Armour (4 Bell, 347). Lord Cockburn there laid down the law as I have stated it. The other Judges differed, but the House of Lords returned to Lord Cockburn's judgment. That being the case, without going into the clauses of this Act, my opinion is, that all Acts of Parliament concerning roads, whether general or local, conferring rights of highway, are to be construed as conferring the limited right I have stated, unless there be something in the special Act conferring higher powers. In this Act there is nothing to indicate any higher right. As to the clauses indicating that the trustees had powers of selling, that occurs in all such Acts, but care is always taken that the owner of the *solum* shall have the right of pre-emption, that thus his estate may be restored to the same state as before. In other words, the *res-publica* is put an end to, and the proprietor enjoys his estate as before. Holding this view, I am clearly of the same opinion as your Lordship.

Lord Deas—I am humbly of opinion that there is no general question raised here, but simply a question as to the construction of this Act of Parliament. In the case of *Galbraith* the superior had feued out his ground for building, with a right of ish and entry to his feuars. The consequence was that the public travelled over the private roads as they ran in connection with various public roads, and the road trustees dealt with them as if they were public roads. A gas company proposed to open the roads, with leave of the trustees, but without leave of the proprietor, and the only thing decided by the House of Lords was, that in such a case any right acquired by the trustees or the public was a mere right of servitude, and the superior was not deprived of the right of property, and that the proposed operations could not be done without his leave; and in that decision, if it were an open question, I should concur. Some views of a more extensive character were enunciated, but I don't see anything in these opinions to prevent us from looking in any particular case to the special Act. It was not said that if it were laid down by the Act that the *solum* was to become the property of the trustees, that was not to take effect. Those references to the *solum* were made, on the one hand, for the purpose of drawing the inference that the trustees proceeded on the footing that by the general law they had a right to the *solum*; and it was in answer to that that some of the Lords said that these Acts were framed in a loose way, and that they could not be held to show that the general law was as was enunciated. But the effect of particular statutes was not repudiated.—His Lordship then quoted from the opinions of Lord Campbell and Lord Brougham, and continued—There is nothing in these opinion to show that in every particular case you are not to be guided by the Act alone, and I look at this case on that footing. The question is what it enacts; and that raises a question of some difficulty arising mainly from the 60th section. [*Reads section.*] I don't see any reason to doubt that under this section the trustees might have purchased the ground, and got a conveyance and been infeft, and, in that case, the property would have been in the road trustees. The difficulty is, that one section says the trustees are to be in the same position as if this were done and they had taken infeftment. But I think the true meaning is, not that the trustees shall be in all respects in the position of having a conveyance, but that to the effect of the specified uses they are to have possession. No doubt the language of the Act is anything but business-like, but it is impossible to read it in any other way than your Lordship has done. There is an additional perplexity from the power of the trustees, if they abandon the road, to convey it to other parties. If this road falls under that provision, the inference is that the *solum* belongs to them, for a disposition to another party is nonsense unless the *solum* is to be conveyed. But I agree with your Lordship that the trustees had the power to have a conveyance and take infeftment, if they agreed on it; but this section applies to that case only. There is a difficulty in construing the Statute reasonably in any view; but here I do not think it was intended that the trustees should have the *solum*.

Lord Ardmillan—I agree that the question is to be decided according to the Act of 1792; but we must first dispose of this question, Are we construing an Act which is in accordance with the general law, or which is an exception? I agree with Lord Curriehill in his remarks as to the nature of highways. That right is vested in the Crown. The right of highway is a right of passing over land; it is not a right of property, but the Act is here pleaded to constitute an exception, not to support the general law of Scotland. The right of highway is rather of the nature of servitude than of property, existing only for uses of the surface. It is not in its nature a right *a cælo ad centrum*. Looking to this Act, does it give a right different from that which the common law of Scotland gives to road trustees, who are the administrators of highways? I do not think it does. It would require very special terms to do that. If it had given power to purchase lands as property, the law must have read that as meaning such property as road trustees could acquire with road funds, and I don't think that with road funds they could purchase land *a cælo ad centrum*. I read the words in the Act, "belonging to" and "property," as meaning property so far as road trustees can possess for statutory purposes of administering highways, but not for the general purposes of landowners, and therefore the statute does not enact any exception from the ordinary rules of the law of Scotland.

Agents for Pursuer—Waddell & M'Intosh, W.S.
Agents for Defender—H. & A. Inglis, W.S.

Thursday, March 26.

FIRST DIVISION.

