the defenders, could be compensated by a claim held by the defenders against the Union Shipbuilding Company, I would say that no answer but one in the negative could be given to that question. It is almost a truism to affirm that a claim by one company cannot be compensated by a counter-claim against another and wholly different company. Yet this is what is involved in the case, stated as I have just stated it.

When the compensation is attempted to be supported by the fact that David Davidson and John Wood, the individual partners of the firm of Davidson & Wood, are two out of the partners of the indebted firm, the Union Shipbuilding Company, and so are individually liable for the debts of that company, it still strongly occurs that there is a flaw in the legal plea. For so soon as the counter-claim involves a claim against Davidson individually, or against Wood individually, the case ranges itself under the well established rule that a claim made by a company cannot be compensated by a counter claim against individual members of that company. It is difficult to see how the case can ever escape from the operation of this rule. The debt due by the Union Shipbuilding Company, on which compensation is pleaded, is plainly not a subject of compensation, whilst continuing (as in truth it always does) a company debt. When made to take the form of an individual liability by Davidson, or by Wood, it does not appear to be different from any other individual debt due by these parties; as, for instance, a debt due by Davidson on an individual bill, and a different debt due by Wood for an individual purchase. These two individuals are not better situated than if they were unconnected third parties interposing as cautioners for the Union Shipbuilding Company. Such individual debts, taken singly, would not afford the ground of compensation; and as little can they do so taken together. The two negatives will not combine to make up a positive.

But I think the whole question superseded by the fact which I consider established in the present case, that the claim against which compensation is pleaded is not a claim made by a subsisting company of Davidson & Wood. It is a claim made in right of the two individual partners of the once existing company of that name, now dissolved, and for what forms the surplus assets of the company, after all their debts are paid, belonging to these two gentlemen in their individual capacity, in equal shares. The claim made in the present action is in substance just a claim by David Davidson individually for one-half the debt sued for, and by John Wood individually for the other half of the same debt. There then arises a clear compensation on the debt due by each of them individually as partners of the Union Shipbuilding Company. It is an individual credit met by an individual debit. The *concursus debiti et crediti* is complete.

I do not find any difficulty in the shape of the case,—and especially nothing in the way in which the pursuer has endeavoured to state his claim in order to avoid the plea,—preventive of the defenders insisting in the plea of compensation thus arising in their favour. And I am of opinion that the plea should be sustained.

The other Judges substantially concurred.

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

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

Friday, February 5.

ALEXANDER *v.* BRIDGE OF ALLAN WATER COMPANY.

(*Ante* v, pp. 174, 227.)

Arbitration—Award—Legal Corruption—Ultra vires *—Reduction—Statute—Proof—Notes of Arbiter.* Circumstances in which *held* (Lord Kinloch *diss.*) that an award in a statutory arbitration fell to be reduced by reason of the arbiter not having acted in conformity with the directions of the Statute.

An arbiter being asked by one of the parties to make it clear on the face of the award that he gave the party no compensation for a certain subject because he held the party to have no legal right to it, and refusing, and this being established by evidence, and the Court being of opinion that he was bound to give such compensation, *held* that this amounted to 'legal corruption.'

The pursuer, Sir James Edward Alexander, is proprietor of the lands of Westerton, on which a part of the Bridge of Allan is built. In 1863 the Act 29 and 30 Vict. c. 241, was passed, entituled "An act for supplying with water the town of Bridge of Allan and places adjacent."

By section 28 of the Statute it is enacted,—"And whereas the existing water-works at Bridge of Allan belong, or are reputed to belong, to Sir James Edward Alexander of Westerton, knight, in fee-simple, and the company have agreed with him for the purchase thereof on the terms hereinafter mentioned, the company shall purchase and take the said water-works, including the reservoir, conduit, or main pipe, and distributing pipes, and all appurtenances connected therewith; and the compensation payable to the said Sir James Edward Alexander, or his heirs or successors, for his or their rights in the said water-works, may be agreed on between him, or his heirs and successors, and the company; or, in case of difference, such compensation shall be fixed and determined by two arbiters, to be mutually chosen by the company and the said Sir James Edward Alexander, or his heirs or successors, with power to the said arbiters to name an oversman in the event of their differing in opinion; and failing the arbiters agreeing on an oversman, he shall be appointed by the Sheriff of the county of Sterling, on the application of the company, or of the said Sir James Edward Alexander, or his heirs or successors, and the company and the said Sir James Edward Alexander, or his heirs or successors, shall be bound to enter into the said arbitration within three months after the passing of this Act; and in the event of either of the parties failing to enter into such arbitration within the said period, then the said Sheriff, on the application of the other party, shall appoint a fit and proper person as sole arbiter to fix and determine the said compensation, and the decision of the said arbiters, or sole arbiter, or of the said oversman, shall be final; and the said arbitration shall be proceeded in under and subject to the provisions of 'The Lands Clauses Consolidation (Scotland) Act 1845,' with respect to the settlement of questions of disputed compensation by arbitration, except in so far as such provisions are varied by this Act; provided that, in fixing the compensation to be paid to the said Sir James Edward Alex-

