appellate Court which decides that the judgment of the inferior Court should be affirmed would be, I should have thought, an untenable position even for the ingenuity of the counsel who supported the grounds of reduction.

Now, if the Lord Ordinary here exercised his jurisdiction, the only remaining question is whether the Court has any power to review his judgment. If the judgment was not final it might be reclaimed. We are told that a reclaiming-note was lodged, but that it is sisted because it was thought incompetent. As its competency is not before us I express no opinion upon it. But we are asked to consider this question on the assumption that the reclaiming-note is incompetent. But on that assumption the present action of reduction is obviously just as incompetent, because what it asks us to do is to substitute our reading of the statutory provision for that adopted by the Lord Ordinary. That is just asking us to review the judgment of the Lord Ordinary on its merits. It is true that the merits of the judgment are not the merits of the whole process, because what the Sheriff and Lord Ordinary have decided is that they cannot enter into the merits of the appeal from the Presbytery, because intimation of that appeal was not given in time. But the merits of these judgments is just what we are asked to consider in this reduction. We are asked to substitute our reading of the statutory provisions as to intimations of appeals for that adopted by the Sheriff and the Lord Ordinary. Therefore I agree with your Lordship that what we are asked to do is to review what was done finally by the Lord Ordinary, and that we have no power to do so. I do not consider our position with regard to the judgment of the Sheriff, because, as I have said, we cannot reach it until the judgment of the Lord Ordinary has been got rid of.

I think, in addition, that the case of *Stirling & Sons* v. *Holm and Others*, 1873, 11 Macph. 480, to which the Lord Ordinary refers, is much nearer the present case than any of the authorities cited for the reclaimer. That was a case where the question was whether the decision of a statutory court of two judges, for the purpose of valuation appeals, was open to reduction in the Court of Session. The Lord President there says—"Whether I should have been disposed to take that course or not if I had been sitting as one of the judges under the statute I am not prepared to say, but I am quite clear of one thing—that we have nothing to do with the matter any more than if this were a complaint that the Court of Justiciary had pronounced a wrong judgment, or had gone out of their way and violated their own form of process or their act of adjournal. I think these two judges sitting under this statute are just as much a Supreme court as we are sitting here, that their jurisdiction is absolutely privative, and that no other judge or Court in the realm can interfere with questions arising under the Valuation Act." Applying these observations to the position of the Lord Ordinary under the present statute, his Lordship is just as much a Supreme Court in matters arising under the statute as this Court is in matters which come under our jurisdiction. The question which has been argued as to the power of the Supreme Court to restrain any special statutory tribunal within the limits of its statutory jurisdiction, even although no appeal lies against an erroneous judgment within the jurisdiction, does not appear to me to arise. The Sheriff has a special jurisdiction conferred upon him by the statute. But it is not a privative jurisdiction. An appeal lies to this Court. But the statute prescribes that this appellate jurisdiction shall be exercised by the Lord Ordinary, and that his judgment shall be final. It follows that we cannot review his Lordship's judgment without violating the statute.

The Court adhered.

Counsel for the Pursuers and Reclaimers —Campbell, K.C.—A. J. Young—Chree. Agents—W. & F. Haldane, W.S.

Counsel for the Defenders and Respondents — C. N. Johnston, K.C. — Cullen. Agent—Peter Macnaughton, S.S.C.

Saturday, November 1.

FIRST DIVISION.

[Sheriff Court of Forfarshire.

BARRIE *v.* CALEDONIAN RAILWAY COMPANY.

Expenses—Unsuccessful Party Found Entitled to Expenses—Action of Damages—Railway Company—Conduct of Successful Party Causing Action—Refusal to Allow Servants to be Precognosced.

