

for the opinion of this Court, and decern."

Counsel for the Appellants—Salvesen, K.C.—Hunter. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—C. N. Johnston, K.C.—MacRobert. Agent—J. Ross Smith, S.S.C.

Wednesday, March 18.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

**BROXBURN OIL COMPANY, LIMITED
v. MORRISON.**

Process—Proof—Judicial Remit—Competency when Opposed—Poor—Poor-Rates—Deduction for Expense of Repairs.

In a suspension raising the question of the amount of deductions to be allowed for annual repairs on an oil company's works in fixing their assessment for poor-rates, the company moved for a remit to a man of skill. The collector of rates opposed this motion, and asked for an allowance of proof. The Lord Ordinary refused to remit, on the ground that he had no power to make a remit against the wishes of one of the parties. On a reclaiming-note, held (*dub.* Lord Kinneir) that the Court had power to remit even when that course was opposed; that in this class of cases to remit was the usual and appropriate course; and that in the circumstances a remit should be made.

The Broxburn Oil Company were assessed for parish rates in respect of their Roman Camp and Broxburn works, situated in the parish of Uphall, Linlithgowshire, on a valuation amounting in all to £17,156. Difficulties having arisen as to the deductions to be made from this valuation in fixing the assessment for poor-rates under section 37 of the Poor Law Act 1845 (quoted in the opinion of the Lord Ordinary, *infra*), for the probable annual average cost of repairs on their works, George S. Morrison, collector of rates for the parish of Uphall, intimated that he proposed to apply for a warrant for poinding, and the Broxburn Oil Company brought the present note of suspension.

After the record was closed the complainers, the Broxburn Oil Company, moved for a remit to a man of skill. The respondent opposed this motion, and moved for a proof.

On 27th February 1903 the Lord Ordinary (KINCAIRNEY) pronounced an interlocutor, by which he refused the motion of the complainers for a remit to a man of skill.

Opinion.—"This case is a suspension by the Broxburn Oil Company, Limited, of a threatened poinding by the collector of rates for the Parish Council of Uphall for recovery of £694, 8s. 1d., as the amount of

parish rates due by the Broxburn Oil Company. The collector has based his assessment on the valuation roll, which is not disputed. But the question is, what are the deductions which must be made from that valuation under the 37th section of the Poor Law Act in order to ascertain the assessable value. These are stated in the Act to be deductions 'of the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their actual state, and all rates, taxes, and public charges payable in respect of the same.' There is no objection to the competency of the suspension, and it is therefore, of course, necessary to ascertain the amount of these deductions. That may be done either by a remit to a man of skill or by a proof at large.

"The Broxburn Oil Company moved for a remit to a man of skill, following and relying on the recent case of the *Pumphreston Oil Company Limited v. Watson*, July 19, 1901, 3 F. 1099, in which a deduction of no less than 90 per cent. of the gross value was allowed. The collector, greatly alarmed by that result, strongly opposed that motion, and moved for a proof at large.

"The complainers, the Broxburn Oil Company, cited the *Edinburgh and Glasgow Railway Company v. Adamson*, March 10, 1853, 15 D. 537; *Glasgow Gas-Works Company v. Adamson*, March 23, 1863, 1 Macph. 727, 728; and the *Edinburgh and Glasgow Railway Company v. Hall*, January 19, 1866, 4 Macph. 301, 303—all of which cases related to the deductions under the 37th section of the Poor Law Act. But no objection was taken to the remit in these cases, and there is nothing to show that the result of that mode of procedure was unsatisfactory in any of these cases. There is nothing in the report of the *Pumphreston Oil Company* to show that any opposition was made to the remit in that case, although it was stated from the bar that at an early stage of that case the remit was objected to. In that case Lord Kinneir, delivering the opinion of the Court, observed that the proper course for ascertaining the amount of the deductions had been adopted. These were said to be the only cases about the ascertainment of the deductions under the Poor Law Act.

"The collector of rates referred to various cases, of which it seems unnecessary to notice more than two—*Quin v. Gardner*, June 22, 1888, 15 R. 776, and *Kilmarnock v. Reid*, January 22, 1897, 24 R. 388. In the former case, which was about the construction of a railway, a remit by the Lord Ordinary to a man of skill was recalled in the Inner House, on the ground that, as it involved questions of law as well as of fact, it was inexpedient, if not incompetent. In that case, while the competency of a remit was affirmed in certain cases, although opposed by one of the parties, yet the Lord President (Inglist) observed that he was not for forcing remits upon unwilling parties to an extent beyond what had been granted by the Court in previous cases.

"In the case of *Kilmarnock* the Lord President (Robertson) indicated that the practice of remitting to a man of skill without the consent of both parties had been and ought to be limited to a somewhat narrow class of cases, not I think including this case.

