

wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, . . ." for the reasons given by the Land Court. It was a question of fact on which the Court were final.

I therefore propose to your Lordships that we should answer the questions as follows:—Question 1 in the negative; question 2 is superseded—if I were called upon to answer it I should answer it in the way suggested in my opinion; and question 3 in the affirmative.

LORD JOHNSTON—I agree with your Lordship that the applicant here is not either in ordinary parlance or in the sense of the statute an innkeeper. The keeping of an inn involves the providing lodging for customers and not merely the supply of liquors or other refreshments. Accordingly the first query follows to be answered in the negative and the second query is superseded.

In support of his contention on the third query I understood the applicant to maintain that a distinction was to be drawn between the situation before and after April 1911. The applicant, on the facts stated, keeps a public-house, better described by the term alehouse, the custom of which is of the smallest. This business, if it can be dignified by that name, is a subsidiary occupation to that of crofting in the sense of the Act, and it is quite clear that once he is found to be a qualified landholder he is entitled to carry on that subsidiary occupation on his holding provided he retains his licence. But it is maintained that if he has been carrying on that occupation on the subjects forming the holding prior to the Act coming into operation, that fact precludes him taking advantage of the statute, because his holding as at the date of the Act coming into operation does not comply with the definition of the statute. I think that this contention is wholly without foundation and only requires to be stated to be rejected. I think, therefore, that the third question falls to be answered in the affirmative.

LORD MACKENZIE and LORD SKERRINGTON concurred.

The Court answered the first question of law in the negative and the third in the affirmative.

Counsel for the Appellant—Mitchell, Agents—W. & J. Cook, W.S.

Counsel for the Respondent—Macphail, K.C.—A. M. Stuart. Agents—W. Marshall Henderson, S.S.C.

Friday, July 19.

FIRST DIVISION.

[Lord Sands, Ordinary.]

SELLAR v. HIGHLAND RAILWAY COMPANY AND OTHERS.

(*Vide supra* at p. 593.)

Contract—Arbitration—Implied Term—Damages—Obligation of Company Appointing Arbitrator to Satisfy Themselves that Arbitrator not Disqualified—Lands Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 19), secs. 23 and 24.

In an arbitration the arbitrator appointed by one of the parties, a railway company, held stock in that company; the other party reduced the decret-arbitral on the ground that the arbitrator referred to was disqualified, and claimed the expenses incurred by him in the abortive reference. *Held* that he was entitled to recover his expenses *per* Lord Johnston, Lord Mackenzie, and Lord Skerrington in respect that the defenders had failed to satisfy themselves from information in their possession that the arbitrator appointed by them was not disqualified; *per* the Lord President in respect that they did not and could not aver that they were unaware of the disqualification when they appointed the arbitrator.

The Lands Clauses (Scotland) Act 1845 (8 and 9 Vict. cap. 19) enacts—Section 23—"If the compensation claimed or offered in any case shall exceed fifty pounds, and if the party claiming such compensation desire to have the same settled by arbitration and signify such desire to the promoters of the undertaking . . . the same shall be settled by arbitration in the manner hereinafter provided." Section 24—"When any question of disputed compensation . . . required to be settled by arbitration shall have arisen then unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred, . . . and such appointment shall be delivered to the arbiters and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made, and after any such appointment shall have been made neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as such revocation, and if for the space of fourteen days after such dispute shall have arisen, and after a request in writing, in which shall be stated the matters so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such other party fail to appoint an arbitrator, then upon such failure the party making the request and having himself appointed an arbitrator may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters

which shall be in dispute, and in such case the award or determination of such single arbiter shall be final."

Colin Reid Sellar, *pursuer*, brought an action against the Highland Railway Company and others, *defenders*, concluding for reduction of a pretended decret-arbitral pronounced in a reference between the pursuer and the Highland Railway Company, and for payment of £628, 14s. 11d., being the amount of the expenses incurred by the pursuer in the reference.

