son, then in the employment of the defenders, was sent by their night superintendent to the top of their furnace No. 9, to open its doors for the men putting in charges of coal and ironstone; (2) that on his opening one of the doors a 'slip' or fall of material adhering to the interior of the furnace took place causing an uprush of flame, by which he was burnt severely, and in consequence of which he died; (3) that the said furnace had been in a dangerous state from the formation of 'scaffolding' therein which had repeatedly caused such slips in the furnace during the previous nine months, and the death of the said Alexander Henderson is attributable to the fault of the defenders in allowing the furnace to be worked for so long a period in the state in which it was, notwithstanding the fact that all efforts to remove the 'scaffolding' had failed: Find in law that the defenders are liable in damages and *solatium* to the pursuer for the loss of his son: Therefore sustain the appeal: Recal the judgment of the Sheriff-Substitute appealed against: Assess the damages and *solatium* at One hundred pounds: Ordain the defenders to make payment of that sum to the pursuer: Find him entitled to expenses in the Inferior Court and in this Court: Remit to the Auditor to tax," &c.

A similar interlocutor was pronounced in Bariscell's case.

Counsel for the Pursuers—Sym. Agent—W. Cotton, W.S.

Counsel for the Defenders—D. F. Mackintosh, Q.C —Guthrie. Agents—J. C. Brodie & Sons, W.S.

Friday, March 15.

SECOND DIVISION.

[Lord Trayner, Ordinary.

MILLER & COMPANY *v.* HOGARTH AND OTHERS.

Ship—Charter-Party—Hire—Freight.

In a charter-party there was this provision —"In the event of loss of time from . . . breakdown of machinery . . . whereby the working of the vessel is stopped for more than forty-eight consecutive working hours the payment of hire shall cease until she be again in an efficient state to resume her service." The hire was to be paid monthly in advance. On the voyage her engines broke down so as to render her unseaworthy, and she had to put into a foreign port. There were no means of repairing her injuries in that port. A tug was sent out to bring her home under an agreement between the owners and the charterers, by which the cost of the tug was to be treated as general average. The ship arrived at the port of discharge with the aid of the tug. The charterer paid his proportion of the cost of the tug. In an action for the freight from the time she left the foreign port till her discharge was complete, *held* (*rev.* Lord Trayner) (1) that she was unseaworthy from the time of the breakdown till she arrived, the assistance of the tug not having rendered her seaworthy, and therefore that having in view the terms of the charter-party the owner was not entitled to freight for the voyage under tow; (2) (*dub.* Lord Young) that hire was due for a reasonable time for unloading at the port of discharge although the repairs necessary to make the ship seaworthy had not been completed.

By charter-party dated 26th February 1887 Alexander Miller, Brother, & Company, merchants, Glasgow, hired from Hugh Hogarth, the managing owner, the steamship "Westfalia" on a charter for a voyage to the West Coast of Africa and back, with the option of continuing the hire for another voyage. Hire was to be paid at 8s. per ton per month in advance. The owner undertook to provide officers and crew, and maintain the vessel in stores, and "in a thoroughly efficient state in hull and machinery for the service." It was also provided—"That in the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service, but should the vessel be driven into port or to anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the charterers' risk and expense. Quarantine (if any) at charterers' expense. That should the vessel be lost, any freight paid in advance, and not earned (reckoning from the date of her loss), shall be returned to the charterers. The act of God, the Queen's enemies, fire, restraints of princes, rulers, and people, and all other dangers and accidents of the sea, rivers, machinery, boilers, and steam navigation throughout this charter-party always excepted." The ship performed one voyage, and under their option the hirers continued to send her for another voyage. She left the West Coast of Africa with a cargo of kernels and palm oil on the 14th September 1887. On the 30th September the high-pressure engine broke down, by the piston-rod breaking. She made her way to Las Palmas in the Canary Islands under sail, and by the help of her low-pressure engine. She reached Las Palmas on the 2nd October. She was surveyed there, and the surveyors declined to give a certificate of seaworthiness. News of her condition was sent to the owners. It was impossible to repair her without great delay and expense. The surveyors declined to authorise an attempt to proceed home under her low-pressure engine. After certain negotiations between the owner and the charterers an arrangement was come to by which the tug "William Joliffe" was sent to her assistance. The expense of the tug was to be treated as general average, the charterers paying in proportion to the value of the cargo, the owner in proportion to that of the vessel. The tug went out and took the "Westfalia" in tow, and left Las Palmas upon 18th October. She arrived at Harburg, her port of destination, on 31st October, and commenced discharging her cargo. The discharging of the cargo took

