error by the fault or negligence of the other party.

What it is proposed to prove is that the fraction one-fifth was inserted in the agreement in place of 5 per cent., the true quantity. This was either a clerical or an arithmetical error, and is *prima facie* subject to correction. We know, for example, that a misnomer is always subject to correction, for on proof of the true name of the person or thing effect is always given to that proof. Then in deeds of conveyance arithmetical errors are subject to correction when it appears on the face of the deed that they are arithmetical errors. In such cases we do not vary the terms of the contract at all, but merely seek to give expression to the true contract as agreed to by the parties.

While I have a strong opinion that such a power of correction is inherent in the Supreme Court, the first step in the operation evidently is to ascertain the facts of the case, and the considerations raised by these facts. I concur with your Lordship that proof should be allowed.

LORD KINNEAR and LORD PEARSON concurred.

The Court recalled the Lord Ordinary's interlocutor *quoad* the second conclusion, and remitted to his Lordship to allow the parties a proof before answer of their respective averments, the defenders to lead, &c.

Counsel for the Pursuers (Respondents) — M'Lennan, K.C. — Mercer. Agent — D. Maclean, Solicitor.

Counsel for the Defenders (Reclaimers) —The Dean of Faculty (Campbell, K.C.)— Morton. Agent—John A. Tweedie, Solicitor.

Tuesday, May 28.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

NELSON AND SONS *v.* THE DUNDEE EAST COAST SHIPPING COMPANY, LIMITED.

Ship—Charter-Party—Breach—Obligation to Provide a Ship "with all Convenient Speed" with Option to Charterer to Cancel Contract after Certain Period—Right of Charterer to Cancel and also where Delay caused by Shipowners to Claim Damages.

By charter-party entered into between charterers and shipowners it was provided that "the s.s. 'Alice,' now trading and expected ready to load about 3rd March," . . . should, "with all convenient speed," proceed to the loading berth and there load. "In the event of . . . any mishap entailing delay in arrival at port of loading beyond seven days of her expected readiness, charterers to have the option of cancelling this charter. . . . Owners to have the option of substituting their s.s. 'Douglas' (sister ship)." The shipowners failed to provide either ship by the 10th of March owing to their conduct in having, subsequent to the charter-party, so chartered their vessels as to make it impossible for them to do so.

Held that as the shipowners had through their own fault failed in their obligation to provide a ship with all convenient speed, they were liable in damages.

Per Lord M'Laren—"If it could be shown that the shipowners had used their best endeavours and that the delay was due to unavoidable accident or perils of the sea, I should have been of opinion that no damages were due. The contract could be cancelled but damages would not be due, for each party would then be within his rights."

On 10th July 1905 Thomas Nelson & Sons, publishers, Parkside Works, Edinburgh, raised an action against the Dundee East Coast Shipping Company, Limited, registered owners of the steamships "Alice" and "Douglas," in which they sued for £44, 17s. 2d. as damages for breach of contract.

The following *narrative* is taken from the opinion of the Lord President—"This is an action of damages for breach of a contract of charter-party entered into between the pursuers, who are a firm of publishers in Edinburgh, and a firm of shipowners in Dundee, and the question turns on the true meaning of the charter-party. That charter-party provides— 'It is this day mutually agreed between Messrs R. Cairns & Company, Leith, agents of the s.s. "Alice" . . . now trading and expected ready to load about 3rd March 1905, and T. Nelson & Sons, Parkside Works, Edinburgh, freighters, that the said ship . . . shall with all convenient speed sail and proceed to a customary loading berth or berths as ordered at Leith,' and there load a cargo of paper in bales, and being so loaded shall proceed with her cargo to London. The charter-party further provides—'In the event of misrepresentation regarding steamer's size or position, or of any mishap entailing delay in arrival at port of loading, beyond seven days of her expected readiness, charterers to have the option of cancelling this charter.' I ought to mention this other clause—'owners to have the option of substituting their s.s. "Douglas" (sister ship).' Now what happened was this. By the 10th of March neither the 'Alice' nor the 'Douglas' was tendered, and as Messrs Nelson were under contract to send on paper which was urgently required in London, they shipped part of it by the ordinary line of steamers, and sent on the remainder by another boat, which by chance happened to belong to the same firm of shipowners. The damage sued for is the difference of freight between that of the 'Alice' and that charged by the ordinary line of steamers."

