

perfectly clear and distinct terms; and I find no averment on record to which it is possible in my judgment to give any such effect. And therefore the ground upon which I should be disposed to place my judgment in this case is, that there are no facts averred upon record which are in the least degree relevant to displace the defenders' liability upon these bills, and therefore that there is nothing which should go to proof.

In the view that I take of the case, I confess I do not feel called upon to consider some of the questions which are discussed in the Lord Ordinary's opinion. It appears to me that there may be questions of difficulty on the construction of the Bills of Exchange Act, but I do not feel called upon to consider whether facts or agreements, differing from anything which is averred upon the record, and which, unlike the averments on record, might be relevant if proved—I do not feel called upon to consider whether such facts or agreements could be proved by parole or not, because it is enough for my judgment to say that there is absolutely nothing upon the record that has any relevancy whatever. I therefore concur in the conclusion which all of your Lordships have arrived at.

The Court pronounced this judgment:—

“Recal interlocutor” of the Lord Ordinary: “Find that in the accounting between the parties, the pursuers are entitled to be credited with the amount of the two bills of exchange libelled, with interest: Find the pursuers entitled to expenses since the date of the interlocutor reclaimed against, and remit the account thereof to the Auditor to tax and report to the Lord Ordinary; and remit to his Lordship to proceed in the cause as may be just, with power to decern for the taxed amount of said expenses.”

Counsel for the Pursuers—Guthrie Smith—A. S. D. Thomson. Agents—Mitchell & Baxter, W.S.

Counsel for the Defenders—Asher, Q.C. Deas. Agent—George Andrew, S.S.C.

Wednesday, March 18.

FIRST DIVISION.

ROY v. TURNER.

Process—Arrestments—Recal of Arrestments—Expenses.

A pursuer who had used arrestments on the dependence of an action for a debt, obtained decree, the defender paid the amount decerned for and expenses, and the pursuer granted a discharge for the amount. The defender then desired the pursuer to withdraw the arrestments by delivery of the execution of arrestment with a discharge thereon, or by sending sufficient inti-

mation to the arrestee. The pursuer demanded as a condition the expenses of using the arrestments. The defender brought a petition for recal of the arrestments and for expenses against the pursuer, who opposed the petition only *quoad* the expenses sought.

Held (diss. Lord Kinnear) that as the pursuer was not entitled to the expenses of using the arrestments, so the defender was not entitled to expenses in having the arrestments removed.

On 30th September 1890 an action was raised by Daniel Turner, Solicitor-at-Law, against Henry Roy, Doctor of Medicine, Gladstone Terrace, Edinburgh, for payment of (1) £83, 19s. 3d., (2) £4, 1s. 6d., with interest, and expenses of process. Arrestments were used on the dependence of the action in the hands of the Caledonian Railway to the extent of £200. No defences were lodged, and after sundry procedure the accounts sued for, which were a law-agent's accounts, were remitted to the Auditor for taxation. The Auditor taxed the accounts at £61, 6s. 5d. and £2, 19s. 2d., and judgment was given against Dr Roy for these sums, with expenses of process amounting to £10, 11s. as taxed. Dr Roy paid these various sums to Turner on 9th December 1890, and obtained from him a discharge thereof written on the extract-decree. Roy asked Turner to deliver to him the execution of arrestment with a discharge thereon, or else to write such a letter to the railway company as would render it safe for them to pay to him the arrested funds. Turner demanded as a condition the expenses of using the arrestments.

On 18th March 1891 Roy presented the present petition for recal of arrestments, and prayed, *inter alia*, that Turner should be found liable in the expenses of the petition and of the procedure necessary to get the arrestments removed. Turner lodged answers, but opposed only in so far as expenses were sought against him.

Argued for the petitioner—The respondent was not entitled, as he had been paid in full, to keep this *nexus* upon the petitioner's funds. The petitioner was obliged to apply to the Court to have the arrestments recalled, and he was entitled to recover the cost of this application from the respondent.

Argued for the respondent—The expenses of an arrestment properly and lawfully used, whether on the dependence of an action or on an extract-decree which was successful in attaching funds, was a proper debt against the common debtor, recoverable in an action of forthcoming out of the arrested funds—*Wight v. Wight*, May 23, 1822, F.C.; *May v. Malcolm*, June 7, 1825, 4 Sh. 79; *Mackay's Practice*, vol. ii., p. 105. The arresting creditor was not liable in the costs of the proceedings which the debtor might take for getting the arrestments removed.

