fit was not great, one may conjecture that it was indirectly for the interests of a coal-selling company to be in a position to satisfy the requirements of its customers. Apart from the specialty that no interest was charged on the advances, the appellants' agency contract was not unlike that of a produce broker who in any particular case may consider that it is profitable to advance money to enable a colonial planter to sow and reap his crop, and who then looks to the proceeds of the sale of the crop in the home market in order to recoup him for his advances either in whole or in part as the case may be. In the case with which we are concerned the appellants appear to have considered that it was worth their while to allow the Colliery Company to have in its hands cash advances representing the value of the coal which it would probably supply in the next ensuing three months.

I have difficulty in understanding why money advanced by the appellants for the benefit of their business, and in pursuance of an agency contract incidental to that business, should not be regarded as capital employed in their business. The Lord Advocate tried to assimilate the credit balances in the appellants' agency account to credit balances which they might at any time have in their bank account in respect of cash which they neither required nor intended to use for the purposes of their business, but which, for example, lay in bank awaiting a permanent investment. The difference between the two cases is obvious and crucial. The credit in the agency account was created for no other purpose except to carry on the appellants' coal-selling business. On the other hand, in the case figured by the Lord Advocate the credit in the bank account represented cash which was not required or intended to be used in the business. The argument seemed to overlook the familiar fact that if money is advanced in order that the borrower may use it as capital in his business, the right to demand repayment of that money may form part of the capital of the lender's business if he is an agent or banker or other person whose business it is to make such advances.

For these reasons I am of opinion that the determination of the Special Commissioners was erroneus.

The LORD PRESIDENT and LORD CULLEN were absent.

The Court reversed the determination of the Commissioners and remitted to them to adjust the assessment.

Counsel for the Appellants—Wilson, K.C. —Mitchell. Agents—Fraser, Davidson, & Whyte, W.S.

Counsel for the Respondents—The Lord Advocate (Clyde, K.C.)—R. C. Henderson. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Saturday, July 18.

SECOND DIVISION.

[Dean of Guild Court at Glasgow.

SMITH *v.* RENNIE.

Burgh—Dean of Guild—Appeal—Defect of Jurisdiction — Petition — Amendment — Competency—Court of Session Act 1810 (50 *Geo. III, cap.* 112), *secs.* 36 *and* 37—*Glasgow Police Act* 1866 (29 *and* 30 *Vict. cap. cclxxiii*), *secs.* 322 *and* 325.

The Court of Session Act 1810, section 36, enacts — "Bills of advocation from . . . inferior judges in Scotland against interlocutory judgments shall be allowed only upon the following grounds: — First, of incompetency, including defect of jurisdiction. . . ." Section 37—"Bills of advocation from such inferior judges shall not in any case be received against interlocutory judgments upon grounds of iniquity or error, but only after final judgment shall have been pronounced."

The Glasgow Police Act 1866 enacts— Section 322—"If any proprietor to whom . . . notice has been given considers himself aggrieved by the requisition . . . he may . . . deliver to the Clerk written objections . . ., and [the procurator-fiscal of the Dean of Guild Court] shall apply to the Dean of Guild for a warrant to cite the objecting proprietor . . ., and the Dean of Guild shall thereupon inquire into, try, and decide the said questions. . . ." Section 325 — "If the proprietors to whom notice has been given fail to comply . . . with the requisition contained in such notice it shall be lawful for the procurator-fiscal of the Dean of Guild Court . . . to enforce the same by applying to the Dean of Guild for a warrant to execute the work . . ., and the Dean of Guild may grant a warrant."

In terms of the Glasgow Police Act 1866 the Master of Works gave notice to one of a body of trustees, as heritable creditors, requiring them to rebuild the fallen portion of the boundary wall of a back court, and intimating that if they had objections they must lodge the same in writing within the time required by the Act. The trustees lodged objections, but the procurator-fiscal erroneously, on the footing that no objections had been lodged, presented a petition for a warrant to execute the work. The Dean of Guild subsequently allowed the petition to be amended so as to proceed, on the footing that objections had been lodged, and on a prayer for a warrant to cite the objector, and for an inquiry into and decision on the question raised. The respondent appealed to the Court of Session against what were admittedly interlocutory judgments of the Dean of Guild. *Held* (1) that the appeal was competent in respect that it raised a question of incompetency, including defect of jurisdiction, and (2) that it was

incompetent by amendment to turn a petition based on section 325 of the Act for warrant to execute the work in the absence of objectors, into a petition based on section 322 for a warrant to cite the objector and for an inquiry into the facts.

