1, that "Where, upon an application for this purpose, it is made to appear to any Court or judge having authority under this Act [including by sec. 6 the Court of Session] that any Court or tribunal of competent jurisdiction in a foreign country before which any civil or commercial matter is pending is desirous of obtaining the testimony, in relation to such matter, of any witness or witnesses within the jurisdiction of such first-mentioned Court, or of the Court to which such judge belongs, or of such judge, it shall be lawful for such Court or judge to order the examination upon oath upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly." . . . By sec. 2 "a certificate by . . . a consul-general of a foreign power in London, that any matter in relation to which an application is made is a civil or commercial matter pending before a Court in the country he represents having jurisdiction in the matter so pending, and that such Court is desirous of obtaining the testimony of the witness to whom the application relates, shall be evidence of the matters so certified." . . .

This was a petition by Thomas Blair, notary-public in Dunfermline, setting forth that he had been instructed by the Consul-General of the German Empire to apply under this Act for the examination of two witnesses residing near Dunfermline on a civil or commercial matter pending before a German Court certified by the German Ambassador at the Court of Saint James to have jurisdiction.

The petitioner prayed the Court to order the examination of the witnesses referred to in the petition on oath before himself, and to grant an order for their attendance at a time and place named in the petition, and grant authority to cite them for that purpose.

The Lord President intimated that in a previous case of *Robinow*, the papers in which were before him, the Court had refused to grant the order for the witnesses to attend before a commissioner suggested in the petition, and had appointed the evidence to be led before the Sheriff-Substitute of the district in which the witnesses resided.

The Court appointed the evidence to be led before the Sheriff-Substitute at Dunfermline, and granted warrant to cite the witnesses.

Counsel for Petitioner—G. Wardlaw Burnet. Agents—Henry & Scott, S.S.C.

Saturday, July 14.

FIRST DIVISION.

GILMOUR'S TRUSTEES *v.* KILMARNOCK HERITABLE PROPERTY INVESTMENT COMPANY.

Public Company — Winding-up — Liquidator— Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 43.

Section 43 of the Companies Act 1862 provides for the keeping by a company registered under the Act of a register of mortgages, and for the entry of certain particulars relating to each mortgage granted by the company in such register, and further provides that if any property is mortgaged without such entry being made, every director, manager, or office-bearer, "who knowingly and wilfully authorises or permits the omission of such entry shall incur a penalty not exceeding £50." In a petition for the winding-up by the Court of a public company a creditor objected to the appointment as liquidator of a person of whose appointment all the other creditors and shareholders approved, the ground of objection being that he had while secretary of the company omitted to see to the entry in the register of mortgages of a heritable bond granted by the company before he entered office, and the entry of which had been omitted by his predecessor. The Court *repelled* the objection.

Observed (*per* Lord President) that in the circumstances the fault was trivial, and would not have inferred the statutory penalty.

The Kilmarnock Heritable Property Investment Co. (Limited) was registered under the Companies Act 1862 and 1867 in June 1874. Its objects were the acquiring for building purposes of land in or near Kilmarnock or elsewhere, borrowing money on the security of the capital or property of the company, lending money on heritable security, and in general the transaction of every kind of business transacted by building and property investment companies. The capital was £25,000 divided into £10 shares.

This was a petition by the trustees of the late Boyd Gilmour, creditors of the company to the amount of £4000, for the judicial winding-up of the company.

The petitioners set forth that the shareholders of the company had never exceeded seven in number, that two of these were now deceased, and of the other five three were bankrupt, and that nominal dividends only would be paid by their estates; that the business of the company had for some time been unprofitable, the profit and loss account showing a considerable loss.

The petitioners suggested an accountant in Glasgow as liquidator.

Answers were lodged for the company and David Broadfoot, accountant, who had for some time been secretary of the company, in which it was stated that in consequence of the state of the business it had been resolved prior to the presentment of the petition, by special resolution duly passed, to wind-up the company by voluntary liquidation, and that the respondent Broadfoot be appointed liquidator; that the resolutions had on 26th June (the day subsequent to the petition being served) been duly confirmed as required by the statutes. It was also set forth that the other creditors (of whom there were 15), whose debts amounted in all to £9935, did not concur in the petition.

Answers were also lodged for all the creditors, other than the petitioners, adopting the answers for the company.

Both sets of respondents submitted that the voluntary liquidation with the respondent Broadfoot as liquidator ought to proceed.