The *submission* between the pursuer and the defenders the Highland Railway Company was in the following terms—"The parties following, namely, the Highland Railway Company, incorporated by Act of Parliament, successors to and as coming in place of the Inverness and Aberdeen Junction Railway Company, incorporated by 'The Inverness and Aberdeen Junction Railway Act 1856,' on the one part, and Colin Reid Sellar, owner and lessee of salmon fishings, and residing in Aberdeen, heritable proprietor of the salmon fishings in the river Findhorn from the Red Craig to the entry of the river Findhorn in the sea on the other part—considering that the Railway Company began some time ago to execute works along the right or east bank of the river Findhorn near their bridge, carrying the Inverness and Aberdeen Railway across the river Findhorn, for the sake of protecting their line and said bridge against encroachment by the river, and that the said Colin Reid Sellar complained of said operations as an interference with his fishing rights while the work was in progress and as rendering them more difficult of operation, and as being besides a standing menace to his fishings of the Long Pool and those below, in case material from the first parties' embankment should at any time find its way into the Long Pool and fishing pools below the same, and intimated a claim for damage in terms of section 16 of 'The Railway Clauses Consolidation (Scotland) Act 1845,' and called upon the first parties to concur with him in naming an arbiter or arbiters under section 24 of 'The Lands Clauses Consolidation (Scotland) Act 1845' to deal with his claim, which the first parties have not admitted: Therefore the said Railway Company do hereby appoint Charles Pullar Hogg, civil engineer, Glasgow, to be arbiter on their behalf; and the said Colin Reid Sellar hereby appoints George Davidson of Wellwood, merchant and salmon fisher in Aberdeen, to be arbiter on his behalf, to determine the compensation, if any, to be paid by the Railway Company to the said Colin Reid Sellar (*one*) for permanent deterioration of the Long Pool fishings through the said new works; (*two*) for added risk to the Long Pool fishings and the other fishings below the same, arising from the possible insufficiency of these works; and (*three*) for loss of fishing during the progress of the works, with powers, and subject to the provisions ament arbitrations contained in 'The Lands Clauses Consolidation (Scotland) Act 1845.'"

After the reference had been devolved upon the oversman it was discovered that the

arbiter nominated by the Highland Railway Company was a holder of ordinary stock in that company, and upon that ground the pursuer sought reduction of the decret-arbitral pronounced by the oversman. On 16th May 1918 the First Division, affirming Lord Sands, Ordinary, reduced the decret-arbitral and remitted the cause to the Lord Ordinary to proceed (see *supra*, p. 593).

The pursuer *pleaded*, on the question of damages,—“3. The defenders the Highland Railway Company being bound to appoint under the said submission a duly qualified arbiter in the said reference, and having failed to do so, are liable to make good to the pursuer the loss which he has sustained through their said failure. 4. *Separatim*. The defenders the Highland Railway Company being liable in terms of the Lands Clauses Consolidation (Scotland) Act 1845 to pay expenses incurred by the pursuer in the said arbitration, decree should be pronounced against them for the amount thereof.”

On 21st June 1918 the Lord Ordinary (SANDS) found the defenders liable to the pursuer in payment of the expenses incurred in the reference.

Opinion, from which the *facts* of the case appear:—“In this case the oversman's award has been set aside on account of an original disqualification of one of the arbiters. The question is whether a party to the abortive arbitration is entitled to recover the expenses to which he has been put in the arbitration proceedings from the party who nominated the disqualified arbiter. The first answer to the claim made on the part of the latter is that such a claim is unprecedented, and therefore presumably it has always been regarded as incompetent. The value, however, of an inductive argument of this kind, which seeks to set up a *consensus communis*, depends upon the number of possible occasions on which such a claim might have emerged. But I am informed that there is no reported case where the original disqualification of an arbiter was successfully insisted in after the expenses of the reference had been incurred. The question must therefore, I think, be treated as a new one upon which there is no authority.

“The arbiters here in question were appointed in accordance with an agreement between the parties made in compliance with a statutory requirement—section 24 of the Lands Clauses Consolidation (Scotland) Act 1845. It does not appear to me to be material for the purposes of this case to determine whether the agreement is to be treated simply as an appointment made in terms of the statute or as an independent arrangement between the parties. The result will, I think, be the same in either case.

“There are two sets of circumstances in neither of which the question now before me would occasion much difficulty. If a party nominates an arbiter whom he knows to be disqualified he must, I think, bear the consequences as regards expenses incurred by the other party. In nominating an arbiter he agrees to nominate one who so

far as he knows is competent to act. Again, where one of the parties nominates an arbiter whom he does not know to be disqualified, and has no reason to suppose may be disqualified, but who for some secret reason turns out to be disqualified, I think that the loss entailed by the abortive proceedings must just rest where it lights. It is a *damnum fatale* if, for example, prior to his appointment one of the arbiters has made a corrupt bargain unknown to the person appointing him with some person having an indirect interest in the result of the arbitration. The difficult case is the middle one, where the disqualification though not known to the party making the appointment is readily ascertainable and is not improbable. The difficulty is enhanced by the consideration that the disqualification may be ascertainable by either party. Each case of the kind must, I think, be judged of according to its own circumstances.

