tained. I am therefore of opinion that the Lord Ordinary's interlocutor ought to be recalled, as far, at least as these two votes are concerned.

The Court recalled the interlocutor of the Lord Ordinary and found that the resolution complained of in the appeal was not carried by a majority of the creditors entitled to vote ; therefore sustained the appeal and declared the said resolution to be invalid.

Counsel for Appellant — Trayner — Dickson. Agent—R. C. Gray, S.S.C.

Counsel for Respondents—Keir—G. Burnet. Agent—George Andrew, S.S.C.

Wednesday, February 28.

SECOND DIVISION.

[Lord Lee, Ordinary.

LIDDELL *v.* MACKENZIE, *et e contra.*

Shipping — Charter-Party, Construction of — "Commencing on 8th of September, at which Date Vessel to be Ready—Breach of Contract— Measure of Damages.

A salvage contractor who had contracted to salve a vessel which had run ashore chartered a tug for the purpose. Under the charter-party the tug was hired "for the towing of a vessel off the rocks" for the period of four weeks, "commencing from the 8th September, at which date the vessel is to be at the disposal of the charterer." The tug, owing to delay on the part of the owner, did not start till after 2 p.m. on the 8th September, and in consequence the charterer lost the opportunity of salving the vessel. *Held* (1) that there was an obligation on the owner under the charter party to have the tug at the charterer's disposal from the commencement of the 8th September, and that the owner was liable in damages for the delay ; and (2) that the measure of damages was the loss occasioned by the failure to salve the vessel, since the tug-owner had notice of the purpose for which she was wanted.

On 6th September 1881 Æneas Mackenzie, a salvage contractor at Stornoway, entered into a contract with Captain Stephens of the London Salvage Association, who was acting for the underwriters of the "Tolfaen," a steamer which had gone ashore and was lying on the rocks at Longa Island, Gairloch, for the salving of the vessel. Mackenzie undertook to send a tug for the purpose of towing that steamer off the rocks on Thursday 8th or Friday 9th September 1881, and to provide pumps and other necessary materials for salving her. On the other hand, Stephens undertook to pay him £300 if the attempt to salve the "Tolfaen" were unsuccessful, £600 if successful, and £50 if the "Tolfaen" were floated off or broken up before his arrival with the tug and apparatus on one of these days. In order to take the steamer off the rocks and tow her to a safe berth Mackenzie required to charter a steam-tug, and before completing the salvage contract he on the 6th September 1881 directed Messrs Mackenzie Brothers, shipbrokers, Stornoway, to telegraph on his behalf to Messrs J. Milligen & Co., shipbrokers, Glasgow, in the following terms:—"Want offer handy paddle-tug for salving purposes, fortnight, month, option charterer, owner supplying *all except coals.* State speed, consumption, fuel, size, bunkers. Wire instanter." Messrs Milligen & Co. on the receipt of the telegram applied to William Liddell, manager of the New Clyde Towing Company, who offered to charter to them, as representing Mackenzie, the paddle-tug "Commodore," the hire to be at the rate of £50 a-week, the charter-party to be drawn up in Government form. Messrs Milligen & Co. thereupon sent the following telegram to Messrs Mackenzie Brothers, dated 6th September 1881:—"Offer paddle-tug fifty pounds week, Government form, steams ten miles, consumption about 7 cwts. hour, bunkers hold fifty tons, time counts leaving Greenock till returned there, ready to-morrow ; wire." In reply to said telegram Messrs Mackenzie Brothers telegraphed to Messrs Milligen & Co. as follows:—"Will accept tug represented your telegram; fifty pounds week; if employed month, charterer's option, forty-five pounds week; must leave to-morrow morning, arriving here not later Thursday morning; supply sufficient coal; bring steamer here subject your immediate confirmation per wire to-night." This telegram, which was received on the morning of the 7th September, was communicated by Messrs Milligen & Co. to Liddell, and was read by him. Liddell in reply dictated to a partner of the firm of Messrs Milligen & Co. to the effect that if the steamer were kept a month the terms would be £47, 10s. a week, payable weekly in advance, and that a steamer was ready to leave. Messrs Mackenzie Brothers telegraphed back on the same day to Messrs Milligen & Co. as follows:—"Accept tug; fifty pounds week, if kept month forty-seven pounds ten. Despatch immediately ; wire sailing. Pass cash-order on us for week's hire. Forward charter." On the same day they sent another telegram stating that the tug was wanted to carry a steam-pump, and to tow a vessel off rocks at Gairloch, and act as a despatch boat, and telling them to hurry her away with all speed. On the afternoon of the 7th Milligen & Co., in consequence of a communication from Liddell, telegraphed that "tug 'Commodore' is coaling ; will leave Greenock to-night about midnight." Messrs Milligen & Co. instructed Liddell to supply the "Commodore" with coals as directed in a telegram of the 6th telling them to supply sufficient coal. All the telegrams received by Milligen & Co. from Mackenzie Brothers were communicated to Liddell.

