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."

The lease of a farm for nineteen years provided that—"notice in writing to quit shall be given on either side two years before the expiry of the lease." The lease expired at Whitsunday 1917. On 13th May 1917, the landlord gave notice to quit to the tenant, who acknowledged the notice, and on 30th July intimated in writing that he intended to claim compensation for unreasonable disturbance. Certain negotiations followed, and the tenant subsequently secured the services of an arbiter to assess the compensation. Questions then arose as to the validity of the notice to quit and the sufficiency of the notice of claim. The landlord having raised an action of suspension and interdict to suspend the proceedings for the appointment of the arbiter, and to interdict him and the tenant from proceeding with the application, *held* (*rev.* judgment of the First Division, *dub.* Lord Finlay) that the arbiter had jurisdiction to determine the validity of the landlord's notice to quit and of the tenant's notice of claim.

This case is reported *ante ut supra.*

The respondent, Nathaniel Fraser Ferries, appealed to the House of Lords.

LORD BUCKMASTER—The immediate question that arises upon this appeal is whether an arbiter who has been appointed under section 10 of the Agricultural Holdings (Scotland) Act 1908 has power to deal with certain definite questions of controversy that exist between the parties to this appeal. The dispute arises in this way—On the 29th April 1898 a lease was granted of certain property to the appellant. The lease was for a term of 19 years, and contained a provision to the effect that notice in writing to quit should be given on either side two years before the expiration of the lease, and that should no such notice be given the lease should be extended for one year at the same rent and on the same conditions. The respondent purported to give a formal notice to quit, and the appellant served a notice making a claim for unreasonable disturbance. On these facts, apart from the amount of compensation, three questions arose between the parties. The first was whether the notice to quit was invalid: the second whether the respondent had given sufficient notice of his claim; and the third whether either of the former questions could properly be determined by an arbiter appointed under section 10 of the Act.

An arbiter having been in fact appointed, proceedings were taken by the respondent for the purpose of preventing him from acting; the Lord Ordinary, before whom the matter came in the first instance, held that the present respondent's plea in objection to the jurisdiction of the arbiter was well founded, "the matter" alluded to in the section being in his opinion a matter of fact, and further he regarded the question as arising under other sections as well as under section 10. On appeal to the Inner House the question as to the arbiter's proper authority to act only appears to have been imperfectly dealt with, but there is no dispute that it was raised, and it may be that the small compass of the question is the explanation of why it was not more fully discussed.

Now the question itself depends upon the true construction of section 10 of the Agricultural Holdings Act 1908. That section provides that where 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, or having been requested in writing at least one year before the expiration of a tenancy refuses to grant a renewal thereof, or for certain other reasons, the tenant shall, in addition to the compensation to which he may be entitled, be entitled to compensation for the loss or expense directly attributable to his quitting the holding, including loss due to sale or removal of his property. It is under those clauses that the present claim for compensation arose. The section then continues with a proviso that there shall be no compensation payable unless the said tenant has given the landlord reasonable opportunity of making a valuation, or unless the tenant has, within two months after he has received notice to quit or refusal to grant a renewal, given the landlord notice in writing of his intention to claim compensation. There are also certain further conditions which need not be referred to. The section then continues in these words—"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."

The first question arises under the earlier words of the section, and the second under the proviso, namely, whether there has been a valid notice to quit, and whether there has been due notice of claim, though other sections may need to be considered in determining the point. It is perfectly true that if those questions are decided adversely to the appellant the claim for compensation can never come up for determination at all; he is excluded from his right. But the point here is whether or no those conditions are conditions to be determined by the arbiter or whether they are conditions entirely outside the arbitration which ought to be determined before the arbitration can possibly take place. To take the view which has been put forward on behalf of the respondent it would be necessary to reduce the arbiter's functions under the section to the settlement of the question of compensation, and of compensation alone, for there can be no reason why he should be able to settle whether the notice to quit was good, and all the other questions arising out of the body of the section, and not the validity of the notice of claim, and the question involved in the proviso—he must be able to decide all or none. It is of course quite possible that that might be a reasonable course for the legislature to have adopted, to say he should decide none of these matters. It might well be considered that the arbiter whose chief function is to settle the amount of claim ought to be