until 10th November. Engines and engineers had been sent from England to Harburg, and the repairs to the vessel went on simultaneously with the cargo discharging, but the repairs were not finished until 11th November. She then left for England. The charterers paid their share of the cost of the tug.

The owners brought an action against the charterers for hire for the voyage home from Las Palmas under tow and for the time taken to unload, in all from 18th October to 10th November, which at the stipulated rate amounted to £341, 4s. 8d.

The pursuers averred—(Cond. 4) "Under the said charter-party the rate of hire payable by the defenders to the pursuers for said steamship is 8s. sterling per gross register ton per calendar month. The defenders are due to the pursuers hire at said rate for said steamship for the period from 18th October to 10th November 1887 inclusive, amounting, as per account herewith produced, to £341, 4s. 8d. At least from and after 18th October the said ship was in an efficient state to resume her service; and she was from at least 18th October engaged on her service under said charter and actively pursuing her voyage, and continued to do so till 18th November. If the said ship had not been efficient, and but for the services rendered by her upon and after 18th October, neither she nor the cargo would have reached the port of discharge till long after they did, and the defenders would thus have suffered very serious loss. The value of the services thus rendered by the said ship to the defenders, and the benefit thereby derived by the defenders, who in consequence recovered their full freight and got the said ship ready for another voyage, all precisely as if there had been no accident, amounts to not less than the amount sued for."

The defenders in answer relied on the breakdown clause above quoted. They stated that the ship had broken down, and that they had paid their share of the cost of the tug, £867. They denied further liability.

The pursuers pleaded—"(2) In terms of the charter-party freight being due for the period from 18th October, decree should be granted as concluded for. (3) In respect of the services rendered by the said ship to the defenders on and after 18th October, which benefited the defenders to at least the extent of the sum sued for, the pursuers are entitled to decree as concluded for."

The defenders pleaded—"(2) In terms of the clause of the charter-party quoted, no freight having been due for the period from 30th September to 10th November, the defenders are entitled to absolvitor. (3) The charter-party having between 18th October and 10th November been superseded by the average agreement, and the defenders having paid their contribution under that agreement for bringing the ship and cargo to Harburg as fixed by the average adjuster, are entitled to absolvitor with expenses."

Proof was led. It appeared that the length of the voyage from Las Palmas to Harburg under tow did not much, if at all, exceed an ordinary voyage. The weather was thick but calm. The pursuers led evidence to show that the ship could have come home safely under the low-pressure engine alone. It appeared, however, that the ship did not at least reverse steam easily in her condition, and that she had great difficulty in getting into the harbour when she put into Las Palmas from that reason. The high-pressure engine was quite useless till repaired at Harburg.

Murphy, marine superintendent to the defenders, deponed—"Even if the ship could have been repaired at Las Palmas, it would have taken at least a couple of months to get the machinery sent out and to do the repairs."

Upon 31st October 1888 the Lord Ordinary (TRAYNER) found the defenders liable to the pursuers in the sum of £320, for which he decerned.

"*Opinion.*—The 'Westfalia' was chartered by the defenders, they binding themselves by the charter-party to pay hire for the steamer at a certain rate per gross registered ton. It was stipulated, however, 'that in the event of any loss of time from . . . break-down of machinery . . . the payment of hire shall cease until she be again in an efficient state to resume her service.'