CARMICHAEL AND OTHERS *v.* CALEDONIAN RAILWAY COMPANY.

Agreement—Jurisdiction—Land Clauses Act—Caledonian Railway Company Act—Valuation-Jury—Verdict—Tender—Expenses. A special Railway Act provided that, where the line passed over a quarry, the Company should pay the value of the stone unwrought under the line, the extent and quality to be ascertained as in ordinary cases of disputed compensation, and the value to be payable from time to time as a face of rock of 130 feet was wrought up to the railway boundary. The Act incorporated the Lands Clauses Act. In 1864 a valuation-jury returned a verdict that the rock under the line was 260 feet, and the value £5272 as at 31st December 1852. The Company had

previously tendered £7005 in full of all claims. In an action by the proprietor for the price, with interest from 31st December 1852, and expenses of the inquiry—*Held* (1) that the Court had jurisdiction to entertain the action, the sale not being a compulsory sale under the Lands Clauses Act, but a sale by contract embodied in the special Act; (2) that the verdict was truly above the tender; and (3) that the proprietor was entitled to the full costs of the inquiry. *Observed*, that in ordinary cases of disputed compensation under the Lands Clauses Act, so long as the parties keep within the Act, the Court has no jurisdiction. *Question*, as to application of the statutory rule as to expenses.

The railway of the defenders passes over part of the quarry-field of Hailes, the property of the pursuer, Sir William Gibson Carmichael of Skirling, Baronet. The company's Act provides that, in addition to the value of the surface land to be taken from the proprietor of Hailes, the company should pay the value of the whole stone under the surface so taken, and the extent and quality of the stone so taken should be ascertained as in ordinary cases of disputed compensation; provided that the value of the said stone should be payable from time to time, as often as a face of rock at least 130 feet in length was worked up to the north or south boundary of the railway, such payment to be only to the extent of the value of the stone opposite to such face. With this special Act were incorporated the Lands Clauses Consolidation (Scotland) Act 1845, and the Railway Clauses Consolidation (Scotland) Act 1845. In 1849 the working of the quarry had almost reached the northern boundary of the railway, and the defenders' agents intimated that the company desired that the workings should not be carried further south than a line 48 feet distant from the railway, and that when a face of rock was worked up thereto to the extent specified in the company's Act, they would be ready to arrange a reference as to the amount of compensation. Various communications then took place between the parties, two submissions being entered into for the purpose of determining the sum payable by the company, both of which fell. In March 1864 the pursuers intimated to the company their desire that the sum should be settled by a jury, in terms of the Lands Clauses Act, unless the company were willing to settle otherwise by payment of the sum claimed. In the following month the company intimated their refusal to pay the sum claimed, and their intention to petition the Sheriff for a jury, giving notice, at the same time, that they were willing to pay to the pursuers the sum of £7005 in full of all claims. This sum being refused by the pursuers, a jury was summoned in July 1864. The jury returned a verdict finding that the rock under the railway was 260 feet long by 90 feet wide, and that the value thereof was £5272 sterling as at 31st December 1852. The Sheriff then pronounced an interlocutor, in which he "approves of the verdict, and finds and declares in terms thereof accordingly; and farther, in respect the verdict has been for a less sum than had been previously offered by the company as the value of the subjects in question, finds the claimants liable in one-half of the expenses incurred by the respondents." That interlocutor was advocated in the Court of Session, and in 1866 the Lord Ordinary remitted to the Sheriff, with instructions to recall that part of the interlocutor which found the pursuers liable in one half of the expenses incurred by the defenders.

The pursuers, Sir William Gibson Carmichael, and the trustees of his predecessor in the estates, now brought an action against the railway company concluding that the railway company should be ordained to make payment "to the pursuers of the sum of £5272 sterling, with interest thereon, at the rate of £5 per centum per annum from the 31st day of December 1852 years until payment, or such sum as our said Lords shall modify as the interest to which the pursuers are entitled on the said sum of £5272: And further, it ought and should be found and declared, by decree of our said Lords, that the defenders are bound to make payment to the pursuers of all reasonable charges and expenses incurred by the pursuers incident to an inquiry held in virtue of the provisions of an Act of Parliament, entitled, 'The Lands Clauses Consolidation (Scotland) Act 1845,' before the Sheriff of the county of Edinburgh, and a special jury at Edinburgh, on the 18th day of July 1864, and following days, under a petition, dated the 20th day of April 1864, and presented to the said Sheriff by the defenders; and the defenders ought and should be decerned and ordained, by decree aforesaid, to make payment to the pursuers of the sum of £2000, or such other sum as our said Lords shall modify as the amount of such reasonable charges and expenses incurred by the pursuers incident to the inquiry aforesaid, with interest thereon at the rate of £5 per centum per annum until payment."

