had confidence. It was Mr Napier's fault if he lost this contract with the company; he could not now complain of undue preference being given to another party, seeing he refused to bind himself to the company to keep his steamer on the line.

Their Lordships recalled the interlocutor of Lord Mure, and refused the petition of Mr Napier, with expenses.

THOMS *v.* THOMS.

Mortis Causa Settlement—Reduction—Essential Error—Fraudulent Impetration. Issue granted to a pursuer to prove fraudulent impetration of a deed from the granter, but issues to prove that it was executed under an erroneous belief and under essential error refused.

Counsel for Pursuer—Mr Patton and Mr Gifford. Agent—Mr A. J. Napier, W.S.

Counsel for Defender—The Lord Advocate, the Solicitor-General, Mr Gordon, Mr Clark, and Mr Shand. Agents—Messrs Hill, Reid, & Drummond, W.S.

This is an action of reduction and declarator at the instance of John Thoms, residing at Sea View, St Andrews, against Robina Thoms, the illegitimate daughter of his brother, the deceased Alexander Thoms, of Rumgally, in the county of Fife. Alexander Thoms died without lawful issue on 15th August 1864, and the pursuer is his heir-at-law and heir of conquest. At the time of his death, Alexander Thoms was possessed of the estate of Rumgally, which is worth about £25,000, some lands in Ceres Muir, adjoining said estate, worth about £1500, and also some personal property.

The pursuer averred that Rumgally was held by his brother Alexander under a deed of entail dated 6th February 1805, made and granted by his father, and that he was the heir of tailzie and provision in the said estate. It was alleged by the defender that none of the prohibitory, irritant, and resolutive clauses in the deed of entail applied to her father, the disponee or institute, and that he therefore held the property subject to his absolute disposal.

The defender had made up titles to the estate and also to the lands in Ceres Muir, and was at present in possession of the same. This she did in virtue of a *mortis causa* general disposition and settlement, executed by her father on 23d January 1861, by which he conveyed to her and her heirs and assignees all his property, heritable and moveable, real and personal. This deed the pursuer now sought to reduce. He averred that his brother did not, and did not intend to, convey the estate of Rumgally; that he always believed that he held the estate under the fetters of a strict entail, and that it would devolve upon his death on the pursuer as the heir of entail. But he also averred that the general disposition and settlement was fraudulently impetrated from his brother by the defender, and by Charles Welch, writer in Cupar, or by one or other of them, the said Charles Welch acting as her agent, or, at all events, acting for her, and in the view of promoting her interest; that this was done on the false and fraudulent pretence that the deed conveyed nothing but personal or moveable property, and that the granter was induced to sign it solely on this representation and in this belief. The deed, it was also averred, was written by the said Charles Welch without any draft thereof having been prepared or submitted; it was signed without having been read over to the deceased, and without its import being explained to him further than the assurance that it conveyed nothing but his personal estate; and immediately after being signed it was, for the purpose of more effectual concealment of its real terms, carried off by the said Charles Welch, and thereafter constantly retained by him in his own exclusive custody until it was produced by him at a meeting of friends after the funeral. It was also averred that at the date of the deed Alexander Thoms was in an infirm state of health, and almost entirely blind; and that the defender and Welch as her agent, or one or other of them, took advantage of his weakness and facility, and so fraudulently impetrated the deed from him. The pursuer's statements were denied by the defender.

The following issues were prepared for the trial of the cause, viz.:—

1. Whether Alexander Thoms, sometime of Rumgally, now deceased, the brother of the pursuer, executed the general disposition and settlement, dated 23d January 1861, and of which No. 9 of process is an extract, under the belief that the said deed did not convey the lands and estate of Rumgally, held by the said Alexander Thoms as heir of entail under the disposition and deed of entail by his father, dated 6th February 1805?

2. Whether Alexander Thoms, sometime of Rumgally, now deceased, the brother of the pursuer, executed the general disposition and settlement, dated 23d January 1861, and of which No. 9 of process is an extract, under the essential error that the said deed did not convey the lands and estate of Rumgally, held by the said Alexander Thoms as heir of entail under the disposition and deed of entail by his father, dated 6th February 1805?

3. Whether the said general disposition and settlement by the said deceased Alexander Thoms was fraudulently impetrated from the said Alexander Thoms by the defender and Charles Welch, writer in Cupar, on her behalf, or one or other of them?

The defender objected to these issues on the ground—

1st, That the pursuer is not entitled to a proof of the circumstances averred by him in support of his construction of the deed, and that, at all events, the first issue is not properly adapted to try that part of the case.

2d, That there is not a relevant case of essential error set forth on record; and

3d. That the third issue, which is the only one the pursuer is entitled to, ought to set forth specially the fraudulent representation to which it refers.

A discussion took place last session, and to-day the Court decided that the pursuer was not entitled to the first and second issues proposed, but the third was allowed, qualified by the clause "in so far as it conveys or pretends to convey the lands of Rumgally."

SECOND DIVISION.

A. *v.* B.

Bankruptcy — Trustee — Appeal — Expenses. Held (Lord Benholme diss.) that a trustee in bankruptcy, who rejected a claim as insufficiently vouched, without investigating it, was liable in the expenses of a successful appeal against his deliverance.

Counsel for the Trustee—The Lord Advocate and Mr Watson. Agent—Mr Somerville, S.S.C.

Counsel for the Claimants—Mr Gordon and Mr Mackay. Agent—Mr Alexander Howe, W.S.

This case arose out of two claims by a legal firm made on the sequestrated estate of a deceased party who had for a series of years acted as their cashier. The claimants allege that by means of under-summation and over-summation respectively of the debit and credit columns, their cashier had defrauded them of two sums, applicable to different periods, of £3188, 2s. 0½d. and £6049, 8s. 2d. The claimants made affidavit to this effect in terms of the Bankrupt Act, and produced their cash-books with the various entries relied upon, which they argued was sufficient evidence of their being the writ of the bankrupt. The trustee rejected the claim as being insufficiently vouched. The claimants appealed to the Lord Ordinary (Kinloch), who recalled the deliverance of the trustee, and remitted to him to rank the appellants in terms of

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