B consigned cattle to a railway company under a contract whereby, in respect of their being carried at a reduced rate, the company was to be liable only for the wilful misconduct of their servants. The cattle were injured in an accident which was not due to such misconduct. No information of the accident was given to B by the company, but having heard of it he wrote on 19th February and claimed damages in respect of the injuries sustained by the cattle. No answer was given, and on 4th March B wrote again threatening to raise an action. The company replied on 9th April denying liability, in respect of the contract-note. A correspondence followed, in the course of which B asked and was refused permission to precognosce the company's servants. B raised an action of damages on 14th August, Before the record was closed he again asked for and was refused permission to precognosce the company's servants. The proof was fixed for 8th November, and on 21st October the defenders wrote asking for the names

of those of their servants whom the pursuer wished to precognosce, and offering to give him an opportunity of doing so in the presence of their agents. B replied that he did not know the names of the witnesses, and refused to agree to the defenders' condition. The Sheriff-Substitute, after a proof, assoilzied the defenders, and found neither party entitled to expenses. The pursuer appealed on the question of expenses to the Sheriff, who found him entitled to expenses. The defenders having appealed, *held* that the pursuer, although he was the unsuccessful party, was entitled to expenses, upon the ground that the conduct of the defenders was the cause of the action—*diss.* Lord M'Laren, who was of opinion that neither party should be found entitled to expenses.

On 5th February 1901 George Barrie, cattle-dealer, High Street, Brechin, consigned to the Caledonian Railway Company seventeen cattle for conveyance from Careston Station to Glasgow. The cattle were consigned and accepted for carriage under a contract whereby they were to be conveyed at a reduced rate, while the sender agreed to relieve the Company from liability for loss, damage, misdelivery, delay, or detention, except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the Company's servants. A truck containing nine cattle while being shunted at Forfar was overturned and a bull had one of its legs broken and had to be killed. The carcase was sold by the Company for the sum of £16, 7s. 9d. Some of the other cattle were said to have been injured. They were delivered in Glasgow on the following morning, but no account of the accident was given to Mr Barrie.

On the 19th of February his Brechin agents wrote to the Secretary of the Company the following letter:—"Dear Sir,—Our client Mr George Barrie, cattle-dealer here, on Tuesday the 5th inst. booked seventeen cattle from Careston Station to Belgrove, Glasgow. There were eight cattle in one waggon and nine in another, and they left Careston about 2 P.M. The cattle did not arrive in Glasgow till after 2 A.M. the following morning. Eight cattle were in such a state that they were unable to stand up and one bull was amissing. Our client has never been informed by the Railway Company what happened to the cattle. He has since found out, however, that the waggon containing the nine cattle was upset on entering Forfar Station, and that the roof had to be sawn off the truck before the cattle could be extricated. That such an event should have happened and no notice given to the consigner is, we submit, a perfect disgrace, especially in the case of a railway company of the standing of the Caledonian Company. We are instructed to claim £25 for the bull which was not delivered, and £3 per head on the eight cattle damaged—in all £49, and we are definitely instructed, if this sum is not paid within ten days, we are to raise an action in the Court of Session.—We are, dear Sir, yours faithfully, SHIELL & DON. The Secretary, Caledonian Railway Company, Glasgow."

No answer was returned to this letter, and on 4th March Mr Barrie's agents wrote to the Company's goods manager—"Dear Sir,—Referring to our letter of 19th ulto. last, we shall now be glad to hear what you intend to do, as we have definite instructions to prosecute at once.—Yours faithfully, SHIELL & DON. Arch. Hillhouse, Esq., 302 Buchanan Street, Glasgow."

On 9th April the Company's goods manager wrote as follows:—"Dear Sirs,—With further reference to your communications regarding Mr George Barrie's claim of £49, I take it the claim refers to a consignment forwarded from Careston Station on the 5th February last by Messrs Reid and Barrie, consigned to them at Glasgow, Belgrove Station, and if so, I regret to find the animals met with a mishap on the journey, but in view of the owner's risk-contract I consider my Company relieved from liability for your client's claim. The bull, on account of having its leg broken, had to be slaughtered, and the carcase was disposed of, realising the undernoted amount—Hide and tallow, net proceeds, £1, 1s. 9d.; Carcase, net proceeds, £15, 6s.—Total, £16, 7s. 9d.—which amount I am prepared to hand over to you on behalf of your client on receiving payment of the carriage, (£5, 9s. 6d.), which was not paid over to the North British Railway Company. In the circumstances I shall be glad to hear that the claim has been withdrawn.—I am, yours truly, ARCH. HILLHOUSE. Messrs Shiell and Don, Solicitors, Brechin."