ander, or his heirs or successors, for his or their rights in the said water-works, the said arbiters or sole arbiter, or the said oversman, shall take into consideration the value of the water, the plant, and the whole circumstances of the case." By section 29th of the said Statute it is provided, that "On payment of the compensation to be agreed on, or to be fixed by the said arbiters, or sole arbiter or oversman, in such manner as has been or may be agreed on by and between the said Sir James Edward Alexander and the company, the said Sir James Edward Alexander, or his heirs or successors, shall grant a conveyance of the said water-works to the company; and, on such conveyance being granted, the said water-works, for all the rights of the said Sir James Edward Alexander, or his heirs or successors therein, shall form part of the undertaking of the company, and shall be vested in, and may be held, used, and disposed of by the company for the purposes of this Act; and the provisions of this Act, and the Acts incorporated herewith, shall be applicable to the said water-works in the same manner and to the same effect as if the said water-works had been authorized by this Act."

Various proceedings followed, and Mr Thomas Ranken, S.S.C., was appointed arbiter to determine the compensation due to the pursuer. The pursuer alleged that—"In the claim, detailed statement, and pleadings, lodged by the pursuer before the arbiter, he explained the nature of his claim, and the sources of the water-supply; and he stated that he had the exclusive right to the water-supply, whether derived from springs within the pursuer's own lands, or from the Coxburn, the pursuer's right to the water of the Coxburn resting partly on his right as proprietor of Westerton, and partly on agreements (in 1851 and 1854) with Lord Abercromby, the only other party interested in the Coxburn. Full explanations on these points were given to the arbiter, but the question of right to the Coxburn did not fall under the arbitration, the arbiter's duty being merely to value, and in valuing he was directed by the Statute to 'take into consideration the value of the water, the plant, and the whole circumstances of the case.'"

Proof on certain points was allowed and taken by the arbiter. "After the proof was closed a hearing before the arbiter took place, in the course of which the counsel for the defenders, the Water Company, for the first time maintained that the pursuer had no legal right to the supply of water from the Coxburn, and maintained that the water-works must be valued as if that supply was cut off. The pursuer, through his counsel, maintained that the claimant had right to the supply from the Coxburn, but urged that the arbiter had no right to decide that question, but must value the compensation on the footing that the right existed. The arbiter then made avizandum with the proof and debate.

"Thereafter the arbiter issued notes of his proposed award in the following terms: "The arbiter proposes to find and award as follows, viz.:—

"1. That the claimant is entitled to the value of new pipes of sufficient quality and dimensions, and of the best construction as they could be supplied at present, including laying, . £1150 0 0
Lead pipes and cranes, . . 140 0 0

£1290 0 0

Carry forward, £1290 0 0

Brought forward, £1290 0 0
Less one-third for deterioration and mal-construction of present pipes, . . . 430 0 0

£860 0 0

2. Value of Sunnylaw reservoir, with sufficient access thereto, and land taken, . . 420 0 0

£1280 0 0

3. Value of springs in said reservoir, . . . 30 0 0
4. Damhead in Coxburn, . 5 0 0
5. Wayleave, . . . 50 0 0

£1365 0 0

"6. The arbiter is of opinion that the claimant has no legal right to divert and sell to his feuars and the inhabitants of the Bridge of Allan the water of the Coxburn, and therefore he proposes to find no compensation due in respect thereof."

