the whole bank interest which would have been due thereupon, had now, with the exception of a sum of £17, 14s. 4d., been accounted for. It was also explained that the trustee was now himself bankrupt, and quite unable to pay penal interest.

LORD ADVOCATE (GORDON) and SKELTON for Accountant in Bankruptcy.

BRAND for trustee.

After hearing counsel on the case, the Court desired information as to (1) whether penal interest had been paid; (2) whether the creditors wished the trustee to be retained or dismissed; (3), what had been done in previous cases; and continued the case.

The case was again called.

LORD ADVOCATE (GORDON) and SKELTON explained that penal interest had not been paid. They cited *M'Cubbin*, 29th June 1861, 2 Macph., 1293, and *Accountant in Bankruptcy* v. *A.B.*, 9th Dec., 1865, 1 Scottish Law Reporter, 67. They craved the Court to censure the trustee, and find him liable in expenses.

TRAYNER, for a creditor, who was also a commissioner on the estate, craved the Court to find that the trustee had contravened the 83d section of the Act; to remove him from office; to find him liable in expenses; and to order a meeting of creditors for appointing a new trustee.

BRAND for trustee.

LORD PRESIDENT—My Lords, this case comes before us on a report by the Accountant in Bankruptcy under the 159th section of the statute, and it is necessary for us to consider, in the first instance, what we can do under that section. The report is to be made by the Accountant when he sees cause to make it, or finds that a trustee or Commissioners are not faithfully performing their duties, and duly observing all rules and regulations imposed on them by statute, Act of Sederunt, or otherwise, relative to the performance of those duties; or, in the event of any complaint being made to him by any creditor in regard thereto, he is to inquire into the same, and, if not satisfied with the explanation given, he is to report thereon to the Lord Ordinary in time of vacation, or, during time of session, to either Division of the Court of Session, who, after hearing such trustees or commissioners thereon, and investigating the whole matter, shall decide, and shall have power to censure such trustees or commissioners, or remove them from their office, or otherwise to deal with them as the justice of the case may require. (Sec. 159.) It appears to me that when anything of this kind is brought before us by report by the Accountant in Bankruptcy, we may do anything in the matter which we have power to do under the statute, even though under other circumstances we could only act on a petition or some other process; in short, that the report brings the whole matter up, and leaves us to deal with the matter. That being so, we come back to the charge made against this trustee under the 83d section of the Act—and it is a very serious charge—because the Accountant reports it to be, and I cannot help dealing with it as, a flagrant violation of a trustee's duty, very gross and long-continued, by means of which monies belonging to the bankrupt estate have been kept in the trustee's own hand instead of in bank, and it is not disputed by the trustee that this charge is in the main well founded. The first consequence of such a charge against a trustee is, that he becomes bound to pay interest to the creditors at the rate of 20 per cent. per annum on the excess of such sum above fifty pounds as he shall keep in his own hands more than ten days for such time as the same shall be in his hands beyond ten days. But then there is a farther provision which devolves a particular duty on the Court. It enacts that unless the money has been so kept out of bank from innocent causes, the trustee shall be dismissed from his office upon petition to the Lord Ordinary or Sheriff by any creditor, and have no claim to remuneration, and shall be liable in expenses. Now, the first thing to be determined is, whether the money has been kept out of bank from innocent causes, and I must say I don't see the slightest ground for thinking that it has. Then, is not the clause imperative? I think it is, and that it is binding on us under this clause to dismiss the trustee from his office; to find that he has no claim for remuneration; and to find him liable in expenses. It is almost an inevitable consequence of a trustee being in such circumstances liable to pay penal interest, and not having paid it, that he should be dismissed from office, because otherwise there would be no one to recover that penal interest for the creditors. But it is not necessary to go into that, because the provision of the statute is imperative. Our course is the same as if a petition for dismissal of the trustee had been presented. I would only suggest that perhaps in the circumstances of this case, as we have had more than one discussion on this report, there may be room for some modification of expenses.

LORD CURRIEHILL—I take precisely the same view of the case as your Lordship.

LORD DEAS—I am of the same opinion. I think we have power to do every thing in the matter as if a petition had been presented to us; and I think that the things to be found against the trustee are imperative. It is the policy of the statute to make them so, for otherwise a trustee could reckon on appealing to the Court *ad misericordiam*.

LORD ARDMILLAN—I concur, and have nothing to add.

TRAYNER moved for expenses of a single appearance.

The Court granted modified expenses.