Mr Barrie's agents in reply wrote that they were instructed to raise an action without delay.

Mr Barrie's Forfar agent, in whose hands the case had been put, having been informed by the Company's station-agent at Forfar that the Company did not allow their servants to be precognosced without the sanction of their solicitor, wrote to him on 16th July:—"Dear Sir,—I have instructions regarding a claim by George Barrie, cattle-dealer, Brechin, against the Company for damage to a number of cattle at Forfar Station while in transit to Glasgow. I wished to get full information as to the cause of the occurrence before doing anything, but find that all the witnesses are in the Company's service. Will you please give the necessary instructions to allow me to precognosce the men engaged in the shunting operations when the accident took place. An early answer will be esteemed a favour. I may mention that my instructions come from Shiell and Don, solicitors, Brechin, agents for Mr Barrie, and with whom I suppose you have already been in communication about the claim.—Yours faithfully,

CHAS. M'NICOLL."

On 18th July the Company's solicitor replied:—"Dear Sir,—Referring to yours of the 16th, I beg to inform you that the Company cannot agree to your precognoscing

their servants, at least at this stage of matters. With regard to the last paragraph of your letter, I have not received any communication in the matter from Messrs Shiell and Don, You are, however, correct in your understanding that the Company dispute not only the amount of the damage claimed but also the liability. I presume that you are aware that the Company are protected by the special signed contract which they hold for the carriage of the cattle in question at a reduced rate and at the risk of the owner.—Yours truly, *for* H. B. NEAVE, THOS. A. GENTLES, *Assistant Solicitor.*"

On 14th July Mr Barrie raised an action in the Sheriff Court at Forfar, in which he craved decree against the Company for payment of £49 as damages for the injuries sustained by the cattle.

The defenders pleaded that the cattle had not been injured by the misconduct of their servants, and that they were accordingly not liable, and tendered the amount offered by them in the letter of 9th April.

The case was ordered to the roll for closing the record on 5th September, and on the 17th the pursuer's agent again wrote asking for permission to precognosce the defenders' servants, but was informed by the defenders' agents that their solicitor "instructs us in the meantime to refuse your request."

The record was closed on October 17th, and a proof fixed for November 8th.

On 21st October the defenders' agents wrote as follows:—"Dear Sir,—The Company's solicitor instructs us to get from you the names of the Company's servants whom you wish to precognosce, and that he will then give you an opportunity of doing so. He further states that he wishes you to take the precognition in our presence. —Yours faithfully, W. & J. S. GORDON."

On 25th October the pursuer's agents replied:—"Dear Sirs,—I duly received your letter of 21st instant. Beyond the pointsman, whose name I am told is Cowie, I do not yet know which of the servants of the Company can give evidence. This is the direct result of their refusal to allow inquiry. I must, however, have the necessary facilities for precognoscing witnesses and examining the *locus*, and unless the Company is to allow that I shall enrol the case for next Thursday and bring the matter before the Court. The stipulation that the precognitions be taken in your presence is most unreasonable, and will certainly not be agreed to.—Yours faithfully, CHAS. M'NICOLL. Messrs W. & J. S. Gordon, Solicitors."

No further correspondence took place, and a proof was taken, the import of which, so far as necessary for the present question, appears sufficiently in the opinion of Lord Adam, *infra.*

The Sheriff-Substitute (LEE) found that the injury to the pursuer's cattle was not caused by the wilful misconduct of the defenders' servants, and assoilzied the defenders, bnt found no expenses due to or by either party.

The pursuer acquiesced in the decision of the Sheriff-Substitute on the merits, but appealed to the Sheriff on the question of expenses.

The Sheriff pronounced the following interlocutor:—"Adheres to the interlocutor appealed against so far as it finds in fact and in law: Assoilzies the defenders, and to that extent refuses the appeal: *quoad ultra* sustains the appeal, and recals the interlocutor appealed against: Finds the defenders liable to the pursuer in the expenses of process," &c.