The pursuer further alleged—"Against the arbiter's proposed findings the pursuer lodged a written representation, in which, *inter alia*, he pointed out that the arbiter's sole duty was to value the pursuer's existing water-works and the pursuer's existing supply of water thereto, including the supply from the Coxburn. . . . Notwithstanding the representation and remonstrances of the pursuer, the arbiter adhered to his proposed findings, and wrongfully, illegally, and unwarrantably, in violation of his duty, and in excess of his powers, took upon himself to decide, and did decide, that the pursuer had no right to the supply of water from the Coxburn, and that the pursuer's water-works must be valued upon that footing, that is, without taking into consideration the value of the said water supply. The arbiter, on considering the representations for the parties, pronounced the following interlocutor and note:—'*Edinburgh*, 31*st July* 1867.—The arbiter having considered the respective representations for the parties, refuses the same, and remits the claimant's account for expenses, when lodged, to the auditor of the Court of Session to tax and report. (Signed) THO. RANKEN. *Note.*—The arbiter's proposed award is founded upon the best consideration he could give to the whole evidence adduced, and the facts and circumstances of the case. He considers that the sums proposed to be awarded to the claimant are full compensation to him for all his legal rights. It may no doubt appear to the claimant to be a hardship to be deprived of the revenue he derived from the water by the sufferance or acquiescence of Lord Abercromby and the ratepayers. But, on the other hand, the claimant should consider himself fortunate in having so long exacted a revenue to which, as at present advised, the arbiter considers that he had no legal right or title." (Cond. 13.) "The arbiter thereafter directed his award to be written out and issued. The pursuer saw the award in draft, and observing that the arbiter proposed to insert in the award a statement or declaration that 'in fixing the said compensation I have taken into consideration the value of the water, the plant, and the whole circumstances of the case,' the pursuer objected to this as inconsistent with and contrary to the fact, and he requested the arbiter to insert in the formal award the grounds of judgment set forth in his final notes and interlocutors, viz., that he had taken into consideration the value of springs in the pursuer's own lands, but not the value of the supply from

the Coxburn, and had fixed the compensation payable to the pursuer on the footing that the pursuer had no right to the supply of water from the Coxburn. The arbiter, however, wrongfully and illegally refused to comply with the pursuer's request, and he issued his award in the terms which it now bears. (Cond. 16.) The statements contained in the said pretended decree-arbitral are false, in so far as the decree-arbitral bears that the arbiter has taken into consideration the value of the water, in so far as this means, or may be held to mean, that the arbiter took into consideration the value of the supply of water from Coxburn; for the arbiter, in point of fact, did not take into consideration the the value of the supply of water from Coxburn, but estimated the compensation on the footing that the pursuer had no right thereto. The statement in the decree-arbitral, therefore, is not only false in the sense now explained, but the arbiter pronounced the said award wilfully and corruptly leaving out of view the consideration of the value of water, which, by the Act, he was bound to take into consideration. The award in this respect is not only corrupt, but *ultra vires.*"

The pursuer now sought reduction of the decree-arbitral.

The Lord Ordinary (ORMIDALE), after a proof, pronounced this interlocutor:—"Finds, as matters of fact, that a portion of the water supplied by the water-works in question, as they existed at the date of the passing of the Bridge of Allan Water Company's Act 1866, was derived from the stream called the Coxburn, referred to in the record, and that the arbiter did not allow the pursuer any compensation for said water, in respect that, in his opinion, the pursuer had not any legal right to the same: Finds, in point of law, that it was *ultra fines compromissi* and *ultra vires* of the arbiter to entertain and try the question whether the pursuer had a legal right to said water, and, on the ground that he had no such legal right, not to allow him any compensation for said water: Therefore sustains the reasons of reduction," &c.

The defender reclaimed.

Solicitor-General (YOUNG) and BURNET for reclaimer.

GIFFORD and MACDONALD for respondent.

The Court allowed the pursuer additional proof of his averments in the 13th and 16th articles of the condescendence.