A charter-party was drawn up on 7th September between Liddell and Messrs Milligen & Co. as representing Mackenzie, the charterer. By the charter-party it was provided, *inter alia*, "That the said vessel or steamer, being tight, stanch, and strong, and in every way fitted for the voyage or service, and so maintained by owners, with a full complement of officers, seamen, engineers, and firemen adapted to a steamer of her class, shall be placed under the direction of the said charterer or merchant, or his assignees, to be by him or them employed for the conveyance of lawful merchandise as follows:—To carry steam-pumps, &c., and tow vessel off rocks at Gairloch, and to act as despatch boat, and do

what is required consistent with safety as may be ordered by the charterers, the cargoes to be laden or discharged in any dock or other safe place the charterers may order. The said steamer is let for the sole use of the said charterers, and for their benefit, for the space of one and/or four weeks at charterer's option, commencing from the 8th September, at which date the vessel is to be at the disposal of the charterers at Greenock. . . . The captain shall use all and every despatch possible in prosecuting the voyages, and the crew are to render all customary assistance in loading and discharging. The captain to sign bills of lading as presented without prejudice to this charter-party, to follow the instructions of the charterers, or their assigns or consignees, as regards loading, discharging, and departure. The coals for the steam-engines shall be supplied by and at the cost of the charterers, as also all port and dock charges, pilotage and extra labourage that may be required in addition to the crew for loading and discharging, the owners finding all ship's stores, paying crew's wages, and necessary stores for the engine-room, that is, oil, tallow, and waste, also dunnage and insurance on ship. The freight for the use of the said steamer shall be as follows, viz.—£50 sterling per week, or £47, 10s. sterling per week if kept one calendar month, payable weekly in advance until the vessel is again returned by the charterers, he or they having previously given not less than four day's notice."

On the 7th September Liddell proceeded to put coal on board the tug, but the loading was not finished till two p.m. on the 8th. The reason for this delay was that Liddell accepted an engagement to tow a steamer up the Clyde on the evening of the 7th after 35 tons of coal had been put on board, and while the remaining 15 were lying in a lighter at the side of the tug. The "Commodore" then left Greenock between two and three o'clock on the afternoon of the 8th for Stornoway, and meeting adverse tides in the Sound of Mull and in the narrows between Skye and the mainland she did not reach Kyleakin till eight o'clock p.m. on the 9th, where the captain anchored for the night, not judging it safe to proceed on the voyage. The circumstances of this delay are fully explained in the note to the interlocutor of the Lord Ordinary. She arrived at Stornoway on Saturday the 10th at two p.m. On her arrival at Stornoway the "Commodore" was at once sent to Gairloch and arrived at the place at which the "Tolfaen" had stranded at 12·50 on the morning of the next day, when the captain found the "Tolfaen" had been got off with other assistance and been beached. He entered into a new contract for towing her to Gairloch, and thence after some repairs to Liverpool.

Mackenzie raised this action against Liddell for the sum of £400, which he averred he had lost through his inability to fulfil the salvage contract, that sum being the amount of the estimated profit on the contract, under deduction of the profit from the new contract. The pursuer averred that the defender had represented to Messrs Milligen & Co. that the "Commodore" could steam at the rate of ten miles an hour, and that she would be ready to leave Greenock on the 7th September, and also that she consumed 7 cwt. of coal per hour, and that her bunkers could hold fifty tons of coal. The agreement to charter the tug had been entered into by the pursuer on the faith of these representations, and for the purpose of fulfilling the salvage contract. The coals could have been and ought to have been loaded not later than the afternoon of the 7th September, and the tug ought to have been ready to leave Greenock not later than midnight of that day. The delay in her despatch was caused solely by the fault of the defender. In consequence of the late hour for starting, the tug found the tides unfavourable, and further delay was thereby caused. She was not capable of steaming ten miles an hour, and the anchoring at Kyleakin was an unwarranted deviation. The tug ought to have arrived at Stornoway not later than Friday morning the 9th.

The defender averred that by the charter-party the coals for the tug were to be supplied by and at the cost of the charterers, but the defender received instructions from pursuer's agents to ship the necessary coals on the charterer's behalf, and they were shipped with all possible despatch. The anchoring in Kyleakin was necessary for the safety of the vessel, and the voyage was thereafter prosecuted with all despatch. He denied that he had ever authorised the use of the tug for the voyage to Liverpool, which he maintained to be in breach of the charter-party.