"It is contended that the present case belongs to the first category, viz., where the disqualification is known, because a company cannot be heard to contend that it did not know who were its own shareholders, and must therefore be taken to have known that the arbiter was disqualified. I hesitate, however, to proceed upon this theory, which is undoubtedly artificial, when one considers the number of shareholders and the department by which an appointment like this is made. I prefer to treat the case as falling within the third category, for the disqualification, though it may not have been known to the party making the appointment, was readily ascertainable by him from documents in his own possession. I have come to the conclusion that, having regard to the comparatively large and widespread nature of the shareholding of the Highland Railway Company there was no improbability in a gentleman like the arbiter here appointed being a shareholder, that the defenders should have satisfied themselves with regard to this before appointing him, and that the pursuer was not put upon his inquiry, but was entitled to assume that the defenders would not appoint one of their own shareholders as arbiter.

"I am accordingly of opinion that the defenders are liable to indemnify the pursuer for the consequences of their having appointed an arbiter who for reasons readily ascertainable by the defenders was disqualified from acting.

"The other question which was argued before me was as to the scale upon which the expenses should be taxed. The pursuer argued that they should be taxed as between agent and client. I confess that the recognition of two scales for the taxation of an account payable by an adverse third party has never appeared to me to be very satisfactory. A party who has been successful in a litigation is entitled to be indemnified by the party who is found to have been in the wrong. This indemnity is designed to cover all that is necessary for the reasonable and prudent conduct of the litigation. Not a penny more can be recovered, no

matter how vexatious or fraudulent the conduct of the other party may have been. If anything less is recoverable there is something unsatisfactory in our system of taxation, and this the Court cannot assume. As between an agent and his own client there may doubtless be other considerations. The client chooses the agent, and, it may be, gives him a discretion or even instructions which may involve expenses which it is proper that the client should pay. In certain cases too there may be special considerations even when a third party has to pay expenses, as, for example, the principle that gratuitous trustees acting *bona fide* must be kept personally *indemnitis*. But apart from such specialities it seems to me to be contrary to principle that there should be two scales of taxation of accounts payable by third parties, and I am not disposed to extend the practice. If I direct this account to be taxed in the ordinary way as a judicial account it is, I conceive, the duty of the Auditor to allow all that was necessary for the conduct of the arbitration in a reasonable and prudent way. If he allows less there must be something amiss with our system of taxation. If he were to allow more he would be allowing something which was not the consequence of the breach of agreement or statutory duty (whichever it be regarded) of which the pursuer complains.

"I shall accordingly find that the defenders are liable to the pursuer in payment of the expenses incurred in the reference, and remit the accounts to the Auditor for taxation."

The defenders reclaimed. In the course of the discussion the pursuer obtained leave to amend his record and the defenders to answer his amendments.

The pursuer's *averments as amended* were—" (Cond. 2) Part of the river fishings now belonging to the pursuer is known as the Long Pool, and this pool is intersected and crossed at right angles or nearly so by the line of the Highland Railway between Forres and Inverness. This railway was constructed under the Inverness and Aberdeen Junction Railway Act 1856, and now belongs to the defenders the Highland Railway Company. The railway is carried across the river by an iron girder bridge on stone piers and consisting of three large spans. For many years the river has shown a tendency to run more and more to the east, and the erosion on the east bank immediately above the said bridge has been considerable. After the end of the fishing season of 1915 the Railway Company, acting under the powers anent maintenance of their works contained in the Railway Clauses Act (8 and 9 Vict. cap. 33), section 16, entered on extensive operations with a view to checking the encroachments of the river on the east bank and with the object of protecting their line and bridge. The effect of these operations has been seriously to diminish the value of the pursuer's fishing rights, which he acquired at a cost of £15,507. [In consequence the pursuer became entitled to compensation in respect of the diminution of the value of the said fishings, in terms of

