auditor is well pleased to learn that it is the intention of the defenders to bring the question before the Court for decision. Warrants to arrest are now introduced into summonses, and form part of them. The loosing of arrestments is obtained by an application in the action on the dependence of which the arrestments have been used. The auditor can see no principle to preclude the expenses of loosing being dealt with as expenses of process. During the dependence of an action (except in very special cases) the question of expenses of loosing cannot be determined, for it does not appear till the issue of the cause whether the use of arrestments was warranted or not; but, in a case like the present, where the defenders have obtained absolvitor, it seems to be a hardship that the cost of loosing arrestments, which ought never to have been used should be thrown upon them. It may be that the defenders, when they obtained the loosing of arrestments, should have craved the Court to reserve the question of expenses. It is for the Court to determine whether the expenses of loosing arrestments, assuming them to be included in 'expenses of process,' require to be expressly reserved.

"It was Mr Hunter's intention, in taxing the account, to reserve for the decision of the Court the question of the pursuer's liability for the expense incurred by the defenders in instructing a third counsel at different stages of the litigation, and for two of the four days during which the trial lasted. The expense occasioned by such employment, as stated in the account, and marked on the margin, amounts to £75, 0s. 8d. It is for the Court to say whether or not this is a case where a third counsel should be allowed, and whether such counsel, if allowed, should be remunerated as a senior or as a junior counsel. If the third counsel is to be allowed, and paid at the rate allowed to the senior in this case, as taxed, there will fall to be deducted from the taxed amount above reported the sum of £11, 0s. 6d.: but if at the rate allowed to the junior, then the sum of £24, 5s. will be deducted. If the expense of the third counsel shall be disallowed altogether, than the sum of £75, 0s. 8d. will be deducted from the taxed amount above reported. "EDMUND BAXTER."

SHAND and BANNATYNE for the pursuer.

GIFFORD and ORR PATERSON for the defenders.

The following cases were referred to as to the expense of recalling the arrestments, Manson *v.* Macara, 7th Dec. 1839, 2 D. 213; Clark *v.* Loos, 20th Jan. 1855, 17 D. 306.

At advising,

The LORD PRESIDENT—I feel some hesitation in regard to the sums allowed to the accountants, and I shall therefore content myself with saying that I do not see sufficient grounds for interfering with the Auditor's report. He seems to have considered the matter very fully and deliberately, and I think his report is characterised by great discrimination. The sums allowed are very large, but the pursuer of such an action as this must lay his account for such a result when he undertakes to prove such an issue as was taken in this case. He offered to prove fraud on the part of the late Mr M'Dowall in regard to large balances extending over a very considerable period. In short, it was a charge of continuous robbery of the pursuer, his partner. Now really the trustees of a gentleman who is so charged, may be very well pardoned if they resort to the most exhaustive process for the purpose of showing that the charge is unfounded, and that the deceased was free from blame; and I cannot say that in this case the defenders did more than that.

With regard to the second matter raised by the defenders' objection, it is undoubtedly a point of practice of some considerable importance, and it is right that it should be distinctly settled, but I see no reason for interfering with the rule which was recognised by the late Auditor on the subject. It appears to me that, prior to the passing of the Personal Diligence Act of 1838, the mode of obtaining recal of arrestments was precisely the same as it has been since. It was done by petition and answers, and the expenses of the application were disposed of when the petition was. It was a distinct and separate process. The only change introduced by the Personal Diligence Act is this, that it is made competent to the Lord Ordinary in the cause to entertain such petitions, which before were competent only in the Inner House. That being so, it is quite impossible to bring the expenses incurred in obtaining a recal within the finding of expenses in this process under which the account has been taxed. In the separate process in this instance there was no finding of expenses and there was no reservation, and I doubt, therefore, if they can now be obtained at all. As in the case of Manson *v.* Macara, expenses may be reserved, or they may be allowed or refused, but we have the direct authority of the case of Clark *v.* Loos for saying that the interlocutor pronounced on the petition having neither given nor reserved expenses, it is now too late to move for them.

Lastly, I think that the allowing of three counsel in this case is a corollary from our allowing Mr Guild's charges; but I think that instead of allowing the expense of two senior and one junior counsel, we should only allow the expense of one senior and two juniors.

The other Judges concurred.

Objections therefore repelled.

Agents for Pursuer—Hamilton & Kinnear, W.S.

Agents for Defenders—J. & A. Peddie, W.S.

RANDALL *v.* JOHNSTON.

Lawburrows—Malice—Suspension. Note passed to try the question whether it is a relevant ground of suspension of a charge to find caution of lawburrows that the warrant has been obtained maliciously and without probable cause.

This is a suspension presented by the Rev. Edward Randall, of St Ninian's Chapel, Castle-Douglas, of a charge given him to find caution of lawburrows that the respondent, Lieutenant-General Thomas Henry Johnston of Carnsalloch "shall be kept harmless and scatheless in his body, possessions, goods, and gear, and in noways molested or troubled therein by the complainer."

The complainer is incumbent of the Episcopal chapel at Castle-Douglas. The respondent is one of the trustees thereof. They seem to have recently quarrelled with each other in consequence, as the complainer alleges, of a change of the second service from the afternoon to the evening. On 12th January 1867, General Johnston presented a petition to the Sheriff of Galloway, in which he stated that he has just cause to dread harm to himself from the said Rev. Edward Randall, he having, on the 14th day of December last, in St Andrew Street of Castle-Douglas, interrupted the petitioner in his progress along said street, and walked in before him, and with violent and threatening gestures put the petitioner in fear of an assault, and he dreads a repetition of a similar

offence and bodily harm from the respondent, to all which the petitioner is ready to depone."