The pursuer pleaded—"(2) The defender having induced the pursuer to charter the said tug by means of the said misrepresentations, and the pursuer having suffered loss and damage through having acted in reliance on the said misrepresentations, the defender is liable in damages as concluded for. (3) The defender having failed to implement the obligations undertaken by him in said charter-party, is liable in damages as concluded for."

The defender pleaded—"(1) The action is irrelevant, and ought to be dismissed. (2) The pursuer is not entitled to found on alleged representations by the defender made prior to said charter-party, so far as inconsistent therewith. (3) The defender having implemented the obligations incumbent on him under the said charter-party, is entitled to absolvitor, with expenses." (4) The pursuer having sustained no loss or damage for which the defender is responsible, the defender should be assoilzied."

An action was subsequently raised at Liddell's instance against Mackenzie for certain sums as compensation for the use to which the tug had been put in breach of the charter-party, with the result, as he averred, of damaging it, so that it required various repairs. He also concluded for £25 as part of the hire unpaid, the price remaining of coals supplied by him, and for freight in lieu of three days' notice that the employment was to terminate, he only having received one day's notice, while the charter-party stipulated for four. In all he claimed a sum of £164.

The actions were conjoined.

A proof was taken in the conjoined actions, the import of which fully appears in the note which the Lord Ordinary subjoined to his interlocutors.

The Lord Ordinary (Lee) pronounced this interlocutor:—"Finds (1) In the conjoined actions, that on 7th September 1881 the pursuer Mackenzie, through his agents Milligen & Company of Glasgow, in terms of the charter-party, contracted with the other pursuer William Liddell for the hire of the steam-tug 'Commo-

dore,' belonging to the said William Liddell, at the rate of £50 per week, commencing 8th September 1881, with the alternative therein mentioned, and for the purpose therein specified; and finds that, according to a sound construction of the contract, the said William Liddell undertook that the vessel should be for the use and benefit of the charterers, and at their disposal, on the whole or any part of the 8th September, and engaged that the captain should use all and every despatch in prosecuting the voyage: (2) In the action at the instance of Æneas M. Mackenzie, finds that the defender Liddell wrongfully failed to put the said steam-tug to the uses of the pursuer until near noon upon the 8th September, and to perform his contract that despatch should be used in the prosecution of the voyage: And finds that, in consequence of the said non-performance of the contract, the pursuer Mackenzie suffered loss and damage to the amount of £250, for which sum decerns against the defender Liddell: (3) In the action at the instance of William Liddell, finds that the pursuer consented to the said steam-tug being made available for the towage of the steamship 'Tolfaen' from Gairloch to Liverpool, and that he is not entitled to compensation therefor beyond receiving the benefit of the defender's earnings by said towage contract, in reduction of the damages caused by the pursuer's non-performance of the stipulations of the charter-party.—[*By subsequent findings his Lordship brought out a balance due by Mackenzie to Liddell of* £94, 5*s.* 4*d.*] Further (4) in the conjoined actions decerns against the said William Liddell for the sum of £250, under deduction of the said sum of £94, 5s. 4d.: Finds the said Æneas M. Mackenzie entitled to expenses, under deduction of the expenses, subject to modification, incurred by the said William Liddell in the action at his instance.

"*Note.*—"The facts of this case appear to me to be well ascertained.

"By the terms of the charter-party entered into by the defender with the pursuers' agents, Milligen & Company of Glasgow, the defender undertook to let the steam-tug 'Commodore' for the sole use of the charterers, and for their benefit, for the space of one or four weeks at the charterers' option, 'commencing from the 8th September, at which date the vessel is to be at the disposal of the charterers at Greenock.' The purpose for which the tug was wanted was disclosed, and was stated in the charter-party as follows:—'To carry steam-pumps, &c., and tow vessel off rocks at Gairloch, and to act as despatch boat, and do what is required consistent with safety, as may be ordered by the charterers; the cargoes to be laden or discharged in any dock or other safe place the charterers may order.' And the defender undertook that the captain should 'use all and every despatch possible in the prosecution of the voyages.' The vessel was to be fitted in every way for the service, and so maintained by the owners, with a full complement of officers, seamen, engineers, and firemen, and was to be placed under the direction of the charterers. The coals for the steam-engine were to be supplied by and at the cost of the charterers, and the hire was to be £50 per week, or £47, 10s. per week if kept one calendar month, 'payable weekly in advance until the vessel is again returned by the charterers, he or they having previously given not less than four days' notice.' It was also provided that 'in the event of loss of time by deficiency of men, collision, want of stores, break down of engines or machinery, or the vessel becomes incapable of steaming for more than twenty-four running hours,' payment of hire was to cease until such time as she was again in an efficient state to resume her voyage.

