is not necessary to show a specific intention to deal with the whole personal estate. Or again, if the testator has used a word such as "estate," which *prima facie* includes everything, that may in itself be enough. In other cases, like the present one, where no technical or general words have been used, the pursuer of the issue must show that the testator intended to dispose of the particular asset which is claimed. We do not require, because we are not asked, to decide whether this will carries corporeal moveables, such as furniture. Is there anything either in the language of the will or in the circumstances of the testator or of his estate which ought to lead us to the conclusion that when he bequeathed two pecuniary legacies of £100 each, and directed "the remainder to be invested," he intended that the house in which he and his son resided should be sold and the proceeds invested. If a satisfactory indication of such an intention can be discovered, then the 20th section of the Act of 1868 entitles, and therefore requires, us to give effect to it. This enactment, however, did not create any presumption that a testator intended to dispose of his heritable estate. It merely abolished a technical impediment which, according to the common law as explained by Erskine (iii, 8, 20) prevented the will of a testator, however clearly expressed, from taking effect in the case of heritable estate. I can discover no indication of an intention that the house should be sold and the proceeds invested. I therefore answer the first question in the negative and the second in the affirmative.

LORD CULLEN—I agree. The testator may possibly have intended the word "remainder" to include his heritable estate. But if so I think he has not so expressed himself as sufficiently to manifest such an intention. On the terms of the will, the word is, I think, sufficiently explained as relating either to the moveable estate as a whole or to the money part of it in particular) and I do not think there is any good ground for extending its meaning further by necessary implication.

The Court answered the first question in the negative, and the second in the affirmative.

Counsel for the First Party—R. C. Henderson. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Second Party—D. R. Scott. Agents—Hamilton, Kinnear, & Beatson, W.S.

HOUSE OF LORDS.

Friday, January 24.

(Before Lord Buckmaster, Lord Finlay, Lord Dunedin, and Lord Atkinson.)

SELLAR *v.* HIGHLAND RAILWAY COMPANY.

(In the Court of Session, May 16, 1918, 55 S.L.R. 593, and July 19, 1918, 55 S.L.R. 752.)

Arbitration — Arbiter — Disqualification — Arbiter Holding Stock in Incorporated Company Nominating Him.

Arbiters having disagreed devolved the reference upon the oversman, who issued proposed findings. One of the parties then discovered that the arbiter nominated by the other party, a railway company, held £3700 ordinary stock therein, and intimated that in consequence he considered that the arbiter was disqualified from acting and that he would not hold himself bound by the award. In an action of reduction of the decreet-arbitral *held* that the arbiter in question was disqualified, and that the decreet-arbitral was in consequence reducible at the instance of the other party to the reference.

Dimes v. *Proprietors of the Grand Junction Canal*, 1852, 3 Cl. H.L. 759, *followed.*

Contract — Arbitration — Implied Term — Damages — Obligation of Company Appointing Arbiter to Satisfy Themselves that Arbiter not Disqualified — Expenses of Reference — Consequential Damages — Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 19), *sec.* 24.

In an arbitration the arbiter appointed by one of the parties, a railway company, held stock in that company; the other party reduced the decreet-arbitral by the oversman on the ground that the arbiter referred to was disqualified, and claimed the expenses incurred by him in the abortive reference. *Held* (*rev.* judgment of the First Division) that he was not entitled to recover his expenses in respect that there was no contract between the parties from which it could be inferred that the other party was bound to appoint an arbiter against whom no objection could be taken; that there was no statutory duty imposed on the railway company to examine their registers to see that the arbiter appointed was not a shareholder; and that, even assuming there had been a breach of duty, the damages claimed were too remote.

The case is reported *ante ut supra.*

The defenders, the Highland Railway Company, appealed to the House of Lords.

LORD BUCKMASTER—So long ago as 1852, in the case of *Dimes* v. *Proprietors of the Grand Junction Canal*, 3 Cl. H.L. 759, your Lordships decided that the possession by Lord Cottenham, who was then the Lord Chancellor, of a certain shareholding in the