section 16 of the Railway Clauses Consolidation (Scotland) Act 1845. The pursuer, in terms of section 23 of the said last-mentioned Act, desired his claim to be settled by arbitration, and accordingly called on the defenders the Highland Railway Company to concur with him in appointing an arbiter or arbiters under section 24 of the said Lands Clauses Act to deal with his said claim.] (Cond. 3) [By virtue of the sections of the Acts referred to in condensation 2 the defenders became bound to nominate an arbiter, failing which the pursuer was entitled to appoint an arbiter to act on behalf of both parties. The defenders accepted the procedure prescribed by the first part of section 24, and] by submission, dated 23rd December 1916 and 12th and 13th January 1917, the pursuer and the defenders the Highland Railway Company referred to the determination of the defender Charles Pullar Hogg, as arbiter appointed by the Railway Company, and of the defender George Davidson, as arbiter appointed by the pursuer, the compensation, if any, to be paid by the said Railway Company to the pursuer (1) for permanent deterioration of the Long Pool fishings through the said new works; (2) for added risk to the Long Pool fishings and the other fishings below the same, arising from the possible insufficiency of these works; and (3) for loss of fishing during the progress of the works, with powers, and subject to the provisions ament arbitrations contained in the Lands Clauses Consolidation (Scotland) Act 1845. . . . (Cond. 10.) [Under and by virtue of the statutory provisions above referred to there was a statutory obligation on the defenders the Highland Railway Company, and it was also] an implied condition of the contract contained in the said submission between the pursuer and the [said] defenders, that the arbiters appointed by the [said] defenders should be duly qualified to adjudicate on the dispute which was thereby referred to arbitration. [In any case there was a statutory obligation or otherwise an implied obligation undertaken by the said defenders that they would not appoint an arbiter who was known to them to be disqualified or whom they might with reasonable diligence have ascertained to be disqualified]. The arbiter appointed by the said Railway Company was not so qualified, and in consequence the said decret-arbital is invalid. The expenses incurred by the pursuer in the said reference, amounting to £623, 14s. 11d., have been thrown away, and the pursuer has sustained loss to the extent of the sum sued for. This loss is the direct result of the said defenders having improperly and illegally named as arbiter one of their own shareholders, known to them [or whom they might with reasonable diligence have ascertained] to be disqualified from acting in that capacity. Further, the expenses incurred by the pursuer in the said arbitration fall in any event to be paid by the defending company under and in terms of section 32 of the Lands Clauses Consolidation (Scotland) Act 1845, inasmuch as no effective award has been pronounced therein of the same sum as or a less sum than was tendered by the

defending company. The pursuer is willing that his accounts of expenses should be taxed by the Auditor of the Court of Session."

The pursuer's *pleas-in-law* as amended included plea 4 *supra*, and the following:—
 "3. The defenders the Highland Railway Company being [statutorily bound under the procedure accepted by them prescribed by section 24 of the Lands Clauses Consolidation (Scotland) Act 1845, or otherwise being] bound under the said submission [to appoint] a duly qualified arbiter in the said reference and having failed to do so are liable to make good to the pursuer the loss which he has sustained through their said failure. [3a. In any event the defenders the Highland Railway Company having in breach of their statutory or contractual obligation appointed as their arbiter a person whom they knew, or otherwise whom with reasonable diligence they could have ascertained, to be disqualified are liable for the loss thereby caused to the pursuer.]"

Argued for the reclaimers the Highland Railway Company—The contract of submission consisted in the appointment of an arbiter under section 24 of the Lands Clause Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 19). The arbiter was disqualified—that rendered the contract merely voidable; but the pursuer having the option to adopt the contract or not had reduced it, and had thus by his own act swept it away and with it any conditions implied in it. Hence he could not plead that the contract implied a condition that the arbiter chosen would be free from exception. But in any event the contract did not imply any such condition, for a condition could only be implied when it necessarily followed from the intention of parties that showed a condition should be implied—*Hamlyn & Company v. Wood & Company*, [1891] 2 Q.B. 488, *per* Lord Esher, M.R., at p. 491, citing *The Moorcock*, 1889, 14 P.D. 64, *per* Bowen, L.J., at p. 68; *Reigate v. Union Manufacturing Company (Ramsbottom)*, [1918] 1 K.B. 592, *per* Scrutton, L.J., at p. 605. No such necessary implication arose here. The Lord Ordinary had assumed that there was an obligation upon the defenders to take reasonable care not to appoint a person who might be disqualified, and had found the defenders liable because they had failed to consider the probability of the arbiter named holding stock in their company and had not ascertained from information in their possession whether or not that was the case. That ground of decision could not be supported, for a railway company could not be held to have always in mind the names of all its shareholders, and in point of fact the disqualification of the arbiter in question had escaped, till a late stage of the reference, the notice of all concerned. Further, the index of shareholders' names would not supply the requisite information, for *e.g.*, if stock was held by trustees only the first of several trustees' names appeared in the index. Further, the arbiter being disqualified, it followed that no appointment of an arbiter had ever been made, but the pursuer could not recover damages for breach of an obligation to refer. He could not

have sued the defenders for implement of an obligation to refer, for if either party refused to nominate an arbiter an alternative procedure was provided—section 24. The defenders were not bound absolutely to warrant the competency of the arbiter appointed by them. The cases cited by the pursuer were not in point, for they were cases of delict.

