he had been an unjust steward and unfaithful; and whether the said statement falsely" . . . &c., as in the original issue.

LORD PRESIDENT—An issue of assault has been allowed here, and the only question is whether there is to be an issue of slander as well. The statement complained of was uttered to the pursuer alone, and it has often been observed that the law of Scotland differs from other systems in allowing actions of slander in such circumstances. But while that is so, it is by no means expedient that vague averments as to what was said should be admitted to probation.

I think the statements of the pursuer here are much too vague, and while I am not to be taken as laying down that to call a man an unjust steward, especially a man who has acted in the capacity of a steward or factor, is not slander, the charge that was made here was so mixed up with the parable that it is really quite impossible to hold it as tantamount to conveying any imputation of dishonesty. I think therefore that the pursuer's averments are too vague to be admitted to probation.

I also think they fail in another respect —they have no sufficient substratum of malice, the occasion on which the statement was made being clearly privileged. I entirely agree with the view expressed by Lord M'Laren in the case of *Ingram* v. *Russell*, 20 R. 771, that it is not enough to use the word maliciously to make a relevant case of malicious slander, but that a circumstantial case of some kind must be set forth.

On both grounds therefore I am of opinion that the issue should be disallowed.

LORD M'LAREN—I concur. I would only add that while the law of Scotland does allow an action of slander for defamatory statements made to the pursuer himself, we apply to such cases a different standard of comparison from that which is applicable where the language complained of is spoken in the presence of others who might take the words used seriously.

I have never known an issue allowed in relation to language such as was used here, except when other persons were present who might be led to form an unfavourable opinion of the pursuer's character.

LORD KINNEAR—I agree with your Lordship. The allusion complained of conveys no definite imputation of a slanderous character. It might have different meanings to different minds, and the pursuer cannot prove his innuendo by evidence of the impression conveyed to persons who heard it, because nobody heard it except himself. I also agree that, if this were doubtful, there is no relevant averment of malice.

LORD PEARSON was absent.

The Court disallowed the proposed issue.

Counsel for the Pursuer (Respondent)—Watt, K.C.—Constable. Agents—Oliphant & Murray W.S.

Counsel for the Defender (Reclaimer)—Scott Dickson, K.C.—R. S. Horne. Agents—Carmichael & Miller, W.S.

Thursday, March 19.

FIRST DIVISION.

[Sheriff Court at Glasgow.

CRICHTON & STEVENSON *v.* LOVE.

Sale—Contract—Implied Warranty as to Quality—Seller's Knowledge of Purpose for which Goods Supplied—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *sec.* 14, *sub-sec.* 1—*Application of Sale of Goods Act* 1893 *to Manufactured Goods.*

An agent for coalmasters, being anxious for an order, saw the agents for a ship, and in conversation told them that his coal would suit them as well as another which they were in the habit of using. They expressed their willingness to give an order, but stated that their orders for coal were made through a certain coal merchant. The coalmasters' agent saw the coal merchant, and both parties being in knowledge of the communings with the ship's agents, received an order for his coal, the coal being named. When it came to be used by the ship the coal was found defective in quality so as to be useless to her and was rejected.

In an action by the coalmasters against the coal merchant for the price of the coal, *held* that the Sale of Goods Act 1893, section 14 (1) applied, inasmuch as the whole proceedings being viewed as one transaction, the communings with the ship's agents must be considered, and so considering them the purchaser had disclosed the purpose of the purchase and had relied on the skill or judgment of the seller, and consequently that the warranty thereby implied not having being fulfilled, the defender was entitled to absolvitor.

Gillespie Brothers & Company v. *Cheney, Eggar & Company*, L.R. [1896], 2 Q.B. 59, *approved*.

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), section 14, enacts—"Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows: (1) where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its

patent or other trade name, there is no implied condition as to its fitness for any particular purpose. . . ."

Crichton & Stevenson, coalmasters, 11 Bothwell Street, Glasgow, raised in the Sheriff Court at Glasgow an action against Robert Love, coal and ore merchant, 95 Bath Street, Glasgow, for payment of £52, 13s. 5d. The sum in question was the price of 140 tons 9 cwt. of Strathaven unscreened coal put on board the s.s. "Dalbeattie" in Glasgow harbour by the pursuers in implement of an order received from the defender.