The Lord Ordinary (BARCAPLE) pronounced this interlocutor:—

"*Edinburgh, 5th March* 1867.—The Lord Ordinary having heard counsel, repels the defences, and decerns against the defenders to make payment to the pursuers of the sum of five thousand two hundred and seventy-two pounds sterling, with interest thereon, at the rate of five per centum per annum, from the thirty-first day of December eighteen hundred and fifty-two years, until payment: Further finds, decerns and declares, in terms of the declaratory conclusion of the libel; and appoints the cause to be enrolled for further procedure under the last petitory conclusion of the libel: Finds the defenders liable in the expenses of process to this date: Allows an account," &c.

The defenders reclaimed.

YOUNG and JOHNSTON for them.

CLARK and RUTHERFURD for respondents.

At advising—

LORD PRESIDENT—This is a case of considerable delicacy, as is obvious at the first sight of it, because it is an action to enforce payment of a capital sum found by the verdict of a jury summoned by the Sheriff to decide a question of compensation under the Lands Clauses Act. Certainly under ordinary circumstances no action will lie for such a sum in this Court, because the sum in the verdict in such cases is to be immediately decerned for by the Sheriff as a matter of course, and there cannot in the ordinary case be any question to which the judicial mind can be applied, after the verdict has fixed the sum to be paid by the promoters to the landowner. But the summons further concludes for interest, and that also is a startling proposition, for in the ordinary case of a verdict by a valuation jury, the price or damages awarded are held to include all the interest claimable down to the date of the verdict. But farther, there is a demand to ascertain in some way what is the amount of the expenses of the trial at which the

verdict was returned, and for decree against the Railway Company for the amount of these expenses. If this were an ordinary case of the compulsory taking of land under the Lands Clauses Act, followed out, according to the machinery provided by that statute, by the verdict of a jury for the price of the land and damages due to the landowner, I should say this Court could not entertain the action, having no jurisdiction. And I wish to make that clear, for it is a matter of great importance, and it must be understood that our present judgment does not conflict with the general rule, that in carrying out the Lands Clauses Act, the Court has no jurisdiction so long as these parties, and the Sheriff and the jury, keep within the provisions of the Act.

The clauses as to the manner of settling cases of disputed compensation form only a part of that division of the statute which provides for the acquiring of lands otherwise than by voluntary agreement, and they are sometimes resorted to, and sometimes imported into other statutes, and made applicable to particular cases, when the whole machinery for transferring land by compulsory means is not applicable, and the difficulty is to know in this case how much of the machinery is to be held applicable to this particular case. If the whole machinery provided by the statute for the compulsory purchase is applicable, then you begin with the 17th section, and go on with the clauses of that part of the statute down to the fifth clause. You begin by the notice by the promoters to the landowner, stating what part of the land within the limits of deviation they desire to have, and that is under the statute a contract sale of that part. Parties may then come together if they please, as indeed they may do at any stage, as to settlement of the price, and, if they follow the statute, then the next thing is to proceed to settle the price, and there are various modes of procedure. When the compensation claimed is under £50, the Sheriff without a jury settles the amount of the price, and there is an end of the matter. If the landowner chooses, he may refer the compensation to be settled by arbitration, and there is machinery provided for that, and lastly, if he does not demand arbitration, and if the sum is above £50, the course is to petition the Sheriff to summon a jury, and again if that is not proceeded with, the landowner may compel proceedings. That is followed by a jury trial, and a verdict is returned, and the statute works out the execution of the contract of sale in this way. It gives the landowner a decree for the amount due to him, and it empowers the Sheriff to settle the amount of the costs of the inquiry; and as to the way in which they are to fall, it provides that if the tender is above the verdict the promoters are to get one-half of the costs. If the tender is not above the verdict, the company are to bear the whole costs, and the amount having been ascertained, they are made recoverable in this way:—If the promoters are to get one-half, they can deduct the amount from the sum payable to the landowner, or if the sum payable to him is not sufficient for that purpose, they may get from the Sheriff or Sheriff-clerk a warrant of poinding for recovery; and if the landowner is entitled to the costs, he is empowered to take a warrant of poinding to enforce his costs. So that, as regards the amount of compensation, there is machinery which works the whole thing without any judicial intervention at all. No doubt the giving decree for the amount is a judicial act, but it does not require the consideration of any question of law or fact. The way in which the contract of sale is to be carried through, the title which the company may make up by notarial instrument, and the immediate entry into possession, are all matters of express regulation, and this Court cannot interpose on the demand of either party, so long as the parties keep within the Act of Parliament.