The defenders appealed, and argued—The appeal was only on the question of expenses, but it involved a point of principle, and was accordingly one which the Court should decide. The position taken up by the defenders all through had been perfectly legitimate. They had never withheld information, and had never refused permission to precognosce their servants. The pursuer on the contrary had refused to avail himself of the opportunity given to him. If he had not been in the wrong before he had certainly put himself so by that refusal. The defenders had been successful on the merits, their conduct had been quite reasonable, and had not been the cause of the litigation, which had been thrust upon them by the pursuer, and there was accordingly no reason why they should be mulcted in expenses.

Argued for the respondent—Unless in the case of an obvious miscarriage of justice the Court would not interfere with the judgment of the Sheriff on a question of expenses—*Bowman's Trustees* v. *Scott's Trustees*, February 13, 1901, 3 F. 450, 38 S.L.R. 537. There were two classes of cases in which a successful party might be mulcted in expenses—(1) Where there had been an offer before the raising of the action to pay, or do, or abstain from doing, practically all that the Court ultimately ordered to be paid or done, or not to be done—*Hamilton* v. *Alexander*, November 15, 1827, 6 S. 58. (2) Where all the facts were outwith the knowledge of one party and within that of the other, who improperly refused to disclose them, thereby causing the expense of litigation, he would, though successful, be found liable for the expenses caused by his improper conduct—*A B* v. *C D*, March 2, 1839, 1 D. 610. This case fell under the second class. It was the defenders' duty in the first instance to give the pursuer due information of the accident, and thereafter to allow him to precognosce their servants. But for their unreasonable conduct the action would never have been raised.

LORD ADAM—This is an appeal from the Sheriff Court of Forfarshire solely upon the question of expenses, and the expenses awarded in this case were certainly in a very singular position. The Sheriff-Substitute took the view that in consequence of the actings of the defenders, the Railway Company, although they were entirely successful in the action, should not be entitled to the expenses of the process. He assoilzied the defenders, but found them

not entitled to expenses. The case was appealed to the Sheriff but upon the expenses only, not upon the merits, and really when the facts came out there came to be no question at all in the case upon the merits. The Sheriff took a different view from the Sheriff-Substitute as to expenses. He took the view that not only was the conduct of the defenders such as to preclude them from being awarded their expenses in the case, but he found the defenders liable to the unsuccessful pursuer in expenses, and that is a very unusual thing to do. The ground, as I understand, on which the Sheriff took that view was that the expenses occasioned in this case were entirely occasioned by the actings of the Railway Company; that if the Railway Company had acted as they ought to have done no action would ever have been brought. As soon as two witnesses were put into the box, who for the first time disclosed in the Court the true facts of this accident, the pursuer we are told immediately gave up the case and there were no further proceedings, leading to the inference, which is not unfounded, that if the full facts had been inquired into by the pursuer before bringing the action no action would ever have been brought. That is the ground upon which the Sheriff has decided this case in this somewhat unusual way.

Now, of course an appeal on the ground of expenses is not very common, but I must say that this does raise a question of principle on which this Court would be quite right in expressing their own views without at all interfering unduly with the discretion of the presiding Judge before whom the case came in the first instance. It will be observed that this is not a question of the conduct of the defenders during the course of the trial, whereby their conduct led to expenses being incurred. It depends upon the construction and meaning and effect of a correspondence which took place between the parties, and their actings before and during the getting up of the case for trial. That is a case in which the Court would be entitled to apply their minds and to say whether the course adopted by the Sheriff was a right or a wrong one. After reading the correspondence and hearing all that counsel have said, I think that the Sheriff was right.