They pleaded, *inter alia*—"4. The pursuers having exercised the option of cancelling the charter, are not entitled to claim damages. 5. The defenders are entitled to absolvitor in respect that (1) the delay of the s.s. 'Alice' and 'Douglas' was due to circumstances for which they are not responsible under their said contract; (2) they tendered to the pursuers another vessel as condescended on."

On 28th March 1906 the Lord Ordinary (ARDWALL) after a proof, from which it appeared that while the "Alice" could at the time the contract was made have been made available, the defenders had so chartered both the "Alice" and the "Douglas" as to make it impossible for them to fulfil their obligation to the pursuers, decerned against the defenders for the sum of £33, 3s. 2d. in name of damages.

Opinion.—"This is an action of damages for breach of a contract of charter-party entered into between the pursuers of the one part and Messrs R. Cairns & Company as agents for the defenders of the other part.

"It will assist in construing the charter-party to advert to the circumstances under which it was entered into.

"In February 1905 the pursuers, in view of the facts that they were in course of printing and publishing a new encyclopædia in conjunction with Messrs Harmsworth of London, which was a work of an important character, and was expected to have a large sale, and that they had other material to send to London from time to time, thought that they would try what is called in the evidence the 'experiment' of sending these goods by a small steam vessel chartered for the purpose. They accordingly applied to Messrs R. Cairns & Company, shipbrokers in Leith, to furnish them with a vessel. The negotiations were carried out to a certain extent by telephone, and on 14th February 1905 Messrs R. Cairns & Company made an offer of a 'steamer 230 deadweight, loading 3/10 March, for £90, for cargo of paper in bales, Leith to London, cargo to be loaded in two days and discharged in two days.' The pursuers on 15th February accepted the offer, and this passage occurs in their letter—'We hereby accept your offer of steamer to carry 230 tons, loading March 9th and 10th, and discharging in two days in port of London.' The said letter further said—'It must be clearly understood that the ship must be put in a suitable condition for receiving a cargo of printed paper,' and on 16th February (for it seems that the 16th is the proper date and not the 15th as in the document itself), the charter-party was executed by the parties. Referring to that document, it is to be noticed in the first place that the vessel is stated to be expected to be ready to load about the 3rd March 1905, the words '3rd March 1905' being in writing. Further down the charter-party, and forming part of the printed form, this clause occurs—'In the event of misrepresentation regarding the steamer's size or position or of any mishap entailing delay in arrival at port of loading beyond seven days of her expected readiness, charterers to have the option of cancelling this charter.' I have no doubt, reading these two passages together, that on a sound construction of the charter-party it provides for the vessel being at Leith (which, in another part of the charter-party, is stipulated as the port of loading) at latest on the 10th of March. I have little doubt that the 3rd of March was written in as the expected date of readiness with the view of bringing the period of seven days in the printed clause, already quoted, to an end by the 10th of March. This is just what might have been expected after Messrs Cairns had received Messrs Nelson's letter, stating that the loading would take place on the 9th and 10th of March. A cancellation clause of the kind above quoted is frequently inserted in charter-parties in order to entitle a charterer, without fear of future questions, to cancel the contract on the occurrence of a specified event, whatever the cause of that event happening might have been, so as to prevent all questions afterwards arising as to his right to cancel or his possible liability for damage for improperly cancelling the contract. But the clause has also this importance in the present case that I think it makes it plain that the 10th of March was to be the latest date on which the steamer was to be put at the disposal of the charterers. The clause does not appear to me to derogate from the right of the pursuers to claim damages on account of the vessel not being forward by the 10th March, because what usually follows on the cancellation of a contract when either party has a right to cancel is that the party cancelling has his full right to claim such damage as he may sustain in consequence of the contract being cancelled, it being, of course, his duty to diminish that damage as much as possible. Apart from the terms of the charter-party, I think it clear that the parties, in point of fact, knew well enough that what was in contemplation was loading on the 9th and 10th of March, and that it was important that the goods should be in London in time . . . and there seems little doubt upon the evidence that Messrs Cairns & Company, with whom alone the pursuers transacted, knew that the pursuers for business reasons required the cargo to be in London on Monday the 13th of March. It is explained very fully in the evidence both of Mr Rintoul and Mr George M. Brown how important it was that the first number of the encyclopædia should arrive in London by that day, and how very anxious they were that no risks should be run regarding that number being in the hands of all retail dealers by the promised day of publication.