Argued for the respondent—The contract of submission necessarily implied that the arbiter chosen would be competent to act as such in the matter referred—*The Moorcock (cit.)*. The contract being voidable reduction of it did not exclude a claim for damages. The contract necessarily involved an absolute warranty that the arbiter was fit at the date of the submission, or, if not, a warranty that so far as known to the defenders the arbiter was fit, or in any event that the defenders had used reasonable care to find out if the arbiter was fit. Further, if that did not arise *ex contractu*, it did arise upon the terms of section 24 of the Lands Clauses Act. Assuming the least onerous of these obligations was the obligation upon the defenders, they had not fulfilled it, for the company was bound to keep a register of their shareholders authenticated by their seal at each ordinary meeting—Companies Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 17), sections 9, 10, and 16; Palmer's Company Law, 9th ed., p. 260. The company's officials were seised with knowledge of the names upon the register, and as their knowledge was official and was acquired by them as servants of the company, the company must also be held to be fixed with knowledge of the contents of the register, and therefore of the disqualification of the arbiter—*Bawden v. London, Edinburgh, and Glasgow Assurance Company*, [1892] 2 Q.B. 534, *per* Lord Esher, M.R., at p. 539; *Stiles v. Cardiff Steam Navigation Company*, 1864, 33 L.J., Q.B. 310; *William Brandt's Sons & Company v. Dunlop Rubber Company*, [1905] A.C. 454, *per* Lord Macnaghten, at p. 463; *Vizetelly v. Mudie's Select Library, Limited*, [1900] 2 Q.B. 170; *John v. Dodwell & Company*, [1918] A.C. 563, *per* Viscount Haldane, at p. 568. Of the two persons upon whom the loss might light the defenders could easily have ascertained the disqualification of the arbiter. The pursuer could not, for he had no right to inspect the register of shareholders—*Davies v. Gas Light and Coke Company*, [1909] 1 Ch. 708.

At advising—

LORD JOHNSTON—A question having arisen between Mr Sellar, the pursuer, and the defenders the Highland Railway Company as to the pursuer's claim against the defenders for damages caused to his fishings by works of the defenders affecting the banks and *solum* of the river Findhorn, such claim fell to be determined under the Railways Clauses Act 1845, section 16, and the Lands Clauses Act 1845, sections 23 and 24. I understand that the works in question fell under the head "Alterations and repairs" as specified in the first-mentioned Act, section 16, and that the pursuer exercised his option under section 23 of the last-mentioned Act of

requiring that his claim should be determined by arbitration, and accordingly that an obligation on the defenders arose so to refer the question as provided under section 24 of the same Act. The latter section, for the purpose of this question, may therefore be regarded as the equivalent of an agreement to refer, for, as it seems to me, the result of a statutory obligation to refer and of an agreement to refer is the same. By said 24th section it is provided that where a question of disputed compensation authorised or required to be settled by arbitration shall have arisen, then unless both parties concur in the appointment of a single arbiter each party shall on the request of the other nominate in writing an arbiter to whom the dispute shall be referred, and it is added "such appointment shall be delivered to the arbiters, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made." But it is necessary to note the concluding part of the section, which provides for the case of either party proving obstructive and failing or delaying to appoint an arbiter. In that case after the lapse of fourteen days from the date of a written request to appoint an arbiter the party making the request is empowered to make the appointment of a single arbiter whose award shall be final. Thus the statutory obligation to refer cannot be evaded. But here both parties so far complied with the statute as to nominate arbiters. In point of fact the nomination of arbiters was made in one mutual writing, and not in two as contemplated by the statute, but this is immaterial.

In the ordinary case a submission is effected by an agreement to refer, followed when question arises by a formal reference defining the question, and submitting it to an arbiter or arbiters nominated. Or the reference may proceed without preliminary agreement to refer and is then effected by the submission or deed of reference, defining the question and nominating an arbiter or arbiters. In either case the reference is a mutual contract to abide by the determination of a definite question by the arbiter or arbiters nominated. There is no real difference between this and the statutory reference effected by the statutory obligation to refer and the subsequent nomination when question arises of an arbiter or arbiters, except a certain absence of formality in the latter case as compared with the former.

The question here is—What is to be the result of one party appointing an arbiter who turns out to be personally disqualified from acting? It has already been determined by your Lordships at a previous stage of the case that the arbiter named by the defenders was so disqualified in respect that he was a shareholder in the defenders' company, and that as there was therefore no valid reference there could be no valid appointment of or devolution on an oversman.