At advising—

LORD DEAS, after narrating the purpose of the Water Company's Act, the purport of its principal clauses, and the terms of the agreements between Sir James Alexander and Lord Abercromby, said—Matters were in that state when the parties went to Parliament, from whom they got these powers on condition of making compensation to Sir James Alexander in terms of the 28th section. In construing the Act, can it be said that the arbiter was not entitled to take into account that Sir James Alexander was actually in the position described in the agreement with Lord Abercromby? These works were in operation. The main supply of water came from the Coxburn. The other supply was very small, and altogether insufficient for the purposes mentioned in the deeds of agreement. Sir James was in possession under these agreements, and no one, except it may be some of the lower heritors, could object to his use of the Coxburn. None of them did object, and it is not clear that any of them could. In that state the works went on for a number of years. Sir James Alexander had agreed to take certain rates from those who benefited by the water supply. He drew an income of some £200 per annum from these works since the date of this agreement. I do not see how it can be said that, according to the fair construction of the deed, it was not meant that Sir James was to have compensation for the rights in his possession which he gave up, whatever their value might be. If they were precarious, that would make the compensation all the less; but I do not see that but for this Act of Parliament there would have been any disturbance of his right. If the Act had not passed his rights would, for some time at least, have gone on as before. It is not said that the Water Company did not get all the benefit Sir James Alexander previously enjoyed, but merely that he could not guarantee the permanent character of his right. But I think that under the Act we must hold that he was to get something for that. Mr Ranken was appointed arbiter, and the question whether Sir James Alexander was entitled to any compensation for this water supply was debated before him. It is said that he did not allow any compensation just because he did not think Sir James Alexander had any right to it. If we look at his notes we could not doubt that that was the opinion he entertained. If we look only at the decree-arbitral, we could not tell whether that was his opinion or not. Assuming that the terms of the decree-arbitral would be otherwise conclusive, it is said that Sir James Alexander, being aware of the arbiter's opinion, from seeing it in his notes, requested the arbiter to allow that to appear on the face of the decree-arbitral; that by the words "value of the water" he meant exclusive of the Coxburn, and that he allowed no compensation for the enjoyment and possession of that water, because he thought Sir James had no legal right to that possession. The next question arises whether that is a relevant allegation. I am humbly of opinion that it is. I think it was the duty of the arbiter, if he was of the opinion, and was deciding on the footing he said he was, to allow that to appear on the face of the decree-arbitral, so that Sir James Alexander might, if he chose, raise the question. If it had been found on the face of the decree-arbitral that Sir James Alexander was entitled to no compensation in respect of the Coxburn, the question would have been fairly before the Court whether that was consistent with the Act of Parliament. Because, though the arbiter was sole judge of the amount of compensation, he was not sole judge of the meaning of the Act, and was bound to allow that to be tried; and if he was asked, and refused, to allow that to appear, I think such a failure of duty falls under the category of legal corruption. That which the law has stamped with the character of legal corruption may exist where the motives are the very best, as no one can doubt was the case here. If an arbiter refuses to allow proof in a case which is proper for proof, no matter how conscientiously he may be of opinion that it is not necessary, on the ground of his being in full possession of the case; and the Court are clearly of opinion that proof ought to have been allowed; that is corruption in the sense of the Act of Regulations. Now, in a case of this kind, where the arbiter takes what the Court thinks was an erroneous view of the powers conferred on him by the statute, and refuses to allow that to appear on the face of the decree, that is fully a stronger case than where he thinks no proof necessary. The next question is,

was he asked here, and did he decline, to allow this to appear? There is no doubt he was asked, and did so decline, believing that by putting the thing as he did he was complying with the Act of Parliament. I do not think the Act of Parliament prescribed the form of the decree-arbitral. He might put it in any form, but he was wrong in putting it in a way which defeated the very object of the Act of Parliament.

In a question of corruption in the sense of the statute, we are not limited as in other questions about decrees-arbitral. I do not inquire whether, for any other purpose, it might be competent to look at the notes of the arbiter. There is a great deal to be said for looking at the decree alone; for it may be argued that the arbiter changed his mind after issuing his preliminary notes. I give no opinion on that, but I have no doubt of the competency of evidence on the question before us; and I have no doubt that the evidence establishes that the arbiter's view of the matter was as stated. Therefore, although the matter could not have been remitted to an abler or more honourable man, or one whose opinion is more entitled to respect, I am of opinion that the decree-arbitral must be set aside.

LORD ARDMILLAN concurred.

LORD KINLOCH—The conclusion at which I have arrived in this case differs from that which has been now expressed. I am of opinion that there are no sufficient grounds on which to set aside the decree-arbitral brought under challenge.

This decree-arbitral was pronounced in a submission process between the pursuer, Sir James Alexander, and the defenders, the Bridge of Allan Water Company.

The submission was engaged in under the provisions of the Bridge of Allan Water Company's Act 1866. By section 28 of that Act it was set forth that the existing water-works at Bridge of Allan belonged, or were reputed to belong, to the pursuer; and it was declared that the Company should purchase these water-works, including, as the clause expressly declared them to include, "the reservoir, conduit, or main-pipe, and distributing-pipes, and all appurtenances connected therewith." The compensation to be paid to the pursuer was declared to be determinable by arbitration; and the clause provided in the end of it, "that in fixing the compensation to be paid to the said Sir James Edward Alexander or his heirs and successors for his or their right in the said water-works, the said arbiters or sole arbiter, or the said oversman, shall take into consideration the value of the water, the plant, and the whole circumstances of the case."

It is very noticeable that the only subject of purchase set forth in this clause is the waterworks, declared to belong, or to be reputed to belong, to the pursuer, and the particulars composing which are expressly stated in the clause. It is for these that a sum of compensation is to be fixed by the arbiters; but it is declared that in fixing the sum the arbiter "shall take into consideration the value of the water, the plant, and the whole circumstances of the case." The meaning of this provision I shall afterwards consider.