"In that state of the authorities I think that a remit to a man of skill ought not to be forced on a respondent against his strenuous opposition. I do not say that it would be incompetent to make the remit demanded. I do not even affirm that the inquiry would not be best made by a remit to a man of skill. I am disposed to think that it would be; but still I think that it should not be forced on the other party, and I am not aware of any practice of the Court which would warrant it, that is to say, when the remit was opposed. The difficulty which I have felt is that it may possibly not be easy to keep the proof within reasonable bounds, but except for that doubt there seems nothing in the nature of the case which would justify a lengthy inquiry.

"I shall therefore refuse the complainers' motion to remit to a man of skill."

The complainers reclaimed, and argued—In all previous cases relating to deductions under the Poor Law Act there had been a remit to a man of skill—*Edinburgh and Glasgow Railway Company v. Adamson*, June 28, 1855, 17 D. 1007; *Glasgow Gaslight Company v. Adamson*, March 23, 1863, 1 Macph. 727; *Edinburgh and Glasgow Railway Company v. Hall*, June 29, 1866, 4 Macph. 1006; *Pumphreston Oil Company v. Wilson*, July 19, 1901, 3 F. 1099, 38 S.L.R. 830. It was true that it did not appear that in any of these cases the remit was opposed, but that showed a settled practice. It was much the most convenient and least expensive mode of procedure. As such remits were made before answer, the respondent would not be foreclosed from stating any objection he might have to the mode of inquiry adopted by the reporter, or the results he might arrive at. The Court had the power to decide what was the proper procedure in a case, and to adopt that procedure. The cases on the other side only showed that there might be circumstances in which a remit was an inappropriate form of procedure, and where it would not therefore be made unless both parties desired it.

Argued for the respondent—As a general rule, a remit to a man of skill was only competent of consent of parties—*M'Gillivray v. Soutar*, June 2, 1860, 32 Scot. Jur. 634; *Quin v. Gardner & Sons*, January 22, 1888, 15 R. 776, 25 S.L.R. 577; *Magistrates of Kilmarnock v. Reid*, January 22, 1897, 24 R. 388, 34 S.L.R. 286; *Sutherland v. Squair*, February 25, 1898, 25 R. 656, 35 S.L.R. 512. A judge must decide the case, not remit to a man of skill to decide it for him—*Clerk v. Shotts Iron Company*, February 24, 1888, 23 Weekly Notes 52. The exceptional cases in which it was competent to remit against the wishes of one party were, as appeared from the opinion of the Lord President in *Magis-*

trates of Kilmarnock (*cit. supra*), either cases purely of accounting or actuarial calculation, or else cases where an existing but evanescent state of facts required to be put on record, such as the state of repair of the fences at the end of a lease. The present case raised a complex question, involving not only the actual expenditure by the complainers on repairs, but also the question how much of that expenditure was necessary to maintain the subjects in their actual state. That should be settled by a proof, not by a remit. The fact that remits had been made in former cases of this kind proved nothing, because it was never opposed, and there was no doubt that a remit could be made of consent.

LORD PRESIDENT—This case raises an important general question as to the proper procedure in cases of the class to which it belongs. It arises on a suspension of a threatened poiding of the reclaimers' goods under a summary warrant at the instance of the respondent, who is the collector of rates for the parish of Uphall, for payment of rates alleged to be due by the reclaimers. The question relates to the deductions which should be allowed under section 37 of the Poor Law Act in respect of the "probable annual average cost of the repairs, insurances, and other expenses, if any, necessary to maintain the lands and heritages in their actual state, and all rates, taxes, and public charges payable in respect of the same." The ascertainment of the amount of these deductions would involve, amongst other things, an examination of the reclaimers' books, which would or should show the cost of their plant, and, in particular, the cost of keeping it in repair. *Prima facie*, the most simple method of ascertaining the amount of the deductions which should be allowed would be by an examination of the reclaimers' books by a person of skill. Such an examination would not necessarily exhaust the case, because it might be shown that these charges in any particular year were either in excess of or below the average. But a remit to a man of skill would in all ordinary cases be the proper method of inquiry, and in most, if not in all the cases of this kind which have come before the Court, that well-known form of inquiry has been adopted. The Lord Ordinary seems to have thought that a remit would be the proper mode of procedure, but to have felt a difficulty, sitting in the Outer House, in enforcing it against the wishes of one of the parties. But I apprehend that in any controversy it is for the Court to determine what is the least expensive, most convenient, and most satisfactory mode of procedure, and to adopt that mode. I do not recollect ever to have seen a proof in a case of this kind, and it is difficult to see how such a proof could be conducted, and what limits could be placed on the inquiry. One would suppose that if the oil companies are like other companies, very great light could be obtained from their books on the question of the average cost of keeping their subjects in repair by an examination by a man of

