1869, 7 Macph. 347; *Macfarlane* v. *Friendly Society of Stornoway*, Jan. 27, 1870, 8 Macph. 438.

At advising—

LORD PRESIDENT—I do not think this question admits of any doubt. I give full effect to the fact that this case was transferred from the Small-Debt Court to the ordinary roll of the Sheriff Court, and I deal with it as if it had been originally raised there. But by the terms of the Sheriff Court Act no appeal is competent to this Court in any case the value of which is a sum under £25. Now, we arrive at the value of a cause by the conclusions of the summons; and the value in this case is only £12. But then it is argued for the appellant that the decree appealed against involves a further and continuing liability, and that the value of the case is therefore above the sum required for this appeal, and if he could have made this out there might have been some foundation for the argument. But I see no ground whatever for this view. When the assessment complained of has been paid it does not appear, or at least it is not a necessary result, that the appellant will ever have a further liability under the statute by which it is imposed, and if he had any such fear his proper remedy would be in the form of a declarator. I think we must refuse this appeal as incompetent.

LORDS DEAS and MURE concurred.

LORD SHAND concurred, and expressed his opinion that the conclusions of the summons having been restricted by the pursuer for the express purpose of bringing the cause within the Small-Debt Court, this Court would not afterwards entertain it on the footing that it represented a larger value than £12, or inquire into the question whether or not a further liability was involved.

The Court dismissed the appeal, with expenses modified at £4, 4s.

Counsel for Appellant—C. S. Dickson. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for Respondent—M'Kechnie. Agent—James Gow, S.S.C.

Friday, November 26.

SECOND DIVISION.

MORISONS *v.* THOMSON'S TRUSTEES.

Arbitration—Disqualification of Arbiter—Corruption—Act of Regulations 1695.

Irregular transactions between an arbiter and the parties to a submission, as distinguished from actual corruption, not a ground for reducing the award, unless some connection be shown between the irregularity and the award issued.

An arbiter becoming during the dependence of a submission deeply embarrassed in circumstances, applied to one of the parties, with both of whom he was intimate, shortly before issuing notes of his award, to assist him with a loan. The party-submitter entertained the application, but did not give a definite answer till after the notes were issued. Some time thereafter he refused to grant a loan, but continued to plead before the arbiter till shortly before the final award was issued, when he protested against the proceedings and declared that he reserved right to reduce the award.

The arbiter meantime having been refused by one party, applied to the other shortly before the final award was issued, and was refused by him. *Held*, on a proof, that while the proceedings of the arbiter were grossly irregular, they did not amount to corruption, and that in respect they were not shown to have influenced the award, the award must stand.

Question—Whether the party who had continued to plead before the arbiter, after knowing of such an irregularity, had not waived his right to object?

In the year 1869 Messrs John Morison senior, John Morison junior, and William Thomson, brewers in Edinburgh, entered into a contract of copartnery by which they agreed to carry on the business of brewing in premises in the Canongate of Edinburgh, called the Commercial Brewery, under the firm of J. & J. Morison & Thomson. The duration of the contract was fixed to be nineteen years. In the year 1878, certain differences having arisen between Mr Thomson and the Messrs Morison, it was agreed that Mr Thomson should, in consideration of the receipt of a sum of money, retire from the firm, and make over to Messrs Morison his whole interest therein, and in the stock and funds thereof. The sum to be paid to Mr Thomson was referred to the decision of Mr James Steel, formerly a brewer in Edinburgh, and now a spirit merchant in Glasgow. Mr Steel on 5th June 1878 accepted the reference, and appointed Mr J. A. Dixon, writer, Glasgow, to be clerk. Proof for both parties on the questions involved in the submission was led before him at various dates in the months of April, May, and June 1879, and counsel were heard on 16th July 1879, and he then made avizandum. For some time previous to that date Steel had been in very straitened circumstances, owing in great measure to the failure in October 1878 of the City of Glasgow Bank, from which he had an overdraft, for repayment of which the liquidators were pressing him. He had tried through his agents to raise money on his premises in Glasgow, which were already burdened to a considerable extent, but had failed to arrange a loan. On 16th July 1879 he called on Mr Duncan, agent for Messrs Morison in Glasgow, and told him he was in need of money; that he had got two persons—one a distiller, the other a brewer—to assist him on condition that he would purchase his stock of spirits and porter from them respectively; and asked him whether he or his firm in Edinburgh, Messrs Morison, would take into consideration a loan to him of the rest of the sum, of which he was in immediate need, provided that he bound himself to purchase from them his stock of beer. It appeared from the proof allowed in the case, and hereafter referred to, that it is a common practice in the trade for brewers to lend money to publicans on such an undertaking. Steel asked Mr Duncan to keep the matter private, and Mr Duncan on the same date (16th July 1879) wrote the following letter to Messrs Morison:—

"*Private.*

"Dear Mr Morison,—I have had an interview with a mutual friend, and he has asked me to speak to you on his behalf. I will be glad to see you here, or I will run through to Edinr., or if you are cruising anywhere near, I would make it my study to meet you; it is our friend Mr Steel, who wants to borrow £1000—the details I can give you when we meet."