Opinion per Lord Salvesen that section 37 of the Court of Session Act 1810 must be read subject to the express rights conferred by section 36.

Burgh—Dean of Guild—Notice to "Rebuild"—Time within which Work to be Executed—Glasgow Police Act 1866 (29 *and* 30 *Vict. cap. cclxxiii*), *secs.* 322 *and* 384.

The Glasgow Police Act 1866, section 384, enacts—"The Master of Works may, by notice given in manner hereinafter provided, require any proprietor or occupier of a land or heritage to fence the same, or repair any chimney stalk or flue or any chimney head or can, or any rhone, signboard, or other thing connected with or appertaining to any building thereon which appears to be dangerous. . . ."

Opinions per the Lord Justice-Clerk and Lord Dundas (1) that section 322 of the Glasgow Police Act 1866, which allows an aggrieved owner six days within which to lodge objections to a notice calling on him to repair, does not render incompetent a notice requiring the work to be done in less time than six days, and (2) that a requisition to "rebuild" as distinguished from one to "repair" was not justified by the terms of section 384 of the Act.

The Court of Session Act 1810 (50 Geo. III cap. 112), sections 36 and 37, and the Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii), sections 322, 325, and 384 are quoted *supra in rubric.*

On 15th January 1919 George Smith, writer, Glasgow, *interim* Procurator-Fiscal of the Dean of Guild Court of the Burgh of Glasgow, for the public interest, *petitioner*, presented a petition in the Dean of Guild Court, Glasgow, in which the trustees of James Rennie (as heritable creditors), *per* R. A. Rennie, 136 Wellington Street, Glasgow, were called as *defenders.*

The *petition* was as follows:—"That upon the 3rd day of December 1918 the Master of Works, duly appointed and acting under the Glasgow Police Acts 1866 to 1915, gave notice to the trustees of James Rennie (as heritable creditors), *per* R. A. Rennie, 136 Wellington Street, Glasgow, defenders, that the boundary wall on the west side of the back court of a part of and in connection with the land and heritage or lands and heritages of which the said defenders are proprietors within the meaning of the said Acts, situated at or near 18 Provanhill Street, Glasgow, has partially fallen, is in a state of disrepair and is dangerous, and thereby required the said defenders to execute the following work in order to comply with the provisions of the said Acts, viz.—'To rebuild the fallen portion of said boundary wall, and repair the portion of said wall existing with suitable material in a secure and tradesmanlike manner,' and that within two days from the date of said notice, to the satisfaction of the said Master of Works. That the aforesaid work required to be executed is necessary and reasonable, *and no* Objections to the requisition contained in said notice have been lodged with the Town Clerk (Police Department), *in a letter dated 6th December* 1918, *herewith produced and referred to, thereto notwithstanding which* The said defenders have failed to comply with the requisition contained in said notice before the expiry of said period therein specified or since the expiry thereof. The cost of the said work required to be executed exceeds in the opinion of the Master of Works the sum of five pounds. May it therefore please your Lordship to grant warrant to cite the said defenders to appear before you, and thereupon *to inquire into, try, and decide the questions competently raised in the objections by or on behalf of the said James Rennie's trustees with regard to the necessity or reasonableness of the work proposed to be executed, and the liability of said trustees for the cost thereof, and to award expenses quoad said objections and procedure against said trustees, and upon resuming consideration hereof, and in the event of said defenders failing to comply with the requisition contained in said notice by the Master of Works within a time to be specified by your Lordship*, to grant a warrant to the petitioner or to the said Master of Works to execute the said work as specified in said notice, and thereafter to ascertain and fix the cost thereof, and to decern against the said defenders for the same; to award the expenses of this petition and application and subsequent procedure against the said defenders, all in terms of said Glasgow Police Acts 1866 to 1915, particularly the said Glasgow Police Act 1866, sections 321, 322, 323, 325, 327, 384, and 397 thereof, and the Glasgow Building Regulations Act 1900, sections 30 and 126 thereof." [The words printed in italics represent amendments subsequently allowed to be made on the petition; those underlined were deleted.]

