subsisted between the parties. These are detailed in article 6 of the condescendence in these terms. [Reads it and the answer to it.]

The letter referred to proves the statement of the pursuer to be true; and, although notice was given that the decreet-arbitral was to be brought under reduction, such notice was no reason for the arbiter's fee not being paid. It is not alleged, and is not the fact, that on receiving the letter of 3d June 1864, the defender or his agent repudiated liability in the matter of the arbiter's fee, or warned the pursuer not to make payment so far as the defender was concerned. Then, when the action of constitution was brought into Court, there is no defence or plea stated to the effect that remuneration to the arbiter was not legally due, and that no claim for relief and payment could be maintained by the pursuer of the money so paid by him to any extent. The ground taken in the defences and record by the defender was that the whole claims advanced under the decreet-arbitral were untenable because of the various objections taken to it on the grounds afterwards made the subject of the reductive process—viz., corruption on the part of the arbiter, *ultra fines compromissi*, and non-exhaustion of the matter submitted. Supposing all these repelled, as they have been, and the decreet-arbitral to be valid, it is not pleaded that no part of the fee paid to the arbiter could in any view be the subject of legal claim. On the contrary, observe the term of the prayer of the reclaiming note against the first interlocutor pronounced by the Lord Ordinary in decerning for the whole £31, 10s. It is for an alteration only as to one-half of that sum — the general ground of defence being repelled.

Altogether, it appears to me that the circumstances of the case, and the principles recognised by the Court in the cases referred to, and founded on at the debate, support the conclusion at which the Lord Ordinary has arrived.

The other Judges concurred. and the Lord Ordinary's interlocutor was therefore adhered to.

Agents for Pursuer—J. & A. Peddie, W.S.
Agent for Defenders—Thomson Paul, W.S.

SECOND DIVISION.

NOTE—RONALD JOHNSTONE.

Expenses. A trustee whose name had been used as a party to an action after he had resigned, allowed the expenses of getting his name withdrawn, and these taxed as betwixt agent and client.

One of certain trustees, hearing that his co-trustees had resolved to raise an action, intimated to them that he resigned office. His name was thereafter used as a pursuer in the action without his knowledge. Upon an application to the Court his name was allowed to be withdrawn from the process. He was appointed to lodge an account of expenses connected with the withdrawal which the Auditor taxed as between agent and client. Upon objection, the Court sustained the principle of taxation, and of consent pronounced decree for the expenses against the other trustees in the process in which the application was incidentally made.

Counsel for Petitioner—Mr MacLean. Agents—M'Lachlan, Ivory, & Rodger, W.S.

Counsel for Trustees—Mr Arthur. Agent—W. Officer, S.S.C.

Tuesday, March 19.

FIRST DIVISION.

NEILLS *v.* LESLIE.

Stamp Duty—Mutual Deed. Held (alt. Lord Mure) that unstamped missives of sale betwixt the pursuer and defender of an action which were founded on by the pursuer alone, fell, in the first place, to be stamped at the expense of the pursuer.

This was an action for implement of a missive of sale and purchase. After a record had been made up and evidence led in the cause, the Lord Ordinary (Mure) *ex proprio motu* took the objection that the document founded on was not stamped, and appointed the stamping to be done "at the joint expense of parties."

The defender reclaimed.

JOHN M'LAREN, for defender, argued—The interlocutor appoints the stamping to be done at the joint expense of parties *now*. The defender does not found on the document, and is willing that the case be decided irrespective of it. In such circumstances, the pursuers as alone founding on the document, ought, in the first instance, to have the document stamped at their individual expense, leaving the question of ultimate liability to be determined at the end of the case.

W. N. M'LAREN, for pursuers—The interlocutor may be read in either of two ways—(1) as disposing finally of the question of expense of stamping; or (2) as determining only *ad interim* upon it. In either view it is correct. The penalty and expenses of stamping are fiscal matters, and not, properly speaking, expenses in a cause. The document is of the nature of a mutual contract, and should be stamped at the joint expense of the parties.

The following authorities were referred to:—Smaill *v.* Potts, 16th July 1847, 9 D. 1502; Flowers *v.* Graydon, 18th Dec. 1847, 10 D. 306; Law *v.* M'Laren, 20th July 1849, 11 D. 489; Logan *v.* Ellice, 6th March 1850, 12 D. 841; Wylie & Lochhead *v.* Times Assurance Co., 15th March 1861, 23 D. 727; Grant *v.* Walker, Grant, & Co., 16th Dec. 1837, 16 S. 246.

At advising,

The LORD PRESIDENT—The interlocutor of the Lord Ordinary in this case was, during the argument, subjected to various interpretations, and therefore the first thing we require to do is to ascertain its meaning. What he does is this, "sists process for ten days in order that the minute of sale No. 10 of process may be stamped, and appoints the same to be done at the joint expense of parties." The minute of sale is the pursuer's ground of action, and what I understand his Lordship by this interlocutor to intend is that, in order to make that minute of sale evidence, the parties are to get it stamped at their joint expense. So construing the interlocutor, I think it is ill-founded, and I think, moreover, it is unprecedented. Among the various authorities that were cited in support of the interlocutor, I find none that does support it. The stamp laws provide that when a document is offered in evidence which ought to be stamped and is not, no court of law shall look at it to any effect. The natural inference is, that when a party tenders the document in evidence it is stamped, but, if it is not, some delay may be allowed, and generally is as a matter of indulgence to him, to enable him to get it stamped. Now, if there had been a practice to

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. Wyllie 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 recall 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 Wyllie 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 Wyllie 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 Wyllie 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 Wyllie 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 Wyllie 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 Wyllie Guild's statement of the time actually given to the investigations conducted by him and his assistants—the charge being disputed chiefly on the gound 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 Wyllie 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 Wyllie 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