this very sensational description. He contended that the boy M'Ewan's slip on the ice might be caused by his own carelessness, as was done at Duddingston Loch many a day; and as regarded the other boy M'Ginnes, who was unable to proceed, he supposed that was to be connected with the insufficient clothing and want of food; but there, again, there was an entire absence of averment of duty on the prisoners of supplying the boys either with food or clothing.

SCOTT'S argument was adopted for the panel Kerr.

GLOAG A.-D. supported the indictment on the general principle that if a delinquency had been committed, the common law of the country was strong enough to punish for this crime. As to the first objection taken to the major charge of "cruel and barbarous usage," he said these words were general terms which, he thought, had been sustained in previous indictments to describe conduct directed against a person as criminal. Cruel and barbarous usage could not be alleged unless injury resulted from the conduct, and it was said in the minor charge that the treatment was such that the victims were subjected to great pain and suffering. The second objection was directed to the offence charged of compelling a person to leave a ship, and he had undertaken to prove that that was done wickedly and feloniously, and culpably and recklessly—done to the manifest danger of the lives of the persons.

Lord NEAVES—What do you mean by compelling? Do you mean by bodily violence?

GLOAG A.-D.—I do not mean necessarily bodily violence.

Lord NEAVES—By moral suasion? There is "compelling" to come in in the sense of the gospel.

GLOAG, A.-D.—Compelling them to come in may be different from compelling them to go out. If you compel a man by moral suasion he goes in or out with his own will.

Lord NEAVES—By putting a higher motive before them?

GLOAG, A.-D. said it was used in the sense of making people go where they did not want to go. If they were to put in the libel, "compelling by force," they would only be adding words without in any way strengthening the language. As to the fourth objection, he thought it was covered by the major proposition of culpable homicide.

Solicitor-General (MILLAR) supported the libel.

MONCREIFF D.-F. replied, and stated, with reference to the mate, in whom he was more particularly interested, and who was an inferior officer, that it was not alleged he had anything to do with the boys being insufficiently clothed or without adequate food.

Lord NEAVES said he was of opinion that the second charge was not relevant. The words "cruel and barbarous usage" were much too vague to be descriptive of a criminal act; and unless it could be affirmed that the usage was indictable, he did not see how they could sustain this charge. He also thought that this charge was defective, as it wanted a statement of the mutual relations of the parties concerned. He therefore could not sustain it. As to the objection to the fourth major charge, while he saw it to be defective, he was unable to say that it was not relevant. The nature of the offence was that they were compelled to leave the ship, and had no resource but to proceed to land, or remain and starve on the ice; and believing that to be the offence, the question came to be, whether it was so stated that the charge could be held to be irrelevant. Though he hoped such a charge as that would not be copied or imitated in future, he could not say it was irrelevant. The objection to the fourth minor proposition was not, he thought, well founded.

Lord JERVISWOODE and the Lord JUSTICE-CLERK concurred.

The Court thus sustained the libel, with the exception of the portion of it which specified as a charge, "cruel and barbarous usage."

The panels pleaded Not Guilty, and the trial was appointed for 23d November.

At the trial,

Evidence was led for the Crown. Kerr withdrew his plea, and offered a plea of guilty of assault, which plea was accepted by the prosecutor.

Evidence was led for Watt in exculpation.

The jury found Kerr guilty, by his own confession; and found Watt not guilty of assault, but guilty *quoad ultra*, adding a recommendation to leniency on the ground of previous good character.

Watt was sentenced to eighteen months' imprisonment, and Kerr to four months' imprisonment.

Agent for the Crown—T. G Murray, W.S.

Agent for Watt—Mr Sheill, S.S.C.

Agent for Kerr—W. Millar, S.S.C.

COURT OF SESSION.

Wednesday, November 25.

SECOND DIVISION.

FOSTER AND OTHERS *v.* SCOTT'S TRUSTEES.

Expenses—Settlement of Action. Certain parties brought an action to enforce the objects of a destination for charitable purposes. The trustees defended, on the ground *inter alia* that the executors of the truster had not accounted to them. An action at the instance of the trustees was in dependence for that purpose. During the dependence of the present action the executors were assoilzied, and the defenders lodged a scheme for the working out of the charity. The pursuers having obtained the object of their action, acquiesced. *Held* that they were entitled to expenses.

Mr William Scott, of St Andrews, New Brunswick, died there in 1838, leaving a will by which he bequeathed his whole property, under burden of some small legacies, "to the Provost and Magistrates for the time being, as also the two clergymen of the east and west parishes of his father's native town, Greenock, to be by the said trustees applied to the endowment of a school for the maintenance and education of as many indigent orphan children as the proceeds of said property may be able to support and educate; said children to be instructed in English, reading, and grammar, together with writing, arithmetic, and a few of the plain branches of mathematics; no children to be continued in the said institution over the age of fifteen years, when said trustees shall endeavour to put said children in a way of providing for themselves in this world." By the will and a codicil, there were also appointed three executors, two of whom resided in New Brunswick, and one in Greenock. Five years were allowed by the will for

realising the testator's property, and founding the institution.