Now, it will be remembered that the goods were loaded at a station called Careston, and on their journey to their place of destination were injured by an accident at the station at Forfar. A collision took place, with the result that one bull was killed and several cattle were said to have been injured. Now, I think that it was the duty of the Railway Company as carriers to give information to the owners of the cattle as to the cause of this accident. The Sheriff held, and quite correctly held, that these cattle had been taken under a risk note which absolved the Railway Company from liability, as I understand, unless there had been direct misconduct on the part of one of their servants for whom they would have been liable. Well, that was a ground of liability still existing against the Railway Company, and I think that if they were asked to do so they were bound to give information as to how the accident occurred and as to how their customer's cattle and property had been used. Unfortunately I think that is the first mistake that has been made in the case. The pursuer did not take the proper course, because he made some inquiries himself, and having got some information he goes to his agents, and his agents write on the 19th of February 1901. I need not read that letter at length. It shows that he had got information about the accident to some extent. But then the agents, instead of asking for full information and proper information on the matter, write—"We are instructed to claim £25 for the bull which was not delivered, and £3 per head on the eight cattle damaged, in all £49, and we are definitely instructed, if this sum is not paid within ten days, we are to raise an action in the Court of Session." Now, as Mr Clyde and Mr Deas said, that was not asking for information. It was stating that information had been got, and that as the result of such information the pursuer intended to raise an action. The agents do not seem to have got any answer to that letter for some time at any rate, and wrote again on the 4th of March. But then on the 9th of April 1901 they got the information from the Railway Company as to where and when the accident had happened, and what had become of the bull which was never delivered, that its leg had been broken and the carcase had been disposed of, and that a sum of £16, 7s. was in their hands awaiting the pursuer. Up till that time I do not see any particular blame to be attached to the Railway Company. That was in April 1901, and there the matter rested for a while. The action was raised on the 14th of August of the same year. Now, what influences my mind is what took place between the first correspondence and the raising of the action. It passed from the hands of the original agents who had written to the Railway Company and who are in Brechin, and was put into the hands of a Mr M'Nicoll, an agent at Forfar. He had this case put into his hands, and he goes and makes inquiry of the Railway Company, and this is the evidence which he gives of what took place—"When I was instructed in this case I proceeded to make inquiries." This is before the action is raised. "I went to Mr Irons, station-master at Forfar, and told him that I wished to make inquiries amongst the Railway Company's servants. Mr Irons told me"—this is the station-agent at Forfar where the accident happened, and therefore the proper man to whom to apply—"Mr Irons told me that I need make no attempt to do so unless I got permission from the Company's solicitors. He told me that the Railway Company did not permit their servants to be precognosced without the sanction of their solicitors. Up to that time I had been unable to dis-