"The high-pressure engine of the 'Westfalia' broke down on the morning of the 30th September, and the ship put back to Las Palmas where she remained till 18th October, during which time she was surveyed and declared, by some of the surveyors at least, to be unseaworthy. No repairs were executed on the engine at Las Palmas, because there were no means of executing such repairs. The 'Westfalia' left Las Palmas on 18th October under steam, with her low-pressure engine alone working, accompanied, and in some measure assisted, by a tug steamer sent out from England. She arrived at Harburg, her port of destination, on the 31st October, where she delivered the part of her cargo deliverable there. The high-pressure engine was repaired at Harburg, and the 'Westfalia' sailed again for Antwerp with the remainder of her cargo on 11th November.

"The pursuers seek decree for the hire of the steamer for the period between 18th October and 10th November, which the defenders refuse to pay on the ground that the 'Westfalia' was not in 'an efficient state to resume her service' during that period. I think the defenders are wrong. The service which the steamer was bound to render to the defenders under the charter-party was to carry the cargo to the port of delivery. That the 'Westfalia' was in a condition efficiently to render this service is best proved by the fact that she did it. The cargo was carried and safely delivered. The breakdown in the machinery had not rendered the steamer inefficient for her service, although it had made her less efficient than she had been; and had she proceeded on her voyage instead of putting back when the engine broke down (as on the evidence I am prepared to hold she could quite safely have done) I think there would have been no reason for suggesting that her full hire had not been earned.

"The defenders, however, plead that they are not liable for the hire sued for, because they have had to pay more than the amount of the hire on account of the tug steamer sent out to her aid. I think this affords no answer to the pursuers' claim. The tug was sent out because all concerned were desirous of having the 'Westfalia' home as soon as possible, for the reasons stated by Mr Hogarth. Had the expense of the

tug been borne by the pursuers alone, the defenders could plainly not have pleaded that the assistance rendered by the tug had absolved them from their liability for the hire of the 'Westfalia.' Nor in the circumstances can they plead this, although they paid a part of the expense of the tug, for they agreed that the whole expense of the tug should be treated as general average, and it was so treated. But payment of general average, whether the amount be large or small, does not exempt a consignee from liability for freight, nor affect the shipowner's right to his hire which comes to him in place of freight. There is no evidence whatever that the arrangement made as to average was intended to supersede or affect to any extent the rights and obligations of parties under the charter-party.

"It was suggested rather than argued that the 'Westfalia' was unable to earn her hire from Las Palmas because she was declared to be unseaworthy. But an unseaworthy ship may earn freight, of which there was a notable instance in the case of *Turner* (1 Macq. 334), where freight was earned by a ship rendered so unseaworthy that her owners were held entitled to abandon her as a constructive loss. As I have said, the hire of the 'Westfalia' came to her owners in place of freight, and was earned if the service was rendered, whether the 'Westfalia' was seaworthy or not.

"The voyage in question from Las Palmas did not exceed much, if any, the average time occupied by the 'Westfalia' on such a voyage. Yet it does appear from the evidence of the pursuers' own witnesses that the 'Westfalia' did not go at the full speed customary with her when both her engines were working. Whether this, on a strict construction of the charter-party, entitles the defenders to any deduction from the stipulated hire I am by no means clear, but I think they are in equity entitled to some deduction in the circumstances, and accordingly I will allow them £21, 4s. 8d., which is nearly equal to the amount of the steamer's hire for a day and half."

