their claim, and found the trustee liable in expenses. The trustee reclaimed, stating that he only insisted in his note in so far as expenses were found due against him. To-day the Court adhered, Lord Benholme dissenting.

The LORD JUSTICE-CLERK said—This resolves into a mere matter of expenses. The question, however, is one of considerable importance in practice, because it has a direct bearing upon the trustee's duty under the 126th section of the Bankrupt Act, and the manner in which he ought to deal with claims of creditors needing explanation or examination to support them. The claim in the present case was a very peculiar one, made after the lapse of a long time. The cashier had managed to deceive his employers, and to blind them to such an extent that no suspicion arose of the fraud that had been practised upon them till his death. In these circumstances it was certainly incumbent upon the persons claiming to give the trustee every assistance and explanation in their power. It occurs to me that the case was of a nature to be more suited for investigation by the trustee than for judicial inquiry. The affidavits lodged by the claimants gave all the explanations which the Court now have in the proof upon which the trustee can no longer resist the claim. It may be that they are in more general terms; but if amplication or detail was all that was required, these would have been obtained under an investigation by the trustee. The policy of the statute was to encourage extra-judicial investigation whenever competent and likely to lead to a settlement of the claim. The trustee is empowered to require further evidence, and power is given him under the Act for the first time to put the creditor or any other party on oath. I can't think that this power was conferred upon trustees but for the purpose of enabling them to get all the light which a judicial investigation would afford. The trustee ought to take all the evidence he can before he rejects a claim and throws a claimant into Court. Had the trustee done so in this case, what would have been the result? The partners of the firm and their clerks would have given him explanations of the cashier's duties, the way in which he had discharged them, and the way in which his work was carried on. That investigation would not have been attended with any expense. It would be hard to say that if the trustee chose, without calling for this evidence, to reject the claims, and put the parties to the expense of constituting it in an appeal, that he should not pay their expenses if they were successful.

LORD BENHOLME dissented on the ground that the course adopted by the trustee was not beyond the discretion conferred upon him by the statute, considering the peculiar nature of the case, and that he could not be held to have been guilty of rash litigation, more particularly as the claimants had been in fault in not attending to their interests for a period of seven years after the cashier had left their employment.

The other Judges concurred.

Tuesday, Nov. 28.

FIRST DIVISION.

M'CLELLAND (LIQUIDATOR OF WESTERN BANK) *v.* BUCHANAN AND OTHERS (BROWN'S TRUSTEES).

Appeal to House of Lords—Remit—Expenses. (1) Held (Lord President, dub.) that under a remit from the House of Lords to decern in terms of the conclusions of the summons, it is incompetent to decern for expenses not mentioned in the remit; and (2) motion by a party, who had obtained a reversal of a judgment of the Court of Session, for the expenses incurred here refused.

Counsel for Pursuer—Mr Shand. Agents—Messrs Davidson & Syme, W.S.

Counsel for Defenders—The Lord Advocate and Mr W. Ivory. Agents—Messrs Gibson-Craig, Dalziel, & Brodies, W.S.

This was a petition to apply a judgment of the House of Lords. The Court of Session, affirming the judgment of the Lord Ordinary, had found that the defenders were not liable *personally* in payment of calls. The House of Lords ordered and adjudged that the interlocutors appealed should, with respect to all the defenders except Dr Andrew Buchanan, be reversed; that with respect to him the appeal should be dismissed with costs; and that the cause should be remitted back to the Court of Session with directions to pronounce decree against the defenders, other than the said Andrew Buchanan, "in terms of the conclusions of the summons in the action in that Court in the proceedings mentioned, subject to the provisions of this order and judgment, and to do farther in the cause as shall be just and consistent herewith."

