family estates on the heirs-male of his body (who failed), whom failing the heirs-female of his body and other heirs of entail, all such heirs being bound to bear the surname, arms, and designation of Mackenzie of Seaforth, conform to the clause quoted in the petition; (7) that the said Mary Frederica Elizabeth Mackenzie or Stewart succeeded to the family estates in virtue of the said entail, and that the petitioner succeeded to and still holds a small part of the same but not either the estates of Seaforth or Kintail; (8) that the said Mary Frederica Elizabeth Mackenzie in 1815, when the widow of Admiral Hood, matriculated the coat of arms shown on Plate IV, and that the petitioner in 1890 matriculated the coat of arms shown on Plate VI; (9) that in 1817 George Falconer Mackenzie of Allangrange, being then the apparent heir-male of Kenneth third Earl of Seaforth, matriculated the coat of arms shown on Plate V; (10) that in 1877 James Fowler Mackenzie, who died in 1907, second and eldest surviving son of the said George Falconer Mackenzie, executed a deed of entail under which the respondent Mrs Fraser-Mackenzie was the institute and is now in possession of the estate of Allangrange; (11) that by said deed of entail it was provided that the respondent, therein designed Beatrice Anna Mackenzie, and each of the heirs of entail, 'shall be obliged in all time coming after succeeding to the said lands to use and retain the surname of Mackenzie and the arms and designation of Mackenzie of Allangrange, without prejudice to his or to her using and retaining therewith any other surname, arms, or designation'; (12) that in 1908 the respondents matriculated by interlocutor of the Lyon King a coat of arms shown on Plate VII; (13) that the arms granted to the respondents in 1908 quartered with the Mackenzie arms those of Fraser of Bunchrew and those of the Falconers; (14) that it has not been proved that the respondent Mrs Fraser-Mackenzie is a stranger in blood to the family of Mackenzie of Kintail: Find in law (1) that the said arms of 1908 are sufficiently differenced to any arms to which the petitioner has right, and that the petitioner is not entitled to challenge the respondents' right to the said arms; (2) that the respondents have right to use the said arms shown on Plate VII; (3) that the petitioner has no title to challenge the respondents' right to use the supporters shown on Plate VII; and (4) that the respondents have right to use the said supporters: Affirm the dismissal of the petition, and decern: Recal the finding for expenses in the interlocutor of the Lord Lyon dated 21st November 1919: Find the petitioner and appellant liable to the respondents in the expenses incurred both in this Court and in the Lyon Court," &c

Counsel for the Petitioner — Macphail, K.C. — Mackay, K.C. — W. H. Stevenson. Agent—John C. Brodie & Sons, W.S.

Counsel for the Respondents—Stevenson, K.C.—Leadbetter. Agents—Mackenzie & Black, W.S.

Tuesday, October 26.

SECOND DIVISION.

[Bill Chamber.

ELLERMAN'S WILSON LINE, LIMITED *v.* COMMISSIONERS OF NORTHERN LIGHTHOUSES.

Expenses — Ship — Action in rem — Arrestment — Expenses of Bail Bond.

The expense of procuring a bail bond incurred by an arrestee in order to liberate his ship, which had been arrested as a preliminary to an unsuccessful action *in rem*, cannot be charged against the opposite party, such expense not being part of the expenses of process.

The Ellerman's Wilson Line, Limited, owners of the s.s. "Finland," *petitioners*, presented a petition for warrant to arrest the s.s. "Pole Star," belonging to the Commissioners of Northern Lighthouses, incorporated under the Merchant Shipping Act 1894, *respondents*. An action had originally been brought by the petitioners against the respondents for damages due to a collision between the two vessels in which the respondents pleaded the Public Authorities Protection Act as excluding the action. That action was then withdrawn, and in order to enforce their maritime lien, the petitioners brought an action *in rem* against the "Pole Star," which required as a preliminary the arrest of that vessel. Warrant to arrest *ad interim* was granted in the Bill Chamber on 3rd April 1919. In the subsequent action *in rem* the Lord Ordinary (BLACKBURN) held that the accident was not due to the fault of either ship, and found the defenders, the owners of the "Pole Star," entitled to their expenses. Thereafter in the Bill Chamber the arrestments were recalled, the petition dismissed, and the respondents found entitled to expenses. The Auditor having allowed, as part of the expenses, the expense incurred by the respondents in replacing the ship with a bail bond for £25,000, objections to his report were lodged. On 3rd August 1920 the Lord Ordinary reported the cause to the Second Division.