Mr Steel's account of this interview on being examined as a witness in the cause was, so far as material, as follows:—"Mr Duncan undertook to submit my proposal to Messrs Morison. I said to him that we were engaged in an arbitration, and that I did not want to be compromised by these money matters until the arbitration was finished. I do not know that I said to Mr Duncan that it was a delicate matter to propose that they should lend me money on account of the submission. I might speak of the matter as being a delicate one altogether; borrowing is always a delicate matter. (Q) Did you say that on that account it would require to be kept private?—(A) No; I do not think I put him under any special obligation. (Q) Did you use any words to the effect that because of the submission it was a delicate matter and would need to be kept private?—(A) In a general way I told him that it was not to be the town's talk. (Q) Was it not delicate because you were the arbiter and Morison was a party-submitter before you at the time?—(A) There was no delicacy in the case; this gentleman was going to speak to Morison about it, and all delicacy and secrecy were taken away at once. I did not think there was any delicacy about it. I thought that Morison would do me the usual friendly turn, and I thought that I was going to do a good turn for them too. (Q) Was this the delicate point in the transaction, that you were seeking a loan, you being arbiter and Morison being a party-submitter?—(A) No; the delicacy was of a general nature. I had a general delicacy in seeking money from anybody. (Q) Had you no delicacy as an arbiter in seeking a loan from a party-submitter? — (A) Not from people whom I had known for many years, and with whom I had drunk so many bottles of champagne, and been invited to their yachting and their houses. *By the Court*—I asked that the matter should be kept private, simply because I did not wish my affairs to be a talk all over the town. *Examination continued*—I had not the slightest care whether Thomson knew or not that I was seeking a loan. That was not in my mind when I asked the matter to be kept private. I wanted it to be kept private from the general public—from the mob of spirit-dealers, ale-agents, and people of that kind. I never thought of telling the Thomsons about it. (Q) Did you think that Duncan would tell them about it?—(A) I never thought at all about it. (Q) But you would rather that they did not know?—(A) I cannot tell you if I would or would not." Mr Duncan, who was also called as a witness, deponed on this matter as follows:—"Steel spoke about keeping the matter private. I cannot condescend on the very words he used, but he said something about the arbitration, and that he did not want it to become known. That was the reason why I marked the letter to Morison 'Private.' (Q) Steel did not want it known because of the dependence of the arbitration?—(A) I understood so. I rather think he said something about being indebted to Morison, but I would not swear positively. Having written that letter on the 16th July, I went through to Edinburgh on the following day, and had a meeting with the Messrs Morison. I explained to them Mr Steel's proposal. They asked my opinion about it, and I told them that I would not go into the transaction. *By the Court*—My impression was that it was not a good investment." Mr Morison deponed as to the meeting with Mr Thomson on the 17th July:—"I said nothing to him about the submission. I felt it was a matter of delicacy, as I felt it was a matter in which I could not offend the arbiter by refusing point-blank until this case was settled."

On 21st July Steel called on Messrs Morison at the brewery, the subject of his visit being the proposed loan. No definite answer was given at that meeting by Messrs Morison to his application —a circumstance which Mr Morison junior explained at the proof to be due to the fact that while he was afraid to offend Steel, and therefore did not wish to refuse, he was at the same time convinced that Steel's affairs were so deeply involved that it would be unsafe to lend him money.

On 28th July Steel issued notes of his proposed findings. These notes showed that he proposed to value Mr Thomson's interest in the business at £12,630, 17s. 9d. Both parties lodged representations against the method by which this result was reached. A few days after the notes were issued Steel called again on the Morisons at their brewery, when the subject of the loan was again discussed and was again left undecided, in consequence, as Mr Morison junior explained, of the same feeling on his part which had prevented the loan from being either granted or refused at the previous interview. About this time Mr Morison senior having consulted his law-agent, was advised by him that the proposal could not be entertained pending the submission. The submission was also a subject of conversation at this meeting, and Steel was informed that a representation against the grounds of his proposed finding was being prepared. The next meeting between Morison and Steel was in Glasgow on 20th August, when the representations were mentioned, but on the matter of the loan being mentioned Steel said he did not wish that matter further alluded to till the arbitration was settled, and the subject then dropped. On 14th October 1879 Steel issued a new set of notes, by which he reduced the sum at which he estimated Thomson's interest to £12,035, 12s. 8d., with interest from March 1878 till payment, being about half the amount claimed by Thomson in the submission. On 2d November 1879 Steel wrote to Mr Morison junior this letter—