Mr Thomas Ranken, the arbiter acting under this provision, issued a decree-arbitral on 7th August 1867, setting forth, "I, the said arbiter, hereby find that the sum of £1365 is the total compensation payable to the said Sir James Edward Alexander for his rights in the said waterworks; declaring, that in fixing the said compensation, I have taken into consideration the value of the water, the plant, and the whole circumstances of the case."

This decree-arbital is a simple echo of the words of the statute; and bears *ex facie* to be strictly in terms of the Act. It implies on its face an entire fulfilment of the statute; and, unless in some way contradicted and neutralized, must be taken to be a good statutory award. According to what I hold settled principles in the law of arbitration, the decree-arbitral could not, speaking generally, be affected or cut down by reference to the arbiter's notes, examination of the arbiter, or any other extrinsic evidence, touching the grounds or considerations on which the arbiter arrived at his conclusion.

But it has been averred by the pursuer that the arbiter, in one important particular, directly transgressed the statute, viz., that he refused to take into consideration the value of the water of the Coxburn, one of the supplies of the water-works, on the ground, as stated by him, that he held the pursuer to have no legal right to this water. It is contended by the pursuer that the arbiter had no power under the statutory submission to pronounce on the legal rights of the pursuer; but was bound to value these rights on the footing of the pursuer having legal right to the water as well as the water-works; his duty as statutory arbiter being to fix value and not to decide on right. The pursuer has further maintained that, whilst thus transgressing the statute, the arbiter framed the decree-arbitral in such a way as would conceal his having done so, and make it ostensibly bear that the statute had been fully followed out. On this special ground the pursuer contended that he was entitled to get behind the decree-arbitral, and prove the alleged transgression of the statute, to the effect of nullifying and setting aside the decree-arbitral. The proceedings of the arbiter, he maintained, constituted corruption in the sense of law; the known and recognized ground on which a decree-arbitral may be competently set aside.

I do not in the least dispute that if the pursuer had made good his averments,—that is to say, had proved that the arbiter transgressed the statute, and purposely framed the decree-arbitral in order to conceal the transgression—the pursuer's conclusion would follow, and the decree-arbitral fall to be set aside. I think that it was quite competent to allow him proof in support of his allegations, and that under this proof he was entitled to lay open the proceedings in the submission, not for the purpose of questioning the soundness of the arbiter's views, but for that of showing what, in point of fact, the arbiter did, and what he did not. But the primary fact which the pursuer must establish is that the arbiter has transgressed the statute. Unless he prove this he proves nothing. If the arbiter did not transgress the statute, he could not have framed the decree-arbitral to conceal a transgression, because transgression there was none. Hence it is necessary to consider first of all, and as indeed the hinging point of the case, whether the arbiter in his proceedings obeyed or disobeyed the statute under which he was acting.

The pursuer says that the statute was disobeyed, because the arbiter found,—to use his own express words in the notes issued by him preliminary to the decree-arbitral—"that the claimant had no

legal right to divert and sell to his feuars and the inhabitants of the Bridge of Allan the water of the Coxburn, and therefore he purposes to find no compensation due in respect thereof." The arbiter, it should be noticed, did find a certain sum due to the pursuer in name of water. He found a sum of £30 as the value of springs in the said reservoir; but as to the value of the Coxburn he found no sum due, for the reason above quoted.

I am of opinion that in so proceeding the arbiter did not transgress the statute. I wholly differ from the pursuer when he maintains that under clause 28 of the statute the arbiter was bound to hold all the water running into the reservoir to be the legal property of the pursuer, and to value it accordingly. I cannot so read the statute. I think the statute so holds as to the water-works, comprehending the different pieces of property specially set forth. As to these, I think the arbiter had no other function than that of valuation. But the statute deals altogether differently with the value of the water, as to which it makes a marked discrimination from the case of the water-works. As to this, it merely says that in fixing the price of the water-works the arbiter "shall take into consideration the value of the water." The expression is somewhat indeterminate; but giving to it its most favourable meaning for the pursuer, and assuming that it puts on the arbiter a compulsory consideration of the value of the water, it cannot be carried further than to lay on the arbiter the duty of considering the value of the water to the pursuer, a thing manifestly dependent on the extent of the pursuer's right in and control over it. For anything that appeared there might be other streams than the Coxburn supplying the reservoir, and streams not flowing through the pursuer's grounds, and in which he had no right or interest. Clearly, as I think, the arbiter was neither bound nor entitled to give to the pursuer the value of these. The pursuer's right in the Coxburn might not be entire but partial; his interest might not be several but joint with others. The right he had might not be absolute, but limited and temporary. It might depend on the right of others, in itself limited. His right might be precarious, so precarious as not to ensure his control over the water for a single day. There might conceivably be a right in another party to cut off at once the water, so as to prevent a single drop from entering the reservoir. Or the right of Sir James in the water might be such as to entitle him to use it unlimitedly for his own purposes, but not to sell it for money to others. The value of the water to the pursuer depended, or might depend, on these and other similar considerations, because just on these or similar considerations depended his control over the water, and his power of turning it to profitable uses, in which consisted its value to him. I cannot, therefore, hold the arbiter necessarily wrong when inquiring into the nature and extent of the pursuer's right in the water supplying the reservoir. On the contrary, I think he could not discharge his statutory duty without some such inquiry, if the pursuer's right was made matter of contest. I so think simply because it was his duty to fix the value of the water, not abstractly or in itself, but its value to the pursuer; and he could not legitimately do this without considering the nature and extent of the pursuer's rights in the water, and, as depending on this, his power of control over the water, and his capacity to make a profitable use of it. It was thus, and thus only, that the arbiter could rightly fix its value.

