mutual gable, I agree with your Lordships in thinking that the expenses thereby occasioned must be disallowed.

The Court altered the interlocutor of the Lord Ordinary by disallowing the expenses of the proof, on the ground that the pursuer had failed to make out his averments, and by varying the date from which interest was to run on the sum found due from 5th March 1879 to 8th November 1880, at which latter date the defenders' title was completed.

Counsel for Reclaimers—Keir—Shaw. Agent—George Andrew, S.S.C.
Counsel for Respondents—J. P. B. Robertson—Young. Agents — Nisbet & Mathison, S.S.C.

Thursday, October 19.

SECOND DIVISION.

ORR, PETITIONER.

Bankruptcy—Petition for Sequestration—Mandate—Recall of by Death of Mandant—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79).

A mandate granted by an insolvent authorising his mandatory to apply for sequestration of his estates under the Bankruptcy Acts, falls by the death of the mandant before the deliverance of the Sheriff awarding sequestration is pronounced. A sequestration therefore *declared void* where the mandant had died previous to the deliverance awarding sequestration.

Alexander Brown Arthur granted a mandate, dated 4th October 1882, in favour of William Veitch Orr, the present petitioner, authorising him to apply for the sequestration of his estates in terms of the Bankruptcy Acts. Mr Orr having obtained the consent of certain concurring creditors, prepared a petition at the instance of the insolvent for sequestration of his estates, which was lodged with the Sheriff-Clerk of Lanarkshire at Glasgow on Tuesday, 10th October current. A deliverance in usual form sequestrating the insolvent's estates, and appointing the meeting of creditors for the election of trustee to be held on 23d October, was pronounced by the Sheriff-Substitute on the following day, Wednesday the 11th. Thereafter the usual *Gazette* notice was inserted, and an abbreviate of the sequestration was recorded in the Register of Inhibitions as required by the statute. Upon the following day, Thursday the 12th, the petitioner learned that the body of a man which had been discovered in Leith Docks upon the said Tuesday, 10th October, had been identified as that of the said Alexander Brown Arthur. It thus appeared that the mandate granted by the deceased had fallen by his death previous to the date of the said deliverance, although this was not known to the petitioner at the time. It had been discovered that the estate was not only hopelessly insolvent, but that the insolvent had for some time been in the habit of pawning and appropriating to his own uses goods supplied to him on sale and commission by certain of his creditors.

Mr Orr thereupon presented this petition to the Second Division of the Court of Session. The prayer of the petition craved the Court "to pronounce a deliverance confirming the deliverance of the Sheriff-Substitute, and all that has followed thereupon, and sequestrating the estates of the said Alexander Brown Arthur, and declaring the same to belong to his creditors for the purposes of the Bankruptcy (Scotland) Act 1856, and Acts explaining and amending the same; and to appoint the creditors to hold a meeting on the 23d October, at the hour and place fixed by the Sheriff-Substitute; and to remit the sequestration to the Sheriff of Lanarkshire at Glasgow."

The Court, after hearing counsel on the competency of the petition, pronounced this interlocutor:—

"The Lords having considered the petition, and heard counsel for the petitioner thereon, in respect that it appears that the bankrupt Alexander Brown Arthur was not in life when the deliverance awarding sequestration was pronounced, and that the sequestration was therefore void, Refuse the prayer of the petition."

Counsel for Petitioner—G. Burnet. Agent—R. C. Gray, S.S.C.

Saturday, October 21.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

THOMSON *v.* MUNRO.

(Sequel to *Thomson* v. *Munro, et e contra*, reported *ante*, 28th June 1882, vol. xix. p. 739.)

Arbiter — Corruption — Process — Reduction of Decree-Arbitral—Jury Trial — Discretion of Court in allowing Proof or Jury Trial.

The pursuer of an action of reduction of a decree-arbitral averred that the arbiters whose award he sought to reduce had acted in a manner inconsistent with their duty as arbiters in refusing to him as one of the parties to the submission a hearing upon various points connected with the case, and in taking certain evidence outwith his presence, and in determining by lot various points on which they had differed. He pleaded that these acts and omissions amounted in law to corruption. He moved the Court to appoint the cause to be tried by jury as being a question of fact. *Held* (*aff.* judgment of Lord M'Laren) that the mode of trial being in the discretion of the Court, and the question for decision depending on the legal import of the facts which might be proved, the case was unsuited for jury trial, and ought to be sent to proof before the Lord Ordinary.