"The steamship chartered under the charter-party was called the 'Alice' and this clause was added—'That the owners have the option of substituting the s.s. "Douglas" (sister ship),' and, as above explained, in my view the contract between the parties as contained in the charter-party was that one or other of these vessels should be placed at the disposal of the pursuers for loading not later than the morning of the

10th of March, and I think I may add that it was within the contemplation of the parties, if not so expressed or implied in the charter-party, that she should be so placed on the morning of Thursday, March 9th. There can be no doubt that this contract was broken, whichever of these days is taken. On 25th February the pursuers notified Messrs Cairns that they would be ready to load either of the vessels, beginning on the morning of Thursday, March 9th, and on 8th March the pursuers telegraphed to Messrs Cairns to ask the earliest date when the 'Alice' or 'Douglas' could load at Leith. To this, upon 8th March, Messrs Cairns replied that the 'Douglas' was expected to be ready at Leith on Wednesday the 14th, or Thursday the 15th March, the 'Alice' about the 20th of March, and then they went on to say that another vessel the 'Marion' might now be ready at Leith on Saturday, 11th March, at noon. It appears from the evidence of the defenders themselves that, having apparently got offers of various other voyages for the 'Alice' and 'Douglas,' they paid no attention to having either of these vessels at Leith on the 9th or 10th of March. The 'Alice' was at Dundee on the 7th of March, but had to undergo repairs and did not leave Dundee until the 11th of March, and apparently by this time the defenders had chartered her to take a cargo of potatoes to Penzance, but in no view could she have been at Leith before the 13th. With regard to the 'Douglas,' she arrived in Dundee on the 28th of February, and in order to fill up time she was sent with a cargo of potatoes to Wisbech, and then the defenders took a charter-party from Stockton-on-Tees to Chatham, so that neither of these vessels was ever even tendered to the pursuers on or before the 10th of March. There is accordingly no doubt in my mind that the contract was broken, but it is said that the defenders tendered the pursuers the 'Marion.' If the pursuers had accepted that vessel there would have been a new contract, and the pursuers were not bound to enter into such. On 9th March, however, the pursuers wrote to Messrs Cairns that they must send some of their goods by one of the regular steamers from Granton to London, and hoped that they may be able to accept their suggestion to send the remainder of the goods by the 'Marion.' But on the same day Messrs Cairns wrote, saying that the defenders had written to them, stating that they 'would only put in "Marion," provided free of any stipulation or condition as to payment of difference of freight, &c., on parcel to be sent by liner, and later state that they are now fixing vessel for other business in view of the position you have taken up.' I am of opinion that this was not an offer which the pursuers were bound to accept, as in my view they were entitled, upon neither of the chartered vessels being forward on the 10th, to ship the goods that required to be in London on Monday by a liner, and to charge the extra expense against the defenders. Curiously enough, the pursuers afterwards chartered the 'Marion' from a broker other than Cairns, and as it turned out she did not arrive in Leith till Saturday the 11th of March at 6 a.m., started loading the pursuer's cargo on Tuesday the 14th of March, but owing to bad weather did not reach London till Saturday the 18th March at 10·15 p.m., and did not get the discharge of her cargo finished till Monday the 20th of March at 5 p.m. It is suggested, however, that if the pursuers had accepted the offer of the 'Marion' at once from the defenders through Messrs Cairns they might have got her off by the morning of Sunday the 12th so as to reach London on the 14th; but I may observe that this is only hypothetical, and I do not think it relevant, for the reason I have already stated, that the offer of the 'Marion' was made subject to a condition which the pursuers were entitled to reject. The defence stated in article 4 that the 'Marion' was ultimately chartered on the footing that no claims were to be made in respect of the breach of charter of the 'Alice' and 'Douglas' is disproved. The pursuers in that matter were not represented by Messrs Henry & Macgregor as their agents; on the contrary, they chartered the vessel from them as principals and paid them a higher rate than the defenders had charged to Henry & Macgregor. I make no comment upon the position of the latter firm in the matter, as it does not concern the present question.