The defender pleaded—"(2) The defender being agent for a disclosed principal is not liable to the pursuers in the sum sued for, and decree of absolvitor should be granted with costs. (3) The pursuers having sold a coal for bunkering steamers, and being aware of the purpose for which the coal was supplied, were bound to supply an article suitably and reasonably fit for the purpose, and having failed to do so decree of absolvitor should be granted with costs. (4) *Separatim* — The order having been given on the assurance that the coal would be as suitable as Auchlochan coal was for the 'Dalbeattie,' and the coal supplied being entirely unsuitable and useless, absolvitor should be granted with costs."

The *facts* with regard to plea 2, the other pleas eventually not being maintained, were thus narrated by the Lord President—"I now go in detail to the facts which raise the controversy in this case. The pursuers, the coalmasters, were represented by a gentleman of the name of Jeffrey, who is their employee. Jeffrey, as he himself sets forth, was the coal salesman with the pursuers, and part of his business naturally was to go about asking for orders. Among other people whose orders he wanted to secure was a firm called Honeyman & Company, who were shipowners and needed coal, and there was no question that Jeffrey approached Honeyman in order to see whether he could get an order out of Honeyman. Now here is what Jeffrey says about it himself; he says—'I never had an order for coal from Honeyman & Company. I am aware that they do a good deal of shipbroking. I have approached Mr Honeyman several times to give me an order. In March 1906 I met Mr Honeyman in the corridor which leads to the office. His office is next door to ours. He mentioned he had a boat coming in and he could give us an order now he thought. He asked the name and price of the coal. I told him it was Slamannan coal. I mentioned it was Strathaven colliery. I said it was unscreened steam coal. The price I quoted was 7s. 6d. f.o.b. Glasgow. He told me it was for bunkers.' Then there is some mention of Honeyman having used another coal and Jeffrey goes on—'I said I thought if Auchlochan suited him that ours would suit him.' Now Jeffrey having thus approached Honeyman and suggested that he might give him an order for this Strathaven coal, and knowing that it was to be used for bunker coal, Honeyman then told him that he did not usually deal direct but that he gave his coal orders through Love, who is the defender in this action; and he therefore suggested to Jeffrey that he would be glad to give him an order but that it must be done through Love and not through him. Accordingly, Jeffrey proceeded to meet Love, and he informed Love of the conversation that he had had with Honeyman. Honeyman in the same way had told Love. Then it is clear that Jeffrey and Love met, that they alluded to the conversation which had taken place between Jeffrey and Honeyman, and, in particular, Love seems to have rather complained to Jeffrey that he had been rather premature in fixing prices, because Love wanted his commission out of it, and he thought it could have been easier done if Jeffrey had not given the prices to Honeyman, and had left that for him, Love. The end of that was that Jeffrey consented, as in a question with Love, to give him it at rather a reduced figure so that there should be a profit for him, Love, allowing Love, so to speak, to resell to Honeyman at the price mentioned between Jeffrey and Honeyman. But here is what Jeffrey says about the interview with Love—'When I met the defender,' that is, Love, 'in the Exchange, he told me the boat the coal was wanted for. He informed me that it was for Honeyman & Company the coal was for.' Afterwards he says—'Defender told me that it was Mr Honeyman's order I was getting; that that was the order Mr Honeyman spoke to me about.'

"Now, the order that he gave him was, undoubtedly, an order for a cargo of Strathaven coal. Well, the Strathaven coal was supplied. It was put in the boat, but the performance going down the river was so bad that they anchored off Greenock Pier; and eventually the coal was put out upon the quay at Ardrossan and rejected. But before it was finally rejected they had another trial of it. They had tried it in the boat, but they also had a trial of it in a tug. I am not going into this matter closely on the evidence. I wish simply to state the result at which I have arrived, because it is a result at which I have arrived without the slightest doubt. This is not the difficult part of the case. I am clearly of opinion, as a jury matter, that this coal was *de facto* unfit. It behaved very badly in the vessel going down, and I think it got a perfectly fair trial in the tug, and was proved to be unsuitable coal for bunker coal. I do not say that with boilers of a particular construction, with forced draught, it might not be possible to get this coal to burn, and analysis probably shows that it has the constituents of heat in it. But that is not the question. The question is an ordinary jury question, and if I was in the trade I should hold, without the slightest hesitation, that this particular cargo of coal was a bad cargo, and was not good enough to raise steam."