In the previous actions between these parties (reported *ante*, vol. xix. p. 739) the First Division of the Court on 28th June 1882 adhered to the interlocutor of the Lord Ordinary (M'Laren) in so far as it dealt with and contained findings in regard to expenses, but *quoad ultra* superseded consideration of the reclaiming-note for Thomson (the pursuer in the present action), in order that

he might, if so advised, state in the form of a reduction certain objections to the award of the arbiters which the Lord Ordinary and the Court held could not be stated as defences to an action for sums due under the award, or in an action for repetition of sums already paid under the contract in the course of the reference on the ground that they were not legally due.

Thomson raised the present action against Munro for reduction of the award of the arbiters, alleging that they had acted *ultra fines compromissi*, and had acted corruptly in various matters, and in particular in refusing the pursuer a hearing upon numerous questions which came before them, and also in refusing to take evidence on certain points, and in taking evidence on other points in the absence of the pursuer and without notice to him. He averred that their decision on some points which came before them was arrived at by tossing and casting lots. The defender denied all the material averments of the pursuer.

The pursuer pleaded, *inter alia*—"(2) The pursuer is entitled to have decree of reduction as concluded for, in respect that the acts and omissions of the arbiters condescended on amount in law to corruption." He moved the Lord Ordinary to order issues in order that the questions raised in the reduction be tried by jury.

The Lord Ordinary allowed the parties a proof before answer under the Evidence (Scotland) Act 1866, and fixed a day for taking the evidence.

The pursuer reclaimed, and argued that he was entitled to have the case tried by jury instead of by the Lord Ordinary, because the matter at issue was a question of fact, that question being whether the arbiters had acted in the manner condescended on. If that was made out by the verdict of the jury, the consequence that the award was corrupt in law immediately followed.

Counsel for the respondent were not called upon to reply.

At advising—

Lord President—I think that the Lord Ordinary is right in the conclusion at which he has arrived. No doubt if a case such as this had occurred ten or twelve years ago it would have been sent to a jury, but a different practice now prevails. It is a matter entirely in the discretion of the Court, in circumstances like the present, to consider what mode of investigation is best for determining the matter at issue between the parties.

The ground of reduction here is an averment of corruption, in the ascertainment of which the pursuer's counsel says are involved some questions of fact; on that account he claims that the case should be sent to a jury. But it appears to me that this is not merely a question of fact, but that a great deal will depend upon the character of the facts. The second plea-in-law for the pursuer is in these terms:—"The pursuer is entitled to have decree of reduction as concluded for, in respect that the acts and omissions of the arbiters condescended on amount in law to corruption." The issue to be answered therefore is, whether the acts of the arbiters did amount to legal corruption? This to my mind is a question of law much more suited for the decision of a judge than for determination by a jury.

Lords Mure and Shand concurred.

Lord Deas was absent.

The Court adhered.

Counsel for Reclaimer — J. C. Smith. Agent —W. Elliot Armstrong, S.S.C.

Counsel for Respondent — Mackay. Agent— Andrew Clark, S.S.C.

Thursday September 14, 1882.

OUTER HOUSE.

[Lord M'Laren, Ordinary on the Bills.

APPEAL—JOHN WILSON & CO.

Bankruptcy — Discharge of Bankrupt — Bankruptcy and Cessio (Scotland) Act 1881 (44 *and* 45 *Vict. cap* 22), *sec.* 6, *sub-sec* (1).

Circumstances in which a bankrupt's petition for discharge, presented after the expiry of more than two years from the date of his sequestration, *refused* on the ground that he had failed to discharge the burden of proving that his inability to pay five shillings in in the pound had arisen from circumstances for which he could not justly be held responsible.

On the 13th June 1879 the estates of John Wilson & Co., bleachers and finishers, Castlebank Works, Partick, were sequestrated, and on the 24th June a trustee was appointed. The same firm, which then included two partners, viz., John Wilson and J. C. Kerr, had been sequestrated on the 9th November 1877. In this (first) sequestration the bankrupts had been discharged on payment of a composition dividend of 2s. 4d. per £1 on the company's debts, and 2d. per £1 on the debts of each of the partners. This discharge was obtained on the 25th November 1878, and thereafter John Wilson was reinvested in the estates of the firm, and carried on the business as sole partner of the firm of John Wilson & Co., down to the date of the second sequestration. On 13th June in this (second) sequestration the trustee was only able to pay to his ordinary creditors a dividend of 2d. per £1, which was declared on 8th December 1881. In the course of that month, after the expiry of more than two years from the date of the sequestration, the bankrupt presented to the Sheriff of Lanarkshire this petition for discharge. The liquidator of the Caledonian Heritable Securities Coy. (Limited) lodged objections to the granting of the discharge, founding mainly on the Bankruptcy and Cessio (Scotland) Act 1881 (44 and 45 Vict. cap. 22), sec. 6, sub-sec. (1), which provides—"A bankrupt shall not at any time be entitled to be discharged of his debts unless it is proved to