The petitioner now moved the Court to apply the judgment, to decern against all the defenders (except Dr Buchanan) "in terms of the conclusions of the summons, and to find these defenders liable in the expenses of the cause in this Court, and also the expenses of the present application and procedure therein." The petitioners also prayed the Court to remit to the Lord Ordinary to proceed with the cause. This last motion was supported by a reference to the Lord Ordinary's interlocutor, adhered to by this Court, which found that the defenders did not undertake any personal liability, but that of trustees only, and it was maintained that the pursuer was now entitled to go into an inquiry into the state of the funds of the trust, with the object of attaching liability *qua* trustee to Dr Andrew Buchanan. The Court, however, held that this was altogether inadmissible, because the action was not directed against the defenders as trustees, but *personally*, and was carefully framed for the purpose of trying the question of their personal liability alone.

The defenders further objected to the petition in so far as it asked decree for expenses incurred in this Court prior to the appeal. The House of Lords had not found them liable in costs of the appeal; and under the remit to this Court it was not competent to deal with the expenses in this Court. The remit to this Court was to pronounce decree in terms of the conclusions of the summons, and thus exhaust the cause. In such cases it has been decided that this Court cannot give expenses. (Stewart *v.* Scott, 14 S. 692, and Colquhoun *v.* Borrows, 17 D. 245). When the House of Lords intends that expenses in this Court should be awarded it always says so in the judgment. (Hay *v.* Magistrates of Perth, 1 Macph. 41.)

It was answered that the remit was to decern in terms of the conclusions of the summons, and one of these conclusions was for expenses. The Court were therefore bound, in applying the judgment, to find expenses due.

The Court applied the judgment, decerned against the defenders (except Dr Buchanan) for the calls sued for, and assoilzied Dr Buchanan, but *quoad ultra* refused the petition.

The LORD PRESIDENT said that as to the expenses there were two questions—first, whether they could competently, under the remit, find expenses due: and second, whether, assuming the competency, they ought to do it. He rather thought that under the general words of the remit, "and to do farther in the said cause as shall be just and consistent herewith," they might, if they were so disposed, find expenses due, but he held that this was not a case in which expenses should be given.

The other judges, while agreeing with the Lord President that this was not a case for expenses, held that under the remit they were bound to decern in terms of the conclusions of the summons, and that they could not competently do any more. It was altogether contrary to the practice of this Court to hold that a decree in terms of the conclusions of a

summons necessarily imported a decree for expenses. No decree of this Court was ever construed in this way. In fact it was not competent to decern in terms of the conclusions, and to find the party in whose favour the decree was given liable in expenses.

LORD BELHAVEN *v.* HARVIE, ETC.

Process—Proving the Tenor—Relevancy—Amendment. Held that an averment of the *casus ammissionis* in a proving of the tenor was insufficient, but amendment allowed.

Counsel for Pursuer—Mr Deas. Agents—Messrs Duncan & Dewar, W.S.

This was an unopposed action of proving the tenor of a charter dated in 1605. The only *casus amissionis* averred was, that in the course of the long time that has elapsed since its date, the deed had been lost in passing through the hands of the successive proprietors and their agents, or had gone amissing *casu fortuito.* The Court holding this averment insufficient, allowed the case to stand over that the summons might be amended.

Thursday, Nov. 30.

In this action the court to-day sustained an amendment of the libel to the effect that neither the pursuer nor his agents had ever seen the deed, the tenor of which was sought to be proved, and so far as they could learn, no person now alive had ever seen it; that it must have gone amissing at a period beyond memory; and that the pursuer was consequently unable to specify either the time or the manner of its disappearance. The pursuer was thereupon allowed a proof of the *casus amissionis* and adminicles alleged.

Tuesday, Nov. 28.

YOUNG *v.* ANDERSON.

Submission — Decree-Arbitral — Reduction — Ultra fines submissi—Corruption. (1) Averments that an arbiter had exceeded his powers, which held irrelevant; and (2) proof allowed before answer of averments that he had acted corruptly.

Counsel for Pursuer—The Solicitor-General and Mr Gifford. Agents—Messrs Baxter & Mitchell, W.S.

Counsel for Defender—Mr Gordon and Mr Mackenzie. Agents—Messrs Ellis, W.S.