On March 30, 1907 the Sheriff-Substitute (FYFE) pronounced this interlocutor—"Finds (1) That in March 1906 defender ordered from pursuers about 150 tons of Strathaven

unscreened coal at 7s. 6d. per ton delivered f.o.b. at Queen's Dock, Glasgow; (2) That in implement of this order pursuers delivered 140 tons 9 cwt., the price of which is £52, 13s, 5d.; (3) That defender has not paid the price; (4) That defender has failed to establish his pleas: Therefore repels defender's pleas and decerns against defender as craved."

Note.—"In my opinion there is no room for defender's agency plea. . . . It seems to me beyond question that the contracting party was defender, by whom the order for the coal was placed, to whose order it was delivered, and to whom it was without objection invoiced. . . . . .

"The rejection of defender's agency plea in effect sets up pursuers' case, for there is no serious dispute about the quantity of coal delivered nor about the price.

"The *onus* of proof accordingly shifts to defender to establish the case he sets forth on record. He first sets out to establish the proposition that pursuers induced him to purchase by representing (or rather misrepresenting) that their coal would give as good satisfaction as Auchlochan coal, which had previously been used in the 'Dalbeattie' bunkers.

"The proof does not seem to me to support this alleged guarantee or sale by Auchlochan sample. . . .

"The defender's case therefore resolves itself into the general plea that the coal delivered not having been reasonably fit for the purpose for which it was supplied, defender was entitled to reject it.

"There is no doubt about the facts (1) that what was sold was 'Strathaven unscreened coal'; (2) that its intended use was, within the knowledge of seller and buyer, for bunkering a steamer; (3) that Strathaven unscreened coal was put on board the 'Dalbeattie.' The case is not that one thing was bought and a different thing was put aboard ship, but rather that the thing bought was, when used on board the ship, unfit for its only purpose of raising steam.

"In this case, as in all such cases, section 14 of the Sale of Goods Act is pressed upon my attention. I often think in looking at section 14 (1) that the most significant phrase in it is the parenthetical phrase 'whether he be the manufacturer or not.' In framing this sub-section (1) of clause 14, what seems to me to have been before the mind of the draughtsman, and probably the only thing before his mind, was the sale of manufactures. I don't think that he had in contemplation at all the sale of a product such as coal, and I cannot but think that if it does apply to products, this entire clause 14 assumes different aspects when applied to manufactures and to products. If a seller sells such a thing as, say a locomotive engine, the ordinary buyer must obviously rely on the seller's skill and judgment, and so it is quite reasonable that under clause 14 the responsibility of the articles sold turning out fit for the purpose for which a locomotive is required shall rest with the seller. But when we come to such a product as unscreened coal —that is, practically coal as it is dug out of the earth—I don't think this applies. No skill or judgment of the seller is, or can be, exercised to fit the subject of sale for a market. If it is not in itself fit for its purpose nothing the seller can do can make it fit.

"The same considerations apply to clause 14 (2). I much doubt whether this subsection either was intended to cover a product such as coal. I think it also contemplated only manufactures. I do not think that coal brought up from the bowels of the earth falls within the term 'goods,' as used in this sub-section, and so I do not think that, in the statutory sense, any question here arises upon merchantable quality or buyer's examination.

"It is not suggested that there was any express warranty given that the coal pursuers sold would attain such and such a result, and if I am right that the statutory implied warranty is not applicable to a product known to the intending buyer, such as coal from a named coalfield, then we get clear of the technicalities of the statute, and are thrown back upon the common law obligations of seller and buyer.