appointed from among a class of people, expert in agricultural affairs, who might be quite unfamiliar with the difficulties that arise with regard to notices to quit and other matters. My difficulty is that the statute seems to me to make no such selection or discrimination in its words. The condition under which arbitration is imposed upon the parties follows the whole of the section, which contains, first, by way of direct enactment, and secondly, by way of proviso, a series of conditions which may necessarily give rise to disputed questions of fact, and even to disputed questions of law; but none the less the words at the end of the section say that any difference which arises as to any matter under the section is a difference which must be referred to the arbiter, while the succeeding section expressly contemplates the possibility of legal complications and gives assistance to the arbiter in the event of his finding himself embarrassed with questions of law.

In these circumstances I find it impossible to see how on a fair construction of the language of the section the words "any matter" can be so restricted and confined as to exclude from their ambit matters which are obviously matters of fact, which may become, as in this case they have become, acute questions of controversy, and which arise directly under the provisions of the section taken as a whole.

For these reasons it is my opinion that the whole of the matters in this dispute were properly for the arbiter to determine, and I find myself unable to accept the view, which has found favour in the Inner House, that the arbiter ought to be restricted from acting because some of the conditions he is called upon to determine may result in showing that there is no claim for compensation on which he is required to arbitrate.

For these reasons it is my opinion that this appeal should be allowed, and that this matter should be referred back to arbitration.

LORD FINLAY—I confess that I feel a great deal of difficulty as to acquiescing in the conclusion which my noble and learned friend on the Woolsack has announced.

The earlier part of section 10 of the Agricultural Holdings (Scotland) Act 1908 deals with the circumstances under which there is to be a claim to compensation, and I am afraid I must read the words of the earlier part of the section in order to show what is undoubtedly beyond all question referred to the arbiter—"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, or, having been requested in writing at least one year before the expiration of a tenancy to grant a renewal thereof refuses to do so; or (*b*) it has been proved that an increase of rent is demanded from the tenant of a holding, and that such increase was demanded by reason of an increase in the value of the holding due to improvements which have been executed by or at the cost of the tenant and for which he has not either directly or indirectly received an equivalent from the landlord, and such demand results in the tenant quitting the holding, the tenant upon quitting the holding shall, in addition to the compensation (if any) to which he may be entitled in respect of improvements, and notwithstanding any agreement to the contrary, be entitled to compensation for the loss or expense directly attributable to his quitting the holding, which the tenant may unavoidably incur upon or in connection with the sale or removal of his household goods or his implements of husbandry, produce, or farm stock on or used in connection with the holding." It is undisputed that everything which falls within the provisions which I have read would have to be determined by the arbiter. He would not be a mere valuer; he would have to take cognizance of the fact whether the landlord had determined without good and sufficient cause, whether he had determined for reasons inconsistent with good estate management, and he would have to determine the various questions mentioned in the second sentence of the clause as to the circumstances under which an increase of rent was demanded. All that clearly falls within the competency of the arbiter. Then we come to the second part of the clause which begins with the word "provided"—"Provided that no compensation under this section shall be payable (*a*) unless the tenant has given to the landlord a reasonable opportunity of making a valuation of such goods, implements, produce and stock as aforesaid; (*b*) unless the tenant has within two months after he has received notice to quit or a refusal to grant a renewal of the tenancy, as the case may be, given to the landlord notice in writing of his intention to claim compensation under this section; (*c*) where the tenant with whom a lease was made has died within three months before the date of the notice to quit or in the case of a lease for years before the refusal to grant a renewal; (*d*) if the claim for compensation is not made within three months after the time at which the tenant quits the holding"; and then at the end of the whole clause comes this provision—"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."

Now the question which, as I understand it, arises, is whether the arbiter appointed to determine the questions which arise under the body of the section is also to determine all questions which arise under the proviso. I confess this question appears to me to be one of some difficulty. It is one thing to say that an arbiter is to determine all the ingredients which go to constitute a claim; it is another thing altogether to say that he is to determine the questions which go to his jurisdiction. The proviso provides for a reasonable opportunity for making a valuation having been given; for notice in writting to have been given to the landlord of the intention to claim compensation; for the case of the death within three months before the date of notice to quit of the tenant, and for the case of the claim for

compensation not being made within three months after the time at which the tenant quits the holding. It seems to me very odd that some of these things should be left to the arbiter appointed specially with reference to his capacity for determining the questions which arise under the body of the section.