Grand Junction Canal Company, rendered voidable a judgment which he had given in a suit to which the Canal Company was a party. This opinion of your Lordships' House was expressed after receiving the unanimous opinions of the learned Judges of the King's Bench who had been summoned for the purpose of expressing their views, the learned Judges being in entire agreement with the views that your Lordships adopted. It is quite true that that case arose in the English Courts, and that the law which your Lordships were then administering was the English law: but in a case of the *London and North-Western Railway Company* v. *Lindsay*, 1858, 3 Macq. 99, the same question arose with regard to an appeal to this House from the Courts in Scotland. Lord Wensleydale there stated that he, being a shareholder in the appellant company, proposed to retire and take no part in the judgment. The Lord Chancellor regretted that this step seemed to be necessary, and although counsel suggested that he had no objection, it was thought better that any difficulty that might arise should be avoided, and he accordingly retired. This was not in express terms a decision that the principle applicable to the Courts in England was also applicable to the Scottish Courts, but in the case of *Smith* v. *The Liverpool and London and Globe Insurance Company*, 1887, 14 R. 931, 24 S.L.R. 672, the Lord President stated his view of the law in these terms. He refers to *Dime's* case, and he continues thus—"It is contended that the laws of England and Scotland are not the same upon this point. I think they are the same in regard to an objection like the present, where the Judge is a shareholder of the litigant company. The laws of England and Scotland appear to me to be identical as regards this particular objection." There is no reason to question the soundness of this opinion, and no subsequent case has thrown doubt upon its authority. The law remains unaltered and unvarying today, and although it is obvious that the extended growth of personal property and the wide distribution of interests in vast commercial concerns may render the application of the rule increasingly irksome, it is none the less a rule which I for my part should greatly regret to see even in the slightest degree relaxed. The importance of preserving the administration of justice from anything which can even by remote imagination be assumed to be a reproach, or to infer a bias or interest in the judge upon whom falls the solemn duty of administering the law, is so grave that any small inconvenience experienced in its preservation may be cheerfully endured. In practice also the difficulty is one easily overcome, because directly the fact is stated it is common practice that counsel on each side should agree that the existence of the disqualification shall afford no objection to the prosecution of the suit, and the matter proceeds in the ordinary way, but if the disclosure is not made, either through neglect or inadvertence, the judgment becomes voidable and may be set aside.

If therefore this was a case in which a judge had possessed the interest that was possessed by one of the arbiters, the appeal so far as this part of the case is concerned must fail. It was, however, suggested by the learned Lord Advocate that there were in fact distinctions to be drawn according to the law of Scotland between the possession of an interest which would disqualify a judge and the possession of an interest which would disqualify an arbiter, and he invited your Lordships to consider an interesting discussion of the law upon that footing. It is sufficient for the present purpose to say that such a point was not argued in the Inner House where it ought to have been raised, and it would be unwise and undesirable for your Lordships to consider such a question now when its decision might affect the determination of a matter intimately affecting the domestic affairs of Scotland when your Lordships have not received the advantage of knowing the opinion of any of the Scottish Judges. So far therefore as this appeal seeks to vary or reverse the interlocutor which decided that the award in this case was voidable and ought to be set aside, the appeal must fail.

But there remains another question of considerable importance. In the interlocutors appealed from it has been held that the respondent in this case is entitled to the expenses which he incurred in connection with the arbitration, and this appeal challenges his right to receive those expenses as damages. In order to test the value of the appellants' contention in this connection it is necessary to see how this arbitration took place, and how it was that the award came to be set aside. The arbitration arose because the respondent put forward a claim for compensation against the appellants the Highland Railway Company, based on their alleged interference with his fishing rights on the river Findhorn. By section 24 of the Lands Clauses Consolidation (Scotland) Act 1845 it is provided that such dispute shall be settled by arbitration. Section 24 constitutes the court of arbitration and shows how it is to be set up. It provides that when a question has arisen each party on the request of the other shall nominate and appoint an arbiter, that the appointment when made is to be delivered to the arbiters, and such appointment shall be deemed to be a submission to arbitration on the part of the party by whom the same shall be made. It seems to me that, stopping at that point of the statute, this is what results—After the statutory obligation to appoint an arbiter has been complied with and the appointment has been communicated to the arbiters a submission is inferred, and as from that point of time all the subsequent proceedings follow just as under an ordinary agreed submission, subject to any statutory modifications which may be imposed. From this it follows that the submission in itself contains no reference, express or implied, to the appointment of the arbiter. It succeeds the appointment and does not precede it. So far therefore as the judgments of the learned Judges in the Court of Session have depended upon the assumption that there was an

actual contract between the parties in this case, and that as an implied term of such a contract the Highland Railway Company were bound to appoint an arbiter against whom no objection could properly be taken, the contention must fail.