"So regarded, the single question seems to me to be—did pursuers do for defender what they contracted to do for him—that is to say, deliver to him what he had bought from them. Now, defender, it is clear from the proof, knew what 'Strathaven unscreened coal' meant, for he had bought it before. What he contracted that pursuers should do for him was—that they should dig out of the bowels of the earth a certain quantity of the coal lying in Strathaven pit, and on his account put that on board the s.s. 'Dalbeattie.' This pursuers did, and that as it seems to me ends the whole matter as in a question between pursuers and defender. . . ."

The defender appealed, and argued (on plea 3 only, the others being given up)—The Sale of Goods Act 1893, section 14 (1) applied. That enactment was applicable to the sale of any kind of goods, manufactured or not—*Wallis* v. *Russell*, L.R. [1902] 2 Irish 585; *Gillespie Brothers & Company* v. *Cheney, Eggar, & Company*, [1896] 2 Q.B. 59. The latter case was *a fortiori* of this, for the contract specified a special coal under a descriptive name, but the seller's knowledge of the purpose of the purchase still was sufficient to bring in the implied warranty of fitness. Here no doubt the coal mentioned was "Strathaven" coal, but such coal could not be treated as a commodity passing under a trade name, and was not homogeneous in character. Though the commodity might answer the description in the contract, that was not sufficient, but it must come up to the meaning of the parties. It was, for example, not sufficient to supply "No. 1 hay" if the parties meant a particular market which required a higher quality to answer that description than other markets—*Jacobs* v. *Scott & Company*, May 4, 1899, 2 F. (H.L.) 70, esp. Ld. Ch. Halsbury at 75–6, and Lord Watson at 77, 36 S.L.R. 611. Here bunker coal, suitable for a steamship, was the meaning of

parties, and Strathaven was merely inserted as having been suggested by the pursuers. There had been no inspection here; the coal was simply bought on the suggestion and recommendation of the sellers. The previous communings with Honeyman formed part of the transaction. Both parties to the contract knew of these communings, of their terms, that these were being carried out, and that it was Honeyman's order. The defender was therefore entitled to act, as he did, in knowledge of and reliance on these communings, and the pursuers also so acted. Where the purpose was disclosed the seller was under an implied warranty of fitness—Benjamin on Sales, p. 652. Mere knowledge of the purpose of the purchase was sufficient to import a warrant of fitness on the part of the seller—*Douglas & Company* v. *Milne*, November 13, 1895, 23 R. 163, esp. Lord Ordinary Low at 164, 33 S.L.R. 128; *Jones* v. *Just*, L.R., [1868], 3 Q.B. 197, where Mellor (J.) laid down the rules which sections 13 and 14 of the statute incorporated, and cited *Jones* v. *Bright*, 5 Bing. 533, a case in which a warranty was implied though there had been inspection. Reliance on the seller's skill or judgment need not necessarily be proved, for the two parts of the section could be read separately. There was therefore here an implied warranty which had not been fulfilled, and the defender should be assoilzied.

Argued for the pursuers (respondents)—The Sale of Goods Act 1893, sec. 14 (1), where it said "so as to show" that the buyer was relying on the seller was to be read "in such a way as to show." That was not so here, and the cases cited were inapplicable. In *Wallis* v. *Russell, cit. sup.*, the question was whether the selection had been left to the seller. In *Gillespie Brothers & Company, cit. sup.*, the buyers had expressly intimated their reliance on the sellers, and that case showed that the statute might be evaded by the actings of parties—Lord Russell at [1896], 2 Q.B. 63. In *Jacobs, cit. sup.*, the difficulty was that the article appeared to have been precisely specified, when it had not, the selection being with the seller—Lord Stormonth Darling, Ordinary, at 2 F. (H.L.) 72. The only question here was whether the contract came under section 14 (1). It did not. The defender asked for a specific article and got it. He did not rely on the seller. The communings with Honeyman were no part of the contract. The connecting link between the two was amissing. To make the section apply it must be proved that Honeyman's "reliance" that the coal was as good as Auchlochan, had been incorporated as part of the contract. The defender had not done so, and all he was entitled to was a fair article for the price—Bell's Prin. sec. 95. He had got that, and the Sheriff-Substitute's judgment was therefore right and should be affirmed.