"The defenders having failed to put either the 'Alice' or the 'Douglas' at the pursuers' disposal on 10th March, and it being perfectly evident from the information communicated to the pursuers by the Messrs Cairns that neither of these vessels could be at Leith in time to carry the pursuers' cargo to London by the time required, they formally intimated to Messrs Cairns on the 10th of March that as they had failed to provide a steamer in terms of the charter-party they had been forced to make other arrangements, and held them liable in damages. That the pursuers had a right to cancel the contract as they did by this letter is, as I have said, clear from the charter-party; and the next question is, what damages are due? With regard to that matter I am of opinion that the pursuers were entitled, in the circumstances, to send the first consignment of the Encyclopædia to London by the Granton steamer so as to be sure of its arriving on Monday the 13th. I do not think they were bound to run any risk with regard to this consignment. If they had, and more damage had followed, it might have been a much more serious matter for the defenders, and I may refer to the case recently decided in the House of Lords—*Ströms Bruks Aktie Bolag* v. *Hutchison*, (L.R.) 1905, A.C. 515—as an illustration of the nature of the damages that may be incurred in consequence of a breach of a charter-party.

"With regard to the remainder of the cargo, I think it is proved that the pursuers used all due diligence with the view of getting another vessel to take it. They

put themselves in communication with Messrs Henry & Macgregor, and first of all chartered a vessel called the 'Alliance,' but that charter having fallen through they accepted the 'Marion,' and this appears to me to have been the best thing they could do in the circumstances, and no blame can attach to them of undue delay or negligence in securing a vessel at a moderate rate to take the goods which they had purposed sending by the 'Alice' or the 'Douglas.' As it happens, the defenders got for the 'Marion' the freight they stipulated for under the charter party of the 'Alice, viz., £90. I have some difficulty as to the details of the damage, owing to the somewhat contradictory evidence regarding the respective carrying capacities of the 'Alice' and the 'Marion,' and the difficulty is increased by the fact that it appears from the evidence of Mr Wright, works manager to the pursuers, that the 'Marion' was not fully loaded; he says she might have loaded a little more, perhaps 6 tons, and they had carted down 16 tons more, but being anxious to get the vessel away before the closing of the docks, did not put any more on board. Now, if it is true that the 'Marion' and the 'Alice' were practically of the same carrying capacity, there is difficulty in holding that the 'Alice' could have carried 170 tons of paper, whereas the 'Marion' only carried 134. The evidence is insufficient to enable me to arrive at a definite result on this matter, but I think it is clear that the 'Marion' could have taken more paper than she did on board of her, and that the pursuers failed to load her fully. On the whole, I think justice will be done by disallowing to the pursuers the charge they make for the carriage of their own goods by the Leith steamer, amounting to £11, 14s., and by holding that they are entitled to be credited with the expense of sending the first number of the Encyclopædia by the regular London steamer, and the expense of sending the other goods by the 'Marion.' These two sums amount to £192, 1s. 8d., and deducting what would have been the cost of shipment per the 'Alice,' viz., £158, 18s. 6d., leaves the sum of £33, 3s. 2d. This represents the loss the pursuers have sustained through the defenders' breach of contract, and for this sum I will grant decree, but without interest, as this is an action of damages. The pursuers, of course, are entitled to expenses."