The notice referred to in the petition also stated—"Your attention is directed to section 322 of the Glasgow Police Act 1866 annexed hereto," the section in question being quoted in full.

The respondent *pleaded*—"1. The action is incompetent in respect (*a*) that the condition-precedent to section 325 of the Glasgow Police Act 1866 becoming operative, viz.—That the respondents 'fail' as therein referred to, and (*b*) that the prayer craves authority to execute work of which no description is given and is thus vague and indefinite. 2. The said notice being null and void in respect (*a*) it demands that the work be executed within two days, (*b*) it does not describe the work required to be executed, (*c*) the requisition by the Master of Works is *ultra vires*, the action should be dismissed as incompetent. 3. The requisition of the said notice being *ultra vires* of the Master of Works, the respondent is entitled to absolvitor with expenses. 4. The action is irrelevant."

On 2nd May 1919 the Dean of Guild (HUNTER) repelled the pleas-in-law, numbers 1 (*a*), (*b*), 2 (*a*), (*b*), (*c*), 3 and 4, stated for the respondent, and on 12th May 1919 the Sub-Dean of Guild (REID) allowed both parties a proof of their respective averments, and to the petitioner a conjunct probation.

The respondents appealed to the Second Division of the Court of Session against the above interlocutors of 2nd and 12th May.

At the hearing the petitioner objected to the competency of the appeal.

Argued for the appellant (respondent in the petition)—The appeal was competent—*Miller* v. *Crawfurd*, 1881, 8 R. 385, 18 S.L.R. 247. The respondent fell clearly within the terms of section 36 of the Court of Session Act 1810 (50 Geo. III, cap. 112)—M'Glashan on Jurisdiction and Forms of Process in Civil Causes of the Sheriff Courts of Scotland, section 2495; Shand's Practice, pp. 20 and 441, and cases there cited. The respondents also had a right of appeal under section 134 of the Glasgow Buildings Regulation Act 1900 (63 and 64 Vict. cap. cl.). The case of *Robson* v. *Menzies*, 1913 S.C. (J.) 90, 50 S.L.R. 802, founded on by the petitioners was not in point. There incompetency with defect of jurisdiction was interpreted subject to the provisions of the Small Debt (Scotland) Act 1837 (7 Will. IV, and 1 Vict. cap. 41). Irregularity in the course of the proceedings was clearly incompetency, and there had been such irregularity in the present case. The proceedings in the case had been initiated under section 325 of the Act which dealt with failure to lodge objections, whereas they should have been brought under section 322, which dealt with procedure after objections had been lodged. The procurator-fiscal of the Dean of Guild Court had endeavoured to remedy this defect by an extensive amendment of his petition, which the Dean of Guild had allowed. This amendment was, however, entirely outwith his power to allow. He was bound to follow the principles of the Court of Session and these made the amendment incompetent—*Morley* v. *Jackson*, 1888, 16 R. 78, 26 S.L.R. 52; *Paterson* v. *Robson*, 1872, 11 Macph. 76, 10 S.L.R. 55; Mackay's Manual of Practice 253; Shand's Practice 498. Further, the notice was inept in respect that the time given for executing the work, viz., two days, was too short. Under section 322 of the Glasgow Police Act 1866 the appellant had six days to lodge objections, and yet if he did not do the work within the time notified he was liable to a penalty—section 323. There was no statutory warrant for a notice of only two days. Further, the specification in the notice was insufficient. It did not state under which section of the Act it proceeded, and it did not describe the work required either directly or by reference to plans—section 321. In any event section 384, on which the respondent founded, had no application to the present wall. In the present case the wall had fallen and it was not "dangerous" so far as fallen. There was no power in the Dean of Guild Court to force an owner to "rebuild" his property, as distinguished from "repairing." Further, a wall did not "appertain" to a building. This was not a case of fencing, as in *Lang* v. *Bruce*, 1873, 11 Macph. 377, 10 S.L.R. 242, and other similar cases. Further, the action was incompetent, because the appellant was not a proprietor but a bondholder in possession and he was only described as a heritable creditor in the petition.