I was not myself a party to that judgment, but I have fully considered it and think it right, with a view to dealing with the present question, to say that I entirely concur in it. As regards the disqualifica-

tion of the arbiter the law of Scotland is fixed that personal interest in the suit disqualifies the judge or arbiter, and that the holding of shares in a litigant company is such personal interest. It may be that the development of joint-stock enterprise of recent years may call for some discrimination between classes of shareholders, but I hardly think that that is now for the Court to draw. But where the shareholder is an ordinary shareholder I cannot see how it is possible to make any discrimination based on the value or importance of the holding. The disqualification here of the arbiter has had a somewhat exceptional result. It has not tainted his award, for he did not get the length of making one. It has vitiated his nomination of and devolution on the oversman. At first sight such disqualification of the oversman may appear far fetched. But I think when the practice in the conduct of arbitrations, at least in Scotland, is remembered, that the propriety and justice of the judgment becomes apparent. By common and I may say almost invariable practice, the arbiters nominate their oversman before commencing the work of the reference. As a pure matter of convenience, and to charge him with a knowledge of the matter at issue, and the considerations *hinc inde*, he accompanies them on any visit to the *locus*. He sits with them throughout the leading of evidence and hears the arguments addressed to them by counsel or agents. He is present at their deliberations. In point of fact he may not inaptly be described as the president of a Court of three, with a controlling voice in case of difference between subordinate colleagues. There can be no question that a man in such a position, should decision of the question in dispute ultimately devolve upon him, is open to be swayed by the opinion and reasoning of either of those with whom he has thus sat, and therefore that there is substance and not merely form in carrying the objection to the arbiter to the length of vitiating the appointment of the oversman in which he has had a hand. The objection must have been sustained if the disqualification of the arbiter had been discovered before the devolution, and it is I think equally well founded though the discovery did not take place till the devolution had been made or even the oversman's award had been issued. The arbitration in question has therefore proved abortive, and the pursuer has in consequence fruitlessly incurred considerable expense which he now seeks to recover from the defenders.

The pursuer's claim for recovery of the expenses to which he has thus been fruitlessly put is based on the proposition that it was an implied condition of the contract of reference that each party should appoint a qualified arbiter. I do not know that "condition" is the right word. But first, what is the contract? There may I think be a double contract—a contract to refer and a contract of reference, in both of which there may be this implication. I think, further, that this implication may equally be found attaching to the statutory obligation to refer. But that does not make it

the less possible that the actual reference may itself be regarded as a contract to which the same implication attaches. I think indeed that it is immaterial which way the matter is regarded.

But reverting to the term "condition," I think that this is a misleading term. It is not a proper condition of the contract which is intended so to be described. There is nothing conditional about it. It is more properly an implied warranty, or from another point of view, an implied stipulation or term of the contract, that the arbiter appointed shall not be subject to personal disqualification.

Now Bowen, L.J., has laid it down in *The Moorcock*, 1889, 14 P.D. 64, that "an implied warranty, or as it is called a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side." The rule so laid down by the learned Lord Justice was adopted by Lord Esher, M.R., in *Hamlyn & Company v. Wood & Company*, [1891] 2 Q.B. 488, at p. 491, where he adds—"I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless on considering the terms of the contract in a reasonable and business manner an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned." It will be noted in passing how the last-quoted learned Judge uses the term "stipulation" while adopting the rule enunciated by his colleague who had used the expression "warranty." This I think supports me in saying that in this relation, though "condition" is misleading, there is no real distinction between "warranty," "stipulation," and "term of the contract." I adopt the rule so laid down in England as equally applicable here; and, applying it, I think it must be said that it was the intention of both parties to this reference to obtain an effectual decision of the question between them. That intention could not be effected unless the reference itself was effectual. It was therefore essential to the efficacy of the transaction of reference that each party should nominate a qualified arbiter. It follows that a necessary implication arises that each party to the reference warranted that the arbiter whom he nominated should be qualified effectually to determine the matter referred.