The Court appointed a meeting of creditors for electing a new trustee.

Agent for Accountant in Bankruptcy—T. G. Murray, W.S., Crown-Agent.

Agent for Trustee—J. Y. Pullar, S.S.C.

Agents for Creditors—Campbell & Smith, S.S.C.

Wednesday, December 18.

COX BROTHERS AND MANDATORIES *v.* BINNING AND SON.

Arbitration—Conditional Allowance of Proof—Consignation—Excess of Power—Award. Circumstances in which *held* (1) that although an arbiter committed an excess of power in ordering consignation by one of the parties of the sum in dispute at the same time as he allowed him to lead farther proof, that party was not justified in refusing to go on with his proof, the arbiter having explained that the allowance of proof and order for consignation were

independent of each other; and (2) that although the arbiter committed an excess of power in decerning against the party for payment of the amount which he found due, that did not invalidate the whole award,—the part which was *intra vires*, and forming a proper answer to the reference, being clearly separable from the part which was *ultra vires*.

The pursuers in this action were Cox Brothers, merchants and commission agents in Liverpool, and M'Gregor, Stevenson, and Fleming, writers in Glasgow, their mandatories, and the defenders were Robert Binning and Son, coal-tar and petroleum distillers, Blochairn Chemical Works, Glasgow, and Robert Binning, the only known partner of the firm; the object of the action being to enforce implement of an award pronounced in a reference entered into by the parties in 1865. The circumstances in which the action arose were as follows:—In Sept. 1864 the defenders sent to Cox Brothers a quantity of petroleum for sale and return. Cox Brothers made advances on the petroleum, and sold the same for the defenders, to whom they forwarded account-sales. A balance arose on the account in favour of the pursuers of £394, which balance the defenders refused to pay, principally on the ground of alleged leakage of the casks, for which they held the pursuers to be responsible. The dispute was, in May 1865, referred to Mr William M'Ewan, merchant in Glasgow, by a joint-minute of reference, signed by the parties, in these terms:—

"A dispute having arisen between Cox Brothers and R. Binning and Son as to who should bear the loss occasioned by leakage on 500 barrels refined petroleum, consigned by the latter to the former, it is hereby agreed to leave the same to the decision of William M'Ewan, Esq., Glasgow, and that the same shall be binding on the parties."

Mr M'Ewan accepted the reference, and the parties lodged accounts with him, and stated their claims. On 26th July the referee issued an order announcing his opinion that, on the evidence produced, no neglect causing responsibility had been proved against Cox Brothers; that it was not established that brokers in Liverpool had ever been held responsible for leakage; and that in the present case the loss was not more than in many cases adduced. As Binning and Son wished to lead farther evidence, he allowed that to be done; but in the meantime ordered the amount in dispute to be consigned. Binning and Son objected to consign. The arbiter, on 2d August, wrote to them, explaining his views, allowing them a month to bring forward more evidence, but declining to receive any farther evidence until they consigned in terms of his order. The defenders wrote to the arbiter objecting to this order as *ultra vires*. On 18th August the arbiter allowed Binning and Son ten days to complete their proof, and renewed his order to consign. Binning and Son stated their readiness to lead proof, but declined to consign, and objected to any order for proof accompanied by an incompetent order for consignation. The arbiter, on 22d August, wrote to them that the proof and the consignation were separate, and in no way dependent on each other; that they might have an extension of time if they wished it, and that he left the order to consign to be dealt with by the pursuers as they thought best. Binning and Son did not answer this letter. On 8th September the arbiter, in respect that no further evidence had been led by Binning and Son, and no extension of time asked by them, pronounced an award adhering to his former opinion, finding that Binning and Son had no claim on the pursuers in respect of leakage; that the pursuers had a good claim for the balance of £394; and appointing the defenders to pay the same with interest.

Binning and Son refused to implement the award as being *ultra vires* of the referee, and were sued in this action by Cox Brothers. The chief grounds on which Binning and Son objected to the reference were, that it was *ultra vires* of the referee to order consignation, and that, they having offered to lead proof if the order for consignation were recalled, and the order not being recalled, the referee had practically refused to allow them to lead evidence in support of their claim; and thus he had been guilty of what amounted in law to corruption. A summons of reduction of the award, at the instance of Binning and Son, was repeated in the process.