I feel very great doubt as to this case, but inasmuch as all your Lordships have made up your minds that the appellant is right I do not intend formally to dissent.

LORD DUNEDIN—I agree with the opinion that has just been delivered by my noble and learned friend upon the Woolsack. The form in which the statute has put this class of arbitration makes no distinction between the various components of the section to which it is applied, and that being so I do not see that there is any reason for us to make a distinction between these two components. I think it is just as easy to say that it is a condition-precedent to anybody getting compensation that he shall be able to show that the landlord has without good and sufficient cause terminated the tenancy, as it is to say that it is a condition-precedent to show that the claim has been timeously made, and again I am swayed by this consideration, that if it could have been shown that the claims under what may be called, and has been called by my noble and learned friend who preceded me, the body of the section, were claims which dealt with things which required agricultural knowledge and agricultural knowledge alone, it might then have been said that it could not be expected that an arbitration clause which would be appropriate for that class of question should be applied so as to subject to the determination of a man who is skilled in that class of question other classes of question altogether. But that cannot be said, because there is no question that in the body of the section there are other things to be considered than mere agricultural questions.

I make bold to quote some words of my own in a judgment I delivered as Lord President in the Court of Session in 1909. I am referring to the case of *Brown* v. *Mitchell*, 1910 S.C. 369, at p. 385, 47 S.L.R. 216. I say this—"Of this I am quite sure—and I think this is necessary to be said, because the arbiter seems a little doubtful upon this part—there may be perfectly good reasons for getting rid of a tenant which are not in the strict sense of the word agricultural reasons, and a landlord who gets rid of a tenant for one of these reasons, being a good one, is not liable under this clause. Now what these again may be I cannot say, and of course the Legislature has gone the very great length of making a person called in from outside the absolute judge upon that matter, because if the arbiter says 'Your reason I consider a bad one' I do not know who is to interfere with him. But none the less I think it is obviously the intention of the statute that there may be a perfectly good reason inconsistent with what may be called agricultural reasons." Then I give various illustrations by way of example, one illustration being this—"Suppose, for instance, the tenant made his farm the headquarters of low and disgraceful company, I imagine that would be a good reason for getting rid of him. Or suppose he made it his custom to take every opportunity of insulting and being disagreeable to the landlord's family. If I were an arbiter I would hold that to be a good and sufficient reason. Of course what any particular arbiter might hold I do not know. But at anyrate I think it is quite clear that reasons of both sorts are within the purview of the Legislature although I cannot express it better—because it is not a definition I am giving—I cannot express it better than this, that the real object of the clause is not to give fixity of tenure but to provide for compensation if there has been capricious action on the part of the landlord in refusing to renew the lease." I adhere to the opinion which I there expressed, and I find also that the provisions of the statute as to arbitration carry out this view, because when we come to section 11 we are told that all questions which are to go to arbitration under the Act shall be in accordance with the provisions set out in the Second Schedule, and when I turn to the Second Schedule, after the rules as to the appointment of the arbiter and so on, I come to No. 9—"The arbiter may at any stage of the proceedings, and shall if so directed by the sheriff (which direction may be given on the application of either party), state in the form of a special case for the opinion of the sheriff any question of law arising in the course of the arbitration." So that when you come to the question of the clause that we have got here upon the merits it seems to me that the statute quite contemplated that these may be questions which arise upon mere questions of fact, for example, as to a debt. The arbiter is quite capable of determining that. But if there is a question where, although it seems to be one of a debt, the real question underlying depends upon a question of law which has to be solved, then there is a procedure for getting an opinion of law, and it is a procedure which may be put into effect practically at the instance of either party, so that the arbiter is not left hopelessly stranded with his agricultural knowledge, but he can get assistance from a court of law if he so wishes. For these reasons I must say I am clearly of opinion that here the question whether there was or was not a sufficient notice was a question which fell to be determined by the arbiter, and that consequently the proceedings before him ought not to have been stopped by the interdict which has been granted by the Court below.

