

on that is that to order an election to fill all the seats on the council would be to wander very far indeed from the ambit of our duty; and it seems to me that all we have to do is to find some means ready to hand for getting an election to fill Mr Shields' vacancy. It must be by one of the wards, for the town is now divided into wards, and it cannot, I think, be suggested that we should revert to the old system which has been abolished. Now, if it be by a ward, it seems to me that the first ward has a clear ground of preference merely by reason of its being the first ward. In some of the Acts of Parliament there is a provision that where there is equality, on some similar emergency arising, the decision should be by lot. We are not required to do that, and accordingly we proceed to take the first ward that comes, and the first ward that comes is the First Ward. And I therefore think that we should order that an additional election of a councillor take place in the First Ward.

LORD ADAM concurred.

LORD M'LAREN—I agree, and shall only add that the principle of ward elections in this Act, as also in the Municipal Corporation Act of 1833 and subsequent statutes, is that of rotation, a certain number of members retiring each year from the bottom of the list. It seems to me that we are carrying out the principle of rotation if in this matter we take the wards in numerical order.

LORD KINNEAR—I agree with your Lordship.

The Court pronounced the following interlocutor:—

“Order that at the next ensuing election of Police Commissioners in Dunoon, two Commissioners, and not one only, shall be elected by the electors in the first ward, and decern: Allow the expenses of both parties to be paid out of the funds of the Burgh General Assessment.”

Counsel for the Petitioners—Sol.-Gen. Dickson—Craigie. Agent—Alexander Campbell, S.S.C.

Counsel for the Respondents—Salvesen. Agents—Sturrock & Sturrock, S.S.C.

Tuesday, October 20.

SECOND DIVISION.

ROBERTSON v. PARK, DOBSON & COMPANY.

Inhibition—Expenses—Expenses of Petition for Recal of Inhibition.

The pursuer of an action who had used inhibition on the dependence accepted a composition upon the defender's estate in respect of the debt upon which the action was founded, and the action was not called in Court. Held that the defender was entitled to have the inhibition discharged extrajudicially, and that the pursuer, having refused to do so, was liable to the defender for the expenses of a petition for recal.

This was a petition presented by Robert Robertson, builder, Leith, for recal of inhibition. The petitioner craved that Park, Dobson, & Company, merchants, Leith, should be found liable in the expenses of the petition.

The circumstances in which the petition was presented were as follows:—On 23rd September 1892 Park, Dobson, & Company had served a summons on the petitioner for the price of timber supplied by them to him. The summons contained warrant to inhibit, and inhibition was used thereon, the summons with warrant and execution of inhibition being duly registered on 7th October 1892.

Shortly after the summons had been served it became apparent that the petitioner was unable to pay his debts, and the summons on the dependence of which inhibition had been used was never called in Court. After sundry negotiations and proceedings a composition arrangement was ultimately arrived at, all the creditors, including Park, Dobson, & Company agreeing by minute of concurrence duly signed by them to accept 2s. 6d. per £ in full settlement of this claim against the estate.

On 9th May 1896 the petitioner's agents wrote to the agents of Park, Dobson, & Company reminding them of the composition agreement and other circumstances, and sending them a discharge of the inhibition for signature, and intimating that on receipt of the discharge, which they stated was required to enable payment to be made, they would settle with them. On 11th May Park, Dobson, & Company's agents replied, saying that they were not aware whether their clients had agreed to accept the composition, but that they would communicate with them. On 19th May they wrote saying that Mr Dobson had no recollection of agreeing to take the composition. In reply the petitioners' agents wrote sending the formal concurrence to the arrangement duly signed by Park, Dobson, & Company. After further correspondence the petitioners' agents wrote sending a cheque for the amount of the composition due to Park, Dobson, & Company in full settlement of

their claims, and on this cheque being returned with an intimation that it could not be accepted as in full of all claims they consigned the proceeds of it in bank. By the end of May Park, Dobson, & Company's claim was almost the only one outstanding. Ultimately on 13th June the petitioners' agents wrote—"We trust you have now gone into this matter, and that your clients have signed discharge of inhibition. The instructions which we have are to apply for recal of inhibition failing settlement by Wednesday, 17th curt." They wrote again on 26th June—"We shall be glad if you now state whether your clients are to take payment of this consignment, or whether you leave us without alternative but to apply for recal of inhibition. If you drive us to the latter course we shall found on our correspondence with you and ask expenses against your clients."