The Lord Ordinary (Barcaple) sustained the reasons of reduction stated by the defenders, holding that the award was liable to be set aside, both because it was pronounced on the defenders' failure to lead evidence in circumstances in which they were justified in refusing to proceed, and because the order to consign was not only a gross excess of power on the part of the arbiter, but a proceeding manifestly calculated to affect the just conduct and disposal of the arbitration, and therefore constituting legal corruption in the sense in which that term has been held to be used in the Act of Regulations.

Cox Brothers reclaimed, and asked the Court to recal the interlocutor, and repel the reasons of reduction, or at least to recal the interlocutor except in so far as it reduces the following part of the award, "And that Messrs Cox Brothers, claim is well founded for full payment of the balance due to them, being £394 2s. 7d.; and find them entitled thereto, with interest thereon at 5 per cent., from 21st April 1867; and appoints Messrs R. Binning and Son to make payment thereof to Messrs Cox Brothers."

Clark and Shand for reclaimers.

Gifford and Gloag in reply.

Lord President—I have had, from the first, a very strong impression that the Lord Ordinary's interlocutor could not stand. The case is simple enough as regards the facts. The minute of reference is dated 23d May 1865, and is in these terms:—[*reads minute*]. Now, there is no doubt what the duty of the arbiter was under this reference. It was to decide who was to bear the loss that had arisen. Whether it was intended that the referee should have all the powers of an arbiter under a formal deed of submission, it is not necessary to inquire. I think it was not meant, and that all that was meant was that this brother merchant should give his opinion on the matter in dispute, which parties were to abide by. M'Ewan accepted the reference, and proceeded to consider the matter, and there is no objection, as I understand, to the way in which he proceeded with the reference. It was done in a somewhat loose way, no formal claims being lodged, but the parties' views being stated in letters, and, after considering these, the arbiter, on 26th July, issued a note, stating his opinion, on the evidence produced, that no neglect causing responsibility had been proved against Messrs Cox Brothers; that it was not established that brokers in Liverpool had ever been held responsible for leakage, and that, in the present case, the loss was

not more than in many of the cases adduced. "As Messrs Binning and Sons wish to lead farther evidence against these findings, the referee allows this to be done; but, in the meantime, orders the amount in dispute to be consigned in his name in one of the banks, waiting his final decision." There are two things to be observed in this note. The opinion the referee expresses is simply an opinion that the case of Binning and Son is not proved. He does not decide against them on any other point. The things to be proved by them, either neglect on the part of Cox Brothers, or practice in the trade, or that the leakage here was more than usual, they have failed to prove; but it is still open to them to make out these things by farther proof. So far, that was an excellent note for a mercantile man to issue in such a case. But after that, no doubt, he does adject an order he has no power to make. He seems to think that, as Binning and Son are to prolong the reference for a considerable time, it was fair that they should consign the amount in dispute. That may have been quite fair, but it is plain that he could not enforce or order it, and therefore that certainly was beyond his power. But there is not here, in this order, anything that makes consignation of the money a condition of Binning being allowed to lead farther evidence.