"Considering the purpose for which the vessel was wanted, I think that the charterers, according to the fair construction of this contract, were entitled to expect that the vessel should be at their disposal at Greenock at any time upon the 8th of September which they might specify with the acquiescence of the defender. And if the history of the contract, as disclosed in the telegrams, be examined, this view of it is in my opinion amply confirmed. It appears to me, however, that the only purpose for which it is necessary to look into the history of the contract is to ascertain the instructions which were given and accepted with regard to placing the vessel at the disposal of the charterers, and despatching her from Greenock to Stornoway.

"Upon this point I think that the evidence shows very clearly that the defender received and accepted without objection instructions that the vessel should leave during the night following the 7th September. His telegram to his agent, dated two o'clock on the 7th (after the acceptance of his offer had been received), says, '"Commodore" fixed for Stornoway job, wanted to leave to-night,'; and the witness Slater of Milligen & Co. swears that his telegram to Stornoway of 4·32 on the afternoon of the 7th was despatched in consequence of the communications which passed between him and the defender when the charter-party was signed. 'Tug "Commodore" is coaling. Will leave Greenock to-night about midnight.' I hold it not proved that there was anything for which the pursuer was responsible to prevent the coaling being completed and the tug ready for starting in accordance with the instructions so accepted. This conclusion I reach even on the assumption that the charterers' agents were parties to the misunderstanding which seems to have existed as to filling up with coals, and not merely supplying sufficient coal to take the vessel to Stornoway. For the evidence satisfies me that the whole fifty tons of coal might without difficulty have been put on board that evening but for the directions which appear to have been given by the defender in his telegram to his agent of two o'clock. The coal was already on board the lighter, and thirty-five tons of it were shipped on board the tug that afternoon.

"In point of fact, the tug did not start for Stornoway until after two o'clock p.m. of the 8th. Meeting adverse tides in the Sound of Mull, and in the narrows between Skye and Inverness-shire, she did not reach Kyleakin until near 8'clock in the evening of the 9th. There, although almost quite through the straits, the captain anchored. It was, he says, a dark night, and perhaps he was justified in anchoring until the weather should clear, which it seems to have done at midnight. But he was scarcely justified in allowing some of his crew to go ashore until five o'clock in the following morning. The result was that the tug did not reach Stornoway until two o'clock on the 10th, when, in consequence of the tide being low,

he was unable to get into the quay to take on board the steam pumps.

"The voyage to Stornoway in consequence occupied about forty-eight hours instead of thirty-six, which is proved to be the time within which in ordinary good weather, such as she had, the tug might be expected to accomplish it.

"The result was that the pursuer on his arrival with the tug at Gairloch found the ship which he was employed to tow off the rocks already removed; and as his contract provided that he should receive only £50 if the ship was floated off or broken up before his arrival, he lost the profitable part of his bargain, which would have yielded him £600, and he was able only to make a new bargain for towing her off the beach to Gairloch, and then, after repairing her temporarily, taking her to Liverpool.

"Now the question raised in this action is, whether the defender is responsible for the loss thus occasioned; and if so, what is the amount of the damage?

"I am of opinion that the defender, having notice of the purpose for which the tug was wanted, was under a special obligation to use all possible despatch, and is liable in damages if loss was occasioned by his non-performance of the contract. The case was not one in which the pursuer could have rejected altogether the services of the tug, for he had authorised the defender to despatch her from Greenock without making the precise hour a condition of the contract, and he was not in a position to prove that the object of the charter-party had been entirely frustrated by the defender's delay. The pursuer's only remedy was an action of damages for non-performance of the contract.