But that does not dispose of all the contention of the respondent; there still remains a matter of considerable difficulty. Although there has been no breach of contractual obligation it may yet follow that there has been a breach of a statutory duty. In order to ascertain whether that has taken place it is important to see what has in fact occurred. The Railway Company appointed as an arbiter a gentleman whose personal character and independence are above all challenge, but it appeared that he possessed at the time when he was appointed and at the time when he sat some comparatively small holding in the shares of the company. Of this fact it is not suggested that the directors who effected his appointment had any direct and personal knowledge. It can only be said against them that the company is bound by statute to keep a register of shareholders, that the register of shareholders must from time to time be examined and kept up to date, that such register was open to their inspection and the inspection of their agents, and that they had full opportunity of ascertaining whether or not he did possess a shareholding before they nominated him. He was, however, nominated without the knowledge being in fact possessed by them, and after having heard the dispute disagreed with the arbiter appointed by the respondent, and on such disagreement joined with him in appointing an oversman, by whom the ultimate award was made. I entertain no doubt that in this he was acting as arbiter, and in consequence of the infirmity of his position the respondent is entitled to avoid the award.

It remains to be seen how far this constitutes a breach of the statute. Section 24 is the only material section. This imposes the duty of nominating and appointing an arbiter, and I do not doubt also of taking reasonable care to appoint a proper and fit person, but I cannot believe that it imposes upon every company the necessary obligation of examining all the registers and documents which are in their possession for the purpose of seeing whether the person whom they appoint happens to be interested in some holding, however infinitesimal, in the various shares and pecuniary obligations of their company. If they knew, or if they had deliberately shut their eyes to knowledge, it might be different. But I cannot reconcile myself to the theory that in this connection you should construe as actual knowledge that which a man did not in fact possess, and hold that a man knows something which upon all hands it is agreed that he did not in fact know. I notice that Lord Skerrington assumes that there was actual knowledge on the part of the Railway Company, because, to use his own words, he says—"It is not according to good faith to nominate an arbiter whom one knows to be disqualified"—of that statement I make no complaint, and he continues—"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." That appears to me in such a case as this to carry the doctrine of constructive notice much too far.

There remains one further question, and that is, Even assuming that there had been a breach of duty on the part of the Railway Company, whether the expenses which were incurred by the respondent in the arbitration are damages which naturally flow from such a breach? Again I find it difficult to assume that there is any such direct connection between the damages which were incurred and the act complained of as would entitle the respondent to their recovery. It must be borne in mind that the arbiter who was appointed was in every sense but one perfectly competent to act—that is to say, he was in every way a fully qualified arbiter, but there was this weakness in his position, that the interest he held in the company would enable the respondent, if the respondent thought fit, to take steps to challenge the validity of the award. The award was not void, nor was the arbiter by virtue of his interest incapable of validly acting provided that the other party did not seek to challenge it. It was therefore the action on the part of the respondent in the exercise of his undoubted legal right to declare that the award was void which was one of the contributory causes why the whole value of the arbitration proceedings became wasted and he suffered the expense. It did not necessarily follow from the appointment that any such cause could ensue. It was possible, but assuredly it was not certain or even probable, and it does not appear to me to be so directly and intimately connected with the act of the appointment of the arbiter that, even assuming that that act constituted a breach of statutory duty, the respondent would be entitled to recover the expenses to which he was put.

For these reasons, it is my opinion that this appeal fails as to the first part, which seeks once more to re-establish the award, but that it succeeds so far as it seeks to reverse the interlocutor which has decreed the expenses in favour of the respondent. Of course so far as, if at all, there was any attempt on the part of the respondent to reduce the award in part and leave part standing, that would wholly fail, but that observation, I think, disposes of all the matter in dispute in this appeal, and the order shall be drawn up accordingly.

LORD FINLAY—In this case Mr Sellar made a claim against the Highland Railway Company in respect of damage which he said had been done to his fishings by works carried on by the railway company. The proceedings went on under the Lands Clauses Consolidation (Scotland) Act 1845, and by the 24th section of that Act when there is to be a settlement of a claim for compensation by arbitration each party has to appoint an arbiter. That was accordingly done here and both parties joined in the

deed of appointment of arbiters, in which the Railway Company appoint Mr Hogg to be arbiter on their behalf, and Mr Sellar appoints Mr Davidson to be arbiter on his behalf. The two arbiters so appointed by the instrument appointed an oversman. The proceedings went on; the arbiters and oversman sat together and heard the case, and then the arbiters differed in their opinion, so that the oversman made his award giving a certain amount of compensation. It was then found out that Mr Hogg held shares in the Highland Railway Company, and proceedings were taken by Mr Sellar to have the award set aside on the ground that Mr Hogg was disqualified by his interest in the Highland Railway Company from acting as arbiter.