At advising—

LORD PRESIDENT—. . . . [*After narrating object of action and Sheriff-Substitute's handling of it*]. . . . —The learned counsel for the respondents did not see their way to support the learned Sheriff-Substitute's judgment upon the grounds on which he had put it, and I do not wonder because I do not think that the grounds can be supported, and certainly it is absolutely in the teeth of an authority which, although not binding, must certainly be treated with respect. The case of *Gillespie Brothers & Company* v. *Cheney, Eggar, & Company* [1896], 2 Q.B. 59, which is a decision of the late Lord Chief-Justice of England (Lord Russell of Killowen), could not have been quoted to the Sheriff-Substitute or I think he would have dealt otherwise with the matter. The facts in that case were that the plaintiffs were commission merchants and the defendants coal agents. The plaintiffs received from their correspondents in Barbadoes a letter in these terms:—"We have now decided to order a cargo of coal and will ask you kindly to look after same. . . . We will take whatever kind of coal you think it best to send us after satisfying yourselves of its suitability for the purposes we require, viz., the bunkering of steamships and ships of war, and, of course, it must stand well upon the British and Foreign Admiralty lists." This letter was taken by the plaintiffs to the defendants and shown to and left with them. And following upon that the following contract was entered into:—"Memorandum of Agreement—That Messrs Gillespie Brothers & Company agree to buy, and Messrs Cheney, Eggar, & Forrester agree to sell, a cargo of coal deliverable at Barbadoes per ship 'Enrichetta M.,' now at Swansea, on the following conditions, viz., that the quantity is to be about 500 tons, that the coal is to be of the description known as Cyfartha Merthyr or Hills Plymouth, that the price, including cost, freight, and insurance, is to be 18s. 6d. per ton. . . ." Well, on the arrival of the coal at Barbadoes it was found, as alleged by the plaintiffs, to be wholly unsuitable for the bunkering of steamships and ships of war, and accordingly the action was raised. Now that I need scarcely say is of course a decision absolutely in point so far as it raises the question of the statute applying to articles of this sort, and the judgment is a very valuable one upon the construction of the statute altogether.

The section of the Sale of Goods Act 1893 upon which the whole matter depends is section 14, which says—[*Here his Lordship quoted the section, ut sup.*] . . . . Now, the first portion of that section was clearly applicable in the case of *Gillespie Brothers & Company*. There was no question that the buyer there had made known to the seller the particular purposes for which the coals were required. They were required for bunkering, and they were to be of such bunkering as was suitable for steamers and ships of war. There is no question also that he had done it in such a way as to show that he relied on the seller's skill or judgment, because in the letter he said—"After satisfying yourself as to the suitability for the purpose we require." But it was contended in that case that there might be a defence under the proviso as to the sale of

an article by its "patent or other trade name." I remind your Lordships that in the contract which was made the coal was to be of the description of Cyfartha Merthyr or Hills Plymouth, and there was no question that that coal had been supplied. The Lord Chief-Justice deals with that in this way:—After reading the proviso, he says, p. 64—"That obviously is intended to meet the case, not of the supply of what I may call for this purpose raw commodities or materials, but for the supply of manufactured articles—steam ploughs, or any form of invention which has a known name and is bought and sold under its known name, patented or otherwise. I am clearly of opinion that the proviso does not apply to this case." Now I humbly agree with that; and although I have had to bring it in at this moment, the application of it will be apparent in a little.

. . . [*After narrative of facts given supra*] . . . Well, now, I come to the application of the statute to these facts. I hold, in fact, that these goods were not reasonably fit for the purpose for which they were supplied. As the Sheriff-Substitute says in his note—"There is no doubt about the facts (1) that what was sold was 'Strathaven unscreened coal'; (2) that its intended use was, within the knowledge of seller and buyer, for bunkering a steamer; (3) that Strathaven unscreened coal was put on board the 'Dalbeattie.'" I think those findings are quite correct. There was no question, therefore, that in the words of the statute the buyer had made known to the seller "the particular purpose for which the goods were required." But the real difficulty and, I confess, delicacy of the case, because I have not found the matter unattended with difficulty—the real difficulty comes with the application of the next words. It is not enough to show that the buyer "makes known to the seller the particular purpose for which the goods are required," but it must be "so as to show that the buyer relies on the seller's skill and judgment." Now, that is where the difficulty of the case comes in, because it is certainly true that Love ordered Strathaven coal, and he got Strathaven coal, and the point is—in ordering that, although he knew it was for bunker work, did he rely upon the seller's skill or judgment?