I think, therefore, that the Lord Ordinary has come to a correct conclusion and that the pursuer is entitled to recover from the defenders damages for the loss to which he has been put by the defenders' failure to fulfil their implied obligation. But I cannot

say that I altogether subscribe to the circumstantial distinctions enunciated by the Lord Ordinary. He draws such between the three following cases:—(1) Where a party nominates an arbiter whom he knows to be disqualified; (2) where a party nominates an arbiter whom he does not know to be disqualified, but whose disqualification is readily ascertainable; and (3) where a party nominates an arbiter whose disqualification is latent and not ascertainable without inquiry behind the scenes or beneath the surface of things. If there is an implied warranty I question whether such distinctions can be drawn and whether it is enough for the party who has *de facto* rendered the reference abortive to say "I took all reasonable means of ascertaining that the arbiter whom I nominated was free from objection, and the fact that he has nevertheless turned out unknown to me to be disqualified must be regarded as a *damnum fatale*, the loss from which must rest where it falls." But it is not necessary to carry the decision to this point, in respect that the arbiter who has been found to be disqualified was an ordinary shareholder in the defenders' company, and that it was their first duty to satisfy themselves that he was not subject to this very patent disqualification.

LORD MACKENZIE—I agree with the conclusion reached by the Lord Ordinary in this case.

The expense incurred by the pursuer in the arbitration which has proved abortive is money thrown away. That it has been thrown away is the direct consequence of the action of the Highland Railway in appointing as they did Mr Charles Pullar Hogg, civil engineer, Glasgow, to be arbiter on their behalf. Mr Hogg was at the time he acted as arbiter a holder of ordinary shares in the Highland Railway. He was thus disqualified by personal interest from acting as arbiter in the reference. The award is therefore invalid and must be reduced. In these circumstances I am of opinion that the pursuer is entitled to recover as damages from the defenders the amount of these expenses.

There was much discussion as to the true legal ground upon which this claim of damages should be put. In my opinion it rests on negligence rather than on breach of contract. I do not find it necessary to formulate propositions applicable to cases different from the one we have now to dispose of. The present case may in my opinion be decided upon the following grounds—The Highland Railway appointed as their arbiter a person who was one of themselves. When they did so they either knew or must be held to have known that he was a shareholder in the company. They must also be charged with the knowledge that this operates as a legal disqualification. In appointing Mr Hogg the defenders were guilty of a breach of the duty which arose from the contractual relations between them and Mr Sellar. These contractual relations were created when they agreed to work out the provisions of section 24 of the Lands Clauses Act 1845 in the manner therein provided.

The duty thence arising was one which was not, strictly speaking, created by the agreement. It arose out of the agreement but was fixed by law, and may be defined as a duty to take reasonable care that they were not nominating a person to be judge in his own cause. The defenders in my opinion failed in the discharge of this duty, and are therefore liable in damages.

LORD SKERRINGTON—I agree with the judgment proposed, and for the same reasons as have been stated by Lord Mackenzie.

I do not think it doubtful that a person who takes upon himself to nominate an arbiter for the settlement of a dispute comes under some duty in regard to the legal qualification of his nominee. A question may be raised as to the source and origin of that duty, and again as to its extent. For my own part I do not think that the duty arises from implied contract or warranty—a theory which involves an appeal to a legal fiction. The truth of the matter is that a person who nominates an arbiter has a duty imposed upon him by the law in consequence of what he has done. That duty is to be careful in order to avoid nominating a person who is subject to a legal disqualification. One of your Lordships has suggested that the duty is higher, and amounts to a warranty that the person nominated is not disqualified. My present impression is that this view goes beyond what is necessary, but the question does not arise in the present case. In the meanwhile it is sufficient to lay down that a person who nominates an arbiter must take due care to avoid appointing one who is disqualified. That, as it seems to me, is really the ground of judgment of the Lord Ordinary, though I do not entirely agree with all that is to be found in his note.

For the purposes of the present case it would suffice to take a lower ground, and to say that a person who nominates an arbiter is at least under a legal duty to treat his opponent with good faith. It is not according to good faith to nominate an arbiter whom one knows to be disqualified either of one's own personal knowledge or by the knowledge of an agent to whom the management of a particular piece of business has been entrusted. This principle applies to the case of a corporation, which can have no knowledge except through its agents.

LORD PRESIDENT—I also agree with the proposed judgment.

At a prior stage of this process we decided that the pursuer was entitled to take advantage of a technical invalidity to get rid of the award which he conceived to be unjust. I for my part came to that decision reluctantly, because the award we set aside was that of an unimpeachable oversman and not of the arbiter subject to disqualification. At first sight it seemed that the pursuer having got rid of the obnoxious award had secured all that he was entitled to. But then I hold that a party who nominates an arbiter in a submission undertakes that so far as he knows his nominee is not subject to disqualification. If he knows that he is subject to disqualification and refrains from disclosing the fact to the opposite party, then I

think he must take the consequences. In short, I agree with the Lord Ordinary's statement of the law that "if a party nominates an arbiter whom he knows to be disqualified he must bear the consequence as regards expense incurred by the other party." In nominating an arbiter he agrees to nominate one who so far as he knows is competent to act. That proposition, I remind your Lordships, was not conceded by the defenders' counsel, but it was not contested. Now that is the very case before us, for the Railway Company of course cannot deny that they had appointed one of their own number to be arbiter. They do not and cannot deny that they knew the fact, for whilst they very pointedly and expressly state that "it had escaped the recollection" of the arbiter that he was a shareholder they do not, and of course cannot, say that they did not know the fact.

