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-

masters, and it was very apt to suffer from transshipment; from hot weather; and from various other contingencies. In the present case the cargo was trans-shipped; and, undoubtedly, when it arrived in this country it had suffered a good deal. It had run together, so that it had to be broken up before it could be got out of the hold, and it had got mixed up partially with cargo shipped by another house, for which the Gladstones were not responsible. The cutch, on its arrival, was examined, and the suspenders' witnesses say it was bad, and they say, moreover, that it was bad independently of the damage arising through the voyage. That might be so; but it was more satisfactory to have evidence of the quality of the goods when shipped at Rangoon, and such evidence as there was was favourable to the shippers. But then there was a report by Mr Baker, for the suspenders, on the quality of the cutch after arrival; and the impression left on the mind after reading this report, and seeing the value put upon the several piles of cutch, after making allowance for sea damage, was decidedly favourable to the respondents. And this favourable impression was confirmed on considering these valuations, together with what one of the suspenders expected to be the value of the cargo on its arrival here. There had been some misapprehension as to the nature of the liability of the respondents. It was not the liability of a mere seller of goods under an ordinary contract of sale, in which the seller undertook to furnish goods of a particular quality manufactured by himself, or by some one else, but then in his hands. This was the liability of a commission agent, and was a question in the law of agency; and the question was, whether the agent had failed in the performance of his duty. It did not appear that he had so failed. Cutch was a very peculiar kind of article, and an agent acting under an order such as here was vested with a considerable discretion to do the best he could, and there was no evidence to show that he did not do the best possible in the circumstances. As to the sale by the respondents, no doubt the goods realised less than they might have done if they had been sold otherwise; but if the rejection of the goods was unwarrantable, the suspenders must bear the loss. They said, no doubt, that the sale was unwarrantable, because it was without judicial warrant. If the proceedings had taken place in Scotland, there might have been a good deal in that objection, for it was the practice here to have a warrant of the Judge Ordinary before sale, in order that the other party might have due notice to attend to his interests. But this all took place in England, and it was not proved that the sellers were not following the usual course in acting as they did. If the chargers would restrict the charge for the balance now due to them, after deducting payments already make, judgment would be given in their favour.

The other Judges concurred, and the charge, as restricted, was found orderly proceeded, and the suspenders found liable in expenses.

Agents for Suspenders—H. & A. Inglis, W.S.
Agent for Respondents—A. Howe, W.S.

Friday, March 27.

SECOND DIVISION.

MULLER *v.* BOLLAND.

Sale—Repetition—Over-payment—Fraudulent misrepresentations. Circumstances in which *held* that there had been an over-payment upon a transaction of skins, and action of repetition sustained.

This was an action of repetition brought by Hermann Magnus Muller, residing at 34 Cockburn Street, Edinburgh, against Patrick Bolland, skin-dealer, Hawkhill, Dundee, and the summons concluded for the sum of £66, 13s. 4d., alleged to have been over-paid by the pursuer's wife to the defender in settling for the price of certain skins. The pursuer's allegation was that he bought a quantity of skins from the defender on 19th December 1866; that on counting them over, in the presence of his own servant, and the defender, the number was found to be 441 dozen; but that, on the defender coming to the pursuer's shop to receive payment, he represented to the pursuer's wife that the number was 841 dozen, and received payment as for that number. The defender's allegation, on the other hand, was that the number of dozens, as counted over in his presence, was truly 841, and that the pursuer's allegation that he had only received 441 dozen was false and fraudulent.

After a proof, the Lord Ordinary (KINLOCH) found for the pursuer.

The defender reclaimed; but the Court adhered.

Counsel for the Pursuer—Scott and Brand. Agent—D. F. Bridgeford, S.S.C.

Counsel for the Defender—Gifford and Balfour. Agent—Henry Buchan, S.S.C.

Monday, March 30.

FIRST DIVISION.

THOMS *v.* THOMS.

(4 Macph. 452; *ante*, iii, 35; i, 254.)

Conveyance—Entail—General Disposition and Settlement—Special Destination—Proof—Intention. A party holding an estate as institute under a deed of entail which was defective in the prohibitions, executed a general conveyance of his whole property, heritable and moveable. *Held*, by majority of whole Court, that the estate was carried by the general conveyance, that deed being habile and effectual to carry it and evacuate the special destination in the deed of entail, provided such was the true intention of the conveyance, and, there being here no proof of an intention on the part of the testator, to exclude the estate from the general conveyance.

The late Mr Alexander Thoms possessed the estate of Rumgally as institute under a deed of entail executed by his father in 1805. In this deed the prohibitions against sale and alienation were not directed against the institute. In 1861 Mr Thoms executed a general disposition and settlement in favour of his natural daughter, Miss Robina Thoms. In 1864 Mr Thoms died, and Miss Thoms made up a title to Rumgally on the assumption that the entail was invalid, and that the estate of Rumgally was carried by her father's general disposition and settlement.

John Thoms, brother of Alexander, who would have succeeded Alexander in the estate if the entail had been valid, brought an action against Miss Robina Thoms, concluding for reduction of the conveyance by Alexander, so far as it affected or might be held to affect the estate of Rumgally, and for declarator that the general conveyance did not comprehend the estate of Rumgally, and that the