"Dear Sir,—Is there any chance of your giving me a lift with the debt to the City Bank? They are writing again, and I suppose I must come to some definite understanding with them now. I will be at the Cross all day to-morrow." To which Morison on the 3d November returned this answer:—

"Dear Sir,—I have your note of yesterday. The overwhelming demand of Thomson's trust for the principal sum, interest, and two-thirds expenses of this very protracted finding have wholly taken us by surprise, and, God knows, loaded us with debt we are unable to meet.

With the trade of the brewery down to one-half of what we have seen it, we are constrained, in self-preservation, with our clipt wings, to endeavour to pay off some of the debt hanging like a mill-stone round our necks, in case the lawyers get the whole carcase, and in these circumstances can hold out no hope that we can give you a lift out from the demands of the bank."

Steel replied on the 4th by this letter:—

"Dear Sir,—You might go into the matter of the loan. I am told you have plenty of money, and that you are not generally easily frightened. The trade of the place is worth a fair venture, as it is worth a small agency. You might put your temper out of it and try and help me. I am sure it would be to your advantage."

About the last-mentioned date Steel wrote to Mr J. S. Thomson, a son and trustee of the submitter Thomson, who had died a few months before, and whose trustees had been sisted as parties in his room, asking him to advance £1000 to make up a sum of £25,000, if he could do it without inconvenience. Thomson replied that he could not himself lend the money, but that his mother might do so out of his father's trust-estate money. Steel replied that it was not an investment for a woman to make, and advising him to consult his lawyers. He enclosed a rent-roll and valuation of his property. Mr Thomson then consulted his law-agent on the subject, and was by him advised that the proposal could not, pending the submission, be entertained, and advised Thomson to burn Steel's letters, which Thomson did. Thomson then wrote to Steel saying the proposal could not be entertained.

On the 11th November the Morisons lodged a note craving an oral hearing by counsel regarding the grounds of the interlocutor of 14th October. This the arbiter, by interlocutor of the next day's date, refused. On the 13th he wrote to Morison as follows:—

"Dear Sir,—I was surprised that you had rebelled against my last decision, as Mr Dickson eight days ago told me the thing was settled. I wonder at your making such a difficulty over a few thousands, when you get brewery and profit and all the comfort of singleness of management to yourself. I thought you'd been more of a philosopher."

On 12th December 1880 the Messrs Morison, who were not aware of the application to Steel, lodged a protest with the arbiter, in which they narrated the whole communings and correspondence which had taken place between themselves and the arbiter, as above narrated, and protested that these transactions amounted to "grossly improper and illegal conduct on the part of an arbiter, and to corruption within the meaning of the Act of Regulations 1695, and that any award or decree-arbitral which the arbiter may pronounce will be illegal and invalid." The protest went on to declare that if the arbiter persisted in going on with the proceedings they would only appear under protest, and reserve their rights to bring a reduction of any decree which the arbiter might pronounce.

On 24th January 1880 the agents for Thomson's trustees wrote to Mr Dixon, clerk to the reference, asking him to inform them what in his opinion would be a proper fee for the arbiter. Mr Dixon replied on the same day stating that the arbiter's fee would be £210. The Messrs Morison having become aware of this correspondence their agent wrote to Mr Dixon protesting against any fee being paid to arbiter, on the ground that, for the reasons stated in their protest, he had forfeited all claim to any fee. In any view, they said the sum proposed was extravagant. On 4th February the arbiter issued his final award and decree-arbitral, finding Messrs Morison bound to pay to Thomson's trustees a sum amounting in all to £12,035, 12s. 8d., with interest from 31st March 1878, together with two-thirds of the expenses of the reference.

Messrs Morison, who had now become aware of the communings between Mr J. S. Thomson and the arbiter, then brought this action against Thomson's trustees and Steel, concluding for reduction of the decree-arbitral on the ground of corruption within the meaning of the Act of Regulations 1695.