I consider it to be no part of the duty of the Court in the present action to determine whether the arbiter was right or wrong in holding the pursuer to have had "no legal right to divert or sell to his feuars and the inhabitants of the Bridge of Allan the water of the Coxburn," and on this account awarding no compensation in respect of the value of this water. I therefore purposely avoid adverting to the deeds or documents supposed to bear on this question of right, to which not improbably more evidence *pro et con* might be added if the point was competently before us. If the arbiter was within his powers in taking this question into consideration, it forms no ground for setting aside his award that his judgment on the point was erroneous. As was once quaintly observed by one of our predecessors, it is not *ultra vires* of an arbiter to go wrong. So soon as it is decided that the arbiter was entitled to consider the question and pronounce on it, the inquiry in the case is at an end. Whether the judgment of the arbiter was right or wrong forms no legitimate subject of present inquiry.

It is said that the arbiter transgressed his duty by excluding altogether from consideration the value of the water of the Coxburn, which it is said is what he did. It is conceded that he might competently have fixed the very smallest sum as representing the value of the water, and that in that case his decree-arbitral would be beyond challenge. The point in which he erred is said to be that he excluded the whole subject from consideration, on an assumption of want of legal right. But this mode of stating the case does not, I think, accurately represent what happened, and is in substance a begging of the question. The arbiter did not exclude from consideration the value of the Coxburn, that is, its value to the pursuer, which is all that he had to do with. He inquired into its value, and found it *nil*, because he thought, rightly or wrongly, that the pursuer had no right to dispose of the water, and therefore could not legitimately make anything of it. Had the arbiter found the claimant to have had a partial and limited right to the water, and in consequence fixed the compensation at a limited sum, it is conceded that his decree would be unassailable. But the same principle which admitted his deciding that the right was partial and limited, equally admitted his deciding that there was no right at all; that is to say, for it is only to this effect that he decides anything, that the pursuer "had no legal right to divert and sell to his feuars and the inhabitants of the Bridge of Allan the water of the Coxburn," and therefore had no right to money compensation. The arbiter, therefore, did go into the question of value, and this, in truth, is the only question into which he goes. It is only to the effect of fixing value, or the want of it, that the decision of the arbiter touches on legal right. As settling legal right, abstractly considered, his judgment is quite unauthoritative, and will not affect the pursuer. But as an element in fixing value, or the want of it, I am of opinion that the arbiter was entitled to inquire into the matter of legal right, and to make his decision as to the value hinge on the result of that inquiry. And this is all that the arbiter has done, when, allowing the pursuer for the value of the springs, he has refused him anything for the alleged value of the Coxburn.

If, as is my opinion, the arbiter was not guilty of any transgression of the statute, I conceive that no sound objection lies to the form of his award. It is, as I have said, a simple echo of the statute.

He finds a certain sum due to the pursuer for his rights in the water-works, having, in fixing this sum, taken into consideration the value of the water, the plant, and the whole circumstances of the case. I am of opinion that this rightly represents what the arbiter did in point of fact. I cannot enter into the idea that the arbiter was bound to set forth on the face of the award the whole details of his procedure, or any portion of these. I know of no authority for holding that an arbiter is bound in his award to mention the pleas stated by the unsuccessful party which were repelled by him, or to make the terms of his decree-arbitral such as that party thinks will afford him more facilities for bringing it under challenge. I entirely agree that an arbiter is not entitled to go beyond the limits of the submission, and to frame his award in such a way as to conceal his having done so. I have no idea that misconduct by an arbiter can be effectually so concealed. I do not doubt that the party wronged has his remedy, and this remedy I conceive to lie simply in his being entitled to bring the award under challenge, on an averment to this effect made out by evidence. I do not object to the competency of the evidence led in the present case, considered as offered in support of this averment. But it is an essential part of the case to be proved by such party, that the arbiter did transgress the statute. So soon as it is held, as I hold, that the statute was not transgressed, *cadit questio*. If the arbiter proceeded in terms of the statute, his decree-arbitral is a good statutory award. Whether his conclusion on the merits of the question was right or not, is a thing wholly apart from the present discussion.