The question then comes to be whether this rule is applicable to the present case; for, if so, we have no jurisdiction.

This is a peculiar case. The contract of sale here is not a compulsory sale under the Lands Clauses Act. It is a sale provided for by a clause in a special Act of Parliament, and it seems to me that the whole question turns on the precise meaning and effect of that clause in the special Act. The 24th section of the Act proceeds on the preamble [*reads preamble*].

This is in truth the embodiment in the special Act of an arrangement of a peculiar kind between the parties. The stone which must be left, and which the Railway Company require to be left for sustaining their Railway in passing over the quarry, is to be valued and its extent is to be ascertained, and that is to be ascertained in the same manner as in the ordinary case of disputed compensation, *i.e.*, the parties are authorised by this special Act to avail themselves of that part of the Lands Clauses Act as to compulsory sale which provides for the ascertainment of the price. But that is not the same thing as saying that the case between them shall be dealt with in all ways as if it were a case of compulsory purchase. All that is necessary to carry out the statute is, that the valuation tribunal shall decide on the value of the stone, *i.e.*, either arbiters named under the clause applicable to that case, or the Sheriff and a jury, shall fix the value of that portion of the stone which the Railway Company are to require to be left unwrought. There is another provision in the Statute, that in the ordinary case of a verdict being returned by the valuation of the jury, of the sum payable by the Railway Company to the landowner, judgment shall follow intantly on the verdict, and that decree is instantly enforceable, but it is not so in this case. The contrary is provided by this Act. This valuation, which is to take place in the same way as in ordinary cases, might obviously take place within a few weeks after the Act was passed, but it is provided that the value shall be payable from time to time, when, and so often as a face of rock at least 130 feet in length is worked up to the north or south boundary of the railway, such payment to be only to the extent of the value of the stone opposite to such face. Therefore, it is plain that though the verdict might be returned immediately after the Act, there might not be one shilling then payable. If in the course of some time after the verdict, a face of 130 feet of rock is wrought up, a certain sum would be demandable, but not the whole sum in the verdict, only such portion as represents the value of the stone opposite to such face. Therefore, before payment can be obtained, not only must this fact that such a face is wrought up be ascertained, but that must be agreed on, or proved. Not only so, but the parties must either have agreed on the proportion of value of the stone, or they must have that ascertained. It is obvious, therefore, that the return of the verdict by the jury does not exhaust the questions that may arise on the verdict. Suppose a verdict is returned before any such face is wrought up, and that the owner of the ground alleges that a face of rock is now

wrought up to the extent of such a value, and the company deny it, and say that the proportion of value is not so much, what is the remedy of the landowner? Clearly an action in a Court of law for enforcing his contract in the special Act, so far carried out by the verdict as to ascertain the total value, but nothing more. Then this dispute and inquiry may be repeated; for, after the lapse of some years, there may be another face of rock wrought up, and again the question may arise at what time the face of rock was completed; and that will give rise to questions as to the term from which interest is to run. This can only be determined by ordinary tribunals of the country, according to the terms of the special contract. This has not been the course of events here; but it is the most natural to anticipate as being likely to happen. Instead of that, there was no demand to have the value of the stone ascertained until a very considerable time after. Not only a face of 130 feet, but a face of double that amount had been wrought up to the north boundary of the railway. The jury returned their verdict respecting the value on 25th July 1864. But, in fact, a face of work of 260 feet in length had been wrought up by 31st December 1852. It does not appear to me that this course of proceedings interferes with the principle which is to regulate the question of our jurisdiction as to inforcing this contract. The parties themselves seem to have been aware that the verdict returned in 1864 would not be considered as a verdict in the ordinary case of disputed compensation, or which could be carried out or made the foundation of a finding by the Sheriff under the Lands Clauses Act, for settling anything more between the parties. The verdict finds:—"The jury before named being inclosed, and having considered the evidence adduced on the part of the claimants, Sir William Henry Gibson Carmichael and others, pursuers, and also the evidence adduced on the part of the Caledonian Railway Company, admissions of the parties, writings, and plans produced, and whole procedure, and having also reviewed and inspected the subject in question, they unanimously find that the rock under the railway is 260 feet long by 90 feet wide, and that the value thereof is £5272 sterling, as at the 31st December 1852." These last words are material to show that the railway company was of opinion that the construction of that was, that the sum of £5272 was payable at 31st December 1852, and the reason for that was, that at that date the whole face of 260 feet was wrought up. But suppose the verdict had not had these words, and had merely found that the rock was so much, and the value was so much, and had stopped there. Could there have been a decree of the Sheriff? No; because it must first have been ascertained whether that sum was payable. It must first be clear that the condition in the special Act has been purified, and therefore, in whatever way the verdict had been returned, it could not have been a verdict to be at once followed by a decree of the Sheriff.