On 27th June Park, Dobson, & Company's agents replied—"We are favoured with your letter of yesterday's date. As we have already explained to you, our clients are not satisfied to take the money consigned by you. So far as they are aware there was no agreement to accept this composition, and unless their debt is paid in full at once we are instructed to proceed with the action for recovery."

Thereupon the petitioners presented the present application setting forth the facts above mentioned, and craving the Court to recal the inhibition, and to grant warrant for marking the same as discharged on the register of inhibitions, and to find Park, Dobson, & Company liable in expenses.

Park, Dobson, & Company lodged answers in which they denied that they had ever agreed to accept the composition, but otherwise admitted the accuracy of the petitioner's allegations. They did not oppose the recal of the inhibition, but opposed the part of the prayer which craved that they should be found liable in expenses.

Argued for the petitioner—The petitioner was entitled to the expenses of this application—*Laing v. Muirhead*, January 28, 1868, 6 Macph. 282—report by the Auditor of Court there quoted, and authorities referred to by him. Where a pursuer who has used inhibition has been unsuccessful, he is bound to clear the record at his own expense. Here the respondents were under the same obligation, because the case had never been called in Court. The fact that there was a debt due by the petitioner to the respondents made no difference, because the inhibition was used not upon any document of debt, but on the dependence of the action, and such inhibition was of no avail unless followed up by decree in the action—*Ersk. Inst. ii. 11, 3*. Moreover, the petition had been rendered necessary by the respondents' unreasonable and nimious conduct in refusing to sign an extrajudicial discharge. [LORD TRAYNER referred to *Roy v. Turner*, March 18, 1891, 18 R. 718]. That case was distinguished from the present. There the pursuer who had used arrestment on the dependence had been successful. Here the respondents had not obtained decree, and by not calling their case in Court they were

barred from maintaining that they were entitled to bring the action, and would have succeeded if they had gone on with it. In *Roy* the pursuers had some benefit from the arrestment, which secured funds for the payment to which they were ultimately never entitled, but here the inhibition had never been of any use to the respondents at any time, and consequently it was unnecessary. Moreover, inhibition was different from arrestment. Some formal document or decree was necessary to clear the record.

Argued for the respondents—The respondents were not bound to give the petitioner any assistance in removing an inhibition which had been justifiably used—*Roy v. Turner, cit.* This inhibition had been justifiably used. The debt for which action was brought was admittedly due. The fact that the action had never been called in Court owing to the impecuniosity of the petitioner could not affect the question. In such circumstances the petitioner was bound to get the record cleared at his own expense. The case of *Roy v. Turner, cit.*, ruled the present. The petitioner was therefore not entitled to the expenses of this application.

LORD YOUNG—The facts in this case are of the simplest possible nature. The petitioner was debtor to the respondents in a sum of money for which the respondents brought action. They did not proceed with that action, very sensibly, no doubt, because the petitioner, I suppose, was not in funds to meet their claim, and was making an arrangement to pay a composition to his creditors. That arrangement was concluded, the respondents agreeing among other creditors to accept the composition. Inhibition had been used on the dependence of the action. When the petitioner's agents were in a position to proceed to carry out the composition arrangement they sent a discharge of the inhibition to be signed by the respondents, intimating that the inhibition stood in the way of the petitioner's making payment, and that upon receiving the discharge signed they would settle with the respondents. The respondents' agents replied that they were not aware whether their clients had agreed to accept the composition, but they would inquire. Their clients said they had no recollection of having done so. Thereupon the petitioner's agents sent the composition agreement bearing the respondents' signature. Ultimately they sent a cheque for the amount due under the composition contract to the respondents. There was thus no question of security such as had been raised by the respondents' agents, for the petitioner was ready to make payment at once. The respondents' agents returned the cheque. They refused to accept anything but payment in full or to sign the discharge of the inhibition, and so the correspondence goes on till the end of June, showing the conduct of the respondents to have been most unreasonable and certainly nimious. On the 27th June their agents write—[*His Lordship read the letter of that date above quoted*]. Now, after that letter, there being an agree-

ment for a composition, all the other creditors having been paid in terms of that agreement, as appears from the letter of date May 30th, and the respondent, who had signed that agreement, having refused to accept the amount due to him under it in full of his claim, or to discharge the inhibition, what was the petitioner to do but make the present application? Accordingly this petition was presented about a fortnight after the letter of 27th June had been received. It asks for recal of the inhibition with expenses. I think the conclusion for expenses was altogether reasonable. The inhibition might have been discharged, as was proposed by the petitioner, without any expense to the respondents. But this the respondents refused to do, and no other course was left open to the petitioner but to present this application. I think the conduct of the respondents has been most unreasonable and nimious, and that the petitioner is entitled to his expenses.