They pleaded, *inter alia*—"(1) The arbiter having been guilty of grossly improper and illegal conduct and of corruption, within the meaning of the Act of Regulations 1695, the said decree-arbitral is illegal and corrupt, and ought to be reduced. (2) The loan asked by the arbiter from the pursuers having been of the character of a gift, or at all events involving large benefit to the arbiter, the whole subsequent proceedings in the submission were and are corrupt, illegal, and invalid. (3) The arbiter having acted improperly, illegally, and corruptly in unfairly increasing his original findings in several particulars, in refusing the reasonable request of the pursuers for a further hearing, and in refusing to correct errors pointed out to him by them, and otherwise as condescended on, the said decree-arbitral is corrupt, illegal, and invalid. (6) The arbiter having misconducted himself and given reasonable grounds for a suspicion of unfairness, and of having negotiated with both parties to the submission for loans and favours, the said decree-arbitral cannot be sustained."

Thomson's trustees alone defended the action. They pleaded—"(3) The arbiter not having been guilty of corrupt conduct, or of bargaining or taking bribes, and having exercised his functions as arbiter to the best of his ability, the defenders should be assoilzied."

The Lord Ordinary allowed a proof, at which the facts above narrated were proved. It also appeared that Steel had for a considerable time been on terms of friendship both with the Morisons and Thomson.

On 21st July 1880 he pronounced this interlocutor:—"The Lord Ordinary having considered the debate, proof, and whole cause, Finds that the defender James Steel did not act corruptly in pronouncing the decree-arbitral libelled: Finds that the pursuers, on or about 16th July 1879, and while the arbitration referred to in the summons was still depending, received from the arbiter, through Mr James Duncan, their agent in Glasgow, an application for a loan of £1000, and that they entertained the proposal, or allowed the said James Steel to proceed in the arbitration, to issue notes of his proposed findings, and to receive representations and answers with reference thereto, in the belief that it was a proposal which could be entertained: And finds that they thereby waived any right which they might have had to found upon the said proposal as disqualifying the arbiter: Finds, further, that the pro-

cedure in the submission was regular, and that the pursuers have failed to prove any unfairness, excess of power, or neglect of duty on the part of the arbiter: Therefore repels the reasons of reduction, assoilzies the defenders from the conclusions of the action, and decerns."

He added this note:—"In May 1878 it was agreed between the pursuers and their now deceased partner Mr William Thomson that the latter should retire from the brewing business carried on by them, upon payment to him by the pursuers of the value of his share and interest in the concern under the contract of copartnery, and a submission was entered into for the purpose of determining the amount so to be paid. The arbiter named was Mr James Steel, a friend of both parties, and formerly a brewer in Glasgow. He is called as a defender in this action, which craves reduction of the decree-arbitral, dated 6th February 1880. The chief ground of reduction libelled is that the arbiter acted corruptly in pronouncing his decree, inasmuch as pending the submission he made a proposal to the pursuers for a loan of £1000, and was influenced in his final award by the pursuers' conduct in not agreeing to the proposal. There are other grounds stated. In particular, it was urged that he improperly refused to the pursuers an oral hearing upon the proposed findings, and that he communicated to the parties before the decree-arbitral was signed, through the clerk to the reference, the amount of the fee which he expected as arbiter. But as the refusal of an oral hearing was after written representations and answers for both parties upon the subject had been received and considered, the Lord Ordinary is of opinion that the case is not one in which such refusal affords a ground of reduction. It is not suggested that the pursuers had less opportunity of being heard than the other party, and it appears to the Lord Ordinary that both parties were allowed abundant opportunity of submitting their views. And as regards the communication about the arbiter's fee, it is sufficient to say that it took place after the award had been finally settled, and in consequence of an inquiry at the clerk to the reference; it was not a case of bargaining about the fee pending the submission.

"But the proceedings with reference to the arbiter's proposal for a loan require to be more particularly considered. The facts are as follows:—The arbiter had heard counsel for the parties on 16th June 1879, after the conclusion of the proof, and he then proceeded to consider his decision. He appears to have made a very full investigation; and as his proposed findings were issued on 28th July, his statement that on 16th July he had substantially settled with the clerk to the reference the general principles of his award is probably correct. On that day (16th July) he went to Mr Duncan, the agent in Glasgow for the pursuers' brewery, and inquired as to the probability of the pursuers being able and willing to lend him £1000 on the security of property which he valued at £22,000, but which was already burdened to the extent of £16,000, and on the further security of his beer business, which he estimated as worth to a brewer about £400 or £500 a-year. The result was that Mr Duncan wrote on that day to the pursuers the letter No. 440 of process. Although marked *private*, it is evident that Mr Duncan saw no impropriety in such a proposal; for he not only transmitted it without hesitation, but explained in answer to the Lord Ordinary that he saw no objection to the transaction except that it was not a good investment. There is no doubt that Mr Steel was pressed for money at the time, owing to his debt to the City of Glasgow Bank (to which he owed £3000, for which decree had been taken); but his unwillingness to sell his property at that time is very intelligible, and there is no reason to doubt that he had a fair going business, and some reason to think that his credit was not so bad but that he might look for assistance from friends upon such security as he could offer. He had already been promised £1500 by two friends upon the security of his wine and porter business. And, on the whole, the Lord Ordinary is satisfied, both upon his own evidence and the other evidence in the case, that there was no corrupt idea or consciousness of impropriety in the mind of Mr Steel in making the proposal.