We had a very excellent argument from Mr Murray in which he treated the matter as one of clear logic. He said that the chain was broken. He said no doubt it might be that in what I may call the touting interview Jeffrey clearly conveyed to Honeyman that if he would order Strathaven bunker coal it would be a good enough coal for steaming purposes; but, he said, Honeyman, having taken his chance of that, then goes to Love and says to Love "Order me a cargo of Strathaven coal," and that, consequently, when Love came to Jeffrey to make the bargain which was made, that Love did not really rely on Jeffrey at all, that really what Love did was simply to order a specific article, not concerning himself with whether that specific article was fit or was not, because all that had already been settled by Mr Honeyman. Mr Honeyman made up his own mind and must take his chance. As I say that is a very powerful argument and a very logical one. But upon mature consideration I do not think it is sound. I think, when you are to inquire if the buyer relies on the seller's skill and judgment, you must take the transaction as a whole; and I think, therefore, that you can really in this matter wrap up Love and Honeyman in one.

I have purposely gone upon Jeffrey's evidence and not upon Love's, because, of course, the pursuer cannot complain of his own evidence being taken. I have already read that passage in which Jeffrey said he "knew that it was Honeyman's order he was getting." Now it seems to me that inasmuch as he knew that Love at that moment was passing on, so to speak, Honeyman's order, not as an agent—I am not raising any question as to that, it was really to serve Honeyman that Love was giving it—and that he also knew that it was bunker coal, it seems to me to import his own conversations with Honeyman; and that, consequently, the real justice of the matter is to hold that in the whole transaction Love and Honeyman together were relying upon the seller's skill or judgment, namely, that the coal should be fit for the purpose for which he was supplying it.

Accordingly, upon these grounds, I am of opinion that, the defence of unsuitability being made out, there was under the terms of the Sale of Goods Act an implied warranty in this case, and that, accordingly, the defence is a good one against paying the price of the articles supplied.

LORD KINNEAR—I concur with your Lordship for the reasons given.

LORD MACKENZIE—I am of the same opinion. It appears to me that the difficulty in this case arises from the form in which the transaction was carried out. I think it is necessary to go beyond the form in order to reach what was the substance of the transaction. It is no doubt true that Love bought this coal because Honeyman had made up his mind, that Love did not trouble himself about the order, and that the contract was not influenced by the previous supplies to Love of coal of the same description. But when one says that Love had bought the coal because Honeyman had made up his mind, that, I think, makes it necessary, in order to get at the substance, to ask this question—why was it that Honeyman had made up his mind to take this particular coal? No doubt the subject that was being dealt with was a specific subject; but then it is equally true that Honeyman had no previous opportunity of examining the coal that he was buying; and according to the admission of the pursuers' salesman Jeffrey, Honeyman told him that he knew nothing about their coal, that is to say, Strathaven coal. It is further matter of admission, and in regard to this matter I prefer to take the evidence from the witnesses of the pur-

suers—it is matter of admission that Jeffrey knew the particular purpose for which the coals were required; and also that Jeffrey told Honeyman that in his opinion they were as good for that purpose as the Auchlochan coal which they had been previously using.

I am of opinion that it is established as a matter of fact that Honeyman relied on Jeffrey's skill and judgment; and therefore if it was a question between Honeyman and Jeffrey I should have no doubt that section 14 (1) of the Sale of Goods Act applied. The difficulty is in taking the next step. I think that the bridge, if I may use the expression, is supplied by Jeffrey's evidence that he knew perfectly well that the order he was getting was not, in any proper sense, Love's order but was Honeyman's order. Accordingly, there is sufficient in the case to enable one to hold that Jeffrey knew that Love was just standing in Honeyman's shoes, and that therefore the 1st sub-section of section 14 is pleadable against Jeffrey as in a question with Love, just as it would have been in a question with Honeyman. On the question whether the coal was suitable or unsuitable for the purpose for which it was supplied I am entirely of the same opinion as your Lordship.

