registration of the order shall be given in the *Edinburgh Gazette.* The reporter refrains from expressing any opinion as to whether the prayer of the petition may be amended so as to permit of your Lordships confirming the special resolution above quoted as a resolution of the company within the meaning of section 45, but it seems to the reporter that, preliminary to the resolution deleting clause5 in its entirety and substituting the clause contained in the special resolution, the company should have resolved to reorganise its existing share capital by consolidating the two different classes of shares into one class and then resolved that in order to permit of this reorganisation receiving effect the conditions contained in the company's memorandum should be modified by deleting clause 5, and in lieu thereof substituting the clause contained in the special resolution as passed. Assuming that your Lordships grant leave to the company to amend the prayer of the petition so as to convert it into a petition praying your Lordships to confirm the special resolution above quoted, the reporter respectfully submits that, on the documents as they at present stand, the company has not put itself in the position to ask your Lordships to confirm the special resolution as a resolution of the company within the meaning of section 45 of the Act. The company has passed no consolidating resolution. Apparently they contemplate passing a resolution to consolidate the two classes of shares after the memorandum has been altered, by the deletion of clause 5 as it at present stands and the substitution of the clause contained in the special resolution. It seems to the reporter that if your Lordships confirmed the resolution in the terms in which it has been passed the position would be that on the company's memorandum as it would then stand the share capital would be stated to be all of one class, while in point of fact it would, until the company passed the necessary consolidating resolution, continue to consist of two classes."

Thereafter the petitioners lodged a minute in which they proposed, if the Court so permitted and required, to amend the prayer of the petition by deleting the part of the prayer quoted *supra* and by substituting therefor the following—"To confirm the said special resolution of the company passed on 9th November 1917 and confirmed on 26th November 1917, modifying the conditions contained in the company's memorandum of association and to direct that a copy of the order of Court be filed with the registrar, and that notice of the registration of the order be given in the *Edinburgh Gazette.*"

Thereafter the reporter, having had the minute laid before him, issued a supplementary report in which he repeated the two paragraphs of his former report, last above quoted.

After hearing counsel the Court, without delivering opinions, granted the prayer of the petition amended as suggested in the minute.

Counsel for the Petitioners — Gentles. Agents—Macrae, Flett, & Rennie, W.S.

Wednesday, October 15.

FIRST DIVISION.

[Sheriff Court at Kirkcudbright.

STIRLING *v.* GRAHAM.

Process—Appeal—Competency—Removing—Appeal against Allowance of Proof in Removing—Court of Session Act 1825 (6 *Geo. IV, cap.* 120), *sec.* 44—*Sheriff Courts (Scotland) Act* 1913 (2 *and* 3 *Geo. V, cap.* 28), *sec.* 2.

Held that an appeal against an interlocutor allowing proof in an action of removing was competent.

The Court of Session Act 1825 (6 Geo. IV, cap. 120) enacts—Section 44—"And be it further enacted by the authority as aforesaid that when any judgment shall be pronounced by an inferior court ordaining a tenant to remove from the possession of lands or houses, the tenant shall not be entitled to apply as above by bill of advocation to be passed at once, but only by means of suspension, as hereinafter regulated."

The Sheriff Courts (Scotland) Act 1913 (2 and 3 Geo. V. cap. 28) enacts—Section 2—"In lieu of section twenty-eight there shall be inserted in the principal Act (7 Edw. VII. cap. 51) the following section:—28 (1) Subject to the provisions of this Act, it shall be competent to appeal to the Court of Session against a judgment either of a sheriff or of a sheriff-substitute if the interlocutor appealed against is a final judgment, or is an interlocutor—(*d*) Against which the sheriff or sheriff-substitute either *ex proprio motu* or on the motion of any party, grants leave to appeal. (2) Nothing in this section nor in section twenty-seven of this Act contained shall affect any right of appeal or exclusion of such right provided by any Act of Parliament in force for the time being."

James Stirling, Laurieston Hall, Kirkcudbright, *pursuer*, brought an action of removing in the Sheriff Court at Kirkcudbright against John Graham and Robert Graham, *defenders.*

The pursuer was the proprietor of the farm of Bargatton in the parish of Balmaghie and stewartry of Kirkcudbright, and the defenders were joint tenants of the farm.

On 7th July 1919 the Sheriff-Substitute (NAPIER) allowed a proof, and on the motion of the defenders allowed them or either of them to appeal to the Court of Session.

The defender John Graham appealed.

