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

the first mandatory desired to retire, another mandatory would necessarily have been sisted in his place, and it would not vary the result that the second mandatory becomes liable for the whole expenses from the first. What the mandatory really undertook was liability for the expenses of process during the time that he acted in that capacity. He can prevent himself incurring liability for future expense by withdrawing from the process, but he cannot by so withdrawing escape liability for the expenses incurred while he acted as mandatory.

Lord Deas—I never heard it doubted that a mandatory was liable for the expenses incurred up to the date of his withdrawing from the action.

Lord Mure—I agree with your Lordships in holding that the mandatory must be held as liable conjunctly and severally with his principals for all expenses incurred during the time that he remains a mandatory, and that he cannot be freed from this liability merely by lodging a minute and withdrawing from the cause.

Lord Shand—If the mandatory had only undertaken to represent his principals at such times as their presence might be necessary, or at the close of the case, then there might have been a good deal of force in Mr Dickson's argument; but a mandatory really becomes a party to the cause, and although he can retire if he so desires, he still remains liable for the expenses incurred during his connection with the case.

Counsel for Mandatory—Dickson. Agent—R. C. Gray, S.S.C.
Counsel for Defenders—Keir. Agent—John Gill, S.S.C.

Thursday, March 1.

FIRST DIVISION.

[Sheriff of Forfarshire.

FLEMING *v.* JAFFRAY.

Process—Cessio bonorum—*Bankruptcy—Bankruptcy and Cessio (Scotland) Act* 1881 (44 *and* 45 *Vict. cap.* 22), *sec.* 11.

Where the Sheriff had, in the exercise of the discretion given him by the above Act, granted the benefit of *cessio* to a bankrupt, a creditor appealed to the Court of Session for the purpose of having the benefit of *cessio* refused and sequestration awarded. *Held* that the statute had vested in the Sheriff a discretionary power, and no good reason had been shown for the interference of a Court of Appeal in the circumstances.

The Bankruptcy and Cessio (Scotland) Act 1881 provides by section 11—"If in any proceedings under the Cessio Acts, where the liabilities of the debtor exceed the sum of £200, it shall appear to the Sheriff that it is expedient, having regard to the value of the debtor's estate, and the whole circumstances of the case, that the distribution of the estate should take place under the provisions of the Bankruptcy Acts, he shall have power forthwith to award sequestration of the estates which then belong, or shall thereafter belong, to the debtor." . . .

John Wright Jaffray, engineer, Albert Square, Dundee, presented a petition in the Sheriff Court of Forfarshire at Dundee praying the Court "to grant warrant for the requisite intimation or citation, and thereafter on resuming consideration of the petition, and advising the whole cause, to find that the pursuer is entitled to the benefit of the process of *cessio bonorum*, and to grant decree accordingly, and to appoint such person as the Court shall think proper to be trustee." . . . This petition was presented by the bankrupt at the request of George Worrall, Dundee, at whose instance he was made notour bankrupt, and at the request also of other creditors.

The petitioner pleaded—"The pursuer being notour bankrupt within the meaning of the Debtors (Scotland) Act 1880, is entitled to the decree of *cessio bonorum* prayed for."

The Sheriff-Substitute (Cheyne) granted warrant to cite the creditors of the petitioner, and ordained him to appear for public examination, and to lodge a state of his affairs, all in terms of the statutes.

The state of affairs showed the liabilities to be £647, and the assets (deducting preferable claims) £501.

On 19th December 1882 the Sheriff-Substitute, after examining the pursuer, and considering the whole process, and in respect that no objection was offered, granted him the benefit of *cessio bonorum*, and assigned and adjudged his whole moveable property to Daniel M'Intyre, accountant in Dundee, as trustee for behoof of the creditors.

One of the creditors given up in the petitioner's statement of affairs was the firm of Anderson & Co., who held a promissory-note for £36. Mr A. G. Fleming had in September 1882 guaranteed this sum, and he subsequently paid the debt. Anderson & Co. were given up as creditors in the list lodged by the bankrupt, but not Fleming, the bankrupt not being aware that Fleming had paid it. Fleming appeared in the proceedings subsequently to the date of the interlocutor of the Sheriff-Substitute, and on 27th December 1882 appealed to the Sheriff against the interlocutor granting *cessio*.

On 15th January 1883 the Sheriff (Trayner) issued the following interlocutor:—"The Sheriff having considered the reclaiming petition, together with the whole process, adheres to the interlocutor appealed against, and dismisses the appeal.

"*Note.*—The prayer of the reclaiming note is that I should refuse *cessio* and grant sequestration. Looking to the extent of the bankrupt's estate, as shown on the state of affairs, I think it would be extremely unfair to subject the bankrupt and his creditors to the expenses of sequestration when the same practical benefit can be obtained by all concerned under the less expensive process of *cessio*. I have accordingly refused to grant the reclaimer's motion. The reclaimer complains that he was not called as a party to the petition for *cessio*, and I think this would have been a serious matter if the petitioner had known that the reclaimer was a creditor when the petition was presented. It is not said, however, that he knew this, and from his petition it appears that he gave up William Anderson & Co. as his credi-