The appeal is brought against two interlocutors which were pronounced by the Lord Ordinary. The first of these is dated the 11th February 1918, by which the Lord Ordinary sustained the first plea-in-law for the pursuer; that was an allegation that as Mr Hogg, the arbiter, was disqualified by personal interest the decreet-arbitral of the oversman was invalid and fell to be reduced, and the Lord Ordinary held the material pleas-in-law for the defenders in answer to that to be bad. Accordingly the result was that by that interlocutor it was decided that the decreet-arbitral fell to be reduced. On appeal the Inner House adhered to that decision of the Lord Ordinary. From that an appeal is brought to this House. The second branch of the appeal relates to an interlocutor of the Lord Ordinary of the 21st June 1918, in which the Lord Ordinary decided that the Railway Company were liable to pay to Mr Sellar the amount of expenses which he had incurred in the arbitration, which as things turned out was abortive, the decreet-arbitral falling to be reduced. The Inner House on appeal adhered to that interlocutor, and from that decision the appeal is now brought to your Lordships' House.

It appears to me that on the first interlocutor to which I have referred it is impossible to say that the decision of the Lord Ordinary and of the Inner House was wrong. Mr Hogg held shares in the Highland Railway Company. It is not disputed that by the law of England a judge would be disqualified from sitting in a case where one of the parties was a company in which he held shares; that was decided long ago in the very well-known case of *Dimes* v. *Proprietors of the Grand Junction Canal*, 1852, 3 Cl. H.L. 759. It has been said that that has never been applied to judges in Scotland. Well in my opinion the same law on that matter must apply to judges in Scotland as to judges in England. It would be odd if there were any difference on a matter of that kind, and in my opinion there is no sufficient ground for saying that such a difference exists. But then it was said that that law has never been applied to the case of arbiters or oversmen, and that even if it applies to judges it does not apply to them. It is sufficient answer to that contention that the point was not taken in the Courts below, and under these circumstances this House ought not to entertain a matter on which they have not the assistance of arguments in the Courts below and of the opinions of the learned judges there, so that that ground of appeal cannot be entertained. It follows that the decreet-arbitral cannot stand for this reason. It is perfectly true that the decreet-arbitral was not the work of Mr Hogg, but Mr Hogg did act as arbiter in the matter; having this interest in the Highland Railway Company, he heard the evidence and arguments and he considered the matter and he and the arbiter on the other side failed to come to agreement. It seems to me that in doing that Mr Hogg did act judicially in the matter, and inasmuch as the function of the oversman in deciding by decreet-arbitral was the result of the failure to agree by the arbiters, the decreet-arbitral cannot stand. The first interlocutor therefore stands, subject to this observation. Reduction of the whole decreet-arbitral, except one part of it giving costs to the pursuer, was asked for. It is impossible that the decreet-arbitral can be reduced in part; if it is to be reduced it must be reduced altogether on a ground of that kind which is not separable but applies to the whole of the proceedings. The pursuer cannot approbate and reprobate and the case must result in an order that the whole of the decreet-arbitral be set aside.

Now the second interlocutor relates to the expenses which were incurred in the arbitration, which became abortive under the circumstances which I have stated, and the pursuer claims to get back from the Highland Railway Company the expenses which he incurred in that abortive arbitration—abortive because the decreet-arbitral has been set aside at his instance. His claim is put on two grounds. It is put first that when the Highland Railway Company appointed Mr Hogg as their arbiter they warranted that he was not liable to any objection such as that which has been disclosed in these proceedings. In support of that contention the well-known case of the steamship "*Moorcock*," 1889, 14 P.D. 64, has been cited. The steamship "*Moorcock*" has been very often requisitioned in cases before this House and in all the Courts, but it appears to me that the "*Moorcock*" was never sent on a more desperate service than when it was sought on the authority of that case to hold that when an arbiter is appointed under this section of the Lands Clauses Consolidation Act, the person appointing the arbiter warrants that that arbiter is not open to any exception. He is bound of course to take every care, but I can find no authority nor anything in the reason of the thing to show that he warrants—that he guarantees that is to say—that the arbiter is not subject to any such objection.

The second ground on which it is said that they were liable was that there was negligence in appointing a man whom they might by examination of their share register and address book have found to be a proprietor of shares in the company. With regard to that I will only say that I entirely agree with the noble and learned Lord on the Woolsack in thinking that no negligence

has been made out which would have any such effect.