The defenders reclaimed, and argued—This ship sailed not under an ordinary contract of affreightment, but under a special contract of hire. Under the usual charter-party the ship did not earn freight unless she delivered her cargo safely, but here the hire was paid monthly in advance even if no cargo had been procured. For such a contract see *Havelock* v. *Geddes*, February 9, 1809, 10 East. 555; Carver on Carriage by Sea, 117, 54. The only condition on which freight was to be paid was that the vessel remained in a seaworthy and efficient condition. First, was she in that condition during the period for which freight was claimed? It was admitted that from 30th September, when her high-pressure engine broke down, and the 18th October, when she left Las Palmas in tow of the tug, that she was not seaworthy. The owners did not ask for freight for that time. The surveyors would not give her a certificate of seaworthiness. It was alleged by several witnesses that she could have come home with safety working with the low-pressure boiler only, but from the difficulty that she experienced in making Las Palmas that evidence could not be trusted to. The fact was that no attempt was made to navigate her to England by her own power. The ship being thus unseaworthy and inefficient, did the sending out of the tug bring her back to an efficient condition? That could not be allowed. The vessel lay inefficient at Las Palmas. If she was to be repaired there so as to put her into an efficient condition, materials and engineers would have to be sent out there, and the time it would take to perform the necessary repairs would be two months. Instead of that the parties thought that it would be better for all interests to bring this unseaworthy ship to Europe and have her made efficient there. They entered into an agreement to do so, and the vessel was brought home and repaired so as to be efficient at Harburg. It would be hard if the defenders had to pay both for a tug to bring the ship home and also hire, on the footing that she was an efficient ship. The vessel was not made efficient by sending out the tug, as if she had been repaired at Las Palmas. The defenders were willing to pay freight for a period equal to the usual time taken in discharging such a cargo as this. They would allow three days for that. But the putting in of the engines took 11 days and they could not be called upon to pay for the whole time.

The respondents argued—This was not different from an ordinary charter-party in the way suggested by the pursuers. The vessel was hired for a voyage to carry her cargo; she did complete the voyage and brought her cargo safe home, therefore she was entitled to earn freight. Under the charter-party the only thing that the charterers could set-off against or demand for freight was loss of time. To say that the vessel was unfit if she lost no time on her voyage was not an answer to a claim for freight. It was admitted that the vessel was not efficient during the time she lay at Las Palmas, because the surveyors refused her a certificate, but under the arrangement between the pursuers and defenders a tug was sent out. The arrival of the tug made her efficient, just as if the pursuer had sent out engineers and boilers to Las Palmas. The engines of the tug took the place of the engines on board the "Westfalia." The time that was taken to reach Harburg was very little more, if any, than would have been taken to get there by her own steaming. Therefore she was efficient and seaworthy in the sense of the charter-party on her voyage from 18th to 31st October. The agreement was concluded on the basis of general average, and was so looked upon and used by the general adjuster at Harburg. In a general average both parties have to make a sacrifice; here the defenders paid £800 in order to get their goods home in time. The defenders could not put a claim under the agreement of average against a demand for freight by the shipowners. They had agreed to pay their share of the towage on the basis of the value of the ship and the cargo respectively, but that did not supersede the charter-party. If the defenders did not pay the freight, then they did not pay their share of the general average as regarded the value of the cargo. The pursuers claimed hire for the whole time of discharging the vessel—Scrutton on Charter-Parties, pp. 2, 3.

At advising—

Lord Justice-Clerk—This action relates to a claim for a sum of money as the hire of a ship by

the shipowners. The circumstances under which it is made are rather peculiar. The defenders hired the ship "Westfalia" from the managing owner of the company, Mr Hogarth, for the purpose of voyaging within certain limits at a certain rate, viz. 8s. per gross register ton, per calendar month. The same hire was to continue during the whole period of employment, and until her delivery to her owners at a safe port in the United Kingdom, or on the Continent. The defenders were to have the option of continuing this charter for another voyage upon giving fifteen days' notice to the owners, and they exercised that option. The pursuers, the owners of the vessel, were to provide a crew and captain for the vessel, but the captain was to be under the orders of the defenders, the charterers, "as regards employment, agency, or other arrangements."

Now, the captain, although acting under the orders of the defenders, had charge of the management of the vessel, and he sailed in safety and in the ordinary course of the voyage in which he was engaged for Europe from the West Coast of Africa. Upon the 30th September 1887 the ship, which was a compound engined vessel, broke down in consequence of her high-pressure cylinder giving way. She made her way back to Las Palmas, and if the claim had been made for hire during the time she was laid up the question could not, I think, have been difficult, as I have no doubt that at the time she lay at Las Palmas after the breakdown she was inefficient. But the owners and the charterers entered into an arrangement to see if they could not get the ship sent home by means of her low-pressure engine only. Now, the surveyors at Las Palmas declined to allow her to proceed to sea in that state; they came to the conclusion that she was not a seaworthy ship in the condition she was in. I think it is plain they were right, because looking at the evidence of the difficulties she experienced in going into Las Palmas she was not fit to encounter the dangers of the sea. But I do not think it necessary to go into that matter, because it is enough to decide the question that the surveyors at Las Palmas would not allow her to go to sea as a seaworthy ship, and I look upon that matter as settled.

