Council, who desire to have a thorough examination into the grounds in fact on which these annual deductions are estimated. It is said that the remit proposed is the ordinary mode of inquiry in similar cases, but then that statement only amounts to this, that in four reported cases since 1845 such a remit was made, and in none of them does it appear that there was any opposition by either party. I have very great doubt whether that can be relied on as fixing a practice which is to be forced upon a reluctant party.

I quite agree that an examination of this company's books by an accountant may throw, as your Lordship says, an important light upon the question as to the annual expenditure on repairs, but then the respondents' counsel announces that he proposes to maintain that this would be a light which would lead astray, because the repairs made were more costly than was necessary. That may or may not be a reasonable objection, but when he proposes to maintain it he raises a question of fact, and I have very great difficulty in holding that he should not be allowed to prove his facts except by the evidence of the books which he says he is prepared to challenge. I confess I have very great difficulty in holding that this method of inquiry should be forced upon the respondents against their opposition.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Before answer remit to the Lord Ordinary to remit to a man of skill to consider and report to his Lordship with special reference to the statements and pleas of parties as to the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain the complainers' subjects assessed in their actual state, and the rates, taxes, and public charges payable in respect of the same, it being the object of this remit to ascertain the deductions to be made in terms of the 37th section of the Poor Law (Scotland) Act 1845, and to report upon any other matter which either party may consider material to the question at issue," &c.

Counsel for the Complainers and Reclaimers—Dundas, K.C.—Younger. Agents—Waddell & M'Intosh, W.S.

Counsel for the Respondents—Shaw, K.C.—Macphail. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, March 19.

FIRST DIVISION.

[Lord Low, Ordinary.

MAGISTRATES OF EDINBURGH *v.* LOWNIE.

Arbitration — Arbiter — Disqualification — Arbiter becoming Member of Corporation which was one of the Parties—Effect of Resignation of Office.

By a reference clause in a contract between a town council and a builder all disputes arising under the contract were to be referred to A as arbiter. In May 1898 the arbiter was called upon to act, and settled the question which had then arisen. In November 1898 A became Dean of Guild, and as such *ex officio* a member of the town council. He continued to hold that office until November 1902, when he resigned, and thereby ceased to be a member of the town council. Another dispute having arisen under the contract, the builder, in July 1902, called upon A to act as arbiter. In a note of suspension and interdict at the instance of the town council, *held* that A became disqualified to act as arbiter by accepting the office of Dean of Guild, and that his disqualification was not removed by his resignation of that office.

Held also (*per* Lord Low, Ordinary) that A was disqualified to act as arbiter notwithstanding his resignation of the office of Dean of Guild, upon the ground that while he was Dean of Guild he was consulted by and advised and reported to the town council with regard to the execution of the contract.

In 1897 the Lord Provost, Magistrates, and Town Council of Edinburgh entered into a contract with John Lownie, builder, Gilmore Park, for the building of a cottage hospital. The contract contained the following clause of reference:—"Except as regards the matters hereinbefore declared to be subject to the final and conclusive directions of the first parties' (the Town Council's) architect, and not subject to appeal to the arbiter, they (the parties to the contract) hereby submit and refer to the final sentence and decreet-arbitral of Walter Wood Robertson, surveyor in Scotland to Her Majesty's Board of Works, whom failing of William Ormiston, surveyor, Edinburgh, all disputes and differences that may arise between the parties hereto regarding the true intent and meaning of any of the provisions hereinbefore written, or of the said specification and schedules of quantities, or regarding the amount, state, or condition of the said works, or of the claims of deduction or otherwise competent to the first parties against the second party (Lownie), or of the claims for extra work or otherwise competent to the second party against the first parties, and generally all disputes and differences in any way connected with or arising out of the execution of or failure to execute the works

hereby contracted for except as before mentioned."

In 1898 the Town Council became dissatisfied with the progress of the building and called on Mr Ormiston to act as arbiter, Mr Robertson having refused to accept the office. Mr Ormiston accepted the office of arbiter, and in June, July, and September of that year he issued reports on the progress of the works.

In November 1898 Mr Ormiston became Dean of Guild, and as such an *ex officio* member of the Town Council of Edinburgh. He retained that office until November 1902, when he resigned, and thereby ceased to be a member of the Town Council.