Argued for the respondent (petitioner)—The appeal was incompetent in respect that the judgments appealed against were purely interlocutory, and it was incompetent to appeal against such judgments unless there was combined therewith a defect of jurisdiction—Court of Session Act 1810 (*cit. sup.*), sections 36 and 37—*Robertson* v. *Thomas*, 1887, 14 R. 822, 24 S.L.R. 596; *Robson* v. *Menzies* (*cit. sup.*) In the present case the Dean of Guild was exercising a jurisdiction which he had. In all the cases in Shand's Practice founded on by the appellant where an appeal was taken from an interlocutory judgment, leave was given, but in the present case leave was neither asked nor granted. Section 134 of the Glasgow Buildings Regulation Act 1900 (*cit. sup.*), founded on by the respondent, did not confer an unrestricted right of appeal. Under section 322 of the Glasgow Police Act 1866 the Dean of Guild was expressly authorised to decide the question raised in the objections. It was true that the petition had been erroneously brought on the hypothesis that no objections had been lodged, but it had been competently amended. None of the statutes dealing with power to amend dealt with the Dean of Guild Court. Therefore the Dean of Guild had the common law power of amendment—Dove Wilson, Sheriff Court Practice 238; *Jeffray* v. *Angus*, 1909 S.C. 400, *per* Lord Dundas at p. 409, 46 S.L.R. 388. The notice itself was in correct form. Under section 321, *et. seq.*, of the Glasgow Police Act 1866 the Master of Works was quite entitled to require the appellant to execute the work in less time than the appealing time, though he could not deprive him of his right to appeal. There might well be cases where the danger was such that immediate action was necessary. The owner would, however, suffer no prejudice, because the notice was accompanied by a copy of section 322 informing him of his right to appeal. If he took advantage of this right his appeal removed the original notice and he became entitled to ten days. If a shorter notice than six days was prohibited the statute would have expressly said so. Further, section 384 of the Act of 1866 applied to anything pertaining to a building which appeared to be dangerous. The wall in question fell within that class in respect that it was connected with a building. The respondent was not bound to aver this. It was impossible to effect repairs without rebuilding, and on the principle of *ejusdem generis* the words of the section sufficiently covered the present case—*The Admiralty* v. *Burns*, 1910 S.C. 531, *per* Lord Kinnear at pp. 538-539, 47 S.L.R. 481. Lastly, the objection that the appellant was only described as a heritable creditor was not a substantial objection. The respon-

dent averred that he was a heritable creditor and proprietor within the meaning of the Act. As a fact he was a heritable creditor in enjoyment of the rents, and under section 4 of the Act such a person was a proprietor.

LORD JUSTICE-CLERK—This case is really a very trifling one as to its merits, but it raises questions of procedure which I have found to be difficult and which I assume are important.

The respondents, when the case was called for hearing before us, objected that the case was incompetent. Though the objection had not been taken before, it was not too late, and we heard a full argument upon it. In that argument sections 36 and 37 of the Act of 1810 were referred to. I had, and still have, difficulties as to the correlation of these two sections, but I do not intend to proceed upon the reading of section 37 which I suggested and which found no, or at least no very sympathetc, support from the Bar. I am of opinion that the appellant has established that the appeal raises questions of competency including defect of jurisdiction, and that it falls within section 36 and is therefore competent. The efficacy of section 36 has been quite recently recognised —*Lawrie & Jackson*, 18 R. 1154, 28 S.L.R. 866.

On the merits of the appeal the material factors are, I think, the provisions of the Glasgow Police Act of 1866, the terms of the notice, the fact that objections were lodged by the appellant's letter of 6th December, the form of the original petition, and the procedure which followed.

