LORD KINNEAR—I agree entirely with my noble and learned friend on the Woolsack, and I have nothing to add to what he has said.

LORD ATKINSON—I also concur with my noble and learned friend on the Woolsack, and as he has entirely expressed everything I should desire to express myself, and better probably than I should have done it, I have nothing further to add.

LORD SHAW—I concur. Having considered the documents and evidence I accept with full agreement the very careful analysis made thereof and the cogent conclusions reached thereon by the learned Lord Ordinary. I regret to have to differ from the judgment of the Second Division. I have anxiously examined that judgment to ascertain what appeared to be the grounds upon which the learned Judges felt warranted in differing from the Lord Ordinary upon this question of fact as to the existence of a certain custom of the port. I gather that the learned Judges appear to have considered that the custom of the Port of Leith was established by the number of instances in fact in which the practice of unloading in bulk had been adhered to. There was much plausibility in the observation made by the learned counsel who addressed this House that that view was justified by the language of Lord Blackburn in the case of *Postlethwaite*, (1880) 5 A.C. 599, in which that distinguished Judge grounded the question of custom upon what he called "settled and established practice." If by settled and established practice the learned Judge meant (as I am certain he did not) that all that was required to establish an obligatory custom was to tick off through a course of years a number of instances in which a certain practice had been followed, then I should certainly venture to doubt whether such an opinion was sound. For I would venture to add to a general proposition as to settled and established practice this. In the first place, no number of contracts to do a thing which is expressly specified can ever establish a binding custom to do that thing without its being specified. In the second place, you cannot build up a custom of trade or of a port out of a series of protests against it. These protests may be expressly against the admission of a custom, or they may be by implication against it in respect of making demands which would have been unfounded if such a custom had already bound the parties. With regard to this case, the letters founded on contain the characteristics of both of these protests.

I desire respectfully to offer these observations, because in view of the grounds of judgment of the Court below I think that the distinction should be made plain between a settled and established practice in the general sense of the mere occurrence of instances (many of which may have sprung from express contract) and a settled and established practice which amounts to the acceptance of a binding obligation of a custom apart from particular bargain.

Their Lordships reversed the interlocutor of the Second Division and restored that of the Lord Ordinary.

Counsel for the Pursuers (Respondents)—Macmillan, K.C.—Hon. W. Watson, K.C. Agents—Bannatyne, Kirkwood, France, & Company, Glasgow—Beveridge, Sutherland, & Smith, W.S., Leith—Botterell & Roche, London.

Counsel for the Defenders (Appellants)—Leslie Scott, K.C.—Lippe. Agents—Maclay, Murray, & Spens, Glasgow—Boyd, Jameson, & Young, W.S., Leith—Thomas Cooper & Company, London.

Wednesday, March 1.

(Before the Lord Chancellor (Buckmaster), Lord Kinnear, Lord Atkinson, and Lord Shaw.)

GAIRDNER *v.* MACARTHUR.

(In the Court of Session, March 9, 1915, 52 S.L.R. 427, and 1915 S.C. 589.)

Process—Appeal—House of Lords—Facts Established in Court of Session on an Appeal from Inferior Court—Court of Session Act 1825 (6 *Geo. IV, cap.* 120), *sec.* 40.

In an appeal from the Sheriff Court the Court of Session allowed additional proof on the ground that the words "if necessary" in section 72 of the Court of Session Act 1868 meant "if necessary for the ends of justice."

Held that an appeal to the House of Lords, on facts set up after such additional proof, was incompetent, being excluded by 6 Geo. IV, cap. 120, sec. 40.

This Case is reported *ante ut supra.*

The defender Captain A. J. Macarthur appealed to the House of Lords from an interlocutor of July 20, 1915, which, on the whole proof, recalled the Sheriffs' interlocutors, gave new findings in fact, and a finding in law that the defender was liable to the pursuer in the value of certain articles, with decree for £150. The respondent objected to the competency of the appeal.

LORD CHANCELLOR—It is easy to appreciate the motives that have prompted the appellant's counsel to urge that he is at liberty to bring before your Lordships' House the further consideration of this case, for it undoubtedly involves serious consequences to his client. It is, however, plain that the appellant cannot proceed with this appeal unless he can show that the provisions of the statute of 6 Geo. IV, cap. 120, have no application to these proceedings.