Lord President—I agree with the majority of your Lordships. If the arbiter has transgressed his duty under the 28th section of the Act, then the award must be set aside. The question therefore is, whether he has transgressed his duty under that section.

The duty assigned to the arbiter was a duty of valuation merely. No question of law was submitted to the arbiter directly or indirectly. He was bound to take the water-works as they stood. The whole language of the statute is clear on that point. In the recital of the section it is set out that "the existing water-works belong, or are reputed to belong, to Sir J. E. Alexander;" that is, it is a matter of no consequence whether he has a good title or not; it is sufficient that he is reputed owner. Whether he is the one or the other the duty of the arbiter is the same. If the construction adopted by Lord Kinloch is sound, then it must have been open to the arbiter not only to consider the validity of the title to the water of the Coxburn, but also the validity of the title to the lands on which the works were situated. That is a very large power to give to an arbiter, and we never heard of it in a valuation of this kind. It may be said that the part of the clause which directs the arbiter to take into consideration the value of the water is different from that which directs him to value the water-works. That is so, but I think it supports the view I take. Observe what it is the arbiter is directed to value. It is to fix the compensation payable to Sir James Edward Alexander, or his heirs or successors, for his or their rights in the said water-works. It is not the stone and lime and other materials of which the water-works are composed that are to be the subject of valuation, but the composite property of the water-works, and the rights in them. Now what rights of any value any one could have in water-works without water, I cannot understand? Right in water-works in which there is no water must be considered as simply rights in so much useless material. Now, in the end of the section we see that the arbiter, in fixing the amount of compensation, shall take into consideration "the value of the water." That I take to be inserted for the very purpose of avoiding the absurd construction that you are to make the valuation as if there was no water in the works. It is here explained that in fixing the value you must take into consideration not only the works themselves, but the water that is *de facto* supplied to and distributed by them. I can therefore draw no distinction as to the powers of the arbiter between the rights in the water-works and the value of the water, as if the arbiter was empowered to take into consideration the title to the water, and to hold that Sir James Edward Alexander had no valid title thereto. He was as much entitled to look at the progress of writs, and, picking a flaw in some sasine thirty years old, to find that the title to the lands was defective. It is impossible to say that the existing state of possession is not to be considered. This clause of the Act intends a valuation of the works as they stand. Now, in fact, the supply of water from the ground itself is very trifling. The value of the fee-simple of that right is put at some £30. The supply of water therefore must be much more copious from other sources. It is said that the supply was derived from a running stream, and that no one was entitled to divert a running stream for that purpose. But is it nothing that this gentleman has come under agreements with another proprietor that the water in this stream shall, to a certain extent, be used to supply these water-works? Is it nothing that the agreements date back to 1851 and 1854, and that under them, without any challenge, water has been taken into these water-works, and has been distributed by them to the inhabitants of Bridge of Allan, and that the pursuer has derived a large revenue therefrom? Are these not circumstances to be considered in construing this Act, and is it not improbable that Sir James Alexander would have consented to an arbitration in which the arbiter would be entitled to say, I consider you have no rights in the water? The case of the defenders proceeds, I think, on an entire misconstruction of the Act, such as no one in his senses, in the position of the pursuer, would have consented to. Coming therefore to the conclusion that this clause of the Act requires the arbiter to value the water of the Coxburn which forms the chief supply of the water-works, see what is done? The arbiter declined to consider this at all, on the ground that the pursuer had no title to that water. I don't know that it is of much consequence that that was his ground. The important fact is, that he declined to take into consideration the value of the greater part of the water supply. That is in direct violation of the Act, the terms of which I have already read. If this had been the sole supply, of course the arbiter, consistently with his view, would have given no value for the water, and yet the statute says that he shall give value for it. I do not think that, according to any reasonable construction of the statute, that argument can be maintained.

The other question is of less importance. It is

so clear that it is sufficient to say that I concur. The arbiter having been requested to make it clear on the face of the award that he refused to take the course required by the Act, and declining to comply with this request, that must be held to fall within the category of legal corruption. At the same time I concur as to this being legal corruption merely, and conveying no imputation whatever on the honour of the arbiter.