And then there is another ground to which attention has already been called on which I think this head of claim must fail, and that is that the loss by prosecuting the arbitration so far was not the direct and natural consequence of any breach of duty on the part of the Highland Railway Company, supposing that that duty existed either under the head of warranty or on the ground that there was a want of proper care in appointing the arbiter. The fact that the expenses were incurred and had been thrown away is due to the fact that Mr Sellar or his agents took the objection only at a very late stage. They did not consider at all the question whether there might be any holding of shares, and I think it is very likely they did not consider it because they thought it was a matter of no consequence, and that if it had been found that Mr Hogg had some interest in the Highland Railway Company any objection on that score would have been waived almost as a matter of course. But the proceedings went on, and when the preliminary findings which the oversman proposed to arrive at were open to the parties, then this question was investigated and it was discovered on examination somehow of the share register of the Highland Railway Company that Mr Hogg held these shares. It seems to me that the incurring of these expenses and the fact that they are thrown away is the direct and natural result, not of any breach of duty on the part of the Highland Railway Company, if there was such a breach—I do not think there was—it was incurred because Mr Sellar did not think it worth while to enter into the subject, and the examination was undertaken only after it was brought to his notice that a decreet-arbitral was about to be pronounced the terms of which he did not like. Under these circumstances it does appear to me that incurring the loss of this amount which he has incurred was not a consequence, either direct or natural, of any default on the part of the Highland Railway Company.

Accordingly it appears to me that the second interlocutor giving Mr Sellar the expenses he was put to in the arbitration cannot stand, and that the interlocutor and judgment of the Court of Session adhering to that ought to be set aside; and it would appear to be a proper consequence that there should be no costs here or below.

LORD DUNEDIN—I concur. As regards the reduction, it has been conceded that the reduction must be total and not partial, and on the merits of that I agree with what was said by the learned Lord Ordinary and in the Court of Session.

As regards the second point, I concur with what has been said by my noble and learned friend on the Woolsack. I can find here neither breach of contract nor breach of duty which should make the proper foundation for the action here.

LORD ATKINSON—I concur, and I have nothing to add.

Their Lordships dismissed the appeal against the judgment of the First Division of 16th May 1918, but sustained the appeal against their judgment of 19th July, and remitted the case back with direction to pronounce decree of reduction of the award, assoilzie the defenders from the petitory conclusion of the summons, and find neither party entitled to expenses after the 16th June 1918, except the expenses connected with the minute of amendment and discussion thereon, which expenses were awarded to the defenders.

Counsel for the Appellants—Lord Advocate (Clyde, K.C.) — Macphail, K.C. — Millar. Agents—J. K. & W. P. Lindsay, W.S., Edinburgh — Martin & Company, Westminster.

Counsel for the Respondent—Constable, K.C. — Macmillan, K.C. — J. S. Mackay. Agents — J. Miller Thomson & Company, W.S., Edinburgh—Beveridge & Company, Westminster.

Monday, January 27.

(Before Lord Buckmaster, Lord Finlay, Lord Dunedin, and Lord Atkinson.)

FERRIES *v.* VISCOUNTESS COWDRAY.

(In the Court of Session, February 5, 1918, 55 S.L.R. 261.)

Landlord and Tenant—Arbitration—Jurisdiction — Outgoing — Compensation — Unreasonable Disturbance—Notice to Quit —Notice of Claim—"Difference Arising as to any Matter"—Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, cap.* 64), *secs.* 10 *and* 18.

The Agricultural Holdings (Scotland) Act 1908 enacts—Section 10—"Where (*a*) the landlord of a holding, without good and sufficient cause and for reasons inconsistent with good estate management, terminates the tenancy by notice to quit . . . the tenant upon quitting the holding shall . . . be entitled to compensation . . . provided that no compensation under this section shall be payable . . . (*b*) unless the tenant has, within two months after he has received notice to quit . . . given to the landlord notice in writing of his intention to claim compensation under this section. . . . In the event of any difference arising as to any matter under this section, the difference shall in default of agreement be settled by arbitration. . . ." Section 18 (1)—"Notwithstanding the expiration of the stipulated endurance of any lease the tenancy shall not come to an end unless written notice has been given by either party to the other of his intention to bring the tenancy to an end—(*a*) in the case of leases for three years and upwards not less than one year nor more than two years before the termination of the lease."