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.