But, on 2d August, the arbiter does put it in that shape. There is a letter which he writes to Binning and Son on that date in which he says:—"As you have already had two months to provide evidence, and that all in their favour, I think it is only fair that this amount should be consigned, and to allow you one month to arrange, if you can, and produce evidence in support of your allegations, when I will again most carefully go into the matter, and decide according to what appears to me right and fair. Meanwhile, I decline to alter the note, or receive any farther evidence, till this is complied with." This is quite a different step, for he here makes consignation a condition of his receiving any farther evidence. That is objected to—and I think quite properly objected to—by the defenders, and they write him a long letter, in consequence of which, and of some other communications, the arbiter makes another order on 18th August, which seems, I think, to be a well considered order, in reference to representations made to him partly by Binning and Son, and partly by Cox Brothers. He says—"The arbiter having considered Messrs Binning and Sons' letter, of date 8th inst., and Messrs Cox's letter, of date 15th inst., allows the parties a proof of their averments; Messrs Binning and Sons to complete their proof within ten days from this date, and Cox Brothers within four days thereafter. The arbiter repeats his order to consign, and of new ordains Messrs Binning and Son to consign the amount in dispute, £394, 2s. 7d., in the Bank of Scotland, at Glasgow, in the joint names of himself and Binning and Son, and that within six days from this date." And he adds a note—"The arbiter will be glad to arrange with the parties to take the proof on a day that may be mutually convenient." Here again the order for proof is put unobjectionably, and in good form. The order to consign required here is undoubtedly *ultra vires* of the arbiter, but it is not in this order made a condition precedent to the party being allowed to lead evidence. Perhaps the arbiter, when he saw that he was wrong in his former order, ought to have called the attention of the parties to the alteration which he had made on his order, and to the fact that consignation was no longer a condition precedent to the leading of evidence, and the defenders seem to have been under the apprehension that this was still a condition of the proof. They write him, on 21st August, that while they are quite prepared to go on with a proof of their averments, they decline to consign any money; they are ready to prove their case, but they will not consign what they have not been found liable to pay. If the arbiter will issue a simple order for farther evidence, they will proceed with the case; "but we must beg you to understand that we hold ten days as quite insufficient to obtain and bring before you evidence from such a distance as Liverpool." Now, Mr M'Ewan, in his answer, makes it quite distinct that the two things are separate and independent; that the order for proof is unconditional, and that the order for consignation is a quite separate order. He says—"If you will look at the order you will see that the proof and consignation are quite separate and distinct, and in no way dependent on each other. I think ten days should be quite sufficient time to complete your proof; but if you find that you cannot complete it within that time, the proper way will be for you to write me a note stating this, and ask for an extension, which there will be no objection to allow to a reasonable extent. With regard to the order to consign, I would remark, that if you had been found liable to pay, it would have been quite unnecessary to order consignation; in that case it would simply have been an order to pay. I have nothing more to do, however, with the order to consign, but leave Messrs Cox Brothers to adopt such measures as they may be advised to enforce implement of the order." Now, what was the position of the defenders Binning and Son when they received this letter, and were told that the arbiter was to do nothing more about the consignation, but leave his order standing, and that Cox Brothers might do what they liked? Binning and Son say that the order is ineffectual, and could not be enforced; and if Cox Brothers had tried to enforce it, no doubt they would at once have failed. But that being out of way, the order for proof was pronounced that they might lead proof without prejudicing themselves in any way. The arbiter supposed that they might apply for an extension of the time allowed for proof, and he was prepared to allow a reasonable extension. But Binning and Son do not adopt that course. They do not appear to send any answer to this letter, but for sixteen or seventeen days they remain absolutely inactive. Then M'Ewan issues his award on the ground that no farther evidence had been led before him by Binning and Son, and no extension of the time for proof asked, and therefore he retains the opinion that Binning and Son have no claim against Cox Brothers, in the circumstances of the case, for loss caused by leakage. Stopping there, and without reference to what followed, it seems to me that the circumstances in which that award was issued do not support anything amounting to legal corruption. No doubt the arbiter thought he had power which he had not, and he made an order which could not be enforced. But how that should be construed into legal corruption, I do not understand. I do not see that the failure on the part of Binning and Son to implement that order by the arbiter must necessarily induce in his mind such a vindictive indignation as would cause him to decide against them whether rightly or wrongly. That is quite an unfair conclusion to draw. I think the arbiter expressed himself very temperately and calmly throughout