"The question remains, however, whether at any subsequent stage of the proceedings prior to his final award he acted corruptly in connection with this matter of the proposed loan, or allowed himself to be influenced by pursuers' conduct in regard to it? What happened was that he personally saw the pursuers on the subject. He states that he did not see them until after the proposed findings were in their hands, and gives a reason for that impression. But the Lord Ordinary is not disposed to doubt the accuracy of the pursuers' statement that he saw them both on the 21st July and in the beginning of August, about eight days after the proposed findings were issued. The way in which the pursuers treated the proposal is not satisfactory. They say that they felt at once that the proposal placed them in a situation of delicacy and embarrassment, but that they did not like to offend the arbiter by refusing to entertain his proposal, and accordingly professed to entertain it and to be desirous of receiving further information as to the securities offered. They allowed him to leave under the idea that he would have the loan if the securities were satisfactory. Before Mr Steel's visit in the beginning of August they had consulted their law-agent on the subject, and he had told them at once to let the arbiter know that the proposal could not be entertained during the dependence of the submission. This was very proper advice, and the Lord Ordinary sees no reason why the pursuers should not have acted on it. There was no awkwardness whatever in their letting Mr Steel know that they had been so advised. They had no right to assume that he would be offended at them for doing so, and no reason to fear him if he did take offence and act unjustly in consequence of their doing what was right. Mr Steel might have exposed himself to an objection as arbiter by his indiscreet conduct. But they were not entitled to hoard up the objection, and to allow him to go on in the belief that the pursuers, as well as himself, felt no difficulty in treating for the loan as a matter which should not affect in any way the arbitration proceedings. Instead of doing so, however, they allowed him to go on in ignorance of the advice they had got, and of the feeling of delicacy and embarrassment which they say troubled them. Mr Morison junior went to Glasgow to see Mr Steel on the subject about 22d August. At that time, if not sooner, it was known that the pursuers were to put in a representation

against the proposed findings; and on that occasion Mr Steel gave Mr Morison junior to understand that the loan proposal would have to wait until the arbitration was settled; and nothing more was said or done about the matter until after 14th October, when the arbiter issued the interlocutor or note disposing of the representations and of the question of expenses in the arbitration. The terms of that interlocutor or note show that the arbiter had fully considered the matters brought before him in the representations, and then finally committed himself to the views (to a considerable extent favourable to the pursuers) upon which his valuation proceeded. The alterations which he made were insignificant and are explained. The letters of 2d and 4th November were thus written after the arbiter had not only intimated his decision, but had disposed of the representations on both sides, and of the matter of expenses. The pursuers' note of 11th November asking an oral hearing was, in the Lord Ordinary's opinion, quite legitimately refused; and the evidence affords no support to the allegation that it was issued under feelings of irritation on account of the pursuers' refusal of the arbiter's request for a loan. The letter of 13th November shows no irritation whatever; and on 27th November the arbiter issued the interlocutor in reference to a point which had occurred in preparing the decree-arbitral as to the form of the decerniture. It was not until 12th December that the pursuers lodged their note protesting against the arbiter proceeding further in the reference.

"The Lord Ordinary is of opinion that the pursuers, unless they could have proved actual corruption on the part of the arbiter (which they have failed to do), had previously waived any right which they might have had to allege that the arbiter by the mere fact of his proposal for a loan had disqualified himself from acting as arbiter. The mere statement of the facts as disclosed in the proceedings and in the evidence of the pursuers themselves appears sufficient to show this.

"It is upon these views of the case that the Lord Ordinary has pronounced the foregoing interlocutor. He considers it unnecessary to go into the details of the proof. But it is proper to add that the evidence of the leading witnesses was in his opinion creditably free from any attempt at exaggeration. The pursuers did not in the least conceal their unfortunate want of candour and sincerity in their communications with Mr Steel. And Mr Steel, on the other hand, while he admitted, under the searching examination through which he was put, his consciousness now of the indiscretion he committed in opening such a proposal before the arbitration was finally settled, gave his evidence in such a manner as to convince the Lord Ordinary that he was entirely free from corrupt motive.