Now the facts are these—The case was originally heard before the Sheriff-Substitute. Accordingly the cause commenced in the Courts of the Sheriff within the meaning of the statute to which I have referred. The Sheriff supported the finding of the Sheriff-Substitute, and from his judgment an appeal was taken to the Second Division of the Court of Session. On proceeding before this Court the appellant urged, as I gathered from a statement in the judgment of one of the learned Judges, that the evidence of two witnesses which had been given

in the Court below was untrustworthy, and that new and material matters were in his possession which should show that it could not be relied upon. For this, and it may be for other reasons, he was successful in contending that he should be allowed to amend the proceedings, and that further proof should be admitted. This took place, and the further proof proceeded before Lord Salvesen, and after his report the learned Lords of the Second Division heard the case and pronounced the interlocutor which is the subject of the present appeal.

Now that interlocutor is admitted frankly by Mr Sandeman to be an interlocutor which as far as it contains a finding of law is nothing but a statement of the irresistible conclusion to be drawn from the findings of fact. In order therefore to maintain the appeal it is necessary that the findings of fact should be open to review. Now the statute to which I have referred provides this—"When in causes commenced in any of the Courts of the Sheriffs, or of the magistrates of burghs or other inferior courts, matter of fact shall be disputed, and a proof shall be allowed and taken according to the present practice, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found, or on matter of law, and the several points of law which they mean to decide; and the judgment on the cause thus pronounced shall be subject to appeal to the House of Lords in so far only as the same depends on or is affected by matter of law, but shall, in so far as relates to the facts be held to have the force and effect of a special verdict of a jury finally and conclusively fixing the several facts specified in the interlocutor." The Court of Session have followed in all respects the direction of the statute, and the only question that arises for decision is whether they have found those facts in reviewing a judgment that proceeded upon the proof before the Sheriff's Court. I entertain no doubt that they were reviewing such a judgment. They did review it—in fact they recalled it—and I cannot think that they the less reviewed it because in order to make things more certain, and to give the appellant every possible opportunity, they permitted further evidence to be called. If once it be conceded that what they did was done in the course of reviewing a judgment which proceeded upon proof before the Sheriff's Court, then it necessarily follows that an appeal to this House upon a question of fact is incompetent and the appeal must fail.

LORD KINNEAR—I entirely agree with the noble and learned Lord on the Woolsack. The one question seems to me to be whether the interlocutor brought before this House is an interlocutor pronounced in reviewing a judgment of the Sheriff's Court pronounced after proof. There is no question that it is. There is nothing before the House except an interlocutor which was pronounced in the course of the review of such a judgment.

LORD ATKINSON—I concur.

LORD SHAW—I agree.

Their Lordships dismissed the appeal.

Counsel for the Appellant—Sandeman, K.C.—Macphail, K.C.—Wardlaw Burnet. Agents—James Scott, S.S.C., Edinburgh—Tredgolds, London.

Counsel for the Respondent—Constable, K.C.—MacRobert. Agents — MacRobert, Son, & Hutchinson, Paisley—Fyfe, Ireland, & Company, W.S., Edinburgh—Marchant & Newington, London.

COURT OF SESSION.

Tuesday, January 18.

SEVEN JUDGES.

[Lord Dewar, Ordinary.

MOSS' EMPIRES, LIMITED *v.* WALKER AND OTHERS.

Valuation Cases—Valuation Roll—Conclusiveness—Review by Court of Session—Failure to Send Notice of Increase of Valuation—Valuation of Land (Scotland) Act 1854 (17 *and* 18 *Vict. cap.* 91), *secs.* 4, 5, *and* 30.

Where it was averred that an assessor while increasing the valuation of certain subjects had omitted to send the usual statutory notice to the proprietors, and the latter had thereby lost their right of appeal to the Lands Valuation Appeal Court, *held* by a majority of Seven Judges, *rev.* judgment of Lord Dewar, Ordinary (the Lord President, Lord Justice-Clerk, and Lord Dundas *diss.*), that an action at the instance of the proprietors against the assessor for reduction of the entry in the valuation roll, and for declarator that the proprietors were liable to be rated and assessed on the former value, was competent.

The Lands Valuation (Scotland) Act 1854 (17 and 18 Vict. cap. 91) enacts:—Section 4—"In every county and burgh . . . a new valuation roll shall be annually made up by the assessors on or before the 15th day of August in every . . . year." Section 5—"On or before the 25th day of August, and not earlier than the 15th day of July in each year, the assessor shall transmit or cause to be transmitted to each person included in his valuation . . . a copy of every entry in such valuation roll . . . along with a notice to such person that if he considers himself aggrieved by such valuation he may appeal against the same . . . : Provided always that where in making up his valuation as aforesaid the assessor is merely to repeat an entry which occurred in the valuation of the immediately preceding year, it shall not be necessary for the assessor to transmit such copy and notice as aforesaid to the person or persons specified in such merely repeated entry." Section 30—"No valua-