These were conjoined actions of suspension of a charge on, and reduction of, a decree arbitral. The parties were partners in the working of the Bartonshill Colliery. They dissolved partnership on 28th February 1863, and appointed Mr William Moore, C.E., in Glasgow, as sole arbiter, with full power to dispose of "all disputes and differences that have arisen or may arise betwixt them." Mr Moore pronounced decree against the pursuer for considerable sums, whereupon this litigation commenced. The grounds of reduction were that the arbiter had exceeded his powers (1) in decerning for a debt claimed by the firm from the pursuer as a third party, while the submission was limited to questions arising betwixt the parties as partners of the firm; (2) in setting aside and disregarding an agreement and docqueted account betwixt the parties; and (3) in disregarding certain invoices rendered by the defender to the pursuer, and debiting the pursuer with much larger quantities of coal than these invoices warranted. The pursuer also alleged that the arbiter had acted corruptly in delegating his duties to the clerk to the submission, in pronouncing judgment without sufficient evidence and otherwise.

LORD BARCAPLE held that the pursuer's averments as to excess of duty on the part of the arbiter were irrelevant; but as to the averments of corruption he thought the pursuer was entitled to lead proof.

Both parties reclaimed, and to-day the Court adhered, and remitted to the Lord Ordinary to allow a proof before answer of such of the statements on record as he should think proper.

SECOND DIVISION.

LATTA *v.* DALL.

Bankruptcy — Trusteeship — Competition — Oath of Creditor—Power of Sheriff to amend. Held that a Sheriff, if not present at the meeting for the election of trustee, may allow a creditor to amend an affidavit not framed in terms of the Bankrupt Statute, when considering the report made to him of the minutes of the meeting.

Counsel for the Appellant—The Lord Advocate and Mr Pattison. Agent—Mr Somerville, S.S.C.

Counsel for the Respondent—The Solicitor-General and Mr J. C. Thomson. Agents—Messrs Millar & Robson, S.S.C.

This is an appeal from a deliverance of the Sheriff-Substitute of Edinburgh, by which he allowed the Rev. John Ewen, a creditor in the process of sequestration of the estates of Henderson & Chisholm, wool merchants, Leith, who voted for the respondent in a competition with the appellant for the office of trustee, to amend the claim upon which his vote had been given at the meeting of creditors for election of a trustee. The appeal is brought under the following circumstances:—At the meeting in question two affidavits for Mr Ewen were produced, setting forth that he was a creditor in two sums of £310, 7s. 9d., and £601, 7s. 11d. The affidavits were not framed in terms of the 60th section of the Bankrupt Act, inasmuch as the deponent did not therein value the obligation of co-obligants, and deduct such value from the debts and specify the balance. The meeting was not attended by the Sheriff, and the preses was chosen by the creditors. There was an apparent majority in favour of the respondent as trustee; but the Sheriff, who is bound by the Act to make declaration of the state of the votes, was not present. The preses reported to the Sheriff the minutes of the meeting. When the case came up before the Sheriff the same objection as before was taken to Mr Ewen's affidavits; but the Sheriff allowed him to rectify them in terms of the 51st section of the Bankrupt Act.

The question raised in this process is, whether or not the Sheriff's authority to give such a direction could competently be exercised after the vote of Mr Ewen had been given and recorded at the meeting. The Lord Ordinary on the Bills (Curriehill) adhered to the deliverance of the Sheriff, and dismissed Mr Latta's appeal.

The Court, after reviewing the course of legislation in reference to the question raised in the appeal, adhered to the interlocutor of the Lord Ordinary, holding that the 51st section of the Bankrupt Act was a remedial clause, having for its object to prevent the votes of *bona fide* creditors being rejected by reason of informalities in the form of their affidavits; and that in order to work out the 51st section, it was necessary that the Sheriff, when he had not been present at the meeting for the election of a trustee, when the proceedings came before him, should then have the power to comply with the provisions of the section. If this were not so, the intention of the 51st section would be defeated. It was important to observe that the 51st section did not leave it in the discretion of, but made it imperative upon, the Sheriff to call upon a creditor to rectify an oath. Had he been present at the meeting, he would have done so then. It is only after he has called upon the creditor to amend the affidavit, and he has failed to do so, that the Sheriff is entitled to reject or disallow his oath.