On that ground, and on that ground alone, I am for upholding the Lord Ordinary's interlocutor. But I ought to add, as I think Lord Johnston has said in his opinion, that nothing was urged in support of the Lord Ordinary's view that the defenders' liability here depends upon the ease or difficulty of ascertaining that their arbiter was a shareholder, or upon the probability or improbability of his being a shareholder. Obviously that is an unsound view. It would lead to decree against the company wherever it was easy to ascertain, but would protect them where it was difficult to ascertain, that their arbiter was a shareholder.

On the simple ground, then, that this company confessedly knew that they were appointing an arbiter subject to disqualification and did not disclose that fact I hold them to be responsible for the consequences, and am therefore for adhering to the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for the Pursuer—Constable, K.C. —J. S. Mackay. Agents—J. Miller Thomson & Company, W.S.

Counsel for the Defenders—Macphail, K.C. — Millar. Agents—J. K. & W. P. Lindsay, W.S.

Saturday, June 15.

SECOND DIVISION.

[Lord Hunter, Ordinary.]

GOFF AND OTHERS (PATERSON'S TRUSTEES) v. FINLAY AND OTHERS.

Trust—Faculties and Powers—Discretionary Powers—Delectus Personæ.

A testator, on the narrative that he was not satisfied with a bequest of residue to the directors of the Glasgow Western Infirmary, made by him in an earlier codicil, cancelled it, and provided—"Should I not hereafter execute any writing disposing of the said two hundred thousand parts of the residue of my estate, I appoint two of my trus-

tees—my sister (the said E. S. P.) and J. M. K." who was his law agent—"to reconsider the matter for me and either dispose of these two hundred thousand parts as provided in my said will—that is, by directing that the said legacy hereby cancelled be paid, or allot the said two hundred thousand parts to any other object or objects they may deem more desirable in connection with the said Western Infirmary of Glasgow, or any other charitable object or objects similar to those mentioned in my said will." The testator died without having executed any such writing. The power was exercised but the deed was cancelled. One of the appointees of the power died before the power had of new been exercised. The remaining appointee executed a writing purporting to exercise it.

Held (dis. Lord Salvesen) that, on a consideration of the deeds, the power could only be exercised by the two trustees jointly and not by the survivor alone.

William Henry Goff, chartered accountant, Glasgow, and others, trustees of the late James Paterson, Southfield, Midlothian, acting under a trust-disposition and settlement dated 25th January 1905 and various codicils, *pursuers and real raisers*, brought an action of multiplepointing and exoneration, the *fund in medio* being 200 one-thousandth parts of the residue of the testator's estate, which he had originally in a codicil bequeathed to the directors of the Western Infirmary of Glasgow, but subsequently left subject to a discretionary power given to two of his trustees. This power was exercised, but the deed was cancelled and was not exercised again by the two appointees. After the death of one, however, the other executed a deed, dated 2nd March 1917, purporting to exercise it.

The *clause conferring* the power is quoted from the codicil of 2nd September 1909, *supra in rubric*.

John Finlay, Southfield, Midlothian, *claimant and defender*, lodged a claim as nephew of the testator, averring that he was entitled to the succession to the testator's estate *ab intestato*, and that the deed of 2nd March 1917 above referred to was invalid. The Royal Edinburgh Hospital for Incurables, *claimant and defender*, also lodged a claim, maintaining that the deed of 2nd March 1917 was a valid exercise of the discretionary power conferred by the testator.

On 20th December 1917 the Lord Ordinary (HUNTER) pronounced the following interlocutor:—"Finds that the *fund in medio* has fallen into intestacy of the late James Paterson: Sustains the condescendence and claim for John Finlay, Southfield, Liberton, Midlothian; Ranks and prefers him to the *fund in medio*; and decerns."

Opinion.—[After dealing with questions which are not reported]—"The second alternative of the contentions for these claimants" (*i.e.*, The Royal Edinburgh Hospital for Incurables) "deserves more consideration. In *Shedden's Trustee v. Dykes*, 1914