In the Single Bills the pursuer objected to the competency of the appeal, and argued—Any exclusion of appeal from the Sheriff Courts to the Court of Session existing as at 1913 was saved by the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), as amended by the Sheriff Courts (Scotland) Act 1913 (2 and 3 Geo. V, cap. 28), section 2. After a final decree in an action of removing the only competent method of review was by way of suspension—Judicature Act 1825 (6 Geo. IV, cap. 120), section 44; *Barbour* v. *Chalmers & Company,* 1891, 18 R. 610, *per*

Lord Adam at p. 614, 28 S.L.R. 446; *Campbell's Trustees* v. *O'Neill*, 1911 S.C. 188, 48 S.L.R. 115. The Judicature Act prescribed a special limited form of reviewing a final interlocutor in an action of removing. Consequently it could not be successfully argued that a more general method of review was open in the case of an interlocutor in an action of removing which was not final.

Counsel for the defender was not called upon.

LORD PRESIDENT — This is an appeal against an interlocutor of the Sheriff-Substitute at Kirkcudbright, dated 7th July 1919, allowing a proof to the parties. The competency of the appeal is challenged on the ground that the action in which the proof has been allowed is an action of removing, and that there is no appeal against a decree of removing. It appears to me that it does not signify what is to happen to the action after proof is led. If the Sheriff-Substitute has granted leave to appeal, then section 28 of the Sheriff Courts Act 1907, as amended by the Act of 1913, is directly applicable. It applies in terms to the case before us, and, if that is so, it appears to me that the Judicature Act 1825 does not apply. It is said that section 44 of the Act of 1825 constitutes a bar to procedure by way of appeal, but that section applies only where a decree of removing has been granted. Here we have no decree of removing, only an interlocutory judgment allowing proof, and therefore I think that the appeal is competent and that the case ought to go to the summar roll.

LORD MACKENZIE—I concur.

LORD CULLEN—I also concur.

LORD SKERRINGTON—I am of the same opinion.

The Court repelled the objection to the competency.

Counsel for Pursuer—Constable, K.C.—R. C. Henderson. Agents—Scott & Glover, W.S.

Counsel for Defender—Gentles. Agents—Baillie & Gifford, W.S.

Wednesday, November 5.

FIRST DIVISION.

[Lord Hunter, Ordinary.

CAMBO SHIPPING COMPANY, LIMITED (OWNERS OF THE S.S. "ROSSETTI") *v.* DAMPSKIBSSELSKABET CARL OF COPENHAGEN (OWNERS OF S.S "MAGNUS").

Ship—Evidence—Collision—Functions of Judge and Nautical Assessor.

Two ships collided on a very bad night. The collision was caused by the "Magnus," which was light, dragging her anchors and coming down on the "Rossetti," which was holding to her moorings. When the "Magnus" was dragging her anchors she had steam up but did not use it. By failure to use her steam she omitted to take a reasonable measure which might have avoided the accident. In an action for damages by the "Rossetti" against the "Magnus" the latter led evidence to the effect that the steam had not been used because those in charge of the "Magnus" did not and could not know owing to the darkness and the weather that they were dragging their anchors. That evidence was uncontradicted. The Lord Ordinary, without expressing any opinion as to whether he credited that evidence or not, accepted an opinion expressed by the nautical assessor to the effect that it would not have been difficult for those on the "Magnus" to know that they were dragging their anchors. He found the "Magnus" liable in damages. *Held* that it was for the Lord Ordinary and not for the nautical assessor to pronounce upon the trustworthiness of that evidence, and to say whether or not the master of the "Magnus" ought to have known when his anchor began to drag; and, on the ground that the evidence did not establish fault, the "Magnus" *assoilzied.*

The Cambo Shipping Company, Limited, owners of the s.s. "Rossetti," *pursuers*, brought an action against Dampskibsselskabet Carl of Copenhagen, owners of the s.s. "Magnus," *defenders*, concluding for £2000 damages in respect of the loss occasioned by the collision of the two ships in Lerwick Harbour. The defenders counterclaimed, and stated the damage to their vessel at £3515, 14s. 6d.

The pursuers *pleaded, inter alia*—"1. The pursuers having suffered loss and damage to the amount sued for through the fault or negligence of the defenders or those for whom they are responsible, are entitled to reparation therefor. 3. The defenders are not entitled to decree for their counterclaim or any part thereof in respect that (*a*) their averments in support thereof are unfounded in fact, and (*b*) any loss and damage suffered by them was caused or at least materially contributed to by their own fault and negligence."

The defenders pleaded, *inter alia* — "3. The said collision not having been caused by the fault of the defenders, they should be assoilzied from the conclusions of the summons. 4. The said collision having been caused or contributed to by the fault of the pursuers, the defenders are entitled to absolvitor. 5. The defenders' vessel having been damaged in said collision through the fault of the pursuers, the defenders are entitled to decree for the sum counter-claimed in name of damages."

On 12th December 1918 the Lord Ordinary (HUNTER), after a proof, found that the s.s. "Magnus" was alone responsible for the collision and continued the cause, granting leave to reclaim.

Opinion (from which the *facts* of the case appear): — "The question that has to be determined in this case is as to liability for