The parties are now agreed that the appellant did lodge objections. In that event section 322 came into operation, and its terms are imperative—the procurator-fiscal shall apply to the Dean of Guild for warrant to cite the objector, and the Dean of Guild shall thereupon decide the questions competently raised by such objections. This procedure was not followed. But several weeks afterwards the Procurator-Fiscal made the present application to the Dean of Guild, which stated that no objections had been lodged, and was apparently intended for a proceeding under section 325. I think this was quite wrong. What should have been done was to ask for warrant under section 322, and to have got the objection disposed of. This is apparently intended to be done summarily and without, in the ordinary case at least, any record being made up, subject of course to section 277, and to what was said in *Walker* v. *Lang*, 1891, 18 R. 928, 28 S.L.R. 720. The Dean of Guild says it has been the practice for both applications to be combined in one. I find no warrant for this practice in the statute. I think it is irregular and wrong. I am of opinion that the appeal should be sustained.

Several points were raised and argued before us which, in the view I take, it is not necessary or even competent for us finally to determine, but upon some of which, for the guidance of the Dean of Guild, I may indicate the opinion which I have formed.

It was objected that the requirement to have the work done in two days was contrary to the statute and made the notice inept, in respect that there were six days to lodge objections under section 322. I was at first impressed with this view, but I have come to be of opinion that it is not sound. I think the reference to section 322 and the appending of it at length to the notice made the matter sufficiently clear so as to save the validity of the notice. In my opinion, however, it would be safer, unless the matter is urgent, to allow more than six days for the execution of the work.

It was then said that a wall such as that in question did not fall under section 384. I think this is a difficult question, and at present I rather incline to the view that that section does not apply. But assuming that it does, I do not think it authorised the Master of Works to require a proprietor to rebuild the wall. He is only entitled, apart from a question of fencing which is not before us, to require the proprietor to repair what is dangerous, and a proprietor might quite well prefer some other kind of fence than a wall, and, in my opinion, is entitled to an option in such a matter.

I think we should sustain the appeal and remit to the Dean of Guild to dismiss the petition and application, leaving the objections to be dealt with *primo loco* under section 322.

LORD DUNDAS—When this case was called objection was made by the respondent's counsel, which ought to have been taken at an earlier stage, to the competency of the appeal. We decided—and I think the course of the subsequent arguments justified our decision—to hear counsel upon the merits of the appeal before disposing of the objection to competency. It was obvious that the two questions were closely interlaced one into the other.

I am not prepared to hold this appeal incompetent. I think that apart from section 134 of the Glasgow Building Regulations Act 1900, to which we were referred, the appellant's counsel was able to show that his appeal, though against interlocutory judgments, was truly based on "incompetency including defect of jurisdiction" within the meaning of section 36 of the Act 50 Geo. III, cap. 112.

On the merits Mr MacRobert for the appellant pressed several points on our attention, in respect of each and every one of which he urged that his client must succeed. In regard to one of these his claim must, in my judgment, be admitted.

Notice, dated 3rd December 1918, was served by the Master of Works on the appellant. On 6th December the appellant intimated objections in writing thereto. The proper procedure would then have been, in terms of section 322 of the Glasgow Police Act 1866, that the procurator-fiscal of the Dean of Guild Court should apply to the Dean for warrant to cite the objector, and the Dean should thereupon inquire into and decide the questions raised. This course was not adopted. Instead of it a petition was brought on 15th January 1919 on the erroneous narrative that no objections to the

notice had been lodged. It was admitted that by some inadvertence the objections had fallen out of sight. On 17th April the Dean of Guild allowed the petition to be amended—at least he pronounced an interlocutor apparently intended to have that effect—so as to proceed on the footing that objections had been lodged, and on a prayer for a warrant to cite the objector, and for an inquiry into, and decision on, the question raised. I think it was incompetent thus to turn a petition based upon a certain hypothesis in fact into one proceeding upon an exactly contrary hypothesis. The Dean of Guild ought, in my judgment, to have thrown out the original petition as incompetent because inapplicable to the facts truly existing. On this ground, therefore, the appeal here must succeed.

