not be set aside and a new trial granted: Refuse to grant a new trial, and appoint the verdict to be applied and judgment to be entered up, reserving the question of expenses of the discussion upon the rule."

Counsel for the Next of Kin, J. S. Paterson, and Others—Watson and Guthrie Smith. Agents—Douglas & Smith, W.S.

Counsel for Bishop Strain and Others—The Dean of Faculty and J. P. B. Robertson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Pursuers—Fraser and Rhind. Agent—R. Menzies, S.S.C.

Saturday, June 20.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

HANSEN *v.* DONALDSON.

Demurrage—Charter-Party.

Terms of charty-party and bill of lading under which *held* that demurrage, arising solely from inability of the crew to give delivery within the lay days allowed, does not fall upon the consignee.

The summons in this suit was raised by Job Ludvig Hansen, as master of the foreign vessel 'Hilda,' and as representing the owners of the vessel, against Donaldson & Son, timber merchants, Alloa, indorsees and holders of a bill of lading, for payment of £30 in name of demurrage.

The facts of the case and the contention of parties are fully set forth in the Lord Ordinary's interlocutor:—

"*Edinburgh, 12th February* 1874.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, proof, and process, Decerns against the defenders, in terms of the conclusion of the summons: Finds the defenders liable in expenses, of which allows an account to be given in, and remits the same, when lodged, to the Auditor to tax and to report.

"*Note.*—The question raised in the present case is—Whether the defenders are liable in seven days' demurrage, under a charter-party of the brig 'Hilda' and a bill of lading, by which they acquired right to her cargo of battens, paying freight and fulfilling 'the other conditions as per charter-party.' It is admitted by the parties that No. 18 of process is an accurate translation of the charter-party and bill of lading.

"The charter-party provides that the vessel when loaded shall proceed from Drammen to South Alloa, where her 'proper place of discharge shall be, the cargo to be discharged according to B/L and the voyage ended.' It is also stipulated by the charter-party as follows:—'The loading of the cargo to be quick, and its discharging at South Alloa is in all stipulated at eight working days, counted from the day when the ship is ready to load and to discharge; should the ship be kept above that time at the port of discharge the sum of £5 (five pounds) sterling to be paid for every day over and above the said lying days, as well as the freight.'

"The port of South Alloa consists of open quays, facing the river Forth. The 'Hilda' arrived at South Alloa early on the morning of Monday, the 27th of October, before the harbour-master was on duty, and was taken by the pilot to the Stone Pier, where she was moored and everything made ready for discharging. She was reported on the same day at the custom-house, and was then ready to discharge. It is proved by the harbour-master that a great many vessels discharge wood at that pier. At that time there was a large quantity of timber on the pier, which would have interfered with the expeditious discharge of the 'Hilda's' cargo had she been discharged there. On the following day, being Tuesday 28th October, the pursuer was told by the defender Mr George Donaldson, and by the harbour-master, to move the 'Hilda' to the quay at the coal spout. But the tide was then ebbing, and it was too late for want of water to get that done on that day. On Wednesday the 'Hilda' was moved, and reached at a late hour the place, outside another vessel, where she began to discharge. And on Thursday, the 30th October, the unloading of her cargo was commenced, and was thereafter carried on by means of a stage across the other vessel until the 4th of November, when that vessel sailed, and the 'Hilda' got alongside the coal spout quay. The cargo was not all discharged until the 12th of November, that is seven days beyond the stipulated number of lay days, assuming that these commenced on Tuesday the 28th of October, being the day after the ship was moored alongside the Stone Pier, South Alloa, and was ready to discharge.

"The defenders maintain, *first*, that the 'Hilda' did not arrive at the proper place of discharge until Wednesday the 29th of October, so that her lay days did not begin until the following day; and *second*, that the delay in the discharge beyond the specified lay days having been occasioned by the fault of the pursuer in not causing the cargo to be put out of the ship within these days, the pursuer is not entitled to the demurrage claimed.