The parties appear to have dealt with the case on that footing, and on the footing that it was a special case. The railway company in their 11th article say:—"It was of consent of both parties that the jury fixed the value of the stone in question as at 31st December 1852. Neither the pursuer's title to the stone, nor the question whether the pursuers were entitled to interest of the price or value thereof from 31st December 1852, was left to or determined by the jury. The claim of the pursuers, and the tender made by the defenders, included the principal sum or value of the stone only, and were both made, leaving the question of interest open, and the verdict of the jury was returned upon the same footing." Now, this question is upon that verdict. If the railway company do not accede to the demand of the landowner for payment of this £5272, or for payment of that sum with interest from 31st December 1852, which is what he demands, then how is the proprietor to enforce his contract? For it is a special contract he has to enforce, included in the special Act, but not the less a special contract. His contention is that this sum was payable as at 31st December 1852, and that, therefore, in law it bears interest from that date. There is no machinery in the Lands Clauses Act for deciding that question, and I don't see how it could be determined except in an ordinary Court of law; and therefore I think we have jurisdiction to entertain the action so far as it concludes for payment of the £5272 with interest. Whether we should give judgment for it is another matter, but I have no doubt as to the competency.

As to the merits of the case, there is not much to be said. It is a fair interpretation of the contract that the value of the stone is to be payable with interest from the time that a face of 130 feet long has been wrought up. What is payable then is of course the value of the stone opposite to that face; but there is no difficulty there, for the value of the whole has been already ascertained, and it is admitted that the face of stone in question was wrought up at December 1852, and therefore Sir Thomas Carmichael is entitled to decree for the sum in the verdict, with interest from December 1852.

But then there is another question upon the remaining conclusion of the summons, which is a matter of some difficulty, but it is a difficulty arising from the special nature of this case, and the manner in which the aid of certain clauses of the Lands Clauses Act has been given to the parties. As I said, the whole aid they get by the 24th section from the Lands Clauses Act is the aid of the valuation tribunal to fix the value of the stone which is to be left un-wrought. The expense of that inquiry is the subject we have to deal with under the remaining conclusion of the summons.

The railway company say we must import the Lands Clauses Act; and, the verdict being under their tender, this Court cannot deal with the question of costs, but must leave it to be wrought out under the Lands Clauses Act; and they are entitled to get from the Sheriff a warrant for recovery of one-half of the costs. Now, that necessarily pre-supposes that it is clear and cannot be disputed that the tender is above the verdict. In the ordinary case of disputed compensation there can be no question as to that; for the two things being compared, the result is clear. The tender is one sum, and the verdict is another. But that is not the case here. The question whether these costs are to be paid by the railway company, or, to the extent of the half, by the proprietors, depends on the construction of the demand made by the proprietors on the one hand, and the tender by the company on the other. That is a question of construction, and requires the application of the judicial mind. There are no provisions for that in the Lands Clauses Act, no means for having that done. The Lands Clauses Act supposes that to be free from doubt, and not to require any judicial interference. But here it is necessary to apply the judicial mind to the question whether the verdict is above the tender or not.