cover who any of the servants in the shunting-yard were. The two yardsmen's names I have only discovered to-day." That is the day when the proof was going on. "In consequence of what Mr Irons told me I applied to the Company's solicitors, and the correspondence that passed subsequently is in process. On Tuesday last I was informed again by the Company's solicitors in Forfar that they still adhered to their refusal to allow me facilities for precognoscing witnesses. I assumed from that that the Company's servants had been forbidden to say anything, or at least would not have considered themselves free to say anything. I therefore did not approach them." Now, this correspondence which this Mr M'Nicoll refers to is the correspondence in process. The date of that interview with Mr Irons cannot be stated, but it was evidently before the letter of 16th July 1901, and I do not say that if the matter had stood there merely upon the statement of the station-master at Forfar that Mr M'Nicoll should have relied solely upon that. But that is not so, because acting upon that Mr M'Nicoll writes the letter of the 16th July. He says that he has instructions to raise the action. Then he says—"I wished to get full information as to the cause of the occurrence before doing anything, but find that all the witnesses are in the Company's service." And then he asks this—"Will you please give the necessary instructions to allow me to precognosce the men engaged in the shunting operations when the accident took place. An early answer will be esteemed a favour." Now, that was the note written by Mr M'Nicoll after the information got from Mr Irons that the Railway Company would not allow their railway servants to be precognosced, and he applied to the agent of the Railway Company for what he conceived to be a necessary condition. On the 18th of July the agent of the Company writes to Mr M'Nicoll—"Referring to yours of the 16th, I beg to inform you that the Company cannot agree to your precognoscing their servants, at least at this stage of matters." That was the 18th of July, immediately before the raising of the action. When the action was raised in August Mr M'Nicoll could get no information, but the action was raised and went into Court, and then on the 17th of September Mr M'Nicoll writes again—"Would you please inquire and let me know as soon as possible whether the Company's servants may now be precognosced on behalf of the pursuer. I was refused permission to do so before the action was raised, but it is plain that the record cannot be closed or adjusted if the pursuer is denied the right to get up his case." Then the answer to that is this on the 23rd from the Railway Company—"We duly received your letter of the 17th curt., which we submitted to the Company's solicitor. He instructs us"—the case had been already in Court—"in the meantime to refuse your request for permission to precognosce the Company's servants." Nothing could be more distinct than that. Well, the action was now in Court and was going on. We come then to the 21st of October 1901, when there was a letter from Messrs Gordon. They say—"The Company's solicitor instructs us to get from you the names of the Company's servants whom you wish to precognosce, and that he will then give you an opportunity of doing so. He further states that he wishes you to take the precognition in our presence." There was a direct refusal on the part of the Railway Company to allow their servants to be precognosced, and even then they refused the names of the witnesses, whom the pursuer could not know, and their other information. The proof was taken on the 8th of November, and there was a letter written on the 25th of October, on the eve of the proof, by Mr M'Nicoll. Again he says—"Beyond the pointsman, whose name I am told is Cowie, I do not yet know which of the servants of the Company can give evidence. This is the direct result of their refusal to allow inquiry. I must, however, have the necessary facilities for precognoscing the witnesses and examining the *locus*, and unless the Company is to allow that I shall enrol the case for next Thursday, and bring the matter before the Court. The stipulation that the precognitions be taken in your presence is most unreasonable."

Now, that was the last letter before the proof at which the case was heard, and the question is just as Mr M'Nicoll puts it and the Sheriff puts it, whether ignorance on the part of the pursuer was not due to and the direct result of the Railway Company not allowing any inquiry to be made of their servants. That was the position taken up by the Railway Company, and that is the position which we have to say is right or wrong in this case. Now, it may be all very well for the Railway Company, who find it very convenient in other cases and for other purposes, to refuse to allow their servants to be precognosced. I think that that is a dangerous course to take, and if they choose to take such a course, they must take what appears to me just to be the consequences. It may be that the pursuer's agent here was wrong in not acting upon his legal rights and insisting on going to the Company's servants and precognoscing them in spite of the Railway Company's refusal. It was not a claim that Mr M'Nicoll was making for facilities. He just wanted to see these servants, and he was told by the station-master, "We will not allow our servants to be precognosced." That is what Mr Irons said, and that is what the Railway Company's agents adopted. It was in the power of the Railway Company to give the necessary information. It was in their power to have allowed their servants to be precognosced. If that is so, what is to be said? As the Sheriff says, the conduct of the Railway Company has caused this action, and although the case differs in its circumstances entirely from the circumstances in the case of *A B* v. *C D*, 1 Dunlop, p. 610, to which reference was made, I think the principle of the two cases was the same. I think the principle of dealing with the

expenses in either case is that they were solely caused by the improper conduct of the defenders in each case. I have dwelt upon the facts at some length, although it is merely a question of expenses. It is an unusual case, and one in which we are bound to show reason for such a course as is taken. I am of opinion that although the defenders were successful in the case they should be found liable to the pursuer in expenses. Therefore I agree with the Sheriff.