Well, the pursuers did not proceed in the matter further by themselves, but they went to the defenders and negotiated with them, so that all parties agreed that the best thing would be that a tug should be sent out to enable the "Westfalia" to make her voyage safe home, and if possible increase her speed by towing. The expense which it was calculated would be incurred by sending out the tug was £1100 or thereby, and in the negotiations about the matter it was considered what proportion of that expense each of the two parties should bear, so that on the one hand the defenders should have the advantage of getting their goods, the cargo, home in good time for its sale, and on the other hand the pursuers should have the advantage of getting their vessel repaired at home more easily, more rapidly, and more cheaply than where she was. It appears from the evidence that if she had had to be repaired at Las Palmas it would have detained her for a period of two months, and that machinery and engineers would have had to be sent out from this county. The result of the negotiations was that the defenders agreed to pay £800 for the services of the tug, and the pursuers paid £300. The tug was sent out, and the ship arrived at Harburg upon the 31st October, and her cargo was discharged by the 10th November.

Now, the pursuers claim that the defenders should pay them the hire at the stipulated rate for the use of the vessel during the time she was upon the voyage from Las Palmas to Harburg, and the time that was occupied in discharging her cargo. The two periods of time do not stand quite in the same position.

The pursuers says that their ship was made seaworthy by the tug towing it home, and that it was then as seaworthy as if a new boiler had been put on board, that it does not matter how the thing was arranged, but that the ship was made seaworthy, and the Lord Ordinary agrees with them. I cannot concur in that opinion. I think that the position of the pursuers and the defenders during the time of the voyage from Las Palmas to Harburg was that they were dealing with an unseaworthy vessel, and the question with them was how they could best save themselves from loss by getting her home in that unseaworthy condition. They therefore had to try some expedient to do this, and the expedient they adopted cost less than it would have done to get the vessel made seaworthy. I think therefore that a special arrangement was entered into for the special purpose of getting this vessel home, and that the whole duties between the pursuers and the defenders for that time were settled by the payment of the sums which they had agreed to pay for the use of the tug.

But the defenders also refuse to pay the hire for the vessel for the time she was engaged in discharging cargo at Harburg. It seems that the discharge took a longer time than was necessary. Probably the stevedores thought that as the repairs had to be executed before the vessel could leave there was no occasion for them to hurry, and therefore dawdled. As one of the defenders pointed out in a letter, they were responsible for the hire of the vessel during the time of discharging. I think therefore that the defenders must pay the hire for the period usually occupied in discharging the vessel. Even if the "Westfalia" had been unseaworthy on her voyage to Harburg, there was here no question of seaworthiness or unseaworthiness; she was sufficient for all that the defenders needed. I think therefore that they should pay, not for the whole time that the vessel was detained at Harburg, but for the period that was usually occupied by discharging the cargo, and the defenders admit that was three or four days.

Lord Young—Upon the question of hire to be paid upon the vessel during the time of discharging her cargo I would wish to say something. Upon the general question I agree with your Lordship in everything you have stated but this. But the facts are striking. This vessel is at Harburg undergoing repairs; she has broken down so far that until repaired she cannot be sent off as before. It required ten days to make these repairs, and it was the defender himself who took her on hire again when she was fit to be used. Now, if during that period the discharge of the cargo went on in rather a dawdling manner,

without injury being done to anyone, I think it is very doubtful whether there is any hire due under the charter-party at all. I think that it was upon my suggestion that the parties agreed to find out what time was usually occupied in unloading, and I then thought that I might have consented to the hire for three or four days being given, but if the pursuers cannot agree as to what was the time, I do not think there should be any hire.

Upon the general question I have already stated my concurrence in your Lordship's opinion, and if the Lord Ordinary's judgment had been to the same effect I would not have thought it necessary to add anything, but as this is a case in which the parties take an interest, and the Lord Ordinary's opinion is different from that which I entertain, I think it right to state my view in my own words.

