per inquiry or investigation into the facts, and that they were not represented at the proof." Now, if that were the case, I should not be disposed to differ from his Lordship, that farther proof should be allowed. But I am unable to find in any of the statements of facts for the complainers that the sum claimed by the respondent, and decerned for, was excessive. With reference to statement 21, where it is said, *inter alia*, that "during the most important stages of the cause the complainers had no law-agent," I do not think there is any sufficient relevancy to entitle a party to be allowed proof; and I find further, as matter-of-fact, that an agent was present when the questions of law were decided. Where a full opportunity has been given to an agent to attend, it requires, in my opinion, a much more distinct averment to warrant us in holding that a decree *in foro* should be suspended.

On the important question raised in the petitory action, I agree with your Lordships that in an ordinary lease the tenant has no claim for reimbursement for improvements when it terminates. The opinion of Baron Hume in the case quoted in the Lord Ordinary's note is conclusive, and in practice it has always been acted upon. The question is, whether that rule of law does not apply in the case of a lease suddenly terminating by the death of the tenant. In principle I do not see why it should not apply equally. Such a result must be in the contemplation of parties when the lease is entered into.

The difficulty I feel is in regard to the statements of eminent men as to the rule of law applicable in the case of a premature termination of a lease. The case of *Morton* v. *Montgomerie* upon which they proceed has plainly been misread to a considerable extent, for it proceeded upon the express stipulation that the tenant was to have meliorations for unexhausted improvements. The only question which could arise there was whether the tenant on an equitable basis in the particular case was entitled, the lease having come to an unexpected termination, to get a less sum than £1100, the amount which it was stipulated the tenant was to expend during the lease, and which was to be repaid him at its issue. It was held that he was not so entitled, the landlord not having been *lucratus*, and the case is therefore no authority for the present contention. It has been explained by Lord Wood in the Second Division, in his judgment in the case of *Thomson* v. *Fowler*, Feb. 8, 1859, 21 D. 455.

It is further quite plain to me that the fact that the tenant did not during his lifetime put the fences, &c., in good condition, cannot give his representatives now a better claim against the landlord than they would otherwise have had.

The following interlocutors were pronounced:—

"The Lords having heard counsel on the reclaiming note for the respondent Sir Thomas Buchan Hepburn, Baronet, against Lord Curriehill's interlocutor, dated 13th December 1875, Recal the said interlocutor: Find that the suspenders have not made any relevant averments to support the prayer of the note of suspension: Therefore repel the reasons of suspension: Find the decree and charge or charges orderly proceeded, and decern: Find the suspenders liable in expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

"The Lords having heard counsel on the reclaiming note for the defender Sir Thomas Buchan Hepburn, Baronet, against Lord Curriehill's interlocutor, dated 13th December 1875, Recal the said interlocutor: Find that the pursuers' averments are irrelevant to support the conclusions of the summons: Therefore dismiss the action and decern: Find the pursuers liable in expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Mr Hadden and others—Guthrie Smith—M'Kechnie. Agent—J. Duncan Smith, S.S.C.

Counsel for Sir T. Buchan Hepburn, Bart.—Dean of Faculty (Watson)—Gloag. Agents—Mackenzie & Kermack, W.S.

Thursday, June 15.

FIRST DIVISION.

SPECIAL CASE FOR THE TRUSTEES OF JAMES PARK AND OTHERS.

Competency—Special Case—Tutor and Pupil.

Held that the Court cannot entertain a Special Case between parties who appear for their own interest and also as tutors for minor children with an adverse interest.

Observed (per Lord President) that a Special Case is a contract binding parties to a certain statement of facts, and that therefore parties who are legally unable to contract cannot enter into a Special Case.

This was a Special Case for James Park, John Park, and Thomas Park, nephews and trustees of the late James Park, merchant tailor and shipowner in Fraserburgh, of the first part; William Park, also a nephew of the late James Park, of the second part; and the said James, John, and Thomas Park, tutors appointed by the said deceased James Park to Douglas James Park, Robert Kidd Officer Park, and Jane Rosamond Park, children of the marriage between the said William Park and Mrs Janet Kidd or Park, of the third part—for the opinion and judgment of the Court on certain provisions of a trust-disposition and settlement executed by the deceased James Park.

When the case was on the Single Bills—

The LORD PRESIDENT said—The Court are of opinion that they cannot entertain this Special Case. The parties are—first, the testamentary trustees of the late James Park, merchant tailor and shipowner in Fraserburgh, and these gentlemen are three of the nephews of the late Mr Park; the second party is William Park, another nephew of the testator; and the third parties are the same individuals as the first parties, in the separate character of tutors appointed by the testator to certain pupil children. Now, there is an ad-

verse interest between the first parties and the second party; there is an adverse interest between the first parties and the third parties, and also between the second party and the third parties.