"Now, it appears to me to be proved that there was about twelve hours' unnecessary delay in starting, and that for that delay the defender was to blame. It may not have been his fault that more coal was put on board than was required by the instructions of the pursuer. That mistake may have originated with Mr Slater. But if the instructions received had been attended to there was nothing to prevent a full supply of coal being taken on board in plenty of time to enable the tug to start soon after midnight. The cause of the coaling not being completed on the afternoon of the 7th appears quite plainly upon the face of the defender's telegram. He desired the tug to be employed upon another job first: 'Wanted to leave to-night, get "Commodore" partly coaled, fill up after towing Captain here' (viz., to Glasgow), 'am pressing him up to-night.' I do not say that the defender was not entitled to use the tug for another job that evening. But I think that, having accepted instructions such as I have mentioned he was bound to take care that no interruption in the coaling or other preparations necessary to enable him to fulfil these instructions should be interposed by himself in such a manner as to defeat these instructions. What occurred in consequence of his telegram was that neither the coaling nor the other job was completed that night. The coaling was stopped after taking on board thirty-five tons during the afternoon of the 7th, and although the other fifteen tons must have been in the lighter alongside, it was then stopped for the other job. But that job was also put off till next morning, and the coaling was not completed for six or eight hours afterwards, viz., at two o'clock in the afternoon of the 8th. I think it impossible to doubt that the defender is responsible for that delay, and that delay of itself is sufficient in my view to account for all the subsequent loss of time which occurred on the voyage to Stornoway.

"If it were necessary to consider the delay at Kyleakin as the sole cause of detention, I should be slow to hold the defender responsible for the captain having thought fit to come to an anchor at that place. Being past the worst and narrowest portion of the Sound, it is possible that he might have gone on. But he was entitled to exercise his discretion. It was for him to judge, in the interests of the vessel and crew, whether he could go on with safety; and so long as he used his discretion reasonably and in good faith I do not think that there could be any failure to use despatch within the meaning of the charter-party. But it was clearly a mistake on his part to allow any of his crew to go ashore with leave to remain absent till five o'clock next morning. He was bound to contemplate the possibility of the weather clearing, as it did at midnight, sufficiently to enable him to proceed on his voyage. Had he started when the weather cleared, the evidence is that the tug might have reached Gairloch by two o'clock on the afternoon of the 10th, and in time to fulfil the pursuer's contract with Captain Stephens. On the whole, however, my opinion is that, assuming the delay at Kyleakin to have been justifiable on the part of the captain, it would not have occurred but for the pursuer's failure to despatch the vessel in proper time from Greenock.

"I must therefore hold the defender liable in damages.

"With regard to the question of amount, I have gone over the authorities referred to at the debate, and it appears to me that this is one of the cases where the object of the contract was disclosed, and necessarily involved special damage, as being within the contemplation of the parties. To tow a vessel off rocks is a work of urgency. Every tide is of importance. Failure to perform such a contract towards the owners of the stranded vessel might lead directly to a total loss. Failure to implement the contract towards a salvage contractor (and it was known that the tug was wanted for salving purposes) seems to me to involve special damage of the same kind. It must be presumed to have been in the contemplation of the defender that as the tug was not wanted merely for ordinary towage, or merely as a despatch boat, the damage which would be caused by non-performance of the contract could not be measured in that way. It must have been within his contemplation that his non-performance of his contract might cause a failure to tow the vessel off the rocks. The charter-party distinctly suggested this, and the previous telegrams had warned him of it.

"The question therefore is, What was the loss suffered by the pursuer? He did not lose his contract entirely, for he got the £50 which was payable in the event of the vessel breaking up or being floated off before his arrival. But I think he lost the balance of £600, less the expenses, and under deduction of any earnings which he made under the new arrangement with Captain Stephens, and for which the tug was available to

him. The defender disputes that the tug was available under the charter-party for that purpose; and it was scarcely disputed that such a long towage contract as from Gairloch to Liverpool was not justifiable without consent, which is said to have been given. But if it be assumed that the tug was available to enable the pursuer to perform the new contract which he made with Captain Stephens, I think that the loss, instead of being about £500, would be reduced to about £250. For he was thereby enabled to make £500 at an additional expense of not more than £250, viz.—

For additional hire of tug and extra coal, say .	£100	0	0
For expense of repairs on ship, wages, and services, say	150	0	0
	£250	0	0

"Now, I think that the defender must be taken to have consented to the towage to Liverpool, although it was not within the original charter-party. This was conceded. He says that he only consented subject to an extra charge for the hire of the tug. But it appears to me that he has no interest to insist on that condition, as it would only diminish the amount of the pursuer's earnings from the use of the tug in connection with salving purposes, of which earnings the defender is to receive the benefit in the shape of a deduction from the damages."