Note. — [*After narrating the facts*] — "Objections are now taken to the Auditor's report in respect that he has allowed against the petitioners a sum of £125 as the expense incurred by the respondents in replacing the ship with a bail bond for £25,000. It was stated at the bar that whereas at one time such expenses were not allowed where arrestments had been used *ad fundandam jurisdictionem*, there had latterly been a change of practice, and on inquiry from the Auditor I have ascertained that this is the case. The change seems to have followed

on a judgment of Lord Salvesen in *Barron* v. *Black*, 1908, 16 S.L.T. p. 180. I cannot say that I think the judgment contains anything which justifies the change in practice, and it does not appear to me that the expense of substituting a bail bond for an arrested ship is necessarily an expense of process which an arrestee should be entitled to recover. It appears, however, that in England such expenses are allowed in an Admiralty action *in rem* (See Rules of the Supreme Court, Order 12, No. 21*a*, quoted in the Annual Practice, 1920, p. 124), and in view of this and of the now established practice in cases of arrestment *ad fundandam jurisdictionem* I should hesitate to sustain the objections to the report. As, however, the case is, so far as I know, the first of its kind in Scotland, I think it advisable to report it before pronouncing an opinion which might not be reclaimed against and which might come to be regarded as establishing a rule of practice."

Argued for the petitioners—The Auditor should not have allowed these charges. In an action *in rem* arrestment of the ship was necessary to enforce the maritime lien, arrestment on the dependence not being suitable—*Clan Line Steamers, Limited* v. *Earl of Douglas Steamship Company, Limited*, 1913, S.C. 967, 50 S.L.R. 771. In the case of arrestment on the dependence, however, no claim of damages would arise to the arrestee unless the arrestments were malicious—Graham Stewart on Diligence, p. 773, and cases *ibid.* The same principle applied to the arrestment of a ship. No claim of damages would arise for the arrestment unless the arrestment was malicious, and the substitution of a bail bond for the vessel was a mere convenience for the arrestee, the expense of which could not be charged against the opposite party. It was not a necessary step of process or, indeed, a step of process at all. The case of *Barron* v. *Black*, 1908, 16 S.L.T. 180, was not an authority in favour of allowing such expenses. In England at common law such expenses could not formerly be included—*The "Collingrove," The "Numida,"* 1885, 10 P.D. 158. This practice had been subsequently altered by rule of the Supreme Court in England in 1900—Roscoe's Admiralty Practice (4th ed.), p. 313. The common law of Scotland was the same as that of England originally was—*Currie* v. *M'Knight*, 1898, 24 R. (H.L.) 1, 34 S.L.R. 93, but no similar change had been introduced here, and such change could not be introduced without the authority of an Act of Sederunt. In the unreported case of *Ole Thuestad* v. *Scheepvaart en Steenkolm Maatschappij* (20th July 1904) Lord Low disallowed such expenses. Arrestments *ad fundandam jurisdictionem* were different, because they were regarded as a proper step of process.

Argued for the respondents—The Auditor had rightly allowed these expenses. The expense of substituting the bail bond was more analogous to the expense of arrestment *ad fundandam jurisdictionem*, which had been regarded as a necessary step of process, than to the expense of arrestment on the dependence, which was not a necessary step of process, and where the expenses would not be allowed. The Admiralty action *in rem* had first been recognised in Scotland in *Currie* v. *M'Knight*, 1896, 24 R. (H.L.) 1, 34 S.L.R. 93, on the ground that the maritime practice of the two countries should be the same. The present case was the first instance in practice of such an action. Such an action was always preceded by arrestment—*M'Connachie*, 1914, S.C. 853, 51 S.L.R. 716; Marsden's Collisions at Sea (7th ed.), pp. 88, 95, 296. In England the expense of a commission for bail was allowed—Williams and Bruce's Admiralty Practice (3rd ed.), p. 472. The Auditor had exercised his discretion in this case in a reasonable manner, and this Court should not interfere with it, more especially in view of the change of practice stated by him in the case of arrestment *ad fundandam jurisdictionem*.

LORD JUSTICE-CLERK—In this action *in rem* a ship was arrested, and the owners in order to get it free from the arrestment arranged a bail bond with the bank so that the bail money should stand as a surrogatum for the ship. The question for our decision upon a report from the Lord Ordinary is whether, having been awarded their expenses, they are entitled to include in their account the expenses incurred in getting that bail bond.

This is a pure question of practice. As regards the Scots practice I entertain no doubt. When expenses generally are allowed, only those expenses are to be included in the account which are expenses necessitated by the steps of process in the cause. I cannot understand how procuring a bail bond in order to liberate a ship which had been arrested can be regarded as in any sense a step of process. It is a step which the owners of the ship take for their own convenience, because they think it is better for them to have their ship at their disposal, and to pay the expenses necessary to procure a fund which may remain as a surrogatum, rather than let the ship remain under arrest.

