pending appeal to the House of Lords.

On June 12th 1867 the petitioner raised an action of declarator of marriage against James Ogilvie Tod Forster, then residing at Findrassie House, near Elgin. On the 5th January 1867 the Lord Ordinary (MANOR) pronounced an interlocutor, in which he found the marriage proved, ordained the defender to adhere to the pursuer as his wife, and in the event of non-adherence to make payment to her of the sum of £60 per annum, as aliment for herself and their lawful child, beginning the first term's payment at Whitsunday 1866; and found the defender liable in expenses.

The defender reclaimed; but the Court, on the 25th May 1869, adhered, with additional expenses; and on July 7th 1869 decerned against the defender for the taxed amount of expenses (£215, 7s. 2d.) in name of the agents disbursers.

On 16th May 1871, nearly two years after the judgment of the Court of Session, the defender presented an appeal to the House of Lords against the interlocutors of 5th January and 25th May 1869, and sundry other interlocutors pronounced in the cause, but not against the decerniture for expenses.

On the 14th June 1871 the present petition was presented. It narrated the procedure in the cause,

and recited the Act 48 Geo. III. c. 151, sec. 17, which declares—"That when any appeal is lodged in the House of Lords, a copy of the petition of appeal shall be laid by the respondents before the Judges of the Division to which the cause belongs, and the said Division, or any four of the Judges thereof, shall have power to regulate all matters relative to interim possession or execution and payment of costs or expenses already incurred according to their sound discretion, and having a just regard to the interests of the parties as they may be affected by the affirmance or reversal of the judgment or decree appealed from."

It was further stated that the petitioner was unable to find caution to repay the sums she might recover, in the event of interlocutors recited being reversed in the House of Lords. The prayer of the petition was as follows:—"May it therefore please your Lordships to allow execution to proceed on the said extract decree, to the effect of enabling the petitioner, notwithstanding said appeal, to recover payment from the appellant of the said sum of £60 sterling per annum for the aliment of the petitioner as his lawful wife, and of their said child James Ogilvie Tod Forster, born on or about the 30th day of November 1866, payable to her at two terms in the year—Whitsunday and Martinmas—by equal portions, in advance, beginning the first term's payment of said aliment as at the term of Whitsunday 1866 for the half year from and after that date, and the next term's payment at the term of Martinmas thereafter for the half year then following, and so forth at the said two terms during their joint lives, or at least until such time as the said James Ogilvie Tod Forster shall adhere to your petitioner and perform the several duties incumbent on him as her lawful husband; together with interest thereon at the rate of five per centum per annum of the termly payments thereof from the time they respectively fell, or shall in future fall due, during the not-payment; as also to recover from the said appellant the sum of £215, 7s. 2d. of expenses, with the sum of £1, 3s. 8d. as the dues of extract, and this, in the circumstances, without having to find caution to repeat the same in the event of the interlocutors above recited being reversed; or to do otherwise in the premises as to your Lordships shall seem proper."

KEIR, for the petitioner, referred to the following cases:—*Sassen* v. *Campbell*, 22d June 1824, 3 S. 163; *Melrose*, 10th July 1830, 8 S. 1054, and 8th July 1831, 9 S. 902; *Maidment*, 5th July 1816, F.C.; *Paterson*, 2d March 1847, 11 D. 905.

ASHER, for the respondent, argued—To give aliment, without caution to repeat, is in reality not *interim* execution, but final execution; for the petitioner is not in a position to repeat. The principles which guide the Court in the exercise of their discretion under 48 Geo. III. c. 151, sect. 17, are stated by Lord Ivory, in *Gray* v. *Low*, March 12th, 1859, 21 D. 723—"There can be no *interim* execution in regard to what cannot be replaced in the same position in which it was before the *interim* execution was granted." The cases cited for the petitioner are not in point. Her claim on the respondent is entirely founded on the declarator of marriage. She has no claim at all upon him, unless she establishes that she is his wife. There is no case in which there has been a declarator of marriage appealed to the House of Lords in which *interim* execution has been granted without caution. There are cases of an award of aliment; but these cases are wholly different from the present, in which the sole claim to aliment is the relation in dispute. Take the case of *Melrose*, 10th July 1830. There a widow brought an action against her husband's trustees, and was found entitled to £3500. Pending appeal, *interim* execution, to a comparatively small extent, was granted against the trust-estate without caution. But she was the truster's widow, and that was not disputed; and therefore she had a claim to be supported out of his estate. The all but universal practice of the Court is to grant interim execution only on caution. The exceptions will be found to be cases where the party has a claim to aliment independent of success in the suit under appeal. To give the petitioner aliment as craved would be to recognise her *status* of wife, while that is the question under appeal.