the whole proceedings. In his letter, where he deals with the two things as separate, the allowance of proof and the order for consignation, he is prepared to go on to decide without reference to that order. I think this is the weakest case for legal corruption I ever saw, and therefore I cannot agree with the Lord Ordinary, who says that the award is liable to be set aside, both because it was pronounced on the defender's failure to lead evidence in circumstances in which they were justified in refusing to proceed, and because the order to consign was not only a gross excess of power on the part of the arbiter, but a proceeding manifestly calculated to affect the just conduct and disposal of the arbitration, and therefore constituting legal corruption. In the first place, I think the defender's failure to lead evidence was not justifiable in the circumstances, and that they were bound, after the arbiter's letter of 22d August, to lead it if they had any, or to apply for an extension of time. I am unable to see how the order for consignation, though it may have been a gross excess of power, must manifestly affect the just disposal of the arbitration, unless the failure of the defenders to obtemper the order created such a feeling in the mind of the arbiter as led him to act unjustly. But there is no evidence of that. On the contrary, he proceeded very fairly to determine the matter, and I think he has decided the matter referred to him, and exhausted the reference, for he says that Messrs Binning and Son have no claim on Messrs Cox Brothers for loss caused by leakage, in the circumstances of the case, and that Messrs Cox Brothers' claim is well founded for full payment of the balance due to them, being £394, 2s. 7d. Then he goes on to commit another excess of power, for he gives a decerniture, which he had no power to do, for the £394, 2s. 7d., with interest. That may be liable to many objections, because (1) the amount was not referred to him, and (2) he had no power to give an order for any sum, not even to assess the damages found due; and, therefore, he had no power to do what he did in the end of his award. But the question is whether, because you hold that the arbiter has accompanied his decision of the whole matter with an incompetent decerniture, you are to set aside the whole award? If that were the rule, it would be matter of regret, for it would render invalid many awards in informal submissions, which it is not desirable to set aside. This is a clear case for separating the competent from the incompetent portions of the award clearer than in a case of separate items of an account. The possibility of sustaining that part of the award which is properly pronounced on the reference, from that which is incompetently added to it, is justifiable on principle, and there is no authority against it. *Reid* v. *Walker* (15 Dec. 1826, 5 S. 130) is no authority against it. The matter in that case was well explained in the opinion of Lord Alloway, who says—"If this were an ordinary submission, I would have no difficulty in setting it altogether aside; but it is part of an agreement, a reference to ascertain the conditions for accepting the surrender of a lease; and, as part of the agreement, I have great difficulty in getting quit of it. To a certain extent, so far as regards the eighty guineas, the arbiter has gone quite right; but as to the rest, his award is quite inexplicable, and I rather think it should go back to the arbiter to settle these; only, I have doubts of sending it to the same arbiter, on the ground of his having given an explanation of his decree on the partial application of one party." Now, it is plain that if the thing referred there was the fixing of the conditions of surrender of a lease, unless the whole matter was disposed of the award was of no use, because not exhaustive of the reference. But that was an entirely different case from the present, and while that case, in its circumstances, is not an authority, it is important in this respect, that there the judges recognise the principle of separating things *ultra vires* and things *intra vires*, and giving effect to the latter when separable from the former. I am therefore for altering in terms of this reclaiming note—that is, for reducing the award as regards the two latter findings, but refusing to reduce it so far as it is a proper answer to the minute of reference.

Lord Curriehill—I concur in the conclusion at which your Lordship has arrived, and on the grounds upon which that conclusion is rested. There are just one or two remarks which I think it right to make. This reference between two mercantile men was entered into in May 1865. The claimants Cox Brothers complained of the dilatoriness of the other party, such as mercantile men do not like; and at last, on 20th July, after having been spurred on to give in answers, the defenders gave in answers which we have before us, in which they plead their case at great length, and found on the evidence on which they rely, and they conclude that long pleading with these words:—"We hold that no more glaring case of neglect could take place than the one now laid before you, and believing it to be so, we confidently leave it in your hands to decide." I hold that the case of both parties was fully before the arbiter, and that he might decide it on the evidence and statements before him; and if he had, on the following day, pronounced this award, I think no one could have challenged it, because of the parties not having been fully heard. But Binning and Son are not satisfied; and on the 26th July the arbiter writes that, as they wish to lead further proof, they may do so; but in the meantime orders consignation of the amount in dispute. Considering the stage of the case at which this order was pronounced, if the question were before us, which it is not, as to the power of the arbiter to pronounce such an order, if it was a condition of the one party being allowed to lead proof, it would be a matter of some nicety. I am not aware that where an order for consignation is made a condition on which a party not otherwise entitled to lead proof is to be allowed to lead it, that would be *ultra vires.* I give no opinion on that question, for it is not before us; for that order for consignation was withdrawn in the most explicit way. The question before us is whether, when the judgment of the arbiter is adhered to, and is final, that judgment is null and void on the ground of corruption? I agree with Mr Gloag that the meaning of "legal corruption" is what he stated. But is there anything here to show that the mind of the arbiter was prejudicially affected? Not only is there no evidence of that, but it is shown by the proceedings that the order was withdrawn, and the arbiter declared that the proof was to go on without consignation. I think the arbiter throughout indicated an amount of good temper that quite excludes even legal corruption. That being out of the case, the question comes to be one of law, Whether the award which is within the reference, and entirely exhaustive of it, is null and void? Your Lordship has

dealt with that question, and expressed exactly what is my opinion.