"The evidence relating to the proposal to Mr Thomson on 4th November really throws no additional light on the matter. Before that date the arbiter had finally intimated his decision, and his proposal of the loan to Mr Thomson when he ascertained that the pursuers were not going on with it does not appear to the Lord Ordinary, in the whole circumstances, to afford evidence of corruption, or of any such misconduct as should vitiate the decree-arbitral."

The pursuers reclaimed, and argued—The circumstances of the case clearly showed corruption on the part of the arbiter. Without maintaining that an arbiter could in no case have an ordinary business transaction for a loan with a party-submitter, the circumstances of this case were that an arbiter in desperate circumstances asked a loan from first one and then the other of the party-submitters without security, and after he had failed to get money in the market. Such a loan was practically a gift. Such a transaction was inconsistent with the position he held, and it would be *pessimi exempli* to support it. This was "a plain failure in duty" by an arbiter, and therefore corruption within the Act of Regulations—Lord Mackenzie in *Mitchell* v. *Cable*, 17th June 1848, 10 D. 1297. It is corruption in the legal sense for an arbiter to put himself in a position inconsistent with that of a judge—*Elliot* v. *Elliot*, 15th Dec. 1789, M. 668; *Fraser* v. *Gordon*, 5th July 1834, 12 S. 887, and sequel to that case, *Fraser* v. *Wright*, 26th May 1838, 16 S. 1049; *M'Kenzie* v. *Clark*, 19th Dec. 1828, 7 S. 215. In point of fact the arbiter was influenced by the refusal of the loan. There was no other explanation of the manner in which he had altered certain figures in the award, nor of his refusing an oral hearing on 12th November. (2) The Morisons were not excluded from redress by having entertained the proposals of the arbiter. They asked their agent's advice, and when he advised them not to enter on the negotiation they did what he recommended. There could be no waiver of an objection on the ground of corruption. The opinions of the Judges in *Fraser* v. *Wright*, *supra*, were inconsistent with such a doctrine.

Argued for defenders—As to the refusal of oral hearing, it is quite right in an arbiter, when the whole case is fully before him, to refuse additional hearing. As to the negotiations about a loan, mere irregularity preceding the award is not enough to vitiate it. It is quite distinct from corruption. Thus, it has been held that a mere indiscretion on the arbiter's part is not enough to set aside the award unless there is connected with it an effect on the mind of the arbiter—*In re Hopper*, 17th Jan. 1867, 2 L.R. Q.B. 567; *Mosely* v. *Simpson*, 8th May 1873, 16 L.R. Eq. 226. So also the mere fact that one of the parties is a creditor of the arbiter will not *per se* invalidate the award—*Morgan* v. *Morgan*, 1832, 1 Dowling, 611. In this case the facts only disclosed a case of irregularity on the part of Steel not amounting to corruption. He was a friend of both parties, and asked the loan in that capacity. The most pressing application he made was made after the notes were issued, when he considered the matter practically over, and was thus made quite unconnected with the arbitration. The words "I am sure it would be to your advantage," in his letter of 4th November, related to the trade in beer which he could offer the Morisons, and not to the arbitration. The evidence showed that his mind had not been affected in the least degree by the refusal. The pursuers had waived any right to object to the irregularity committed by going on with the proceedings and pleading before the arbiter after they knew of the alleged disqualification—Bell on Arbitration, sec. 238, p. 132 (2d ed.), with cases of *Drew* v. *Drew*, 2 Macq. 7, and *Johnston* v. *Cheape*, 5 Dow, 247, there cited; *Mosely* v. *Simpson*, *sup. cit.*

At advising—

LORD JUSTICE-CLERK — [*After narrating the facts connected with the dissolution of partnership*] —It was agreed that the amount to be paid to Mr Thomson on his retiral should be referred to Steel, who was a person engaged in an analogous line of business, and presumably was well acquainted with the details of such a business as this brewery was. The reference was entered into in the year 1878. In the course of the next year Steel got into difficulties owing to the failure of the City of Glasgow Bank, and he proposed in July 1879 to borrow £1000 from Morison, one of the parties before him in the reference. To this request he received no definite answer till November. Morison says that Steel left him after their July interview apparently under the impression that he would get the loan, but that he himself was not disposed to lend money to a man who he was convinced was in deep water. In November, after seeing the notes of the arbiter's proposed findings, Morison wrote saying that the loan would not be given. Probably a day or two afterwards Steel made the same application to Thomson, and he found it impossible to negotiate such a matter with the arbiter pending the submission, and there the matter ended. Neither party did anything to stop the proceedings, and they went on to a final award. The claim of Thomson was for £28,000—the award was for £12,000; and now the question is, whether the arbitration was rendered nugatory and illegal, and the whole proceedings and award are corrupt in the sense of the Regulations Act? On two grounds on which the decree is said to be nullified, and to which the Lord Ordinary has given no effect, I think it unnecessary to say anything. The first was that the arbiter refused further oral hearing. That has been often stated as a ground of challenge, but I apprehend that within limits that is a matter wholly within the discretion of an arbiter, and I am not disposed to think this arbiter acted wrongly in that matter.

