to Merrow & Co. Had the managers in point of fact power to borrow £4000? For in fact that sum was lent by Ross, Skolfield, & Co. to Merrow & Co. The position is exactly the same as if there had been no bill transaction at all, as if Ross, Skolfield, & Co. had handed over £4000 in hard cash to Merrow & Co., to account of freight. If Merrow & Co. had power to borrow, then the pursuers must prevail; if such a power was not theirs, then the defenders are entitled to absolvitor. Now, we may inquire what was the position held by Merrow & Co., what was their appointment, and what were their powers, and I think the result of that inquiry will enable the Court to answer the question I have suggested. We see by the minute of agreement appointing Merrow & Co. to be managers that they were "the principal agents" of the company. [*His Lordship quoted the terms of appointment given above.*] That appointment does undoubtedly involve a very wide power, but does it give power to borrow? If it do not, then clearly there is not given any power to impignorate. No doubt an agent who has not the power to borrow may make advances for his principal, and if he does so he will have, as against that principal, a direct claim for the advance. But it comes to be a matter of much greater difficulty when the money has not been applied to the principal's business, and he has not been *lucratus* by the advance. If therefore I am right in thinking that there was no power to borrow or to pledge under the appointment given to the managers, we come to inquire whether their powers so conferred were subsequently increased. To answer this inquiry there are two sources open—(1) evidence of a course of dealing; (2) evidence of the books. Now a man cannot increase the powers granted him simply by claiming further powers, however often he do so, unless his principal know of his claim and by non-interference tacitly acquiesces in such a course of dealing, and looking to these two sources of information, I agree with your Lordship in the chair, although not perhaps on quite the same grounds, that there was no power afterwards conferred to borrow or to impledge.

It is said, however, that the sums obtained in this manner were applied for the benefit and behoof of the company. But is that at all proved? The proceeds of these bills are found in the "private column" of the ledger, while the bills themselves appear in the "steamer's" column. Merrow was at the time largely indebted to the company, and he used funds to meet the calls on his shares. I am unable to distinguish between a debt arising from dues and one from unpaid calls.

On the matter of the books, I rather think that those of the agent would be good evidence against him, but not good as against a sub-agent.

Therefore, on the short ground that this action is one for a loan, and that the managers had no power to borrow, I am for assoilzieing the defenders from the conclusions of the summons.

Lord Neaves was absent.

The Court adhered.

Counsel for Pursuers—Dean of Faculty (Watson)—Guthrie Smith—J. J. Reid. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Defenders — Asher — Jameson. Agents—Webster & Will, S.S.C.

Saturday, November 20.

FIRST DIVISION.

[Lord Shand.

STAFFORD (PETITIONER) *v.* M'LAURINS (RESPONDENTS).

Arrestment—Competency—Recall—Reduction—Personal Diligence Act, 1 *and* 2 *Vict. cap.* 114.

Held (1) that it is incompetent to use arrestments on the dependence of an action of reduction or of any other action containing no petitory conclusion other than that for expenses; (2) that a conclusion for expenses is not a "conclusion for payment of money" within the meaning of the Statute 1 and 2 Vict. cap. 114, sec. 16.

This was a petition praying for the recall of arrestments used upon the dependence of an action at the instance of Mrs M'Laurin and her husband against Mrs Stafford and her husband. The summons in that action concluded for reduction of a disposition granted by the pursuers in favour of Mrs Stafford, and of a ratification of the disposition by Mrs M'Laurin, both dated the 12th November 1874. The summons contained no further conclusion except for expenses.

Upon the 6th October following, the pursuers, by virtue of letters of arrestment purporting to be on the dependence of the action of reduction, arrested in the hands of John Sinclair, merchant, Oban, and Robert Lawrence, writer, Oban, all sums of money due by them to the petitioners.

The petitioners presented this petition to the Lord Ordinary under the Act 1 and 2 Vict. cap. 114, sec. 20, praying that the arrestments might be recalled on the ground that they were incompetent and without warrant, and further, that they were nimious and oppressive, and used for the purpose of embarrassing the petitioners.

The Lord Ordinary pronounced the following interlocutor:—

"19*th October* 1875.—Having heard counsel, recals the arrestments complained of, except to the extent of £100 sterling, and decerns, reserving the question of expenses."

The petitioners reclaimed, and argued—The action was one of reduction, and contained no pecuniary conclusion except for expenses. A conclusion for expenses was not a "conclusion for payment" falling under 1 and 2 Vict. c. 114, sec. 16; and apart from the statute, did not warrant arrestment. Moveable property could not be attached unless in respect of a debt already due. It was true that arrestment covered expenses, but these were incidents of the general claim, and followed it. If the case of *Ross* v. *Renton*, M. 690, were held to govern, the matter was already decided.

Authorities—*Ross* v. *Renton*, M. 690; Erskine's Inst. iii. 6, 10; Bell's Comms. (MacLaren's edition) ii. 67; *May* v. *Malcolm*, June 7, 1825, 4 S. 76; *Telford's Exr.* v. *Blackwood*, Feb. 3, 1866, 4 Macph. 369; *Dove* v. *Henderson*, Jan. 11, 1865, 3 Macph. 339; *Weir* v. *Otto*, July 19, 1870, 8 Macph. 1070; Statute 1592, cap. 144; Shand's Practice, 226; *Wilkie* v. *Tweedale*, Feb. 25, 1815, F.C.