Further disputes having arisen between the parties as to the execution of the contract, Mr Lownie in July 1902 called upon Mr Ormiston to act as arbiter in the matter. On 2nd August Mr Ormiston issued an order appointing the parties to meet him to arrange procedure. The Town Council thereupon in September 1902 presented the present note of suspension and interdict to interdict Mr Ormiston from acting as arbiter.

The complainers averred, *inter alia* — "In November 1898, Mr Ormiston having been elected Dean of Guild, became *ex officio* a member of the Town Council, and acted as such until the beginning of November 1902. The Public Health Committee of the Council, who are in charge of the erection of the hospital, have on various occasions since Mr Ormiston entered the Council, consulted with and been advised by him on matters pertaining to the erection of the hospital and the work under Mr Lownie's contract. In particular, the said committee obtained from Mr Ormiston and Mr Morham, the city architect, a joint report on matters connected with that contract."

The complainers pleaded, *inter alia*—"(1) The complainers are entitled to interdict as craved in respect that Mr Ormiston became and is disqualified to act as arbiter under the contract, by virtue of his election as Dean of Guild, which made him one of the parties to the arbitration. (2) *Separatim*, Mr Ormiston became disqualified by virtue of his acting as a skilled adviser of one of the parties to the arbitration, in connection with matters falling to be dealt with under the arbitration, and interdict should therefore be granted as craved."

Answers were lodged for Lownie and for Ormiston.

On 10th January 1903 the Lord Ordinary (Low) pronounced an interlocutor by which he granted interdict as craved.

Opinion. — "In 1897 the complainers made a contract with the respondent Lownie for the mason-work of a fever hospital. By the contract all disputes were referred to Walter Wood Robertson, whom failing to the respondent William Ormiston.

"In May 1898 a question arose under the contract, and Mr Robertson declined to accept the office of arbiter. Mr Ormiston, however, did so, and disposed of the question which was then raised.

"In November 1898 Mr Ormiston was elected Dean of Guild, and thereby became *ex officio* a member of the Town Council. He continued to be Dean of Guild until November 1902.

"In July 1902 a question arose between the complainers and Lownie in regard to a claim which the latter made for extra work, and Lownie formally called upon Mr Ormiston to act as arbiter in settling the dispute. Mr Ormiston accordingly appointed parties to meet him to arrange procedure, and appointed Lownie to lodge his claim.

"The complainers objected to Mr Ormiston acting as arbiter, on the ground that he was disqualified by being Dean of Guild and thereby a member of the Town Council, and ultimately they brought the present note to have the arbitration proceedings interdicted.

"I am of opinion that so long as Mr Ormiston was Dean of Guild he was disqualified, because by being a member of the Town Council he was one of the parties. It was argued for Lownie that, although the objection might have been well founded if taken by him, it was not one which the complainers had any interest to raise. I am not able to give effect to that view. I think that the rule that no person can be judge in his own cause is absolute, and that the party taking the objection does not require to show any special interest.

"But then it was contended that Mr Ormiston having now ceased to be Dean of Guild the disqualification has flown off, and there is no reason why he should not act as arbiter.

"When the question to which this note relates was raised, and Lownie called upon Mr Ormiston to act as arbiter, the latter was still Dean of Guild, and he continued to hold that office when the note was presented. If, therefore, the competency of his acting as arbiter falls to be determined as at either of these dates, he must in my judgment, be held to be disqualified. Perhaps, however, it does not follow that interdict should be granted seeing that since the note was presented Mr Ormiston has ceased to be Dean of Guild, and if I thought that no objection could have been taken to Mr Ormiston, if the dispute had not arisen until after he had ceased to be Dean of Guild, I should be very unwilling to grant interdict. The complainers' objection, however, is not only that Mr Ormiston was Dean of Guild when the dispute arose, and was referred to him by Mr Lownie, but that while he was Dean of Guild the complainers' 'consulted with and were advised by him on matters pertaining to the erection of the hospital, and the work under Mr Lownie's contract.' In particular, the complainers found upon a report which they received from the city architect and Mr Ormiston in April 1899 in regard to the condition of the works at that time. Mr Ormiston admits that report, but avers that upon no other occasion did the complainers' consult him in regard to the hospital.