If this view be sound, one need say but little in regard to any of Mr MacRobert's other points. Upon a construction of section 384 of the 1866 Act, I doubt whether this boundary wall could fairly be regarded as a "thing connected with or appertaining to" the building on the appellant's land; and also whether that section would justify a requisition to "rebuild," as distinguished from one merely to "repair," the wall in question. Objection was taken to the competency of the notice in respect that while under section 322 a proprietor is entitled to six days within which to lodge written objections, this notice orders the appellant to execute the work within two days "under certification that if you fail so to comply with the requirements thereof, proceedings will be taken against you for enforcing the provisions of said Act." I do not think this objection, at first sight formidable, can be sustained. I have come to think that the Dean of Guild's answers to it in the note to his interlocutor of 7th November 1919, are satisfactory and sufficient. He points out that "in the vast majority of cases there are no contests, and the specification of a short period may get cases immediately attended to with advantage to the proprietors themselves." Nor is there any danger of hardship or oppression. It was made apparent to the appellant by the terms of section 322 which was appended to the notice and to which his attention was specially directed, that he had six days within which to lodge objections, and that if he did so there must be an application to the Dean of Guild for warrant to cite him prior to an inquiry into the merits of the dispute. And section 323, upon which Mr MacRobert placed reliance, does not seem to me to help him, because it is only prior to the expiry of ten days after the Dean of Guild's decision upon his objections that the respondent could be held guilty of a guild offence in respect of failure to comply with the notice. I think, therefore, that while it may not have been altogether prudent or suitable in this case to prescribe two days as the period for the execution of the work, the notice cannot be held to have been incompetent on that account.

We ought, in my judgment, to repel the respondent's objection to the competency of the appeal, sustain the appeal, recal the interlocutors appealed against, and remit to the Dean of Guild to dismiss the petition.

LORD SALVESEN—The only question of general importance raised by this appeal is that of competency. The first interlocutor appealed against repels certain pleas-in-law stated for the respondent, and appoints the case to be put on the roll of the Court for further consideration. The second interlocutor allows both parties a proof of their averments. Neither is, therefore, a final interlocutor, and no leave to appeal has been granted. The right of appeal thus depends upon sections 36 and 37 of the Act 50 Geo. III, cap. 112, for the Sheriff Court Acts do not apply to proceedings before the Dean of Guild.

The appellant maintained that his appeal was competent under section 36, which provides that all advocations from the inferior judges in Scotland against interlocutory judgments "shall be allowed only upon the following grounds—first, of incompetency, including defect of jurisdiction." If the appeal be of this nature no leave is required; and I do not think this express enactment is at all affected by the general provision in section 37 that "bills of advocation from such inferior judges shall not in any case be received against interlocutory judgments upon grounds of inequity or error, but only after final judgment shall have been pronounced." This section, I think, must be read subject to the express rights conferred by section 36; and so far as we were referred to authorities it has been uniformly so construed. The appeal here presented is not on inequity or error, but on the ground of incompetency, including defect of jurisdiction.

In the view I take of the case it is only necessary to consider one of the grounds upon which the interlocutors appealed against were attacked, namely, that contained in the first plea-in-law for the respondent. The facts are as follows—On 3rd December 1918 the respondent was served with a notice requiring him within two days to execute certain work, namely, to rebuild the fallen portion of a boundary wall. On 6th December the respondent intimated that he had objections to the notice on the ground that he was neither the proprietor nor owner of the wall or any part of it. The interim procurator-fiscal of the Dean of Guild Court appears never to have had the objection brought to his notice; and on the footing that no objections were lodged he presented a petition for a warrant to execute the work specified in the notice. This was admittedly a blunder which he afterwards endeavoured to rectify by amending his petition in the manner shown in red ink on page 4. The prayer of the petition in the amended form proceeded on the narrative that objections had been lodged, and praying the Court to inquire into, try, and decide questions competently raised in these objections, and on resuming consideration of the petition, and on the defender's failing to comply with the requisition contained in the notice, to grant a warrant to the petitioner or the Master of