Liddell reclaimed and argued—(1) On a sound construction of the charter-party, the defender fulfilled his legal obligation when he put the vessel at the pursuer's disposal at two o'clock on the 8th of September. The pursuer's construction of the contract was false and unnatural. As long as the obligation was fulfilled on any part of the 8th--at any time before the 8th elapsed--the terms of the charter-party were implemented—*Campbell* v. *Strangeways*, November 23, 1877, 3 L.R., C.P. Div. 105. Any delay in starting from Greenock was caused by the pursuer instructing the defender to put coals on board the tug, these instructions being only given on the afternoon of the 7th. In point of fact no more time was taken off the 8th than was given him by taking in coal on the 7th. There was no delay during the voyage to Stornoway. (2) But assuming that the charter-party was so ambiguous as to require construction, it was not competent to refer to the telegrams which passed between the parties prior to the charter-party to clear up the ambiguity—*vide Inglis* v. *Buttery & Company*, November 3, 1877, 5 R. 58, and March 12, 1878, 5 R. (H. of L.) 87. The most favourable view of this case for Mackenzie was this—Where certain words occur both in the telegrams and in the charter-party, if it can be clearly shown that the words used in the telegrams are the same as those used in the charter-party, then it might be competent to refer to the former to clear up the ambiguity of expression in the latter. In the present charter-party none of the words to be construed were to be found in the telegrams.

Mackenzie replied—The fair reading of the charter-party was that the vessel was to be put at his disposal at the commencement of the 8th. It was no answer to say that he was responsible himself for the delay in starting. If his instructions had been properly attended to a full supply of coal might have been loaded in plenty of time to enable the tug to start soon after midnight. The true cause of delay lay with the defender, who took another job for the evening of the 7th. But (2) assuming ambiguity in the wording of the charter-party, it was quite competent to refer to the telegrams as showing the intention of the parties in making it — *vide* Lord Blackburn in *Inglis* v. *Buttery & Company*, 5 R. (H. of L.) 102. They showed that the pursuer's construction of the charter-party was the one which the parties had in view before it was executed.

At advising—

Lord Craighill—Two actions are before us, one at the instance of Mackenzie, the other at the instance of Liddell. The Lord Ordinary has given judgments in both, but that in Mackenzie's action has alone been submitted to review. In the other both parties have acquiesced.

In this action, damages are sued for, the grounds on which these are claimed being, first, that the steam-tug "Commodore" which was chartered to the pursuer under the charter-party libelled was not put at the pursuer's disposal as early as was provided for by the contract; and second, that after it was placed at the pursuer's disposal, the master, in consequence of his delay at Kyleakin, did not use all and every despatch possible in the prosecution of the voyage. The result as alleged is that the purpose of the voyage was frustrated, the gain which would have accrued was not earned, and thus the loss for which special damages are here claimed was suffered by the pursuer. Those questions have been dealt with by the Lord Ordinary, and I concur in his views of the case.

The first question for consideration is, When was the steam-tug chartered to be at the disposal of the pursuer under the charter-party? Three answers to this question have been suggested, one by the pursuer, and two alternatively by the defender. The first is that the stipulated time was twelve a.m. of the 8th September; and this is the pursuer's contention. The second is twelve a.m. of the 9th, or otherwise any period in the course of the 8th, at and after which a considerable or a reasonable portion of the 8th was still to run. These alternatively are the views of the defender. As between the pursuer's and the first of the defender's readings of the charter-party, the former, I think, should be adopted, because, in the first place, it harmonised better with all that is expressed. "From the 8th September" is an ambiguous expression undoubtedly; for consistently with ordinary use of the word, it may mean from the beginning so as to include the whole, or from the termination so as to include no part of that day. But it appears to me that this ambiguity is cleared up by the words "at which date" that immediately follow. At a date or at a time means from the period when the date or time begins to run. As so used it contrasts with "on." A thing that is to happen on day or date, may occur at any time within the day or date, but when the occurrence is to happen at a date or at a time, this means, as I think, the opening of the specified period. If the time covered by the contract had been set forth as beginning at a specified hour on the 8th, the beginning of the hour, and not its close, would, according to common usage, have been the term at which the period would have begun to run. At

an hour means the beginning of an hour, and so by parity of reasoning at a date means the beginning of that date. This results from the distinction between "at" and "on."

My second reason for choosing the pursuer's rather than the first of the defender's readings is that the conduct of the defender immediately after the charter-party was signed, supports not that for which he now argues, but the pursuer's interpretation. The tug was at the pursuer's disposal from the 8th, not by way of favour, but as matter of contract. This may have occurred in time or out of time for due fulfilment, but whichever of these alternatives may be the true one, it shows at least that in the view of the defender when the contract was concluded the term was to begin before the close of that day.

The next question is, whether the pursuer's reading or the alternative reading of the defender is the true construction, and I think that the former is what should be adopted. The words employed indicate, as I think, not that the terms begin in the middle or at any time intermediate between the commencement and the close of the date, but the contrary. Were the defender's interpretation to be taken, there would be given to the word "at" the meaning of the word "on." These two words are not synonyms. The meaning of the one indeed is a contrast to that of the other. The tug therefore ought in my opinion to have been at the disposal of the pursuers not later than the beginning, or what in a reasonable sense was the beginning, of the 8th September.

