

the effect that when the writing was a mutual one, the stamping must be got done at the joint expense of the parties to it, I would not have been for disturbing it; but, in the absence of that practice, I think it clear that the pursuers must bear the expense, in the first place, of what is indispensable to their using the document as they propose. The authorities cited have all reference to questions as to liability for stamping arising at the end of a cause. Such was the point in the cases of Smaill, Flowers, Wylie & Lochhead, and Logan. I think these cases have nothing to do with the present; still less has the case of Law. But I think the case of Grant v. Walker, Grant, & Co. was decided upon a principle which we ought to apply here. It was a case of a landlord and tenant. The landlord was *in petitorio*, and he was held bound to get any document stamped that was necessary for his case. The reason was thus expressed by Lord Corehouse—"If Grant could say that there was any of the documents on which he did not found, while Walker, Grant, & Co. founded on it, then the expense of stamping such documents might, in the meantime, be laid on Walker, Grant, & Co. But, in place of this, Grant founds on all the documents in making his application to the Court, and he must pay for stamping them at least in the first instance." That statement, I adopt; therefore I am for recalling the Lord Ordinary's interlocutor, and remitting to him to give the pursuers an opportunity of getting this document stamped at their own expense.

The other Judges concurred.

Interlocutor altered with expenses.

Agent for Pursuers—J. M. Macqueen, S.S.C.

Agents for Defender—White-Millar & Robson, S.S.C.

#### STEVEN v. M'DOWALL'S TRUSTEES

(*ante*, vol. i. p. 260, and vol. ii. p. 155).

*Diligence—Arrestment—Recal—Expenses.* A petition for recal of arrestment on the dependence is a separate process, and the expenses of it must either be reserved or disposed of when the petition is disposed of.

*Expenses—Accountants.* Circumstances in which fees amounting to £696, 3s., paid to two accountants engaged at a jury trial, allowed against the losing party.

*Expenses—Counsel.* Circumstances in which the expense of three counsel allowed at a trial.

This case was tried by a jury, who returned a verdict for the defenders, and the Court found them entitled to expenses. It was before the Court to-day on objections by both parties to the auditor's report. The pursuer objected to a sum of £590, 2s. allowed as paid to Mr J. Wylie Guild, and a sum of £106, 1s. allowed as paid to Mr Walter Mackenzie, accountants employed by the defenders for and at the trial, on the ground that these sums were excessive. The defenders objected to the report on the ground that the auditor had disallowed a sum of £29, 14s. 3d., incurred by them in obtaining the recal of arrestments which had been used by the pursuer on the dependence.

The auditor made the following special report in regard to these two points; and as to whether three counsel should be allowed, which point he reserved for the Court to dispose of:—

"This account was submitted to the late auditor (Mr Hunter) for taxation in July last. It was examined by him in presence of the agents for the parties, and the audit was completed, except as regards two items of outlay—being the fees paid

to Mr James Wylie Guild and Mr Walter Mackenzie, accountants in Glasgow, for their trouble in preparation for examination at the trial, and attendance giving evidence as witnesses for the defenders. These are important items, Mr Wylie Guild's fees being stated at £753, and Mr Mackenzie's at £170, 12s. 6d.; together, £923, 12s. 6d. The information before Mr Hunter as to these fees was not sufficient to enable him to dispose of the objections to them stated by the pursuer, and the completion of his report was consequently delayed for further information.

"In this position of matters the auditor has been called upon to complete the audit, and to report. The parties have not thought it necessary to resume before him the taxation of the account so far as disposed of by his predecessor, and the discussion before him has therefore been confined to the fees paid to Mr Wylie Guild and Mr Mackenzie. To enable the auditor to dispose of the question as to these fees, the parties have laid before him the records and prints used at the trial, and detailed statements of the work done and charges made by the accountants employed on both sides. The auditor has carefully considered these, and he has also called for and examined the notes taken by Mr Wylie Guild, and draft states made up by him and his assistants in the course of his preparation for examination as a witness. The auditor has further had the advantage of receiving full explanations from the agents on both sides, from Mr Wylie Guild, who took the lead in making the investigations into the accounting on the part of the defenders, and from Mr George Auldjo Jamieson, who acted in like manner for the pursuer.

"Both parties are agreed that the case is one in which the aid of accountants was absolutely necessary; and, in the discussions before the auditor, no question has been raised on the part of the pursuer as to Mr Wylie Guild's statement of the time actually given to the investigations conducted by him and his assistants—the charge being disputed chiefly on the ground that the investigations embraced a wider field of inquiry, and were more minute than were required by the nature of the actions raised by the pursuer, or, at all events, by the issue sent to the jury. The auditor has arrived at the conclusion that, having regard to the whole circumstances of the case, the defenders and their accountants were entitled, in the exercise of a fair discretion, to make the investigations in the manner appearing from Mr Wylie Guild's account; and, consequently, that the expense thereby incurred, although unusually heavy, must (subject to taxation according to the regulations as to witnesses in jury causes) be allowed as expenses of process. But the fees under consideration are so large, and the amount objected to by the pursuer so great, that it is obvious the question must ultimately be disposed of by the Court, and not by the auditor. At one time the auditor was inclined to report the facts without offering any opinion; but it appears to him that he will best consult the convenience of the Court, and put the matter in shape for final settlement, by taxing the fees, and indicating the grounds of his opinion, leaving it to the pursuer to object to his report.