Agents for Pursuer—H. & A. Inglis, W.S.
Agent for Defenders—A. J. Dickson, S.S.C.

Saturday, February 6.

ANNAND'S TRUSTEES *v.* ANNAND AND OTHERS.

Proof—Parol Evidence—Competency of Proof—Advance of Money for behoof of another. As a general rule, advances of money under £100 Scots may be proved by parol evidence. *Opinion* (by Lord Deas) that the rule will not hold good if writing may reasonably be expected in the circumstances, or if there is long delay in making the claim.

The rule *held* applicable to a claim for money alleged to have been advanced for behoof of a party deceased, the advance being only three months before the death of the party, and the claimant producing from his own repositories a receipt for the money.

The rule *held* not applicable (Lord Kinloch *diss.*) where the receipts were found in the repositories of the deceased.

Where a party paid, on one occasion, for behoof of another, now deceased, a sum of £16 for wages to three servants, the payment to each being under £100 Scots, this *held* to be a single advance of £16, and therefore parol proof held incompetent.

The Rev. Thomas Annand, minister of the parish of Keith, died at Keith on 15th June 1867. In this multiplepoinding, brought for the distribution of the estate of the deceased, three claims were stated.

The widow, there being no surviving children, claimed the whole free executry estate, amounting to about £800, under burden of a few legacies, under her husband's last will and testament.

The trustees of the late John Annand, the father of the Rev. Thomas Annand, claimed a sum of £470, as having been advanced to the Rev. Thomas Annand by his father by way of loan.

John Annand, hotel-keeper at Inverurie, brother of the deceased Rev. Thomas Annand, alleged, (2) "The claimant, on several occasions, by request of the deceased, advanced and paid to merchants, tradesmen, and others, the price of furnishings made to the deceased. In 1863 the claimant also paid for the deceased, at his request, his railway fare to London, his servants' wages for six months at Keith, and his contribution to the Ministers' Widows' Fund. (3) The deceased, for a period of six months in 1864, when he shut up his manse, and ten weeks in 1866, boarded and lodged in the claimant's hotel at Inverurie, and on these occasions he specially requested and arranged with the claimant that he should be charged for his board and lodging at the rate usual in the hotel. The amount of the sums which were incurred by the deceased to the claimant for his board and lodging during the periods above-mentioned is £73, 8s., as specified in the second portion of the said account to be herewith produced." He stated the following claim (No. 20 of process):—

1.—Account, the deceased Reverend Thomas Annand, minister of the parish of Keith, to John Annand, hotel-keeper, Kintore Arms Hotel, Inverurie (being the account referred to in the condescendence in this action).

(1) *For accounts paid by Mr John Annand on behalf of Mr Thomas Annand.*

			£	s.	d.
1860.					
Feby. 28.	To paid	H. Fraser for six cut liqueur glasses,	0	5	0
1861.					
Jany. 31.	,,	Milne, nurseryman, account,	0	16	9
June 27.	,,	Joseph Hopkins, upholsterer, for 12½ yards of stair cover,	0	10	6
1862.					
March 29.	,,	Philip Brors. account for Bass, &c.,	1	1	0
Aug. 16.	,,	For a chest of drawers,	4	15	0
1863.					
Jany. 26.	,,	Railway fare to London,	4	0	0
,, 27.	,,	J. Munro, druggist, account,	0	5	5
May 2.	,,	Mr Cheyne, treasurer of Widows' Fund,	4	15	10
July 4.	,,	G. Taylor, seedman's account,	0	10	6
	,,	Servants' wages for six months at Keith, viz:— Grieve, £7 0 0; Cook, 5 0 0; Housemaid, 4 0 0	16	0	0
1866.					
Dec. 20.	,,	D. Grant, tobacconist,	0	4	6
	,,	Hay & Lyall for repairing thermometer,	0	1	2
1867.					
Mar. 23.	,,	for 12 bushels of seed potatoes,	1	10	0
			£34	15	8
1868.					
Oct. 14.	Periodical interest at 5 per cent. on the foregoing acto this date, as per interest state annexed,		9	8	11
		Total,	£44	4	7

(2) *Account for board and lodging supplied to the deceased Rev. Thomas Annand by Mr John Annand in his hotel.*

			£	s.	d.
1864.					
May 24.	To six months' board and lodging, including private room, washing, and attendance, at 42s. per week,		£52	8	0
1866.					
Aug. 14.	To ten weeks' board and lodging, including private room, attendance and washing up to October 23d, at 42s. per week,		21	0	0
			£73	8	0
		Carried forward,	£73	8	0