But the defenders on this assumption argue that credit must be given for the time occupied in taking coals on board on the evening of the 7th and forenoon of the 8th, as the first use in the contemplation of the parties which could have been made of the vessel after it came to be at the disposal of the pursuer was to put coals on board. What might have been the answer to the question thus raised had the intention of the parties not been shown by their conduct after the charter-party was signed may be matter of speculation, but there is no need in the circumstances to come to any decision on the point. The fact that the loading was begun and nearly completed on the evening of the 7th points to the conclusion that to be at the disposal of the pursuers at the time specified in the charter-party meant that the tug should then be ready to start upon her voyage. The coals were no doubt to be supplied by and at the cost of the charterers, but the loading, as arranged, was to be provided for and conducted by the defender, and the term at which the start could take place was, for anything that appears, not to be later than it would have been had the coals, like other necessaries for the tug, been to be supplied by and at the cost of the defender.

But even the opposite view would not free the defender from fault, because six hours at most was all that was required for coaling. Thus, beginning at 12 a.m. on the 8th, the full quantity, 50 tons, could have been shipped at 6 a.m., whereas it was not till half-past 2 p.m. that the tug left Greenock. Had those eight and a-half hours been spent on the voyage the night's detention at Kyleakin would have been avoided, and the tug would have reached Gairloch in time for the work on which she was to be employed, and the loss for reparation of which the defender is sued could not have been incurred. The conduct of the defenders is to be explained by the unfortunate circumstance that they took a new job, which cast up after the contract with the pursuer had been concluded. They were thus led to endeavour to fulfil both engagements, and the result is that they have broken their contract with the pursuer, and incurred the liability for the consequences of which the present action has been instituted.

Much argument was offered from the bar upon the question whether and to what extent the telegrams passing between the parties prior to the signing of the charter-party could be used in determining the import of the charter-party. Upon this, however, I deem it unnecessary to offer an opinion, because my interpretation of the contract has been reached without reference to those communications. That they may be looked at for the purpose of ascertaining the surrounding circumstances can hardly be disputed, though the nature as well as the extent of the benefit to be derived may be matter of controversy. It is at least as clear that they may not be referred to for the purpose of discovering the intention of parties, or, in other words, of giving a colour to the language of the contract other than what it will bear according to its usual and natural interpretation. The case of *Buttery* v. *Inglis*, 5 R. 98, was referred to for the opinions of the learned Lords who took part in its decision. The opinion of Lord Cottenham in moving judgment in the case of *Forlong* v. *Taylor's Executors*, 1838, 3 Shaw & Maclean, 177, appears to me to be also well worthy of consideration; since its date it has always appeared to me to be the leading authority on this subject.

Neither on the delay at Kyleakin, nor on the question as to the amount of damages to be awarded, do I think it necessary to offer more than a single observation, agreeing as I do in what the Lord Ordinary has said on these subjects. But on the former I remark that if the tug had left Greenock at or soon after 12, or even soon after 6 a.m., the detention at Kyleakin would have been avoided, because the time of her arrival there would have been broad day. For these reasons, as well as those given by the Lord Ordinary in support of his judgment in the conjoined actions, I am of opinion that we ought to adhere to the interlocutor of the Lord Ordinary.

Lord Young—I think if I had been following my own individual judgment here I should have arrived at a different conclusion, and thought that the charter-party here was implemented according to its terms. The ship being hired for four weeks commencing on the 8th September, and the coals to be supplied by and at the cost of the charterer, I should probably, following my own judgment, have arrived at the conclusion that that was fulfilled by sending off the vessel at two o'clock, especially as the order to fill up with coals, that is to say, to put in more coals than were in it the night before, was only given on the Thursday morning. There was a question between the pursuer and his agents as to whether the vessel was to be filled up with coals or not, or only so many to be put on board as could take her to Stornoway, where she might get more coals belonging to the pursuer there. But undoubtedly the pursuer's agent — contrary, the

pursuer says, to his instructions, or to his understanding, or to what he meant to instruct—ordered the vessel to be filled up, and that was done, and the vessel was sent off at two o'clock.

As, however, the Lord Ordinary has arrived at another conclusion upon the facts, and your Lordships agree in that conclusion, I feel that I am entitled, and in a manner bound, to defer—sacrificing my own judgment—to that large amount of opinion the other way, especially as the question is undoubtedly one on which there may legitimately be a difference of opinion. Therefore I do not dissent.