He thereafter deponed that his statement was true, and the Steward-Substitute thereupon *ex parte* ordained the complainer to find caution of lawburrows under a penalty of £50.

The complainer then suspended, on the ground chiefly that the proceedings had been taken by the respondent maliciously and without probable cause. No caution was offered. Lord Mure refused the note, for the reasons stated in the following

"*Note.*—The Lord Ordinary has refused this note, in respect of the decisions in the case of Barbour, March 11, 1825, 3 S. 647; and Baxter, June 16, 1827, 5 S. 752, in both of which it was ruled that it was not a relevant ground for suspending a charge on letters of lawburrows regularly obtained, to allege that they have been taken out maliciously. The cases are very shortly reported, but the Lord Ordinary has examined the session papers, and he finds that in the case of Barbour the decision was pronounced upon written argument, and that, although the note was presented on caution, the petition was refused without answers. Nothwithstanding, therefore, of the older case of Smith *v.* Baird, January 26, 1799, M., 8043, relied on by the complainer, the Lord Ordinary has considered himself bound, in obedience to these later authorities, in which the case of Smith appears to him to have been brought under the consideration of the Court to refuse the present note. "D. M."

The complainer reclaimed.

YOUNG and WATSON for the reclaimer.

MONRO and SHAND for the respondent.

The following authorities were cited :—Ersk. 4, 1, 16; Bankton 1, 10, 157; Stair 4, 48, 2; Barclay's M'Glashan, p. 408–9; Stat. 1424, c. 2; 1449, c. 113; 1581, c. 117; 1661, c. 38; Barbour and Others *v.* Hogg, 11th March 1825, 3 S. 453 (647); Taylor *v.* Taylor, 25th June 1829, 7 S. 794; Gadois *v.* Baird, June 1856, 28 Jurist, 682.

After discussion, the complainer stated that he was willing to find caution of lawburrows binding him to keep the peace towards the respondent in common form under a penalty of £50 sterling *ad interim*, and until the suspension shall be finally disposed of.

On this offer being made, the Court recalled the Lord Ordinary's interlocutor, and remitted to him to pass the note. The Lord President observed that this case on the passed note would form a very fitting opportunity for considering the whole law on the subject, and putting it on a proper footing.

Agents for Complainer—Jardine, Stodart, & Frasers, W.S.

Agents for Respondent—Ronald & Ritchie, S.S.C.

PET.—DARLING.

Diligence — Inhibition — Husband and Wife — Aliment. Question—whether an inhibition by a wife against her husband, founded on a claim of aliment, under a decree of separation and aliment, is competent, the aliment having been regularly paid, and the husband not being *vergens ad inopiam*.

This was a petition for recal of an inhibition which had been used against the petitioner by his wife, who had, in the year 1865, obtained decree of separation and aliment against him, the aliment awarded being £55 yearly during the joint lives of the parties. The petition prayed for absolute recal, and made no offer of caution, and it was therein alleged that the aliment had been regularly paid to the petitioner's wife in terms of the decree. In her answers, the wife did not dispute this fact, but alleged that her husband was in course of disposing of his heritable property (which formed his sole source of income), and that he had, just before the inhibition was used, advertised his dwelling-house with its fixtures for sale. She alleged that he also desired to dispose of his furniture, and that it was his intention to remove to some place abroad, *animo remanendi*, and to place his person and effects beyond the jurisdiction of the Courts of this country. On behalf of the petitioner, it was denied that he was about to go abroad, but it was conceded that he had disposed of a considerable part of his property, and that he was in course of disposing of other portions when the inhibition was used—with the explanation that he was so acting for the purpose of making a more profitable investment of his money.

FRASER and SCOTT, for the petitioner, argued that the inhibition was incompetent :—1. The wife's claim was a future debt, and inhibition cannot proceed upon a future debt unless the debtor is *vergens ad inopiam*, which is not alleged here; 2 Bell's Com. 144. 2. A wife should not be allowed in this way to tie up her husband's property.

SOLICITOR-GENERAL and MACLEAN, for the wife, cited Stair, 1, 4, 15; Glenbervie, 16th July 1638, M. 6053; A. *v.* B., 15th June 1678, M. 6054; Geddes *v.* Geddes, 14th March 1862, 24 D. 794.

Some of the Judges regarded the question raised by the petitioner as one of great importance, but the petitioner offered to find caution to pay the aliment in all time coming, and it became unnecessary to decide it.

The inhibition was recalled on caution being found, and the wife was found entitled to expenses.

Agents for Petitioner—Watt & Marwick, S.S.C.

Agent for Respondent—John Leishman, W.S.

Tuesday, March 19.

SECOND DIVISION.

MURRAY *v.* STEWART.

Sale—Delivery—Implement—Abandonment of Contract. Circumstances in which held that a contract for sale of potatoes, after there had been partial delivery, had been abandoned by mutual agreement of parties, and accordingly that farther implement could not be enforced.

This is an advocation from the Sheriff Court of Forfarshire. On November 2, 1861, the respondent's husband, David Stewart, purchased from the advocator the potatoes, both regents and rocks, which he had on the farm of Ingliston, at the price of £4 per ton, the whole potatoes to be carried away by the 26th of the said month, and to be paid for in cash when weighed over the steelyard. Stewart took delivery of certain quantities of the potatoes, but after the 7th of December of the same year he ceased to take further delivery. The parties then had a litigation as to the price of the potatoes, and when it was ended, and when the price of potatoes had considerably risen in the market, the respondent, on 4th April 1862, intimated that he proposed to take delivery again on the following Thursday. The defender then refused to give such delivery, on the ground that the contract had come to an end by the previous