Works to execute the work specified in the notice. The Dean of Guild informed us that it has been the practice in his Court to combine the application for an inquiry and the application for a warrant in one petition. He does not, however, say that that has ever been done in a case like the present, where the original petition was presented on the false narrative that no objections had been lodged to the notice. Apart from this point I think the practice is not in accordance with the Glasgow Police Act 1866, on which it bears to proceed. The procedure where objections have been lodged is prescribed by section 322, and provides for the objecting proprietor being cited to appear before the Dean of Guild, who is to inquire into and try and decide the said question. Section 325 may thereafter be brought into operation if the Dean of Guild has previously repelled the objections, and it may also be appealed to if no objections have been lodged. It is only where there is a failure to comply with a requisition that a warrant may lawfully be applied for to have the work specified therein executed. But an objecting proprietor who has given due notice of his objections cannot be said to have failed to comply with the requisition the validity of which he disputes. If he be found wrong in the inquiry provided for by section 322, it is not to be assumed that he will fail to comply with the notice, and until there has been such failure I think it is incompetent to have recourse to section 325. In my opinion, therefore, the whole proceedings in this case were incompetent, proceeding as they did on the mistake that the appellant was a person who had failed to comply with the notice, whereas he was an objecting proprietor who was entitled to have his objections disposed of under section 322. That initial mistake I think could not competently be cured by amendment, even if it would have been competent, in a proper application under section 322, to have added a crave under section 325.

I am, therefore, of opinion that the appeal should be sustained, and that we should remit to the Dean of Guild Court to dismiss the petition, so that if any further procedure is necessary it may be taken in terms of section 322.

LORD GUTHRIE was absent.

The Court repelled the objections stated by the petitioner and respondent to the competency of the appeal, sustained the appeal, recalled the interlocutor of the Dean of Guild appealed against, and remitted to him to dismiss the petition.

Counsel for the Petitioner and Respondent — Sandeman, K.C. — D. P. Fleming. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondent and Appellant —Constable, K.C. — MacRobert. Agent— A. C. D. Vert, S.S.C.

HOUSE OF LORDS.

Tuesday, July 29.

(Before Viscount Finlay, Viscount Cave, and Lords Dunedin, Shaw, and Wrenbury.)

FRONSDAL & COMPANY (OWNERS OF S.S. "HANSA") *v.* WILLIAM ALEXANDER & SONS.

(In the Court of Session, November 23, 1918, 56 S.L.R. 60.)

Ship — Charter-Party — Demurrage — Lay Days—"Provided Steamer can Discharge at this Rate."

Charterers of a ship were under the charter-party to unload its cargo of timber at the rate of 100 standards per day, "always provided that steamer can . . . discharge at this rate." Owing to shortage of labour the rate was not maintained and the shipowners claimed demurrage. *Held* that the charterers were liable, as there was no fault on the part of the shipowner, and the proviso of the charter-party did not cover want of labour, but referred to the capacity and fittings of the vessel herself.

This case is reported *ante ut supra.*

The defenders, William Alexander & Sons, charterers of the s.s. "Hansa," appealed to the House of Lords.

At delivering judgment—

VISCOUNT FINLAY—This is a claim by shipowners for demurrage under a charter-party. The Lord Ordinary decided in favour of the pursuers (now respondents), and the Second Division affirmed his decision. The questions arising on this appeal from their affirmance are two—(1) as to the general nature of the obligation imposed upon a charterer by a clause providing for discharge in a fixed number of days; and (2) as to the meaning and effect of the words at the end of the marginal note in this charter-party—"always provided steamer can load and discharge at this rate."

The appellants are the charterers and the respondents the owners of the steamship "Hansa." By the charter-party the vessel was to load at Archangel a cargo of timber and proceed with it to Ayr. The third clause in the charter-party so far as material is as follows:—"The cargo to be loaded and discharged *at the rate of not less than* 100 *standards per day, counting from steamer's arrival at the respective five ports, and notice of readiness given in writing during business hours and permission to load granted, whether berth available or not, always provided that steamer can load and discharge at this rate.* . . ." The words in italics form the marginal note, and there is a provision in the charter that "should the steamer be detained beyond the time stipulated as above for loading or discharging demurrage shall be paid at £70 per day and *pro rata* for any part thereof."

If the discharge at Ayr had been carried out at the rate of 100 standards per day the