That satisfies me that this, like all the other parts of this dispute, must be settled by the ordinary legal tribunals, except in so far as relates to the ascertaining the value of the stone. Therefore I think it follows, first, from the nature of the contract, and secondly, from the construction of the clauses of the Act and the procedure, that this Court must have jurisdiction to entertain that question also. How is that to be done? The Lord Ordinary has merely decided in terms of the declaratory conclusion of the libel. That conclusion is [*reads conclusion*]. Whether he is right in holding that the pursuers are right in this contention is another question. That is all he has done; and he has not applied his mind as to how the costs are to be ascertained, or what rule is to be applied, statutory or common law. There is a good deal of difficulty as to that; but whichever be applied, we must consider the question whether the verdict is above or below the tender. That is a question of some difficulty. My impression is, that the verdict is above the tender, because I read it as a tender of £7000 for a discharge of all claims. That is its fair meaning. If Sir Thomas had accepted that, he would have come under an obligation to grant a full discharge. But I have already said that in consequence of the verdict finding him entitled to £5272, which bears interest, his claim is much larger than £7005. Therefore the ordinary mode of determining whether the verdict is above or below the tender will not apply, and this verdict contains in itself the means of Sir Thomas working out a much larger claim, and he is doing that successfully in this action. Therefore, in that point of view, I think the tender is below the verdict, for the sum in the verdict, with interest, will considerably exceed the sum of £7005, and we must, therefore, deal with the cost on the footing of the pursuer having got more by his verdict than he was offered. The question whether we are bound in this matter to follow the statutory rule—*i.e.*, to give full costs to the pursuer because his verdict is above the tender—is a difficult question; but I confess I think it is not necessary to solve that question, because, whether we are bound or not, I am inclined to follow that rule, and I would come to that result whether by the Statute or by common law rules. I think the verdict being above the tenders the pursuer is entitled to the full costs of the inquiry, according to the justice of the case. I am, therefore, for adhering to the Lord Ordinary's interlocutor.

There may be a little difficulty in carrying out the details ef the case; but if the parties are inclined to be reasonable that difficulty will not be insuperable.

The other Judges concurred.

Agents for Pursuers—Gibson-Craig, Dalziel, and Brodies, W.S.

Agents for Defenders—Hope & Mackay, W.S.

Friday, March 27.

SELLAR AND SONS *v.* GLADSTONE AND COMPANY.

Agency—Commission Agent—Sale—Disconform to Order—Judicial Warrant—Foreign. A firm in Scotland instructed a foreign firm to send them a quantity of "best Pegu cutch." When the cutch arrived in this country, it was rejected by the purchasers as inferior in quality, and disconform to order, and was sold by the importers at the port of discharge in England. The importers charging on a bill which had been accepted by the purchasers for the price, suspension by the purchasers *refused;* and *held*, on a proof, that there was no evidence that the cutch was not as good as could be procured at the time, or that any inferiority in quality was due to any other cause than sea damage. Objection by suspenders that the cutch had been sold without judicial warrant, *repelled*, on the ground that it was not shown that judicial warrant was necessary in England, where the sale took place.

In August 1863 one of the suspenders, then acting at Rangoon for J. Sellar & Sons, of Elgin, ordered from the respondents 150 tons of the best Pegu cutch. The respondents shipped from Calcutta about half of the quantity of cutch ordered, and drew a bill for the amount, which was accepted by the suspenders. In May 1864 the cutch arrived in London, where it was seen and examined by the other suspender, who then called on the respondents' house in London, and intimated that he declined to accept the cutch, as it was not in accordance with the order. His reason for this he stated to be that the cutch was of inferior quality, and had, owing to the insufficiency of the bags in which it was packed, suffered greatly from the voyage. After some correspondence between the parties, the respondents sold the cutch by private sale, and in August 1864 charged the suspenders on the bill.

The principal ground of suspension was, that the cutch being disconform to order, the suspenders were entitled to reject it. The respondents denied that the suspenders had in fact timeously rejected the cutch, and contended that there was no relevant allegation that the cutch in question did not answer the description of the best Pegu cutch to be had at the time in terms of the order. An issue being proposed, the case was reported to the Inner-House, and a proof was allowed.

The suspenders now contended on the proof that the cutch was inferior and was properly rejected; and, farther, that as the respondents had no right to sell under their lien, they must be held to have sold the goods as their own property, and so the suspenders had received no value for the bill.

Gifford and Keir for suspenders.

Clark and Mackay for respondents.

At advising—

The Lord President said there were substantially two questions at issue—(1) whether the order was in the terms alleged; and (2) whether there was a failure on the part of the firm who furnished the goods in respect of the quality of the goods. The first question, however, might be dismissed, for the order was clearly an order for the best Pegu cutch. The only difficulty was as to the second question, and that difficulty arose from the nature of the goods. If this had been an order for manufactured goods, bearing a particular brand, or described by a name well known in trade, indicating a special quality of goods, no question could have arisen. But here the goods were the natural produce of a foreign country; and it did not appear from the evidence that there were any well defined classes or qualities of it. The nomenclature used by all the witnesses was of a very uncertain and varying kind; and all that could be said, therefore, was that "best Pegu cutch" meant cutch of a very good quality. Now this cutch was a very peculiar kind of cargo. It was not a favourite with ship-