The respondents argued—Arrestment covered expenses, and therefore arrestment upon a con-

clusion for expenses was valid. A conclusion for expenses was a conclusion for "payment of money."

Authorities—Statutes 33 Geo. III., cap. 74, sec. 3, and 54 Geo. III., cap 137, sec. 2; *Thomson* v. *Butter*, M. 1225; *Wight* v. *Wight*, May 23, 1822, 1 S. 424; *M'Donald* v. *Halket*, Feb. 2, 1825, 3 S. 494; *Ritchie* v. *M'Lachlan*, May 27, 1870, 8 Macph. 815.

At advising—

Lord President—This is a petition for recall of arrestments, and the Lord Ordinary has so far granted the prayer and has loosed the arrestments except to the limited extent of £100. The petitioner has reclaimed against the Lord Ordinary's interlocutor, and contends that the arrestments should be recalled *in toto*, on the ground that they are wholly incompetent. The question involved is one of some importance and of general application, but I confess that I entertain no doubt of the way in which it is to be solved. The action on the dependence of which the arrestments were used is one of reduction, and of nothing else. It concludes for the reduction of certain documents, and for payment of £100, or of whatever other sum shall be modified as the expenses of the process. It was conceded in the argument that, but for this last conclusion for expenses, the arrestments would be incompetent. The question before us therefore is reduced to this point, Whether in an action on the dependence of which otherwise arrestments could not be used, they are nevertheless made competent by the fact of the conclusion for expenses? I am of opinion that they are not. I think that the case of *Weir* v. *Otto*, 8 Macph. 1070, is directly in point, and that the present case goes no further. I am quite unable to see any distinction between the two diligences of inhibition and arrestment on the dependence of an action.

But there are various other authorities which have been referred to, and which are of great importance, because in these cases it was undoubtedly taken for granted that such a diligence as has been used here would have been incompetent. For example, there is the case of *Telford's Executor* v. *Blackwood*, 4 Macph. 369, in which the petitioner prayed for recall of arrestments used upon the dependence of an action of count, payment and reckoning. This action concluded for payment by the defenders to the pursuers of the amount that should appear to be due to them, while the pursuers at the same time expressed willingness to pay to the defenders whatever balance, if any, might be found after the count and reckoning to be due by them. With great difficulty the Second Division, when I sat there, held that the arrestment was competent, upon the ground that the conclusion was for payment of a sum of money apart altogether from the separate conclusion for a sum in name of expenses. If the conclusion for expenses had been considered to warrant the arrestment, we should have had no reason to consider the other point. That and a variety of other decisions are not direct authorities, but go greatly to aid the inference we draw from the case of *Weir* v. *Otto*.

The only difficulty which has been suggested arises from the consideration that arrestment covers the expenses of process, and in like manner the interest which may accrue on the principal sum from the date of citation. From this it is argued that in its original use it was intended that it should so secure the expenses, and did have this effect. But I think it was a good answer which was made to this argument that expenses and interest are future debts not due at the date of the arrestment on the dependence, and therefore not covered by it. They only afterwards become a part of the debt, as incidents of and outgrowths from it, and are recoverable under the ultimate process of furthcoming. That is a good explanation of the difficulty.

The argument used on both sides upon the words of the statute 1 and 2 Vict. cap. 114, secs. 16 and 17, is not of much avail. The words of these sections give authority to insert in the summons a warrant of arrestment, and describes the summons on the dependence of which, after the insertion of a warrant, effectual arrestment may proceed, as a summons "concluding for payment of money." It is contended on the one side that this can only be an action of debt concluding for payment of a sum of money; on the other, that a summons in which the only conclusion for payment is for expenses, is in strict language within the section of the Act. But the determination of the construction of these words of the statute brings us back to what we have already been considering. This statute must refer to summonses which conclude for payment of a principal sum of money.

It has neither been established by practice nor by decision that this arrestment is good, and the appeal to the Act of Parliament is equally unavailing. I cannot assent to the view of the Lord Ordinary, and I am of opinion that the arrestment must be recalled *in toto*.

Lord Deas—I am clearly of the same opinion. All the authorities go in the direction pointed out by your Lordship, and the decisions as to the competency of the diligence of inhibition in actions of a similar nature to the present lead to that result. Apart from these, I should be of the same opinion.

The diligence which the law allows either by arrestment or by inhibition on the dependence of an action is an extraordinary remedy, and being so, it is not to be extended beyond the length to which by practice it has been carried. No instance has been cited where the privilege of that extraordinary remedy has been given in an action which contains conclusions for payment of nothing further than of expenses. All the authorities, so far as they go, are against such a proceeding. An arrestment on the dependence might then be used in every action. The conclusion for expenses is no part of the summons, and it is to be held as merely expressing that which is an incident of the action. I quite agree with your Lordship that the explanations with which we were favoured against the argument which was used by the respondent, that arrestment covers expenses where these are allowed, were perfectly satisfactory.