proper skill of what they have annually expended in their own interests. The fact that no objection has previously, so far as I am aware, been taken in prior cases to such a remit seems to show that it has been regarded as the ordinary and proper procedure. It is not as if there was any question in the case as to the truth of any statement to be tested by cross-examination. The question is a very simple one, to be tested primarily by the entries in the reclaimers' books. It will, of course, be open to the respondent to show, if he can, that the result of such an examination of the books does not truly show the true average annual expenditure on repairs, and he will have an opportunity of doing so.

LORD ADAM—The first question is whether the mode of inquiry into the facts by means of a remit is competent where one of the parties objects to it being adopted. I do not doubt that even in the face of such objection it is competent for the Court to remit in the class of case we are dealing with. We know that in such cases since the Poor Law Act of 1845 there have been numerous instances in Court, and more out of Court, in which this mode of procedure has been adopted. The last instance is to be found in the recent case of the *Pumpherson Oil Company, Limited v. Watson*, 3 F. 1099.

It is said with truth that in the reported cases there is no notice that any objection was taken to this course being followed, but on the other hand it does not appear that the remits were made of consent, and if the remits were only competent if made of consent, it appears to me that that must have appeared on the face of the proceedings. I am unable to see how this mode of investigation could be competent in the proper sense of the word if it could only be made of consent. I quite agree that the power is one to be exercised with great discretion, but this is not the kind of case which raises any difficulty as to the exercise of this discretion. I have no doubt that authority and practice prescribe a remit as the appropriate mode of inquiry in the present class of case. I therefore agree that we should strengthen the hands of the Lord Ordinary by authorising him to adopt what he clearly thinks is the best mode of proof.

LORD M'LAREN—I do not doubt that in a limited class of cases it is competent to investigate the facts by means of a remit to a man of skill. Illustrations of this class are given in the opinion of Lord President (Robertson) in the case of *Kilmarnock v. Reid* (24 R. 388). I do not understand that his Lordship's definition of the class is meant to be exhaustive, but is rather given by way of illustration and for the purpose of showing that a remit to a man of skill would not be an appropriate method of investigation in the case under consideration. A familiar example of a class of cases in which it is the practice to investigate the facts by a remit is to be found in entail petitions, formerly pre-

sent to the Inner House, but now to the Lord Ordinary. It is quite settled in such cases that although a remit is made in the first stage of the case to investigate the facts, it is competent to allow a proof at a later stage, where a conflict arises as to some particular fact, or where there is a balanced state of opinion and further investigation is necessary. The same practice has been followed in suspensions under the Poor Law Acts, where the question relates to the deductions to be allowed for the cost of maintenance. It is said that in these cases the remit has been made with consent of both parties, but it is to be observed that the reports do not bear that the remit was made of consent, and the inference to be drawn would rather appear to me to be that no objection was taken because counsel were aware of the settled practice in such cases to investigate the facts by a remit.

If it could be shown that there was any peculiarity in this case which made investigation by a remit inappropriate, I should have been prepared to allow a proof; nor do I doubt that if a question of fact should emerge upon the report of the man of skill under the remit, it would be within the power of the Court to make a further order allowing a proof. It appears to me that it would be inconvenient if the administration of a rating statute could be interfered with in this way, and a proof before a judge substituted for the more summary ascertainment of facts which I think was intended. It is to be observed that the duty of determining the deduction is in the first instance placed on the parish authorities and their officers, and that this assessment is fixed without any proof being taken. This suggests the analogy that if the assessment is not acquiesced in, any further investigation should be of the same kind, that is to say, by a remit to a neutral person to inquire and report so as to put the Court in a position to determine the amount of the deduction to be allowed.

LORD KINNEAR—I have more difficulty in this case than your Lordships, and I confess that if I had been deciding it alone I should, as at present advised, have been inclined to agree with the Lord Ordinary, and to hold that this particular method of inquiry should not be forced upon a party who opposes it. I am not much moved by the consideration that valuation which forms the basis of assessment is made by a single expert, because, in the first place, the objection we are to consider is not to the valuation, which the parochial authority is bound to take as it stands, but to the failure of the Parish Council to make such deductions as the statute prescribes from the amount appearing on the valuation roll; and secondly, because if the deductions have in fact been estimated by a single expert, that is just the estimate to which the ratepayer objects, and I do not see why the form of procedure, which is said to have had a wrong result, should necessarily be imposed upon the party objecting. But then the objecting party here is not the ratepayer, but the Parish

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