We have authority bearing on this point in the judgment of Lord Low, printed in the paper before us. In that judgment, so far back as 1904, in proceedings where an arrestment on the dependence had been used, his Lordship disallowed such expenses. In his note his Lordship said—"I have consulted the Auditor, and he tells me that he can find no instance in which commission for arranging bail for release of a ship has been allowed as one of the expenses of process. That being so, I do not think that sitting alone I would be justified in interfering with the course taken by the Auditor, which is in accordance with practice." I am entirely against making any change in that practice unless there is very clear ground for doing it. The only ground suggested here is that the English Courts have framed certain rules of practice under which expenses of this kind could be allowed. But these rules of the English Court are not binding upon us. In Scot-

land a corresponding rule or act would have to be an Act of Sederunt to the effect that, contrary to the practice which has hitherto prevailed, the expenses of procuring a bail bond were to be chargeable against the opposite party. We have no such Act of Sederunt, and I see no reason for making a change in the practice which has hitherto prevailed.

I accordingly am of opinion that the objection to the Auditor's report should be sustained.

LORD DUNDAS—I am of the same opinion and have nothing to add.

LORD SALVESEN—It is gratifying to find in a matter of this kind that the common law of Scotland is in precise accordance with the common law of England. The case that Mr Carmont quoted lays it down in very clear terms that the expense of procuring a bail bond not being part of the expenses of process cannot be charged against the opposite party. I think that was the rule established long before 1885, because it is in accordance with my earliest experience of shipping law that the expense of procuring a bail bond, being in the interest of the person who made the application for the release of the vessel, fell to be borne by himself. The pursuer in the action was entirely indifferent as to whether he had the ship secured for his debt or money deposited in lieu of it. But it was to the interest of the defender, who desired the release of his vessel for its profitable employment, to obtain its release on such terms as the Court would sanction.

Now that having been the practice in Scotland so far back as I can recollect, I see no warrant for changing that rule in the fact that the English Courts have now, in the exercise of jurisdiction conferred upon them by Parliament, issued a rule that in England such expense shall be treated as part of the expenses of process. These rules are not binding upon us, and we have no equivalent rule in Scotland.

I agree that sometimes it is a hardship that such expenses are not allowed, but until an Act of Parliament is passed to the contrary, or we, if we have the jurisdiction, pass an Act of Sederunt similar to the rule of the Supreme Court in England, we must go by our own law and practice, and that is, as I think, practically admitted to be in favour of sustaining this objection. I therefore agree with your Lordships.

LORD ORMIDALE—I also agree with your Lordships.

The Court remitted to the Lord Ordinary to sustain the objections for the petitioners to the Auditor's report on the respondents' account of expenses.

Counsel for the Petitioners — Carmont. Agents—Beveridge, Sutherland, & Smith, W.S.

Counsel for the Respondents—Maconochie. Agents — Waddell, M'Intosh, & Peddie, W.S.

HIGH COURT OF JUSTICIARY.

Monday, November 1.

(Before the Lord Justice-Clerk, Lord Dundas, and Lord Ormidale.)

MONK *v.* STRATHERN.

Justiciary Cases — Statutory Offence — Charge of Assaulting Police-Constable when in the Execution of his Duty — Scope of Constable's Duty—Prevention of Crimes Act 1871 (34 *and* 35 *Vict., cap.* 112), *sec.* 12.

A police constable while proceeding in uniform from his beat to his home passed some young men standing at a street corner and asked them if they were not away to bed yet. As he was walking away one of them threw a bottle at him, which struck him on the head and injured him. The assailant was charged with assaulting the constable while engaged in the execution of his duty, contrary to section 12 of the Prevention of Crimes Act 1871, and convicted. *Held* that the constable was not engaged in the execution of his duty at the time of the assault, and conviction *quashed.*

Justiciary Cases — Review — Sentence — Amendment — Circumstances in which Court Refused to Pronounce New Sentence — Summary Jurisdiction (Scotland) Act 1908 (8 *Edw. VII, cap.* 65). *sec.* 75.

In an appeal at the instance of an accused who had been convicted of assaulting a police constable while engaged in the execution of his duty, contrary to the Prevention of Crimes Act 1871, section 12, the respondent argued that if the Court should hold that the accused had not committed a contravention of the statutory offence with which he had been charged, the Court should, under the powers conferred by section 75 of the Summary Jurisdiction (Scotland) Act 1908, sentence him for an assault at common law. The Court *quashed* the conviction *simpliciter*, holding that the case was not one for the exercise by it of the powers conferred by the section.

The Prevention of Crimes Act 1871, sec. 12, enacts—"Where any person is convicted of an assault on any constable when in the execution of his duty, such person shall be guilty of an offence against this Act, and shall, in the discretion of the Court, be liable either to pay a penalty not exceeding twenty pounds, and in default of payment to be imprisoned, with or without hard labour, for a term not exceeding six months, or to be imprisoned for any term not exceeding six, or in case such person has been convicted of a similar assault within two years, nine months, with or without hard labour."

The Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 65), sec. 75, enacts—"... Subject to the provisions contained in sections sixty and seventy-two hereof no conviction, sentence, judgment, order of