The action is one for the payment of the hire of this vessel for the period between 18th October and 10th November 1887 under a charter-party, and if the vessel during that period had been in the hands of the defenders under the charter-party in an efficient and seaworthy condition the action would have been unanswerable. The question is, whether during that period the vessel was in the hands of the defenders under the charter-party in an efficient and seaworthy condition? My opinion is that she was not.

The charter-party in question is not a common one, *i.e.*, it is not in the usual form for these instruments, although I dare say it is often used. It is not a contract for the carriage of goods at all, but it is a contract for the hire of a ship. The shipowners are no more carriers of goods than the owner of a waggon and horses who has lent them to a carrier, or to anyone for conveyance of his goods, is a carrier. She was hired to be employed "in carrying lawful and non-injurious merchandise between such ports within the following limits, viz., Swansea $\frac{\text{and}}{\text{or}}$ Rotterdam, or other ports in the United Kingdom, and Continent, to such safe ports on the West Coast of Africa as charterers direct, and back to Europe. Between these somewhat wide limits the merchant may use the vessel as he pleases. The hire is to be paid monthly and in advance, and is not dependent upon the carriage of goods. Hire is due for her although she should never carry a ton of goods, and even in the event of her being lost the hire must be paid up to the day of her loss. Under the ordinary charter-party the owners of the ship cannot earn freight except for goods delivered safely and in good order as when placed upon the vessel. This contract is distinguishable in a marked manner from the usual contract of carriage of goods by sea, as here if the ship has made however long a voyage, and should be lost at the harbour mouth, freight would be payable up to that moment. Then, necessarily in a contract of this kind there must be some provision for calamity overtaking the vessel. In the ordinary case of carriage by sea if calamity overtakes a vessel and impedes her voyage, that does not matter to the owner. If the ship finally arrives freight has to be paid by the owner of the cargo. Here it is otherwise, and provision is thus made in the charter-party for any breakdown which may overtake the ship, and delay her voyage—"That in the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service, but should the vessel be driven into port or to anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the charterers' risk and expense. Quarantine (if any) at charterers' expense. That should the vessel be lost, any freight paid in advance, and not earned (reckoning from the date of her loss), shall be returned to the charterers. The act of God, the Queen's enemies, fire, restraints of princes, rulers, and people, and all other dangers and accidents of the sea, rivers, machinery, boilers, and steam navigation throughout this charter-party always excepted." That is the contract made by the charter-party under which, it is alleged by the pursuer, the vessel was in the defenders' hands during the period mentioned.

Now, what are the facts? The engines broke down when the ship was at sea upon the 30th September. Thereby she admittedly ceased to be in an efficient state, and was got into Las Palmas with difficulty from her broken down condition upon the 2nd October. She was then in an unfit state to perform the service for which she was engaged, the goods were safe on board, but the vessel was broken down—she was inefficient and unseaworthy. Nothing is done to her machinery to make her seaworthy until she arrives at Harburg. Therefore if she was in an inefficient state at Las Palmas, she continued to be in that state until Harburg was reached. Nothing was done to her during that period, and that the pursuer admits she was inefficient when at Las Palmas is clear, because he does not ask hire for the period she was lying there up to 18th October.

During the course of the argument I put this supposition to the defenders' counsel—"Suppose the charterer had found another vessel at Las Palmas which could have brought his goods home, would he not have been entitled to take them out of one vessel and put them on board the other?" The first answer I got was, "Certainly;" but this was afterwards modified with the limitation, "If the pursuers' vessel was unseaworthy," and it was conceded that she was in that condition. But how could he have done that unless the contract was at an end? That course could not be taken, because there was not another ship at Las Palmas, and therefore the supposition was only an illustration, but it illustrates the fact that the contract was at an end. Again, to put another illustration—Suppose instead of reaching Las Palmas this ship had only got on an uninhabited island, and was unable to proceed because she was unseaworthy. What then? The goods were safe on board, but they are of no value in that place, and they must be brought to a place where they are wanted to be of any value, just as the ship must be brought home to be repaired before she can be of use again. Now, Las Palmas is not very different from that; the goods are of no value, and there were no means of repairing the vessel. The owners therefore concurred that the best means of saving the vessel and cargo was to have the vessel towed to Harburg. That was the agree-