"It appears that the work was not completed within the specified time, and the

report deals with the causes of the delay. Now, under the contract it was provided that Lownie should pay to the complainers as liquidated damages the sum of £3 a-day for every day which the buildings remain incomplete beyond the stipulated time, unless the arbiter should be of opinion that the delay was caused by strikes of workmen or exceptional weather. The complainers say that their claim against Lownie in respect of delay in completing the work amounts to more than £3000, and as the claim is disputed by Lownie it will fall to be determined by the arbiter. The complainers, however, object to Mr Ormiston dealing with the matter, seeing that he has already expressed an opinion on the subject. I think that that is a relevant consideration, because if Mr Ormiston can competently act as arbiter in the question which has already arisen, it would be difficult for the complainers to object to any other dispute which might arise under the contract being referred to him.

"It was not disputed by the respondents' counsel that the objection would have been good if taken by Lownie, because the report was to the effect that he had been to blame for the delay, but it was contended that the complainers could not take the objection, because they had no reason to fear that the arbiter would be biassed against them.

"I do not imagine that there would be any danger of Mr Ormiston consciously and intentionally favouring either one side or the other. The true ground of objection seems to me to be that his judgment might unconsciously be affected by what occurred when he was Dean of Guild.

"I think that that is a good objection, and I am therefore of opinion that the complainers are not bound to accept Mr Ormiston as arbiter, and I shall accordingly grant interdict."

The respondents reclaimed, and argued—The arbiter's powers to act, if suspended while he was a member of the Town Council, revived when he ceased to be so. But the rules as to what would disqualify an arbiter were the same as those regarding declinature of a judge, and membership of a large public body was not sufficient to justify a declinature—*Lord Advocate v. Edinburgh Commissioners of Supply*, June 5, 1861, 23 D. 933. Nor was it sufficient to disqualify a party from acting as arbiter that he had given professional advice to one of the parties—*Caledonian Railway Company* v. *Magistrates of Glasgow*, November 17, 1897, 25 R. 74, 35 S.L.R. 67.

Counsel for the complainers (respondents) were not called upon.

LORD PRESIDENT—In or about June 1898 Mr Ormiston, who was then free from any disqualification, agreed to act as arbiter in a dispute which had then arisen in the execution of a contract between the complainers and Mr Lownie, and he issued several awards. In November 1898 Mr Ormiston was elected Dean of Guild of Edinburgh, and thereby he became *ex officio* a member of the Town Council. He held this office till November 1902, and before the expiry of his term of office a further question arose under the contract in July 1902 between Lownie and the Town Council several months before Mr Ormiston ceased to be Dean of Guild. The dispute related to extras for which Lownie claimed payment beyond the contract price, and he called upon Mr Ormiston to act as arbiter in the matter. Mr Ormiston agreed to do so, and issued an order appointing Lownie to lodge a claim. The Town Council objected to Mr Ormiston acting as arbiter, on the ground that he was disqualified from doing so by his holding the office of Dean of Guild, and being *ex officio* a member of the Town Council, and thus a unit of one of the parties to the submission. With a view of obtaining a judgment upon this question the complainers have presented this note of suspension and interdict, praying for interdict against Mr Lownie and Mr Ormiston proceeding with the reference.

I think it may be assumed that so long as Mr Ormiston was Dean of Guild he was so identified with the Town Council, one of the parties whose case was submitted to him, as to be disqualified from acting as arbiter. That condition of things is, however, now at an end, as he has ceased to hold the office of Dean of Guild, and the question is whether he is made eligible to act by the termination of his office of Dean of of Guild and his resulting membership of the Town Council. It was also argued that as Lownie, the party adverse to the Town Council, is content to have Mr Ormiston as arbiter, and has called upon him to act, the disqualification (if there is a disqualification) cannot be pleaded by the Town Council. As regards the first question, I am satisfied that the disqualification is not purged or obviated by Mr Ormiston having ceased to be Dean of Guild, and consequently also ceased to be a member of the Town Council, It is not suggested, and could not be suggested, that Mr Ormiston would consciously allow his judgment in regard to the question submitted to be affected by his connection with the Town Council, but what we have to do is to apply the general rule irrespective of the character of particular individuals. That rule is that a man cannot be judge in his own cause or in the cause of a body of which he is a member. The rule is not personal to any particular individual. A Dean of Guild might in that capacity or in his capacity of member of the Council acquire information or become imbued with views as to this contract and as to the buildings to which it relates—information or views from the inside—which it would not be desirable that he should have when he came to act as arbiter between parties who should be at arm's length. He might well form views as to this contract while acting as a unit of one of the parties to it which might unconsciously affect his judgment as arbiter. It would, in my view, be contrary to the fundamental rule to which I have referred to allow a party in such a position to act as arbiter. If both parties had chosen to

waive the objection the case would have been different. That would have been equivalent to a fresh submission entered into in knowledge of the disqualification, and therefore would have implied waiver of it. But there is no such waiver here, and it seems to me that in the absence of waiver either party is entitled to refuse to submit his case to an arbiter who has become disqualified. I am therefore of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD ADAM concurred.