At the bar both parties consented to an order

directing the winding-up to proceed under the supervision of the Court.

The petitioners objected to the liquidation proceeding with the respondent Broadfoot as liquidator, on the ground—(1) That being engaged as inspector of poor in a populous district he was unsuitable for the office; and (2) that he had failed when secretary of the company to have registered in the register of mortgages a heritable bond for £2000 which had been granted by the company.

Section 43 of the Companies Act 1862 provides —"Every limited company under this Act shall keep a register of all mortgages and charges specially affecting property of the company, and shall enter in such register in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created, and the name of the mortgagees or persons entitled to such charge; if any property of the company is mortgaged or charged without such entry, as aforesaid, being made, every director, manager, or other officer of the company who knowingly and wilfully authorises or permits the omission of such entry shall incur a penalty not exceeding £50." It is thereafter provided by the same section that the register of mortgages shall be open to the inspection of the creditors or members at all reasonable times, and provision is made for penalties for refusal of such inspection and for an order on the company to afford it.

It was stated for the respondent Mr Broadfoot —(1) That he was engaged in business as a property agent and accountant in Kilmarnock, and was quite able to undertake the liquidation, being well aquainted with the property; (2) That he was not secretary at the time the bond referred to was granted, and that all that could be alleged against him was that he had not had the bond registered in the mortgage register after he came into office.

At advising—

Lord President—I do not think that any sufficient objection has been stated against the appointment of Mr Broadfoot as liquidator to continue the voluntary liquidation of this company under the supervision of the Court. The only thing which has been urged against him is that he omitted to enter in the register of mortgages the heritable bond for £2000 granted to Miss Finnie's trustees. Now, it is admitted that this bond was granted before Mr Broadfoot became secretary, therefore the duty of so entering it did not, in the first place, fall upon him, and all that can now be said against him is that when he became secretary he neglected to supply this omission. Now, I do not think that in these circumstances Mr Broadfoot would have incurred the penalty provided by the statute for failure to register under this 43d section, and indeed in his case the fault was a very trivial one. In other respects from all that has been stated I think that he is very well qualified for the appointment, as he has acted for three years as secretary of the company.

Lord Deas—No substantial objection to my mind has been stated against the appointment of Mr Broadfoot. From his business as a house-agent, and his acquaintance with the locality, I think he is particularly well suited for the office of liquidator of this company.

Lord Mure—For the various reasons which have been mentioned to us, I think the present secretary is the best man who could be appointed to act as liquidator. He knows all about this property, and also about the affairs of the company from his official connection with it, and I do not think that the mere circumstance of his omission when he became secretary to enter this bond on the register of mortgages should disqualify him from the office of liquidator.

Lord Shand—There can be no doubt of the importance of carefully performing the duty which from some cause or other was omitted here. The utmost care must be taken that the register of securities contains a full and accurate statement of all the transactions of the company, and nothing which we may decide in this case is to be held as diminishing the necessity of keeping up this register with the greatest regularity and care.

Mr Broadfoot's mistake here was in failing to supply what had been omitted by his predecessor, and I do not consider that sufficient to disqualify him from the office of liquidator.

The Court appointed the winding-up resolved on by the company to be continued subject to the supervision of the Court.

Counsel for Petitioner—Wallace. Agents—Bruce & Kerr, W.S.

Counsel for Respondents—Lorimer. Agents—Duncan & Black, W.S.

Tuesday, July 17.

SECOND DIVISION.

[Sheriff of Lanarkshire.

ROONEY *v.* J. & A. ALLAN.

Master and Servant—Reparation—Culpa—*Defective Machinery—Contributory Negligence.*

In an action by a labourer against his employers to recover damages for injury sustained by the breaking of a chain and the consequent fall of a heavy weight upon him, it was proved that the cause of the accident was the defective condition of the chain and that the pursuer had been at the time working immediately below the weight which fell, instead of working, as he might have done, in a place in which he would have been protected from the result of the accident which happened. *Held* that as he was entitled to rely upon the chain being of the proper strength there was no contributory negligence in his working immediately below the weight which fell, and that he was therefore not thereby disentitled to recover damages for the injury he had received.

Charles Rooney, quay labourer, Govan, raised this action against J. & A. Allan, shipowners, for £195, as damages for bodily injuries sustained through the fault of the defenders