LORD ATKINSON—I am of the same opinion. In my judgment the first part of this section enumerates the different things which must be done in order to entitle the tenant to get compensation. Many of them, as my noble and learned friend has just pointed out, have no connection with agriculture at all. For instance, the very first, as to whether the reasons are inconsistent with good management of the estate, may be for some mismanagement or some improper

use of his holding by the tenant which has nothing to do with agriculture. Then again many of those questions are questions involving matters both of law and of fact, and then when you come to the second part of the section which begins with the proviso, you find there the things enumerated which may deprive the tenant of his right to compensation, some of which are not connected with agriculture at all, for the first one is that the tenant must give the landlord a reasonable opportunity of making a valuation of the goods, and again that the tenant must within two months after reception of notice to quit or refusal to grant renewal, as the case may be, give the landlord notice in writing of his intention to claim compensation under the section. That involves, first of all, the adequacy of the notice, and next whether it is given within the proper time. That has nothing whatever to do with agriculture. Therefore when you find the section terminated by the provision that 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, it would certainly appear to me that that must extend both to all the things which the tenant must do in order to get compensation, and to those things for which unless he does them he will be deprived of compensation. I therefore think that the jurisdiction of the arbiter arises both as to the notice to be given under the first part of the section and as to the notice that may be required to be given under the second portion of the section.

Their Lordships reversed the interlocutor appealed from, with costs.

Counsel for the Appellant (Respondent)—Hon. W. Watson, K.C. — C. H. Brown. Agents — Ronald & Ritchie, W.S., Edinburgh—John Kennedy, W.S., Westminster.

Counsel for the Respondent (Complainer)—Macmillan, K.C.—Gentles. Agents—John C. Brodie & Sons, W.S., Edinburgh — Grahames & Company, Westminster.

Tuesday, January 28.

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

MALCOLM *v.* LOCKHART.

(In the Court of Session, November 16, 1917, 55 S.L.R. 98.)

Revenue — Income Tax — Stallion's Fees — Mode of Assessment — Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 63, *Schedule B, and sec.* 100, *Schedule D, First Case, Rule First, and Sixth Case — Income Tax Act* 1853 (16 *and* 17 *Vict. cap.* 34), *sec.* 2, *Schedules B and D.*

The Income Tax Act 1853 enacts—Section 2—"For the purpose of classifying and distinguishing the several properties, profits, and gains for and in respect of which the said duties are by this Act granted, and for the purposes of the provisions for assessing, raising, levying, and collecting such duties respectively, the said duties shall be deemed to be granted and made payable yearly for and in respect of the several properties, profits, and gains respectively described or comprised in the several schedules contained in this Act, and marked respectively A, B, C, D, and E, and to be charged under such respective schedules—that is to say," Schedule B, "for and in respect of the occupation of all such lands, tenements, hereditaments, and heritages as aforesaid, and to be charged for every twenty shillings of the annual value thereof." Schedule D—"For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever . . . and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every twenty shillings of the annual amount of such profits and gains."

The above schedules replace Schedules B and D of the Income Tax Act 1842, but the cases and rules applicable to the Schedules B and D of that Act are still operative, and of these the following are the first and sixth cases under Schedule D:—First Case—"Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act." Sixth Case—"The duty to be charged in respect of any annual profits or gains not falling under any of the foregoing rules, and not charged by virtue of any of the other schedules contained in this Act."

The tenant and occupier of a mixed farm of 400 acres at a rent of £580 kept a stallion which he used to serve his own mares on the farm, and also to serve mares belonging to others. The mares were either served at the farm or at other places where the stallion attended under the care of the owner's servants. The owner was assessed under Schedule B of the Act of 1853 upon the rental of his farm as tenant thereof, and in the year of assessment his gross earnings from the stallion amounted to £290. The Commissioners for the General Purposes of the Income Tax decided to assess the owner of the stallion upon the profits derived from its ownership under Schedule D of the Act of 1853, in respect that the use made by the owner of the stallion was a use that provided a profit that did not arise in respect of the occupation of his lands. *Held* that the question of the use made of the stallion was a question of fact, and that the Commissioners' decision was final.

The case is reported *ante ut supra.*

William Taylor Malcolm, the appellant, appealed to the House of Lords.