LORD M'LAREN — We do not usually review the judgments of the Inferior Courts on questions of expenses alone. I should never be inclined to do so except where I think some question of principle is raised, but I think a question of principle is raised in this case, and I regret that I am unable to take the same view of the law as has been taken by Lord Adam, although I do not think I differ in regard to his review of the facts of the case. I say in the first place that it seems to me to be perfectly clear that there was no refusal on the part of the Caledonian Railway Company to give information before the action was raised. They were never asked for information. They were told in language which the Sheriffs think polite, but which appears to me to be at least very strong, that there is a clear claim against them, and that it must be settled within ten days. There was at no time a refusal to give information, but I agree that there was an obstruction on the part of the Railway Company's agents to the pursuer obtaining information through the Company's servants after the action was brought. After the station-master had said in substance, "I can give you the names of the men who will be witnesses in the case, but there is no use going to them because they would not be allowed to be precognosced"—after that statement had been made the pursuer's agent had no alternative but to write to the Company's solicitor asking that this disability should be withdrawn, and that he should be allowed to precognosce the witnesses. I think that the permission, tardily given, to precognosce them, coupled with the condition that it should be in the presence of a representative of the Company, was one that the pursuer's agent was not bound to accept, and was tantamount to a refusal on the part of the Company to allow its servants to be precognosced according to the ordinary course of legal proceedings. Now, in these circumstances, and I may add that this is the only matter of fact on which I do not quite agree with Lord Adam, I am not satisfied that if permission had been given, or if there had been no attempt to prevent the Company's servants from being precognosced, the action would not have been brought, or that it would have been abandoned. I do not see any evidence in the correspondence of a desire on the part of this pursuer or his agents to settle his claim upon the basis of the information that he was to receive. On the contrary, I think that there has been an attempt to press the claim by all means in his power. But I think that the circumstance proved regarding the refusal to allow the Company's servants to be precognosced is a matter affecting the conduct of the action which justified the Sheriff-Substitute in withholding expenses. The conduct of a party in the cause has always been recognised as a legitimate element for dealing with expenses in a way different from the normal way, and if the case had rested on the Sheriff-Substitute's judgment, I should certainly not have proposed to interfere with it. In the case supposed I think I should probably agree with it; in any case I should not disturb it. But, just as I should support the discretion of the Sheriff-Substitute, I think that the Sheriff ought to have supported it, and I see no ground whatever in the circumstances of the case for altering that judgment, which I think was a reasonable award on the subject of expenses, not imposing on the Company the penalty of being made to pay the pursuer's expenses.

Now, the only precedent cited was a case so different in its character and circumstances that I can hardly regard it as one that would afford much light on this question, and it certainly has not been followed in cases of actions for damages. But further, I doubt very much whether it is within our power to deal in this arbitrary manner with the liability for expenses. The ground for awarding expenses is that the party may be compensated for the cost to which he has been put in vindicating a just claim. Well, if we think that it has been his own fault that this claim was not established, that may be a ground for withholding expenses, but I cannot see that there is any legal principle for awarding expenses to a party who has not established a just claim, but who, on the contrary, has failed in his claim. There may be cases in which this extreme course ought to be followed. I certainly think this is not such a case, because it is a case of a claim by a party who has signed a risk-note taking all the risk upon himself for the carriage of his goods, and he raises this action alleging wilful misconduct on the part of the Company's servants without having any facts to go upon justifying such a statement. The facts as brought out in the evidence entirely negative such a case. I think there must be some mistake in the statement made at the bar that when the facts came out the case was at once given up, because I see that each party brought forward all the evidence that was desired and closed his case, and the Sheriff-Substitute made avizandum and dealt with the case upon its merits as well as the matter of expenses. That is perhaps an unimportant detail. I think we ought to return to the judgment of the Sheriff-Substitute.

The LORD PRESIDENT and LORD KINNEAR concurred with LORD ADAM.

The Court pronounced the following interlocutor:—

"Find in fact and in law in terms of the findings in fact and in law in the

interlocutor of the Sheriff-Substitute, dated 28th November 1901: Further adhere to the interlocutor of the Sheriff, dated 24th January 1902, appealed from, and dismiss the appeal and decern of new against the defenders for payment to the pursuer of the sum of £11, 6s. 3d. admitted to be due: Find the respondent entitled to expenses, and remit," &c.

Counsel for the Pursuer—Ure, K.C.—Hunter. Agents—Smith & Watt, W.S.

Counsel for the Defenders—Clyde, K.C.—Deas. Agents—Hope, Todd, & Kirk, W.S.

Wednesday, November 5.

SECOND DIVISION.

[Sheriff Court at Falkirk.