If I were to construe the statute, I should be of opinion that the conclusion for expenses is no part of the conclusions of the summons as therein referred to. To lead to the opposite result, we should expect first that the practice should support it, and the burden lies on those who main-

tain that construction to show this. I am of opinion that the Lord Ordinary's interlocutor should be recalled.

LORD ARDMILLAN—Even if this question were entirely open, and now to be decided on principle, I should be of opinion that in a case of this kind, which is simply an action of reduction, where there is no petitory conclusion for payment of money arrestment on the dependence is not competent.

Arrestments in security on the dependence of an action is an extraordinary remedy,—an equitable and appropriate remedy,—but not, I think, to be extended beyond the limits which have been sanctioned by law, and recognised by practice.

I do not think the case turns on the statute of 1 and 2 Vict. The competency of using arrestments does not depend on that statute, though the procedure in arrestment was regulated. I agree with your Lordship in the chair in regard to this Act. I have no doubt that where there is a petitory conclusion for money, an arrestment on the dependence will be available to the pursuer to cover expenses.

When competently used as regards the leading petitory conclusion, it will be effectual to secure the expenses. This result is, I think, right on principle, the expenses as it were growing during the procedure, and attaching to the debt concluded for; and it is according to practice.

But on this summons there is no allegation of a present debt, no conclusion for a present payment, no ground for the extraordinary diligence of arrestment on the dependence.

The point has been decided in regard to inhibition in the case of *Dove* v. *Henderson*, 11th January 1865, and in the case of *Weir* v. *Otto*, 19th July 1870. Both judgments — one in each Division—were unanimous. In the first of these cases the opinion of Lord Curriehill, and in the last the opinion of Lord Justice-Clerk (Moncreiff), are conclusive; and the law has been so assumed in other cases, and so far as I have been able to ascertain, the use of either prohibition or arrestment to secure expenses only, where there is no petitory conclusion in the summons, is unknown in practice. No precedent for it has been adduced.

On principle, the able argument of Mr Balfour was to my mind quite satisfactory. In point of authority, the only decisions truly in point are adverse to the competency; for as regards this question, I am unable to perceive any sound distinction between inhibition and arrestment. And to sustain this arrestment would be against usage and without precedent, contrary, as I believe, to the understanding and practice of the legal profession.

LORD MURE—I am entirely of the same opinion. I entertained at first a little doubt as to the effect of the statute, but on considering the authorities I am satisfied that the words of the Act cannot be held to have operated an alteration of the law, but were merely intended to introduce a change on the previous practice and to allow the addition of a warrant of arrestment to a summons.

Counsel for Petitioners—Balfour—J. P. B. Robertson. Agent—Thomas White, S.S.C.

Counsel for Respondents—Dean of Faculty (Watson)—Asher. Agents—Hamilton, Kinnear, & Beatson, W.S.

Tuesday, November 23.

SECOND DIVISION.

[Lord Rutherfurd Clark.

TOWN COUNCIL OF LEITH *v.* LENNON.

Process — Reclaiming Note—Leave to Reclaim — Administration of Justice and Appeals Act (48 *Geo. IV. c.* 151), § 16.

Parties who had failed to reclaim against an interlocutor within the time allowed by statute, applied to the Lord Ordinary for leave to submit it to review under the 16th section of the Act 48 Geo. III. c. 151, which provides "that if the reclaiming or representing days against an interlocutor of a Lord Ordinary shall from mistake or inadvertency have expired, it shall be competent, with the leave of the Lord Ordinary, to submit the said interlocutor by petition to the review of the Division to which the said Lord Ordinary belongs."

The Lord Ordinary refused leave, and against this interlocutor a reclaiming note was presented to the Inner House. *Held*, without deciding whether in every application under this section of the statute it would be incompetent to bring the decision of the Lord Ordinary under review, that in the circumstances of this particular case, and as the right contended for was a mere possessory question of no great importance, the judgment of the Lord Ordinary should be adhered to.

Opinion, per Lord Justice-Clerk, that under said section the Lord Ordinary is the sole judge of the propriety of giving leave to reclaim.

The Provost, Magistrates, and Council of Leith raised in the Bill Chamber a note of suspension and interdict against Mrs Lennon, residing in Leith. Their statement of facts set forth that the respondent had, in violation of the complainers' rights, interfered with the structure of, and begun operations of a prejudicial nature upon, a boundary wall between their respective properties, but built wholly upon that of the complainers. This wall formed the south-west boundary of a public park in North Leith.

The complainers accordingly craved their Lordships to "suspend the proceedings complained of, and to interdict, prohibit, and discharge the respondent from using the wall forming the south-west boundary of the public park in North Leith in any way to the detriment thereof, and particularly from interfering with the present condition of the said wall, by lowering the same or adding to the height thereof, or from building or carrying on any building operation either on or against the said wall, or that may in any way affect the same; and to ordain the respondent to remove any stone, lime, or other building materials or erections she may have placed or caused to be placed on the said boundary wall, and to restore the same to the condition in which it was before