The other matter was about the arbiter's fee. I am satisfied on reading the evidence that there is no ground for attacking the award in that respect. But the question is, whether the whole demeanour and actings of the arbiter were such as to prevent us from holding that he acted with a clear and unprejudiced mind? That is a question not without delicacy. On the general law I should say that it is not necessary, if the actings of the arbiter be corrupt in the general sense—that is, if they are illegal in themselves,—to show that the corrupt tendency of the arbiter's mind took effect on the award. The contrary could not be maintained. If an act proved is in its own nature of a tendency unduly to bias the mind of the arbiter, that in the general case will be enough. But if the act be indifferent in itself, or may be so—if it does not necessarily imply a tendency to bias the mind of the arbiter, but may only derive that quality from circumstances—it becomes necessary in that case to show that it was such that it left the arbiter's mind bereft of that quality of impartiality which it ought to possess. The cases of *Elliot* and *M'Kenzie* illustrate the distinction to which I refer. The question in them was, not whether the things done were themselves corrupt, but whether the arbiter had not so mixed himself up with the subject of dispute as to prevent him from being in the position of having no interest in the subject of dispute. But this case has a feature which did not occur in either of those two cases. It is this, that the transaction founded on by the pursuers had no reference at all to the circumstances or facts connected with the arbitration, but to matters altogether removed from them. I am not aware of any case where reduction was decreed for on such grounds. The question is, whether anything occurred which must have had a corrupting tendency? I have read and re-read the evidence, and I have formed a clear opinion in favour of the view of the Lord Ordinary on that head. There is nothing proved which must be presumed to have biassed the arbiter's mind, and that is enough in a case where the facts founded on are outside the arbitration. There is nothing illegal in itself in an arbiter having business transactions with one of the parties which are unconnected with the arbitration. I have no doubt the arbiter now sees that the proceeding questioned was a very improper one. But while it was in the abstract inexcusable, I have no doubt that Morison, Steel, and Thomson did not at first see that it had any bearing on the award. When Morison was first asked for the loan time was all-important to Steel. The ordinary channels of borrowing money were exhausted. I am not prepared to assume that Steel went to his two friends between whom he was acting as arbiter to use his position as an arbiter to get a loan. I think he went because they were his friends, and they thought so too. Morison gave no answer to the application before the notes were issued, and then after they were issued, and he had seen them, wrote to say that there was no hope of his advancing the money. That was put to us in the light of his waiting till he should see whether the arbiter was to favour him. I think the true explanation is much more simple. Morison saw when the notes appeared that the arbiter was going to give the Thomsons £12,000, and that he would have no money to spare. It would have been friendly enough if he had done the thing, but there is no reason to suppose that Steel was biassed by the refusal. Thomson again was in a different position. But the conclusive answer to any objection on the score of a transaction with Thomson is that the arbiter had his mind made up before he went to Thomson. In point of form the arbitration was not at an end, but in reason it is impossible to say that the hope of an advance was that which induced the arbiter to come to his ultimate award. I think, therefore, that though the arbiter made a grievous mistake, there is no solid ground for the imputation of corruption.

The other ground on which the Lord Ordinary proceeds is, that Morison waived any right he might have had to stop the proceedings by going on to plead before the arbiter in the knowledge of the transaction with him. That involves more delicate principles, and though I am quite prepared to adhere to the interlocutor as it stands, I must say that I think that if there be a corrupt motive disclosed on the arbiter it will take a great deal of acquiescence on the part of a party to the submission to waive it. In the present case I think Mr Morison was quite satisfied with the arbiter. If so, he was not entitled to let the proceedings go on and put the other party to the expense of this inquiry. On the whole matter I think we should adhere to the interlocutor of the Lord Ordinary.

LORD GIFFORD concurred.

LORD YOUNG—I concur in your Lordships' opinion. The only thing I hesitate about in affirming the Lord Ordinary's interlocutor is the matter of waiver. I would not put my judgment on that ground.

The Court adhered.

Counsel for Pursuers—Trayner—Mackintosh. Agent—J. Gill, S.S.C.

Counsel for Defenders — Scott — Kinnear. Agents—Nisbet & Mathison, S.S.C.

Friday, November 26.

FIRST DIVISION.

SPECIAL CASE—M'LAREN AND OTHERS (BRYSON'S TRUSTEES) AND OTHERS.