The defenders reclaimed, and argued—The respondents' right to cancel the charter-party was not disputed. What was disputed was their right to claim damages in addition. They were not entitled to do both—*Buttercase and Geddie's Trustee* v. *Geddie*, July 16, 1897, 24 R. 1128, 34 S.L.R. 844. There was no warranty to provide a ship, consequently there had been no breach of contract. If the vessel failed to appear on the 10th the charterers had the option of cancelling or waiting till it arrived. The maxim *expressum facit cessare tacitum* applied, and accordingly the remedy expressed, *e.g.*, cancellation, excluded all implied remedies, *e.g.*, claims of damages at common law. The reclaimers had not willingly failed to provide a ship; their failure to do so was due to bad weather, and was a "mishap" in the sense of the charter-party. They had offered a sister ship on the 4th March, and another on the 8th, but the respondents had declined to accept either, and were therefore themselves in breach of contract. The reclaimers being under no absolute obligation to provide a ship, and having done their best to do so, consistently with their other engagements, were not liable in damages. Reference was made to Abbott on Merchant Shipping, 14th ed., p. 418; *Shubrick* v. *Salmond*, 1765, 3 Burr. 1637; *Jackson* v. *The Union Marine Insurance Company, Limited*, 1874, L.R. 10 C.P. 125; and *Bentsen* v. *Taylor, Sons, & Company*, [1893], 2 Q.B. 274.

Argued for respondents—The Lord Ordinary was right. The reclaimers' breach of contract lay in their failure to proceed with all convenient speed. The object of the cancelling clause was to provide for a case of unavoidable delay, *e.g.*, accidents or perils of the sea, and assumed that the reclaimers would do their best to arrive in time. Such a clause was quite usual in short voyages, *e.g.*, in the coasting trade. *Esto* that it was an open question whether the charterers could cancel the contract and claim damages as well, where the shipowner had failed through no fault of his own; that question did not arise here, for the facts showed that the shipowner was in fault. No definite offer of the "Douglas" was ever made. There had been no "mishap" in the sense of the charter-party, for the reclaimers had deliberately disabled themselves from proceeding with all convenient speed by making other engagements for their vessels. To read the charter-party so that the shipowner was under no obligation to provide a ship at all (as the reclaimers contended), was inconsistent with mercantile usage, and absurd.

LORD PRESIDENT—. . . (*after narrative quoted supra*) . . . The Lord Ordinary has held that, reading the charter-party as a whole, the true construction is this—I quote from his opinion—"I have no doubt . . . that on a sound construction of the charter party, it provides for the vessel being at Leith (which, in another part of the charter-party, is stipulated as the port of loading) at latest on the 10th of March." I confess I have some difficulty in holding that there is an absolute obligation to provide a steamer by the 10th of March, but I agree that it was in the contemplation of parties that the steamer was to be ready on or about the 3rd, and that parties were not expected to wait after the 10th. But the matter truly depends on whether the owners have or have not fulfilled the contract by which they bound themselves to provide a ship "expected ready to load about 3rd March," and which should "with all convenient speed" proceed to the loading berth at Leith. There does not seem to have been

any case precisely the same as the present, but there are many cases in which the words "with all convenient speed" have been construed. They mean that the vessel is to proceed as soon as it can to its destination. If it is delayed by perils of the sea that would be a sufficient answer. If a definite date is inserted that of course speaks for itself. But the words here are "expected ready to load." That expression shows that the parties were well aware that the ship might not be ready on the 3rd of March, and it is for that reason that the second clause is put in, viz., that after the 10th of March the charterer might cancel the contract. The ship might not be ready through no fault of the owners; it might be delayed by accident or by stress of weather. That, however, does not alter the fundamental matter that the shipowner must do nothing on his part to prevent the ship being ready at the time mentioned.

Now, in his evidence, Nicol, one of the defenders, admits frankly that he so chartered the boats in question as to make it impossible for them to be there on the 10th of March. That seems to put him out of Court. We were told that this was an important case for those engaged in the coasting trade, but I cannot think that it is so, for nothing would be easier than to insert words declaring that the owners should not be liable in the event of their failure to provide a ship. I therefore think the Lord Ordinary is right, although I do not base my judgment on the same grounds. I base my judgment on this, that the shipowners by their own act put it out of their power to fulfil the contract. It is a case of simple breach of contract for which the other party is entitled to sue. I am therefore for adhering to the interlocutor reclaimed against.