BARNETSON *v.* PETERSEN BROTHERS.

Shipping Law — Shipbroker — Foreign Owner—Master Accepting Services and Disbursements by Shipbroker Instructed by Foreign Owner's Agent—Liability of Foreign Owner to Shipbroker—Agent and Principal—Foreign Principal—Liability of Foreign Principal to Shipbrokers Instructed by Agent—Contract—Privity of Contract.

The master of a foreign ship on arrival at a port in this country accepted the services of a shipbroker, who did the business and made the disbursements which were necessary to enable the ship to be berthed, loaded, and dispatched on her next voyage. This shipbroker was instructed by the foreign shipowners' regular agents in this country, to whom the ship had been chartered. In an action at the instance of the shipbroker against the foreign shipowners for payment of his account for services rendered and disbursements made, the defenders maintained—(1) That there was no contract between them and the pursuer, his contract being with the defenders' agents only; and (2) that the services were rendered and the disbursements made for the purposes of a sub-charter which the defenders' agents had entered into for their own benefit, and upon terms which were not authorised by the defenders. *Held* that, the defenders' master having taken advantage of the shipbroker's services and disbursements, the foreign shipowners were liable directly to him therefor.

Samuel Keith Barnetson, shipbroker, Methil, Fife, having used arrestments *ad fundandam jurisdictionem*, raised an action in the Sheriff Court of Stirling at Falkirk against Petersen Brothers, Flensburg, Germany, owners of the s.s. "Rocklands," for payment of an account for services rendered and disbursements made for the "Rocklands" at the port of Methil.

On 11th January 1900 a charter-party was entered into between the defenders and Gans & Sell, their agents in Scotland, under which the "Rocklands" was chartered to carry a cargo of coal from Methil to Kjöge, in Norway. Under this charter-party ninety-six running hours were allowed for loading and discharging, to be effected within four running working days. "Time for loading to count from first high-water after arrival roads from the time the master has got his ship ready to receive cargo and reported her as ready for cargo to charterers or their agents in writing during business hours." The charter-party contained a clause permitting re-chartering "at any rate of freight, but otherwise on the same conditions."

It was not maintained that the ship had been demised to Gans & Sell,

The defenders' agents Gans & Sell on 11th January re-chartered the vessel to Burns & Lindemann, merchants, Glasgow, for a voyage from Burntisland or Methil to Kjöge with a cargo of coal. This charter-party provided as follows:—"Steamer to be loaded in forty-eight running hours, commencing to count when ready to receive cargo, reported at Custom-House, berthed, and written notice given to charterers or their agents within office hours, . . . and to be discharged, weather permitting, in four running working days."

On 26th January Gans & Sell wrote to the pursuer advising him that the "Rocklands" was due at Methil on the 29th, and placing her business in his hands.

The "Rocklands" duly arrived at Methil, and the necessary services were rendered and the usual disbursements made on her behalf by the pursuer.

After sundry correspondence and communications with Gans & Sell and Burns & Lindemann, the nature of which sufficiently appears from the Sheriff-Substitute's interlocutor and note, *infra*, the pursuer rendered his account for services and disbursements to the defenders, and upon their refusal to pay he raised the present action, in which he concluded for payment of his account.

The items in the account sued for, as summarised, were as follows:—

Pilotage, Towage, Dock Dues, Dock Lights, - - - -	£15	11	5
Trimming Cargo and Bunkers,	10	11	4
Water, Consulage, Boatmen, Telegrams and Telephones, Postages and Petties, Clearance, Exchange, and Noting Protest, - - - - -	4	19	9
Cash to Captain, - - -	15	0	0
2 per cent. add. Comm., - -	7	1	0
	£53	3	6

The pursuer pleaded—"(4) Pursuer having been employed under said charter-party to make the disbursements sued for on behalf of defenders' vessel, defenders are liable in direct payment thereof to pursuer."

The defenders pleaded—"(3) The pursuer not having been employed by the defenders, the defenders should be assoilzied with expenses. (4) The pursuer having been employed by the said Gans & Sell,