LORD M'LAREN—I also concur. I think the question of disqualification is the same in the case of a judge who derives his authority from the law of the country and an arbiter appointed by the parties. For all practical purposes the objection is the same whether the body of which the arbiter has become a member is a public body like a town council or a private body like a commercial company. In either case it is a good objection that the arbiter has become so identified with one of the parties to the case that he can no longer be regarded as a neutral person. In the present case Mr Ormiston was originally qualified to act as arbiter, but he became disqualified by acceptance of the office of Dean of Guild, whereby he became a member of the Town Council. It seems unnecessary to inquire whether it was part of Mr Ormiston's duty as Dean of Guild to take cognisance of this contract, because the objection would be the same if he had been elected an ordinary member of the Town Council. I do not think it was seriously disputed that so long as Mr Ormiston was a member of the Town Council he was disqualified, but it was contended that the effect of this disqualification was not to disqualify him absolutely but rather to suspend his power to act so long as the relation exists, and that as Mr Ormiston has ceased to hold the office of Dean of Guild he is no longer disqualified. No doubt after the arbiter's relation to the Town Council ceased it might have been a reasonable and sensible thing if both parties had concurred in requesting him to act. But that is a matter for the parties themselves, and I am not prepared to say that the disqualification of Mr Ormiston was removed by his ceasing to hold the office of Dean of Guild. I should not wish it to be understood that a director of a company might sell his shares and thereby put himself in the position of adjudicating in a matter in which he had been interested as a director. Such a rule might have other inconvenient results; it might lead to the hanging-up of arbitrations indefinitely in the expectation that in time the arbiter might have his disqualification removed. As no authority has been cited for this, I think we must hold that on an arbiter becoming disqualified his appointment as arbiter ceases, and the arbitration must be worked out in some other way.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Complainers and Respondents—Guthrie, K.C.—Cooper. Agent—Thomas Hunter, W.S.

Counsel for Mr Lownie—Campbell, K.C.—Hunter. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for Mr Ormiston—Crole. Agents—Duncan Smith & MacLaren, S.S.C.

Friday, March 20.

FIRST DIVISION.

HARPER'S TRUSTEES *v.* HARPER'S TRUSTEES.

Succession—Legacy—Construction—Money in Bank—Deposit-Receipt with Colonial Bank.

A truster directed his trustees to pay to his wife "all moneys in the house or in the Bank of Scotland or the City Bank of London, or in any other bank or banks in my name." *Held* that the bequest carried a deposit-receipt for £2000 with a colonial bank, repayable four years after its date.

By his trust-disposition and settlement the late Dr George Harper, who died on 7th October 1886, conveyed his whole estate to trustees for certain purposes therein mentioned. He directed that his wife Mrs Ellenor Maria Campbell or Harper should during her lifetime be his sole executrix and should have a liferent of his whole estate.

In the testing clause the following direction occurred:—"Declaring that it is further my will and desire that all moneys at my death in the house or in the Bank of Scotland or the City Bank of London, or in any other bank or banks in my name, shall be paid over to the said Mrs Ellenor Maria Campbell or Harper for her own exclusive use and behoof immediately after my death."

By a codicil Dr Harper directed his trustees, *inter alia*, "after providing for all my just and lawful debts, deathbed and funeral expenses, and others, as mentioned in the first purpose of the foregoing trust-disposition and settlement, and after payment to my wife Mrs Ellenor Maria Campbell or Harper of all moneys in the house or in the Bank of Scotland or the City Bank of London, or in any other bank or banks in my name, as provided by a clause to that effect inserted in the testing clause of said trust-disposition and settlement, and which clause is hereby confirmed, but before setting apart the residue of my estate to be liferented by my said spouse, to pay" certain legacies to the parties therein named.

Dr Harper's moveable estate amounted to about £10,300. It included, *inter alia*, the following items:—