LORD M'LAREN—The Lord Ordinary has given very moderate damages, limited to the actual difference of freight which the Messrs Nelson had to pay for that part of the cargo which had to be sent by the regular line of steamers. No question was raised as to the amount of the damages, but it was submitted by the reclaimers that no damages were due, in respect that the insertion of the clause giving an option to cancel came in place of the common law obligation to provide a ship or pay compensation. I do not think the clause was inserted for any such purpose. Under the known case law on this subject, where there is a general obligation to send a ship with all convenient speed, and circumstances have prevented her arrival, the question is a circumstantial one, whether the contract of affreightment may be rescinded. In the case of *Jackson* v. *The Union Marine Insurance Company, Limited* (L.R. 10 C.P. 125), which is a decision of the Exchequer Chamber and an important authority in mercantile law, it was so treated, even though in that case the ship had been a year late in arriving, the delay, however, being due to unavoidable accident. One of the five Judges who heard the case gave it as his opinion that the merchant, the charterer, was bound to wait till the end of the year, but the majority thought otherwise, on the ground that the object of the contract would be defeated or frustrated by such delay, and that the charterer was entitled to treat the contract of affreightment as broken. In such a state of the law it never could be ascertained except by proceedings in Court whether the object of the voyage had been frustrated, and whether the charterer was entitled to take another ship. That was not a very convenient rule in mercantile practice, and may have led to the insertion of clauses in charter-parties fixing the date beyond which the merchant was not bound to wait before chartering another ship.

Now, I take it that this cancelling clause has fixed a time beyond which the Nelsons were not bound to wait and to risk the disappointment of those with whom they were under contract to supply the paper. That, however, leaves untouched the question whether damages are due, and I agree that the liability depends on whether the shipowner has fulfilled his primary obligation to provide a ship with all convenient speed. If it could be shown that the shipowners had used their best endeavours, and that the delay was due to unavoidable accident or perils of the sea, I should have been of opinion that no damages were due. The contract could be cancelled, but damages would not be due, for each party would then be within his rights. In this case the shipowners sent each of the two named vessels on coasting voyages which could not be completed in time to admit of one of these vessels being put at the disposal of Messrs Nelson before the date prescribed when the charter might be cancelled; and when a shipowner fails by his own wilful act to do his best to provide a ship, I see no reason why he should not be liable in damages like any other person who is in breach of a contract.

LORD KINNEAR—I did not hear the argument and therefore give no opinion.

LORD PEARSON—The charter-party which we have to construe contains a clause which is said by the defenders to have been inserted by them in order to secure a special object. They are owners of several small coasting steamships, and they say that it is necessary for their profit that the ships should be in constant employment. Their case is that they refrain from tying themselves down to any specific day for arrival at the port of loading. In order to keep their hands free they use a form of charter-party which in their view contains no obligation at all to furnish a ship as part of the contract, but which confers on the charterers the option of cancelling the charter if no ship is tendered, or of waiting until it pleases the defenders to tender a ship. In this view these two alternatives exhaust the charterer's remedies, so that no room is left for a claim of damages.

I do not say that it might not be possible so to frame a charter-party. I suppose it could be done by an express clause that all claims of damages for late arrival or for

non-arrival at the port of loading are excluded, though whether the defenders would get merchants to hire the ships on such terms is another matter. Here, however, there is no such clause; and in the absence of it the Lord Ordinary has held that a claim for damages is not excluded by the clause as it stands, seeing that when read in connection with the opening words of the charter it imports in his view an absolute obligation to have the ship at Leith on 10th March at latest.

I think the question so raised is one of some difficulty, and I prefer the alternative case which was made for the pursuers, and which in my view affords the true solution of this dispute.