Succession—Vesting—Conveyance in Trust, with Interposed Liferent and Destination.

B. by his trust-disposition and settlement directed his trustees to pay his wife Mrs B. a liferent of his whole estate during her survivance of him and viduity; and within twelve months after the death of the survivor of him and his said wife, to convey, *inter alia*, certain heritable subjects to his wife's nephew J. B. C., and the heirs of his body, whom failing to W. C, his brother, whom failing as therein set forth. His wife survived him, and did not marry again; she also survived J. B. C., who died in 1870. *Held* that the subjects had not vested in J. B. C. so as to be carried by his testamentary deeds, but fell to be conveyed by the trustees to W. C. in terms of the original destination.

Succession—Calling up of a Bond—Intention.

A testator directed his trustees to convey to a certain series of heirs, within a year after the death of the survivor of himself and his wife, some heritable subjects "if not sold as after mentioned," and under burden of a security of £2000 affecting them. He then proceeded to direct that in case the holders of the bond for £2000 should resolve to call up their money, and should intimate their resolution to do so before said period had arrived, the trustees should make up a title to and sell the subjects, and divide the proceeds among a slightly different series of heirs. During the lifetime of the testator's widow, A., who held one-half of said bond, desired and received payment of his money, and assigned his bond to a third party; and the bond affecting the other half was subsequently similarly assigned. The trustees did not sell until many years after, when the then holders of the bond called it up formally by notarial intimation. *Held* that the trustees had acted rightly, as the former proceedings did not amount to what the testator had contemplated as a "resolve to call up," the bond.

By trust-disposition and settlement dated July 1, 1847, the late John Bryson, plasterer, Bainsford, conveyed his whole estate, heritable and moveable, to trustees for the purposes therein specified. His widow Mrs Margaret Campbell or Bryson was named a trustee *sine qua non* during her viduity, and by the second purpose of the said deed was to enjoy the liferent use of the whole estate during her survivance and viduity, except the subjects fifth therein disponed, which were otherwise destined. The said deed contained the following provisions—"*Fourthly*, Within twelve months after the death of the longest liver of my said wife and me, or as soon thereafter as conveniently may be, I appoint my said trustees, at the expense of the disponees respectively, to dispone and convey the several remaining subjects before described, with houses and pertinents thereon, as follows, viz.—The subjects first above disponed, if not sold as after mentioned, to be conveyed under the burden of said security (conveyed) to John Bryson, my nephew, residing with me, and the heirs of his body, whom failing to William Bryson, his brother, whom failing to John Bryson Clark, my wife's nephew, residing with me, whom failing to William Clark, his brother, whom failing to George Clark, his brother, whom failing to his three sisters Mary, Ann, and Margaret Bryson Clarks, all residing in Bainsford, and their heirs; . . . . . . *Item*, the subjects third and seventh above disponed to be conveyed to the said John Bryson Clark and the heirs of his body, whom failing to the said William Clark, whom failing to the said George Clark, whom failing to the said Mary, Ann, and Margaret Bryson Clarks and their heirs: *Fifthly*, In case the holders of the bond affecting the subjects first above disponed resolve to call up their money, and intimate such resolution prior to the expiry of twelve months from the death of the longest liver of my said wife and me, I appoint my trustees to complete all necessary titles to these subjects, and sell the same in such manner as they shall deem proper, and after paying the debt which affects the same, to divide the free proceeds of the price into four equal parts or shares, and to pay to the said John Bryson, my nephew, and his heirs one such share, the said William Bryson, my nephew, and his heirs one such share, the said John Bryson Clark and his heirs one such share, and the remaining share to be paid to the said Margaret Campbell, whom failing the said John Bryson Clark, whom failing his brother William, whom failing his brother George, whom failing his three sisters Mary, Ann, and Margaret Bryson Clarks and their heirs." By the seventh purpose the testator directed the trustees to convey and make over the residue of his estate, heritable and moveable, to his said widow, whom failing to be among John Bryson, William Bryson, and John Bryson Clark equally, and their heirs whomsoever.

The said John Bryson, the testator, died on October 22, 1856, without issue, and was survived by his said wife Mrs Margaret Campbell or Bryson, who did not marry again, and also by the said John Bryson Clark, William Clark, George Clark, and Mary, Ann, and Margaret Bryson Clark, and John and William Bryson.

John Bryson Clark executed a disposition and assignation of his whole right and interest under the said trust-disposition and settlement in favour of the said Mrs Margaret Campbell or Bryson, dated December 6th 1854. There was no evidence of any formal intimation of this assignation to the testator's trustees, but Mrs Bryson was one of the trustees *sine qua non*, and it was found in