"The pursuer maintains his opposition to Mr Wylie Guild's charge mainly, as the auditor understands, on the ground that the eminent accountant (Mr Jamieson) who conducted the pursuer's case made all the investigations which he regarded as necessary with a view to the trial in

a much shorter time, and at a much smaller cost. Mr Jamieson's charge for his own time and that of his clerks, as stated in the account laid before the auditor, is £285, 1s. 5d., being little more than one-third of the charge stated by Mr Wyllie Guild—viz., £753. The difference between these sums is very great; but it is thus (and, to the auditor's mind, satisfactorily) explained:—Mr Jamieson was acting for the pursuer, who had been a partner of the firm whose affairs formed the subject of investigation, and who had the power to fix, and could narrow as he thought proper, the limits of the case to be submitted to the jury. Mr Wyllie Guild, on the other hand, was acting for the trustees of a deceased partner of the same firm, and under the disadvantage that, not knowing the line or extent of attack to be made by the pursuer, he was bound to be prepared on all points. Mr Jamieson's investigations appear to have been (with the exception of certain pig-iron transactions) exclusively confined to the cash operations recorded in the cash-books of the firm. But Mr Wyllie Guild, while he made up similar statements of these cash and pig-iron transactions, considered it also necessary to prepare detailed statements of materials purchased and work produced, in order to show the whole extent of the business carried on by the pursuer and his deceased partner, both financial and operative, involving a minute analysis of the whole day-books, sale-books, and invoice-books of the firm, and an adjusted balance of the whole business for a considerable period. Another branch of investigation charged for by Mr Wyllie Guild has no counterpart in Mr Jamieson's account—viz., the collection of materials for, and the preparation of, a statement of the accumulation of the deceased partner's private fortune. It was stated by Mr Wyllie Guild that more than two-thirds of his charges are applicable to work of which there is no counterpart in Mr Jamieson's account.

"The investigations made by Mr Wyllie Guild beyond those of Mr Jamieson are stated to have been, in the opinion of the defenders and their advisers, necessary to enable them to repel the charge of fraud brought by the pursuer against his deceased partner, whom they represented; and it seems not improbable that these additional investigations may have been as necessary for the protection of the estate, as for the vindication of the character of the trustee.

"An abstract of Mr Guild's charges is given at the end of his account in these terms:—

"The whole time occupied between June 1865 and 12th April 1866 was—

Self—In Glasgow equal to 95 days	£299	5	0
In Edinburgh at consultations,			
&c., 6 days	31	10	0
In Edinburgh at trial 4 days	42	0	0
Clerks—Principal clerk equal to 115			
days in Glasgow	120	15	0
And in Edinburgh at trial 4			
days	6	0	0
Other clerks, some of them			
either wholly or partially			
engaged for a period equal			
in all to 324 days	243	0	0
	£742	10	0
Expenses	10	10	0
	£753	0	0

"The rate of charge for Mr Wyllie Guild's own time in Glasgow is £3, 3s. per day; while in

Edinburgh at consultations £5, 5s. per day; and in Edinburgh at trial £10, 10s. per day. The charge for time in Glasgow does not exceed the rate which has been recognised in similar cases, and the auditor is of opinion that the charge of £299 should be sustained. The charge of £31, 10s. for attending consultations in Edinburgh is in a different position, and, although perhaps a proper charge as between agent and client, does not seem admissible as against the unsuccessful party. The auditor has accordingly disallowed it, and he has also restricted the charge of £42 for attending the trial to £8, 8s., being at the rate of £2, 2s. per day, in accordance with the regulations. The charge of £10, 10s. for expenses, the auditor has reduced to £1, 1s., as the proper allowance for railway fares, &c., to attend trial.

"The charges made by Mr Guild for the time of his clerks are at the following rates:—For 'principal clerk,' while in Glasgow, £1, 1s. per day, and while in Edinburgh at trial £1, 10s. per day; for 'other clerks,' 15s. per day.

"It seems to the auditor that the charge for the principal clerk while in Glasgow is reasonable, and should be sustained, but that the charge for attendance in Edinburgh should be disallowed. The auditor is further of opinion that the allowance of 15s. per day for each of the 'other clerks' is too high in proportion to the charge for the principal clerk, and that it should be restricted to 10s. 6d. per day. He has given effect to these views in taxing the charges.

"The auditor does not consider it necessary to make any special remark on the fees paid to Mr Walter Mackenzie. They are somewhat less in amount than the fees paid by the pursuer to Messrs M'Cowan and Brown of Glasgow, the accountants employed by him to corroborate Mr Jamieson, the fees of Mr Mackenzie being £170, 12s. 6d., and those of Messrs M'Cowan and Brown being £173, 12s.

"Mr Mackenzie's charges are thus stated at the end of his detailed account—

Self in Glasgow equivalent to 27 days	£85	1	0
In Edinburgh at consultation 1 1/2 days	7	17	6
In Edinburgh at trial 4 days	42	0	0
Experienced clerks in Glasgow, three of			
them, equal in all to 30 days	31	10	0
Expenses	4	4	0
	£170	12	6

Applying to Mr Mackenzie's charges the principles adopted in dealing with Mr Wyllie Guild's charges, the auditor has disallowed the charge of £7, 17s. 6d. for attendance in Edinburgh at consultations, and has restricted the charge for attendance at trial to £8, 8s., and that for expenses to £1, 1s. In dealing with Mr Mackenzie's clerks' fees, the auditor proposes to allow for one of the three clerks (as 'principal clerk') £1, 1s. per day for ten days, and 10s. 6d. per day for each of the other two for ten days, thus restricting the charge to £21.

"The auditor observes that in taxing the account Mr Hunter has disallowed *in toto* (and without taxation of the details) the expense incurred by the defenders to their agents in Edinburgh and Glasgow in obtaining a loosing of the arrestments used by the pursuer on the dependence of the action of count and reckoning, amounting to £29, 14s. 3d. The auditor is aware that, in disallowing these expenses, his predecessor was following out the practice of the auditor's office; but, so far as known to him, the practice has never received the direct sanction of the Court, and the

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 Carnallock "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