I may say that I have formed this opinion after reading the opinions delivered in the case of *Roy v. Turner*, March 18, 1891, 18 R. 717. It is not necessary to make any observation on that case further than to say that, after reading the opinions of the learned Judges who took part in the decision of it, in this case I am of opinion that the respondents should be found liable in expenses.

The LORD JUSTICE-CLERK, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court pronounced the following interlocutor:—

“Recal the inhibition referred to in the petition, and grant warrant for marking the same as discharged on the Register of Inhibitions, and find Messrs Park, Dobson, & Company liable in the expenses of this application,” &c.

Counsel for the Petitioner—Shaw, Q.C.—Constable. Agents—Wallace & Pennell, W.S.

Counsel for the Respondents—C. J. L. Boyd. Agents—Boyd, Jameson, & Kelly, W.S.

Thursday, October 22.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MARSHALL *v.* CALLANDER AND TROSSACHS HYDROPATHIC COMPANY AND OTHERS.

(*Ante*, July 18th 1895, 32 S.L.R. 693, 22 R. 954.)

Appeal—House of Lords—Effect of Appeal on Decree for Specific Implement within Limited Time—Extension of Period.

An interlocutor having been pronounced ordering specific performance of certain work which was to be commenced within three months of the date of the interlocutor, the defenders

appealed to the House of Lords. The appeal was dismissed of consent, and the interlocutor was affirmed *simpliciter*. The period within which the work was to be commenced had then expired, but no motion was made for an extension of the period. *Held* that the period of three months did not begin to run till the date when the interlocutor was affirmed by the House of Lords.

This was an action at the instance of Mr William Marshall against the Callander and Trossachs Hydropathic Company and others. The summons concluded for declarator, *inter alia*, that the defenders were bound to rebuild certain subjects which had been destroyed by fire. The Lord Ordinary on March 1st 1895 pronounced the following interlocutor:—“... Decerns and ordains the whole defenders, jointly and severally, forthwith to proceed to rebuild the buildings of the hydropathic establishment, which were erected on the subjects contained in the feu-contract referred to in the summons in terms thereof, and which were on or about 7th November 1893 destroyed by fire, and that to the extent necessary to maintain said buildings as of the total value of £15,000—said rebuilding to be commenced within three months of the date hereof, to be duly proceeded with to the satisfaction of John Dick Peddie, architect, Edinburgh, and to be completed to his satisfaction within two years from the date hereof: *Quoad ultra* continues the cause.”

The defenders having reclaimed, the First Division on 18th July 1895 pronounced the following interlocutor:—“... *Quoad ultra*, adhere to the interlocutor with this variation, that the rebuilding is to be commenced within three months from the date of this interlocutor.”

The defenders appealed to the House of Lords, but on the 8th May 1896 consented to the appeal being dismissed, whereupon the interlocutors complained of were affirmed *simpliciter*, and the appeal dismissed.

No motion was made by either side to vary the interlocutor by extending the time within which building was to be commenced.

Building not having commenced on 18th July 1896, the Lord Ordinary, on the motion of the pursuer to insist in his alternative conclusions for damages, pronounced the following interlocutor:—“The Lord Ordinary having heard counsel, in respect the defenders have failed to implement the order to rebuild contained in the interlocutor of 18th July 1895, afterwards affirmed by the House of Lords, Finds therefore that the pursuer is entitled to damages: Allows the pursuer a proof of his averments in regard to the amount of damages, and the defenders a conjunct probation thereanent, the proof to be taken on a day to be afterwards fixed.”

The defenders reclaimed, and argued—The interlocutor was premature inasmuch as the defenders had been preparing, and had fully