Lord Rutherfurd Clark—I also had considerable difficulty in this case; but I do not dissent from the judgment.

Lord Justice-Clerk—I concur entirely in the opinion of Lord Craighill, excepting the passage in regard to the previous communings. That is a doubtful question at any time, and in this case I do not think they aid the charterer of the vessel, but rather the reverse. On the whole matter, however, I concur.

On the question of the amount of damage it was then argued for Liddell—The amount of damage awarded by the Lord Ordinary was, in any view, excessive, on the following grounds:—(1) The damage sued for was not proved to have been sustained by the alleged breach of contract. Even if the tug had started from Greenock at 12 a.m. on the 8th of September—which might be said to be the defender's extreme obligation—it could not have reached Gairloch in time to fulfil the salvage contract between the pursuer and Captain Stephens. (2) In any event, the defender was only liable for nominal damages. He had no knowledge of the contract between pursuer and Captain Stephens for the loss on which he was sued, nor of the value and position of the "Tolfaen," nor of the difference which a few hours' delay might make. The loss sustained by the pursuer was not thus within reasonable contemplation of both parties at the time when the charter-party was entered into. In order to make the defender responsible the pursuer should have taken him into his confidence. It was contrary to the English cases cited below to make him in these circumstances liable in special damages—*Hadley and Another* v. *Baxendale*, February 23, 1854, 23 L.J., Exch. 179; *Horne and Another* v. *Midland Railway Company*, February 7, 1873, 8 L.R., C.P. 131; *Sandars and Others* v. *Stuart*, May 10, 1876, L.R., 1 C.P. Div. 326; Mayne on Damages, 33.

The Court adhered.

Counsel for Reclaimer—J. P. B. Robertson—Dickson—Salvesen. Agent—Thomas M'Naught, S.S.C.

Counsel for Respondent—Trayner—Thorburn. Agents—Boyd, Jameson, & Kelly, W.S.

Thursday, March 1.

FIRST DIVISION.

ERSKINE AND OTHERS *v.* WATSON AND PARK.

Process—Mandatory—Expenses.

A mandatory who withdrew from a cause prior to decree being pronounced, *held* liable for the expenses ultimately decerned for in favour of the opposite party, down to the date of his withdrawal.

This was an action of reduction of the trust-deed and settlement of Thomas Walker, fishcurer, Fraserburgh, which was raised at the instance of Mrs Helen Erskine and Archibald Walker against the trustees and executors appointed under the said settlement, and John King, farmer, Strichen, Aberdeenshire. Shortly after the action was raised the pursuers had to leave the country temporarily, and a mandatory was sisted on 3d February 1882. By minute, dated 1st November 1882, the mandatory withdrew from the cause on account of the return to this country of the principal pursuers. The case was thereafter tried before a jury, who found for the defenders. Thereafter, on the motion of the defenders, the verdict was applied, and they were found entitled to expenses. Thereafter the defenders moved for approval of the Auditor's report, and for decree against the pursuers and also against the mandatory down to the date of this minute of withdrawal. The motion was objected to on behalf of the mandatory, and it was maintained for him that he was not liable for any part of the expenses incurred to the defenders, because he had withdrawn by minute from the case six weeks prior to decree being obtained.

Authorities—*Renfrew* v. *Brown*, June 7, 1861, 23 D. 1003; *Nelson* v. *Wilson*, Feb. 13, 1822, 1 Sh. 290.

Argued for defenders—The mandatory was conjunctly liable along with the principal pursuers for all expenses incurred up to the date of the minute by which he withdrew from the process. A mandatory until he withdraws is just in the position of a party to the cause *quoad* the expenses.

Authorities—*Martin* v. *Underwood*, June 8, 1827, 5 Sh. 730; *Anderson* v. *Bank of Scotland*, Jan. 22, 1836, 14 Sh. 316; *Barclay* v. *Barclay*, July 16, 1850, 12 D. 1253; *Cairns* v. *Anstruther*, Nov. 15, 1838, 1 D. 24; *Chapman* v. *Balfour*, Jan. 8, 1875, 2 R. 290.

At advising—

Lord President—The mandatory must in this case be held liable for all expenses which have been incurred down to the date of the minute intimating his withdrawal from the cause, but not for any expenses incurred subsequent to that date. I think that this principle has been assumed in several of the cases to which we were referred, particularly the case of *Anderson;* and indeed it does not require direct authority, but arises from the nature of the position of a mandatory in a cause. It can make no difference in that position that the principal parties to the cause have returned to this country, for had they not so returned, and had