In answer to a question by the Court, counsel for the respondent stated that his client was out of the kingdom, and his address unknown to his agents.

At advising—

LORD PRESIDENT—By the interlocutor appealed against we adhered to the interlocutor of the Lord Ordinary, dated 5th January 1869, by which he declared marriage, and decerned for aliment at the rate of £60 a-year from Whitsunday 1866. What we are now asked is to allow execution to go out on that decree, to the effect of enabling the petitioner (*reads prayer of petition*). It seems quite impossible to allow interim execution to go out *simpliciter* on such a decree as that. It would be a decerniture of the most prospective kind. It is desirable and reasonable that the party who has obtained judgment in this Court should to a reasonable extent be placed in a position of advantage. Applying this to a declarator of marriage, our judgment has placed the petitioner in the *status* of a wife, and it is fair that she should to a reasonable extent enjoy the privileges of a wife. One of the most obvious privileges of a wife is to be alimented, especially when her husband does not adhere to her. The child, too, is entitled to aliment. The question comes to be, under what limitations is the decree to be put into execution? The safest course is to give interim execution for the aliment which has fallen due from Whitsunday 1866 to Whitsunday 1871. This will give the petitioner £300, with interest, and enable her to maintain herself and her child in a reasonable way, pending the appeal. By so doing we proceed cautiously, and in no way contrary to previous decisions. The position of the defender is peculiarly unfavourable. It is admitted that he is not accessible, and that his address is unknown. He has never paid a shilling of aliment, and obviously does not intend to do so, unless compelled. It is difficult to imagine a more unfavourable position in any question involving the discretion of the Court.

The question of expenses is totally different. We cannot grant interim execution on that part of the prayer. In the first place, the decree for expenses is not in name of the petitioner, but of the agents disbursers, and they alone can put the decree into execution. *Secondly*, it is very remarkable that this decree for expenses is not embraced in the appeal to the House of Lords. It is impossible to give interim execution. For all that the defender has done, execution final and complete can be done. I am therefore for refusing this part of the prayer.

LORD DEAS—I agree with your Lordship. The

decree for expenses has gone out in name of the agents disbursers, and it has not been appealed. It is impossible then to give the petitioner execution pending the appeal.

As regards aliment, I also agree. We should not give decree in terms of the prayer of this petition. Some limitation must be placed. I think that the safe course is to give *interim* execution to the extent of arrears due before the appeal was presented. It was rightly stated for the defender that our usual practice is to grant *interim* execution only on caution. But there is no incompetency in granting it without caution, and that being so, we could not have a stronger case than the present.

LORD ARDMILLAN—I concur as to the expenses. The question of aliment is one of some nicety. We cannot under form of *interim* execution give final execution. We cannot therefore give direct judicial recognition of the petitioner as the wife of the defender, pending the appeal. But the awarding of aliment past due is not direct but only inferential recognition of her status. *Interim* execution always implies, to this extent, recognition of the right in dispute. There is nothing objectionable in point of form, in awarding arrears past due. If it were incompetent, caution would not solve the difficulty. The offer of caution may make it more easy and natural to allow *interim* execution, but it will not create competency. In this case I am of opinion that the petitioner cannot reasonably be called upon by the defender to find caution.

LORD KINLOCH concurred.