Lord Deas—I concur. Your Lordship has stated the circumstances very fully, and therefore I need not go over them again. There are two objections to the award. One is, that these parties were not allowed an unconditional proof, but only a proof to which was adjected the wrongful condition of consignation. That is said to amount to legal corruption. The other objection is that the arbiter decerned for a sum which it was *ultra vires* of him to deal with. Both these questions are of some delicacy. The result as to both depends very much on the special circumstances of this case. One remark applies to both, and that is, if in regard to either, the arbiter had made some gross mistake, I am not prepared to say that the effect of that might not have been to shake our confidence in the arbiter's judgment. But I do not think he made any gross mistake. He made no such mistake as to indicate that his mind was in a state of legal corruption. The reference bears [*reads reference*]. It would not have been an unreasonable construction of this reference that the referee was to decern for the amount of damage, if the parties had so construed it. As to the power of the arbiter to order consignation, I have more difficulty. As to the effect of the order to consign, assuming it to be *ultra vires*, one must read the whole correspondence to see how the matter stands. I think the main objection to the award on account of that order would have been that the arbiter had committed himself to an opinion at an early stage of the case, and that that might have been supposed to some extent to have confused his mind, and created a prejudice against the party. That might have much force in many cases where the arbiter had expressed an opinion, but it is peculiarly inapplicable to this case. On 26th May 1865, when the arbiter first stated that opinion, there had been written evidence laid before him by both parties, although there was no formal allowance of proof, and it was quite open to the parties to lead parole evidence during the long period of two months and eight days. Further, up to that date the parties were disposed to rest on the evidence already put in. The defender had put in a long pleading of several printed pages, in the conclusion of which he says he leaves the matter in the hands of the referee. It is after that that the order of 26th July is issued, allowing the defenders further proof, if they chose to consign. It is a nice question whether he had not the power to do that. He says, "If you are not satisfied, I shall allow further proof, if you consign." Whether he had power to make the order or not, it was not unreasonable for him to suppose that he had the power. But that order was not adhered to; for when he found that the order was objected to, he expressly stated that the allowance of proof was independent of the order to consign, and suggested an extension of the time for proof. His error in the matter, if there was any error at all, was that he did not say, "I will recal the order for consignation in the meantime." I do not think that the defenders have proved either moral or legal corruption.

There is more difficulty as to the other point. On that the Lord Ordinary is against the party in favour of whom he has given judgment. I rather think that if there is a general rule at all, it is, that where one part of an award is *ultra vires*, the other part cannot stand, and it is rather incumbent on the party supporting the award to show that that part ought to stand. That requires consideration of the special circumstances. I think that in this case that general rule should not be applied. The sound part of the award is not mixed up with other matters, and if it be possible, this is a case for separating them.

Lord Ardmillan—Both of these points are important. The one which falls to be considered first is the one last mentioned, because it arises on the face of the award, without looking at the procedure. It is contended that this award contains a decerniture for a balance due; that that is not within the scope of the reference, and, therefore, that the whole award is to be set aside. I rather agree with Lord Deas that the general rule,—if there be a general rule—is, that an award ought to stand or fall as a whole. I give no opinion that loose grounds for separating the findings of an award ought to be admitted, if one part is clearly unlawful. But it does not follow that, because one finding *ultra vires* has been pronounced, therefore that part which is a direct answer to the reference shall go for nothing, if there are clear grounds for separation. I think there are good grounds for such separation here.

The other question turns upon the question of corruption, for it is not disputed that the pursuer of the reduction is bound to establish legal corruption on that point; but without going into the question whether it was entirely within the power of the arbiter to order this consignation—for that question is not before us, and I should consider it a very nice question—I rather agree with Lord Curriehill, that it is not here put as part of the ordinary duty of an arbiter, but rather as a condition imposed on a party against whom the arbiter had indicated an opinion, prior to his leading proof against the finding. But I have no doubt that the order to consign, issued in the manner in which it was issued here, indicates nothing of the character of legal corruption. And then, before the final award, the arbiter announces distinctly that the allowance of proof and the order of consignation were separate. The defenders, in the knowledge of that, declined to lead proof. I think they were not justified in refusing to go on with their proof, and that they have not succeeded in establishing grounds sufficient to lead us to set aside the award.

Agent for Pursuers—James Webster, S.S.C.

Agents for Defenders—Wilson, Burn, & Gloag, W.S.

Thursday, December 19.

LYELL *v.* GARDYNE.

(*Ante* p. 39.)

Expenses—Auditor—Three Counsel—Jury Trial.

Expenses of third counsel disallowed.

The auditor, in his report on the account of expenses in this case, reserved, for the consideration of the Court, the question whether the expense of a third counsel at the trial ought to be allowed.

Mackay, for the defender, referred to the case of *Routledge* v. *Sommerville*, 11th January 1867, 5 Macph. 267.

Watson in reply.

The Court disallowed the expense.