The pursuers are three orphan children, natives of and resident in Greenock, and the defenders are the testator's trustees. The pursuers allege in the record that by 1843 the testator's property had been realised to the extent of £2797, 8s. currency; that this was only a portion of the deceased's property; that, although the testator died in 1838, and allowed only five years for endowing the institution, the trustees had taken no steps for this purpose; that, accordingly, for many years complaints against the trustees on this account had been frequently made in Greenock at meetings of the Parochial Board, at meetings of the Town Council, in the form of letters in the newspapers, and by a Sheriff-court action, which failed on a point of form. The summons concludes, *inter alia*, for an order upon the defenders, as trustees, to lodge in process the draft of a constitution for the regulation and management of an institution such as the testator provided for.

The defenders pleaded that they had not yet obtained payment of the whole proceeds of the deceased's estate from the executors; that they had instituted an action of count and reckoning against the defenders for the purpose of obtaining payment of the balance in their hands; that they were not bound to institute the charity until they had obtained payment of the balance in the hands of the executors; and that the trustees could not be competently controlled by the pursuers or the Court, in the exercise of the discretion vested in the trustees, both as to the time of instituting the school, and as to the details thereof.

During the dependenee of the present action the action of count and reckoning against the executors was brought to a termination. In that action a remit was made to an accountant, whose report set forth the extent of the trust-estate, and the executors were assoilzied with expenses. Thereafter the defenders, as directed by the Lord Ordinary, lodged in this process a proposed scheme for the deed of endowment, setting forth that the sum in their hands was £3881, 18s. 6d., and containing a scheme for the regulation and management of an institution, and intimated that premises for boarding the children had been purchased, and that other measures were in progress for starting and carrying on the institution. The pursuers having thereupon intimated that their object in bringing the action had been substantially attained by what the defenders had done, moved the Lord Ordinary to find them entitled to the expenses of the action. The defenders resisted this motion. The Lord Ordinary, after hearing counsel, pronounced an interlocutor finding the pursuers entitled to expenses, under reservation of the question of modification. His Lordship added in a note:—"The truster, Mr Scott, died very nearly thirty years ago; and while no doubt some delay was unavoidable before his trustees could be in a position to establish and put in operation the school which he contemplated, the Lord Ordinary has found it impossiible to justify the great delay—nearly a generation—which has taken place. It is not surprising, therefore, that such an action as the present was at length brought in June 1864. It is surprising, indeed, that such an action had not been instituted long before. The defenders, Mr Scott's trustees, say that they had previously raised an action against Mr Scott's executors, to compel them to account for the trust funds; and that is true, but it appears to the Lord Ordinary, on examining the proceedings in that action, that it was in reality a useless proceeding, as the defenders had, long before it was brought, obtained all the accounting and information that could be procured, or at least had the means of doing so without an action, and that they had also recovered or might have recovered, the trust funds so far as there was any prospect of their ever being recovered. Accordingly, the defenders in the action referred to ultimately obtained absolvitor, with expenses. The dependence of the action cannot therefore, in the Lord Ordinary's apprehension, be held to be a sufficient reason for the defenders' great delay in doing what they recently did, under the pressure of the present action, viz., the establishment of a school such as that contemplated by the truster; and, besides, the Lord Ordinary has all along, while the two actions, the present and the other referred to, were depending before him, felt that the defenders did not proceed with the expedition which he considered was incumbenton them. For example, the other action, at their own instance, was allowed by them to fall asleep, and remain so for some time, and in the present action, although the state of the funds had been made up and reported on so far back as 6th July 1865 by an accountant to whom a remit had been made in the other action, it was not till the beginning of the present winter session that the defenders made it known in this process that they had set the school in operation. Having regard to these and to all the circumstancee of the case, the Lord Ordinary thinks that the pursuers had grounds for bringing the action, and are entitled generally to expenses. Whether any, and what, modification ought to be made upon their account, can be best determined when it has been taxed and reported on."

The defenders reclaimed.

GIFFORD and SHAND for them.

LORD ADVOCATE and BLACK for pursuers.

The Court adhered, and found the pursuers entitled to additional expenses, their Lordships remarking upon the great delay which had taken place in the institution of the charity.

On the pursuers' account of expenses being taxed, the defenders moved that the amount should be modified; but this motion was refused, and the pursuers were accordingly found entitled to the full amount of the expenses as taxed.

Agents for Pursuer—T. & R. Landale, W.S.

Agent for Defender—John Ross, S.S.C.

Wednesday, November 25.

LEITCH *v.* WILSON.

Charter Party—Freight—Date of Payment—Prior loss of Ship. Held that freight stipulated to be paid "one month after vessel sailing" was due, notwithstanding the loss of the vessel prior to the date of payment, and the inability thereby arising to implement the contract.

This was an action for freight under a charter party by which the charterer undertook to load the pursuer's ship, the Barbata, of Greenock, with a full and complete cargo of such merchandise as the defender, the charterer, might send alongside, to carry the same to Demerara, and deliver it to the defender or his assigns, "freight for the same being paid at and after the rate of a lump sum of £550 for the full and entire reach of vessel's hold and