LORD M'LAREN and LORD PEARSON were not present.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutor of the Sheriff-Substitute, dated March 30, 1907: Find in fact—1. That in March 1906 the defender ordered from the pursuers about 150 tons Strathaven unscreened coal at 7/6 per ton delivered f.o.b. at Queen's Dock, Glasgow, for the purpose of being used as bunker coal in s.s. 'Dalbeattie;' 2. That the defender made known to the pursuers the purpose for which said coal was required, viz., for use as bunker coal on an ordinary steamer, and that he relied on the pursuers' skill and judgment in this matter; 3. That the pursuers delivered 140 tons, 9 cwt. of coal purporting to be in fulfilment of said order; 4. That the coal so delivered was not reasonably fit for the purpose above mentioned: Find in law that the defender is not liable to pay for said coal: Therefore assoilzie the defender from the conclusions of the action and decern: Find the defender entitled to expenses both in this Court and in the Sheriff Court, but subject to modification, remit," &c.

Counsel for the Defender and Appellant —M'Clure, K.C.—M. P. Fraser. Agents—Macpherson & Mackay, W.S.

Counsel for the Pursuers and Respondents — M'Lennan, K.C. — C. D. Murray. Agents—R. H. Miller & Company, S.S.C.

HIGH COURT OF JUSTICIARY.

Tuesday, March 10.

(Before the Lord Justice-General, the Lord Justice-Clerk, and Lords M'Laren, Kinnear, Stormonth Darling, Low, and Ardwall.)

MIDDLETON *v.* TOUGH.

Justiciary Cases—Statutory Offences—Fishing—Salmon Fishing—Weekly Close Time—Duty to Remove Leaders of Bag Nets on Sunday when Impossible on Saturday—Sunday Labour—Salmon Fisheries (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 97), *sec.* 7—*Salmon Fisheries (Scotland) Act* 1868 (31 *and* 32 *Vict. cap.* 123), *sec.* 24 *and Schedule D.*

The Salmon Fisheries (Scotland) Act 1862, sec. 7, enacts—". . . The weekly close time, except for rod and line, shall continue from the hour of six of the clock on Saturday night to the hour of six of the clock on Monday morning."

The Salmon Fisheries (Scotland) Act 1868, sec. 24, enacts—"The proprietor, or when let the occupier, of every fishery at which . . . bag nets are used shall in regard to such nets do all acts required by any bye-law in force within the district in which such fishing is situated for the due observance of the weekly close time"; and Schedule D contains a bye-law with regard to the observance of the weekly close time which requires "(3) that the netting of the leader of each and every bag net shall be entirely removed and taken out of the water."

The occupier of a salmon fishing was charged with a contravention of the above-quoted enactments and bye-law. It was proved that until Sunday morning the leaders of the bag nets could not with safety be removed owing to stress of weather; that the operation could have been accomplished on Sunday without danger; that no attempt was made to do so on Sunday, but that they were removed early on Monday morning.

Held that the accused having proved no *vis major*, had been guilty of a contravention in not having had the leaders of the nets removed on Sunday, and ought to have been convicted.

Middleton v. *Paterson*, January 30, 1904, 4 Adam 321, 6 F. (J.) 27, 41 S.L.R. 256, *overruled; Irving* v. *Phyn*, December 14, 1891, 3 White 46, 19 R. (J.) 7, 29 S.L.R. 275; and *Osborne* v. *Anderson*, November 4, 1887, 1 White 497, 15 R (J.) 12, 25 S.L.R. 21, *commented on.*

Justiciary Cases—Sunday Labour—Work of Necessity—Statute—Desuetude—Act 1579, *cap.* 70.

The Act 1579, cap. 70, against "Sunday labouring or working on Sunday," and other old Scots statutes penalising Sunday labour, do not extend to a work of necessity, and work performed