"1. The Lord Ordinary is of opinion that the lay days commenced to run on Tuesday the 28th October, being the day after the arrival of the ship at the Stone Pier, and her entry at the custom-house. That is one of the piers at South Alloa where vessels are in the practice of discharging timber, and the ship was on that day ready to discharge her cargo. By the charter-party the pursuer engaged to proceed to South Alloa as his proper place of discharge, and the lay days are expressly stipulated to run from the day when the ship is ready to discharge. It was the duty of the defenders, as owners of the cargo, to procure a proper berth for the speedy discharge of the 'Hilda,' if, as was the case, the blocked state of the Stone Pier prevented the expeditious discharge of the cargo there. And the delay which was occasioned by the shifting of the vessel to another of the quays, must, it is thought, fall upon them, seeing that it is expressly stipulated by the charter-party that the cargo is to be discharged in eight working days, counted from the day when the ship is ready to discharge.

"2. The Lord Ordinary is also of opinion that it is not proved that there was any fault on the part of the crew in putting the cargo out of the ship. The evidence is contradictory on this matter, but after full consideration of it the Lord Ordinary thinks that the crew, which consisted of five hands, besides the captain, mate, and cook, could not have unloaded 14,000 battens in less time than they took, even with the assistance of one of the

defenders' men on four days, and of two of their men on another day. The defender, Mr George Donaldson, on this point depones:—'The main cause of the delay, if delay it may be termed, was that the vessel had too few lay days for the crew that she had on board, and that the cargo could not have been put out by the crew without assistance in her lay days. The captain did not employ extra hands." He also depones that 'the crew of the vessel were not capable of discharging that cargo in eight days.' But it was no part of the captain's duty to hire extra hands. Mr Bell has clearly stated the law applicable to such a case as the present. He says, 'When lay days and demurrage are stipulated, the shipper's obligation is absolute not to detain the ship beyond the days; and he will be liable for the demurrage, or for the loss arising from further detention, although occasioned by circumstances over which he has no control.' (Bell's Principles, § 432).

"The defenders' obligation is, by the positive terms of the charter-party, that the 'Hilda' shall be unloaded in eight days, or that they shall pay £5 as demurrage for every day beyond that period. The defenders, then, should have put on a sufficient number of extra hands to assist the crew, if they considered that the crew could not unload her in the specified lay days. Not having done so, and the ship having been detained in discharging for seven days beyond the lay days, the defenders are, the Lord Ordinary thinks, liable in demurrage for seven days at the stipulated rate of £5 per day."

The defenders reclaimed.

Authorities cited—Bell's Principles, § 432; Abbot, 266, 270; Parker, 7 Ellis and Blackburn, 94.

At advising—

Lord Justice-Clerk—I concur with the Lord Ordinary as to the period from which the lay-days began to run. I think that the voyage was completed on Monday, 27th of October, when the ship, under the guidance of the pilot, arrived at the stone pier of Alloa, and was reported at the Custom-House. There had been no place within the harbour of Alloa specified in the charter-party as her place of destination, and the cases on that subject have no application. The delay which occurred between Monday the 27th and Thursday the 30th, when the unloading commenced, was not in my opinion attributable to the master, and therefore must fall on the consignees. In regard to the delay which occurred subsequently, it is sufficiently established that the consignees were ready to take delivery with as much despatch as the master and crew could give it. It is also proved that the master and crew used all reasonable exertion to complete the delivery as far as their strength and numbers admitted of. But it is established that with ordinary exertions they were unable to complete the delivery within the 8 lay-days allowed. A very important question has been raised, in this state of the fact, as to whether this delay is to fall on the consignees, or was at the risk of the vessel herself. The question is of some novelty, and we have considered it with care and deliberation. It is contended on the part of the ship-owner that the consignee became absolutely liable for the detention of the vessel from any cause not the fault of the master and crew; that there was no obligation on his part to provide more than a crew sufficient for the purposes of navigation, and that, as the crew was sufficient, and as he was guilty of no unreasonable delay in unloading, demurrage is due by the consignee. This plea has been sustained by the Lord Ordinary. The question is of considerable mercantile interest, and I do not find, after some research and enquiry, that it has ever occurred before.