The Court, in respect it was stated by the respondent's counsel that he was out of the kingdom and his address unknown, and in respect that the said respondent has paid no aliment to the petitioner, allowed execution to proceed, notwithstanding the appeal, to the effect of enabling the petitioner to recover the aliment payable from Whitsunday 1866 to Whitsunday 1871, with interest at 5 per cent; and refused the petition as regards expenses, in respect that the decree is in name of the agents disbursers, and has not been taken to appeal.

Agents for Petitioner—Philip & Laing, S.S.C.
Agents for Respondent—H. & A. Inglis, W.S.

Friday, June 16.

CALDERS *v.* CALEDONIAN RAILWAY CO.

Reparation—Solatium—Culpa—*Master and Servant*—Collaborateur. The N. B. Rail. Co. have running powers over a portion of the C. R. Co.'s line. *Held* that the C. R. Co. were liable for injuries sustained by a guard in the employment of the N. B. Rail. Co. while in charge of a train passing over that portion of the C. Co.'s line, in consequence of the negligence of a pointsman in the employment of the C. Co., there being no common employment between the guard and the C. R. Co.'s servant, in the sense in which it would have relieved the C. R. Co. from liability.

This was an appeal from the Sheriff-court of Glasgow. The widow and only child of the late Alexander Calder sued the Caledonian Railway Co. for the sum of £500, to be paid to each, as reparation and *solatium* for the loss sustained by them through his death, which was caused as they averred, by the negligence of the defenders and their servants.

The facts of the case, as disclosed by the evidence, were shortly as follows:—On the night of the 22d May 1868, Calder, who was a guard in the employment of the North British Railway Co., was engaged as guard of a goods train from Glasgow to Dunfermline. As the train was approaching Stirling from the south, on the down or west line of the Caledonian Railway, over this part of which the North British Railway Co. have running powers, the last carriage (being the brake van) in which Calder was, along with some other carriages, became detached from the rest of the train, which moved on past a set of points and then stopped at a place where, in the ordinary course, the train would have been backed along the points on to the Caledonian up line, and thence on to the Dunfermline line. The points were in charge of a man named Sinclair, a servant of the Caledonian Railway Co. After the fore part of the train had stopped, he kept the points so as to allow it to return on the down line, and showed a white light or "all right" signal. In consequence the driver, not being aware that any waggons had been detached, or that there was any special occasion for proceeding slowly, and supposing that the signal was given in order to take the train on to the up line as usual, backed the engine and fore part of the train with some speed on to the detached waggon. The concussion threw Calder out of his van, and in consequence of the injuries so received, he died on 17th June following.

It was not clear from the evidence whether or not Sinclair noticed that the train was incomplete, but there was little doubt that he was to blame in either case. If he did not notice the fact, he was guilty of negligence in not doing so. As every train ends with the guard's brake van, it is easy for the pointsman to notice whether the train is complete or not, and it is his duty to do so. Further, if he did not observe that the brake van was wanting he was guilty of negligence in not adjusting the points so as to have taken the returning portion of the train off the down and on to the up line, instead of allowing it to go along the former line till it ran into the detached waggon and guard's van left thereon. If, on the other hand, Sinclair did observe the break which had occurred in the train, then he was guilty of negligence in shewing, as it is clearly proved he did, the white light instead of the green, thereby signalling that all was right, and inducing the driver to believe that he was about to cross from the one line to the other, and that he might safely do so at the usual rate of speed, the result of which was that the collision became inevitable, the points not having been adjusted in crossing.

The defenders pleaded that they were not liable on the following grounds:—(1) Because the accident was mainly due to the driver of the North British train backing his engine at an unwarrantable speed. (2) "Contributory negligence" on the part of Calder in not getting out of his van when it stopped. (3) Because, even supposing the accident to have been caused by the carelessness of Sinclair, inasmuch as the North British Railway Co. have running powers over their line, Calder and Sinclair must be considered to have been fellow-servants acting in one common employment, viz., passing the train from the Caledonian line on to the Dunfermline line.

The Sheriff-Substitute (DICKSON) repelled the