The effect of a Special Case, which is a contract between the parties, is to bind these parties to a certain statement of facts. We cannot entertain a case of contract between parties who cannot in law contract. If the point must be settled now, the parties must have recourse to the usual method of settling it, by raising an action of declarator in the ordinary form.

Lords Deas, Ardmillan, and Mure concurred, and the case was dismissed.

Counsel for First Parties—Kinnear. Agents—H. & H. Tod, W.S.

Counsel for Second Party—Adam. Agents—Tawse & Bonar, W.S.

Counsel for Third Parties—Lorimer. Agents—H. & H. Tod, W.S.

Friday, June 16.

FIRST DIVISION.

[Sheriff of Inverness-shire.

THE HIGHLAND RAILWAY COMPANY *v.* JACKSON (NICOL & COMPANY'S TRUSTEE).

Railway—Lien—Common Carrier—Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33) *sec.* 90—"*Tolls.*"

The word "tolls" in the 90th section of the Railways Clauses Consolidation (Scotland) Act 1845, does not mean charges for the conveyance of goods by the railway company in their carriages, but only charges for the use of the company's line by persons conveying their goods over the line in their own carriages; and therefore the railway company has no lien over, or right to sell, goods on their premises for delivery, in satisfaction of charges previously incurred by the owner, for the conveyance by the company of other goods for him, and has no greater right than that of a common carrier.

Observations upon the cases of the *North British Railway Company* v. *Carter,* 8 Macph. 998, and the *Caledonian Railway Company* v. *Guild,* 1 Rettie 198; Railways Clauses Consolidation (Scotland) Act 1845—"tolls."

Opinion (*per* Lord President) upon the construction of the word "tolls" in the Railways Clauses Consolidation (Scotland) Act 1845, secs. 79-100.

Opinion (*per* Lord Ardmillan) that the lien given under section 90 of the Act is incident to the contract of hiring rather than to the contract of carriage.

This was an appeal from the Sheriff Court of Inverness-shire, in a petition at the instance of the Highland Railway Company, petitioners, against Thomas Jackson, trustee on the sequestrated estate of Nicol & Company, manufacturers, Holm Mills, Inverness, respondent.

Nicol & Company had incurred to the petitioners an account of £26, 17s. 1d. for railway carriages performed between 1st July and 9th September 1874. On that date Nicol & Company were sequestrated, and the account being still unpaid, and the goods for the carriage of which the charges were made having been removed from the petitioners' premises, the railway company detained certain articles, consisting of three bags wool, one truss tweeds, and three bundles of empty sheets, which were in their possession at the time for delivery to Nicol & Company. They did this in the exercise of a right of lien which they claimed for such accounts for carriage in virtue of the Railways Clauses Consolidation (Scotland) Act 1845. They thereafter presented the petition praying for warrant for the sale of the goods, "and for the application of the proceeds thereof in payment of the expenses connected with their detention and storage."

In their condescendence the petitioners averred—"By section 90 of 'The Railways Clauses Consolidation (Scotland) Act 1845' (8 and 9 Vict. cap. 33), it is enacted, that 'If on demand any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the monies arising from such sale to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the monies arising by such sale, and such of the carriages and goods as shall remain unsold, to the person entitled thereto, or it shall be lawful for the company to recover any such tolls by action at law.' By the interpretation clause of the said Act (§ 3) the word 'tolls' is declared to include 'any rate or charge or other payment under the special Act for any passenger, animal, carriage, goods, merchandise, articles, matters, or things conveyed on the railway,' and the charges or rates in the account produced are made under and in virtue of the petitioners' Special Act for the carriage of goods and merchandise."

They pleaded, *inter alia*—"(1) The petitioners have a lien over the goods in question for payment of the carriages charged in the account produced, and it is competent and expedient for them to have their lien realised and made effectual under warrant of the Court."

The respondent lodged defences, and pleaded, *inter alia*—"(1) The petitioners, as common carriers, have not a general lien at common law. (2) Nor have the petitioners any such lien in virtue of the Railways Clauses Act of 1845, the right of lien thereby conferred being confined to goods undelivered; and the petitioners having ceded possession of the goods mentioned in their account other than those stated in the petition, their right of lien over the former was relinquished, and cannot now be revived. (3) The petitioners having waived any lien they might have had over the goods mentioned in the petition, they are not now entitled to insist therein."

The following minute was put in for the parties:—"(1) That the petitioners were in the habit of keeping a monthly or periodical account