At advising—

LORD ADAM—This is a petition for the recal of arrestments used on the de-

pendence of an action by the respondent against the petitioner, and there is no question that these arrestments fall to be recalled. The question simply is, whether the petitioner is entitled to have his expenses in coming here, or whether he is to pay the respondent his expenses? As I understand the facts, they are these—As soon as the respondent obtained decree in the action the petitioner paid him the whole sum in the decree—that is, the principal sum sued for and the expenses of the action; and having done so, the petitioner obtained the discharge which the respondent was bound to give him. The respondent now says that he is not bound to loose the arrestments except on payment of the expenses of using them, but I think that an arrestment on the dependence does not cover the expenses of using the arrestments. It may or may not be that these expenses would have been recoverable in a subsequent forthcoming, but as soon as the principal sum sued for and the expenses are paid the decree is satisfied, and there is nothing further covered by it. It may be that the respondent ought to have given the letter which the petitioner asked him for, but I do not think that he was bound to do so. The petitioner, however, is entitled to have the arrestments loosed, and had he confined his application to that there would probably have been no question about the matter, but unfortunately for himself he asks for expenses against the respondent. I think that he is not entitled to expenses against the respondent. He is entitled to recal of the arrestments, but not to the expenses of obtaining that recal. Therefore the respondent was quite entitled to put in answers as he has done in which he only opposes the application in so far as expenses are sought against him. I think the petitioner was wrong in asking for these expenses.

LORD M'LAREN—I agree with your Lordship that when arrestments are rightly laid on, in the exercise of a legal right to recover a just debt, the expenses of using the arrestments do not enter into the costs of the original action. Each party must bear his own costs, whatever they may be, in getting the arrestments out of the way.

On the one hand the arresting creditor cannot unless by bringing a separate action recover from the defender the costs of laying on the arrestments which he has used for his own protection. When the defender tenders the sum decreed for and the costs of the action this must be accepted as a satisfaction of the decree.

On the other hand, the arresting creditor is not, in my opinion, bound to discharge the arrestments voluntarily. He is not bound to grant a letter which will entitle the arrestee to pay or hand over the sum arrested.

As the pursuer is not bound to assist the defender in getting the arrestments taken out of the way, it follows, in my opinion, that he is not liable in the costs of the proceedings which the defender may take for that purpose.

LORD KINNEAR—I am sorry to say that I am not able to agree with your Lordships. I think Mr Turner was bound to grant the letter which the petitioner asked him for, or to withdraw the arrestments in some other form. He had brought an action against the petitioner, and for his greater security used the arrestments which are the subject of the present dispute. It has turned out that the arrestments were unnecessary, for the petitioner was able to pay the sum for which Mr Turner sued, and he in fact paid it as soon as decree was given against him. I think therefore that he was entitled to require the creditor, whom he had paid in full, to remove the unreasonable embargo which he had placed upon the petitioner's property. I say unreasonable, not because the embargo was unreasonable in its origin, for it is the right of a creditor to use arrestments upon the dependence of an action in which he sues for payment of his debt, but because it became unreasonable to continue it after the petitioner had paid the whole sum for which decree was given against him in the action. It was therefore, in my opinion, the duty of the respondent to write such a letter to the arrestee as would put him in safety to pay over the funds arrested. But the respondent took a position which I understand both your Lordships to regard as untenable, for he maintained that he was entitled to the expenses of using the arrestments. Your Lordships are of opinion that such a contention cannot be maintained, and therefore the respondent declined to assent to the recal of these arrestments upon a ground which, in the judgment of your Lordships, is untenable. What course then in these circumstances was open to the petitioner? He could only present this petition to have the arrestments recalled. The respondent lodged answers to this petition, and as he has taken up a position which we all think wrong I cannot see any reason why he should get his expenses.

The **LORD PRESIDENT** was absent.

The Court recalled the arrestments, but found the respondent entitled to expenses modified to £2, 2s.

Counsel for the Petitioner—C. N. Johnston. Agents—T. & W. A. M'Laren, W.S.

Counsel and Agent for the Respondent—Party.