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

Court to ordain the pursuer to sist a mandatory. The pursuer objected, and argued that this was really a motion to oblige him to find caution for expenses. He was compelled by his position as trustee to raise the action. The Judgments Extension Act, 1868, 31 and 32 Vict., cap. 54, sec. 3, makes a decerniture for expenses by the Court of Session effectual in England.

Authorities—*Simla Bank* v. *Home*, 21st May 1874, 8 Macph. 781; *Raeburn* v. *Andrews*, 27th Jan. 1870, 9 L.R., Q. B. 118.

At advising—

LORD PRESIDENT—In this case the defenders move that the pursuer should be bound to sist a mandatory in respect that he is not at present within the jurisdiction of the Court, and to that demand two answers are made. In the first place, it is said that the pursuers are owners of heritable property in Scotland as trustees, but that is not a good answer under the circumstances, because the object of the action is to reduce a security held by the defenders over that property. But there is a second answer, which is of much more importance. It is contended that as by sec. 3 of the Judgments Extension Act decree for expenses given by this Court may be enforced against parties resident in England, the defenders are in no worse position than they would have been if the pursuer had been resident in Scotland. It seems to me that there is a great deal of force in that argument in so far as sisting a mandatory is intended to secure the payment of expenses in the event of their being found due. That, however, is not the only purpose of such a sist; there is the further object that there may be always some one here who is responsible for the proper conduct of the cause. That, however, is a matter which is rather the interest of the Court, and no doubt the great interest of the party is that he may have some one against whom he may enforce his decree for expenses, and so in determining this case the circumstance that the decree for expenses will be enforceable must have great weight. The question is one entirely within the discretion of the Court, and we considered the matter so important that we consulted our brethren, and the result of that consultation is, that we shall always consider it very important that the pursuer or defender who is asked to sist a mandatory is not resident in a foreign country, but is in some part of the United Kingdom, and unless there are other circumstances which have to be considered, the Court would refuse the motion. In consideration that in the present case the security for the expenses is quite good, we have no doubt that the motion must be refused.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the note for the British Linen Company, craving that the pursuers should be ordained to sist a mandatory (No. 31 of process), and having conferred with the other Judges, Refuse the said note."

Counsel for Lawson—Kinnear. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for British Linen Co.—Adam. Agents—A. & A. Campbell, W.S.

Friday, June 12.

SECOND DIVISION.

[Sheriff of Forfar

M'GAVIN *v.* M'INTYRE.

Road—Servitude—50 *Geo. III. c.* 120.

Where a road was originally a private servitude road, trustees *held* not entitled to shut it up.

This was an appeal from a decision of the Sheriff of Forfar on a petition at the instance of Robert M'Gavin of Ballumbie, against Messrs W. A. partners of the company, to the effect that—M'Intyre & Co., bleachers, Douglasfield, and the "The petitioner is proprietor of the lands of Mid-Craigie and others, situated near Dundee, including therein a piece of land originally feued from the estate of Fintry, bounded on the north partly by the Pitkerro turnpike-road, formerly known as the post-road leading from Dundee to Aberbrothock, and partly by mill-lead, formerly the mill-lead of the town of Dundee's mills, conform to infeftment produced. That parallel with, and near to the said mill lead, there until lately existed a statute-labour road running eastward from the said Pitkerro road to a road leading north and south near Craigie Mill; but the site of this road was recently given up to the petitioner by the statute-labour road trustees of the district, in consequence of the substitution therefor, at their instance, of a new road, situated to the southward, made upon the petitioner's lands; which substitution was carried through and notified in terms of the statute 50 George III., chap. 120. That the petitioner, and his authors and predecessors, have been in the uninterrupted possession of the land lying betwixt said new road and the said mill-lead from time immemorial, and the same is at present under lease. That the petitioner, on the 21st February current, proceeded to erect a fence at the eastern extremity of this land, and running between the eastern termination of said new road and the said mill-lead—a distance of about 25 yards, for the enclosure of the land from the public road; but on the following day the petitioner's land was entered upon, and the said fence interfered with and partly taken down by workpeople or others in the employment of the said W. A. M'Intyre & Co., acting under instructions from the said firm, or one or other of the individual respondents, and that without warning to or authority from the petitioner, and without any right or title whatsoever. Farther, that this day the petitioner's servants, who were engaged in removing from one spot to another of said ground a large boulder, were, by personal violence on the part of the said James M'Intyre and others, servants of the said firm, stopped in the execution of their work." The petition finally prayed the Sheriff to interdict the respondent from entering the petitioner's property situated between the mill-lead and the said new road, and from molesting the petitioner in the erection of the proposed fence.

After a proof the Sheriff-Substitute (CHEYNE,) pronounced the following interlocutor:—

"*Dundee*, 31*st January* 1874.—The Sheriff-Substitute having advised the process as regards the road mentioned in the petition, Finds *in fact* that the same has for upwards of forty years been a statute labour road, and as such has been under the