The special words of the charter-party do not give us much assistance—(refers to them). The question, therefore, must be solved on the ordinary principles of law applicable to such a contract.

The shipowner is right in saying that where demurrage is specially stipulated, the consignee takes the risk of casual causes of detention over which neither party has any power. This is well settled. Neither under this contract was there any obligation on the ship-master to deliver within a certain time, provided he was not guilty of unreasonable delay. There might have been a stipulation on this subject, but there was none. But, on the other hand, the essence of the contract was that the ship should carry the cargo and deliver it at the port of discharge, and this means an obligation to deliver over the ship's side. The consignees could not interfere with the internal arrangements of the ship, which were entirely under the control of the master and crew. Until, therefore, the ship-master, not being prevented by any external or adventitious circumstance, was prepared to give delivery, there could be no detention of the vessel in the sense of the charter-party. While the ship-master was engaged in the fulfilment of his part of the contract, the detention of the vessel for the time necessary for that purpose was his own act, for his own objects, and the vessel was engaged in earning the freight. It is, therefore, in my opinion impossible to sustain a claim for demurrage against the consignee on that ground. I may refer the parties to the opinion of Mr Justice Blackburn in the case of *Ford* v. *Colesworth*, 4 L. R., Q. B., 129—which lays down very clearly the general principles to which I have referred.

Lord Ormidale—Although the sum concluded for in this action is small, the principles involved in it are of considerable importance and of general application in a certain class of shipping transactions.

The pursuer, Mr Hansen, as representing the owners of the "Hilda," sues the defenders as consignees of her cargo for the amount of demurrage which he says he is entitled to in respect of a delay of seven days through their fault in taking delivery of her cargo of battens at South Alloa, the port of discharge. The defenders, Messrs Donaldson & Son, in defence, maintain that there was no delay caused by any fault of theirs, but that the delay was owing exclusively to the fault of the pursuer himself in not giving delivery of the cargo with sufficient despatch.

It appears from the proof that the "Hilda" arrived at South Alloa, and was moored at the stone pier of discharge, a usual and in itself a perfectly fit place, on Monday the 27th of October, and was also that day reported at the Custom House. The discharge of the cargo ought therefore to have commenced on Tuesday, the next day, but in consequence of the stone pier being taken up by another vessel, having precedence, the cargo could not be delivered there, and the defenders did not offer to take delivery of it then, or till Thursday

the 30th day of May, when the "Hilda" was enabled to get alongside of what is called the "shoot" or "spout." The delay thus arising in commencing the discharge of the cargo not having been caused by any fault of the pursuer, but solely in consequence of the state of the harbour at the time, I think there can be no doubt that the defenders, as consignees of the cargo, must be liable in demurrage as for these two days. On this point I entirely concur in the observations which have been made by your Lordship in the chair, and have nothing to add to them.