The contract must be read as a whole in order to see exactly what obligations it lays upon the shipowners according to its terms. The ship is described as "now trading;" and as the voyages were apparently confined to home ports, there could be no difficulty in forecasting the probable day of her arrival at the port of loading, which was Leith. Accordingly the contract declares that she is "expected ready to load about 3rd March"; and the owners undertake that she shall with all convenient speed sail and proceed to Leith, and there load as customary. The defenders dwell on the expression "expected ready to load about 3rd March," as if it left everything open, with the result that the charter is absolutely indefinite as to time, in the important matter of the commencement of loading. I do not say that the words amount to an undertaking that she will be ready to load on 3rd March, or even about 3rd March. But touching as they do a matter within the shipowner's own knowledge and control, they at least import in my opinion an assurance that the vessel was at the time in such a position that she might reasonably be expected to be in Leith ready to load by the day named. Now, although that assurance was well founded at the time it was made, and although the ship might with all convenient speed have proceeded to Leith in ample time, the defenders deliberately put it out of their power to fulfil the contract. If for any reason the "Alice" was not available, they had the option of substituting a sister ship. But as regards each of them it appears that the defenders interposed a new charter in such a way as to make it impossible for them to fulfil their contract with the pursuers with either ship. That of itself seems to me sufficient to infer liability in damages.

The Court adhered.

Counsel for Pursuers (Respondents)—Solicitor-General (Ure, K.C.)—Grainger Stewart. Agent—W. & F. Haldane, W.S.

Counsel for Defenders (Reclaimers)—Morison, K.C.—J. G. Jameson. Agents—Boyd, Jameson, & Young, W.S.

Friday, May 31.

SECOND DIVISION.

[Lord Dundas, Ordinary.

PHILP & COMPANY *v.* KNOBLAUCH.

Contract—Offer—Acceptance—Terms of a Letter which was held to Constitute an Offer—Terms of a Telegram which was held to Accept that Offer.

Where defender wrote, "I am offering to-day Plate linseed for January/February shipment to Leith, and have pleasure in quoting you 100 tons at 41/3, usual Plate terms. I shall be glad to hear if you are buyers, and await your esteemed reply," and pursuers telegraphed in reply "Accept hundred January/February Plate 41/3 Leith, per steamer Leith," *held* (*reversing* the Lord Ordinary, Dundas) that the letter did not merely give information of the price quoted, but was an offer to sell, and that the telegram in reply accepted this offer and concluded the contract.

Harvey v. *Facey* [1893], A.C., 552, *distinguished.*

Alexander Philp & Company, carrying on business at Oil Mills, Lower Largo, Fife, and Alexander Philp, the sole partner of the said firm, raised an action against Hugo Knoblauch, Baltic Street, Leith, in which they sought decree for £94, 4s. 7d., with interest thereon at 5 per cent. that sum being as they averred the difference between the price at which the defenders contracted to sell them 100 tons of Plate linseed, and the market price on 5th January when they received notice that the defender declined to perform the alleged contract

The correspondence between the parties was as follows:—

1. Letter, Defender to Pursuers.

"Leith, 28th December 1905.

"Dear Sirs,—I am offering to-day Plate linseed for January/February shipment to Leith, and have pleasure in quoting you 100 tons at 41/3, usual Plate terms. I shall be glad to hear if you are buyers, and await your esteemed reply.—Yours truly,

"Hugo Knoblauch.

2. Telegram, Pursuers to Defender.

"29th December 1905.

"Accept hundred January/February Plate 41/3 Leith, per steamer Leith.

"Philp.

3. Telegram, Defender to Pursuers.

"29th December 1905.

"Sorry 41/3 now useless; sellers ask to-day 42/6. "Knoblauch.

4. Letter, Defender to Pursuers.

"Leith, 29th December 1905.

"Dear Sirs,—I wrote you yesterday quoting 100 tons Plate linseed for January/February shipment to Leith at 41/3, usual Plate terms, and I am much obliged for your wire to-day *accepting* 100 tons. However, sellers to-day ask 42/6, and I wired you as follows:—Sorry 41/3 now useless; sellers ask to-day 42/6.—Yours truly,

"Hugo Knoblauch.