But as regards the remaining five days' demurrage, in which the Lord Ordinary has subjected the defenders, the matter, in my view of it, must be dealt with differently. The Lord Ordinary has explained in his note that these five days' demurrage arose in consequence of the inability of the pursuer's crew to give delivery of the cargo within the lay days, and so far, I think, he is right on the proof. I cannot, however, agree with him in holding, in point of law, as he appears to have done, that the defenders are responsible for demurrage so caused. I am, on the contrary, of opinion that while it was the duty of the pursuer, as representing the ship, to give delivery of the cargo; or, in other words, to put it out of the ship so that it might be taken delivery of by the defenders, it was, on the other hand, the duty of the defenders and they were bound to be ready then to receive it. The parties were, I think, under reciprocal and correlative duties which they were respectively bound to discharge. In regard, indeed, to the duty incumbent on the pursuer, as in charge of the ship, he is himself quite explicit, for in his cross examination as a witness he unqualifiedly states (proof p. 5, letter G.), "it is the ship's duty to put the cargo clear of the ship's side," and others of the pursuer's witnesses make statements to the same effect. Nor was it contended by the pursuer's counsel, in his argument addressed to the Court, as I understood it, that he was under no duty in regard to the discharge of the cargo. On the contrary, it was in answer to a question put by myself distinctly admitted by his counsel that so far as the crew of the ship could do it he was bound to employ them in putting the cargo out of the ship; and when it was suggested that as the crew of a British ship usually, if not invariably, left her in a home port, as they are entitled to do, on the conclusion of the voyage, and so could not be employed in putting out the cargo; it was stated that when that occurred the shipmaster or owner would require to employ shore hands, or lumpers as they are called, in numbers and strength equal to the crew, and that in the event of their proving insufficient, the merchant or consignee must supply the deficiency or be liable in the consequences. I cannot help thinking that this must be an entirely erroneous view of the matter, for not only is there no trace, so far as I have been able to discover, of so very anomalous and unworkable an arrangement either in the text writers or in the reported cases bearing on the subject of demurrage, but there is no allusion to it in the proof in the present case as I read it. On the other hand, it appears to me that according to the true construction of the charter party, and especially the 5th article or head of it, to the effect that "the cargo is to be delivered free to and from the ship's side at place of loading and discharging," the duty of putting the cargo out of the ship so that it may be received by the merchant or consignee lies exclusively on the ship; and I think that although there may be no direct or express authority to this effect—probably because it has never been made the subject of dispute—it is impossible to read the opinions of the Judges in the English case of *Ford and Others* v. *Cotesworth and Another*, referred to by your Lordship, without being satisfied that it proceeds on the footing and assumption that there are reciprocal duties incumbent on the ship and on the merchant in the way and to the effect I have already explained; and, I may add that although Mr Bell, in the passage quoted by the Lord Ordinary in his note, says the shipper's "obligation is absolute not to detain the ship beyond the lay days, and he will be liable for demurrage or for the loss arising from further detention, although occasioned by circumstances over which he has no control," he does not mean to say, and does not say, that the merchant or consignee is liable for the consequences of detention caused by fault on the part of the ship, or in other words by the culpable or undue delay of those in the charge of the ship in putting out the cargo. This, I think, is made abundantly clear in Mr Bell's Commentaries (particularly at pp. 557-8. vol. i.), where the subject is treated more fully than in his Principles, from which the Lord Ordinary's quotation is made.

If I am right in these views, the result will be that at which your Lordships have arrived.

The other Judges concurred.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for George Donaldson & Son, against Lord Mackenzie's interlocutor of 12th January 1874, Recal the said interlocutor, and find no expenses due to or by either party: Find the defenders liable in demurrage for two days, amounting to £10 sterling, for which sum decern against the defenders; *quoad ultra*, assoilzie the defenders from the conclusions of the summons, and decern."

Counsel for Pursuer and Respondents—Trayner and Thorburn. Agents — Boyd, Macdonald & Lowson, S.S.C.

Counsel for Reclaimer and Defendants—Dean of Faculty (Clark) and Asher. Agents—Webster & Will, S.S.C.

Saturday, June 20.

FIRST DIVISION.

LAWSON (LAWSON'S TRUSTEE) *v.* BRITISH LINEN CO.

Mandatory—Judgments Extension Act, § 3.

Where the pursuer of an action in the Court of Session was resident in England,—*held* (after consultation with the other Judges) that he need not be ordained to sist a mandatory, the Judgments Extension Act, sec. 3, having made decree for expenses enforceable in England.

The trustee of the late Mr Lawson raised an action against the British Linen Co. for the purpose of reducing a security held by the latter over the trust property. The trustee was at the time resident in England, and the defenders moved the