ment. The interest of the cargo-owner was to get his goods to where they would be of value, and of the shipowner to get his vessel repaired; therefore they agreed to have her brought home in this way, and that the expense should be divided between them in the proportions that the value of the cargo bore to the value of the ship. That was not upon the charter-party at all, although it was a most proper and reasonable agreement to make. The cargo was more valuable by the freight that had been paid upon it, and the freight had been paid to the shipowners up to the time of the *quasi*-shipwreck. That was therefore a reasonable division of payment, and may be called salvage if you like, but I do not see what the contract of hire has to do with it.

It is put in the Lord Ordinary's note, and was argued to us, that if the owner of the ship had provided a tug at his own expense and brought her home safe, then his claim for hire would have been unanswerable. I am not quite so sure of that. If that had been done under agreement I think it would have been unanswerable; but again, to take the former supposition, suppose there had been another ship at Las Palmas, and the cargo-owner had preferred to tranship his goods to her, would he not have been entitled to do so? It does not appear to me the same thing to have my goods in an inefficient ship which has to be towed home, and to have them in a seaworthy vessel which goes by her own power. I think the owner might have refused to have his goods so brought home, and therefore, unless under a contract, I am not clear that the shipowner would have done his duty to the charterer by giving a tug to his vessel instead of machinery. But another arrangement was come to, and the ship was brought to Harburg under this other arrangement. If that is so, then nothing can be claimed by way of hire for the voyage. I indicated my concurrence in that result with the view that the vessel was unseaworthy. I do not indicate, however, that the breakdown of the machinery, if it could be repaired in a few days, or even in a period exceeding a week, that that would terminate the contract. Indeed that is the view taken in the charter-party, because the hire is not to cease unless the vessel has been detained for more than forty-eight hours, but there must be a limit, and I think that limit has been exceeded when the delay would extend to two months if the ship was to be repaired.

Well, there is another point. The vessel arrives at Harburg, being towed by the tug, and she is useless unless repaired, so they immediately set about repairing her in order to hire her out to the same persons, the defenders in this action. They could not hire her out until she had been repaired, and the question of whether there is any hire due for the time during which she was discharging her cargo is complicated by the consideration that she was not seaworthy and efficient until the repairs were done. I am of opinion that no hire is due for the period of discharging.

Lord Lee—I have come to the same conclusion, although I confess it was with diffidence I reached a conclusion differing from that of the Lord Ordinary, whose particular knowledge and experience in this branch of the law I desire to recognise. But my difference from him is, I think, chiefly on a matter of fact. I quite agree with the observation in his Lordship's note that payment of general average does not exempt from liability for freight. But it seems to me the question is, whether the arrangement come to between the cargo-owner and the shipowner deprives the latter of his right to sue for hire during the period mentioned in the record?

The clause in the charter-party is a very special one, and requires to be attended to. The provision is—"That in the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service, but should the vessel be driven into port or to anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the charterers' risk and expense. Quarantine (if any) at charterers' expense. That should the vessel be lost, any freight paid in advance, and not earned (reckoning from the date of her loss), shall be returned to the charterers. The act of God, the Queen's enemies, fire, restraints of princes, rulers, and people, and all other dangers and accidents of the sea, rivers, machinery, boilers, and steam navigation throughout this charter-party always excepted." Now, it is important to notice that this is not an agreement which provides that time lost from a breakdown of the vessel shall be deducted from the time for which hire is due, but the provision is that on the breakdown the payment of hire shall cease until the vessel has again been made efficient. Now, when the breakdown took place the owner had to make arrangements for his vessel being put in an efficient and seaworthy condition again, but while she was in an inefficient condition he could not claim that hire should be paid. The vessel could not be repaired at Las Palmas, and the owner, as he says, tried to coax her home in the state she was in with only one boiler as seaworthy, but he failed to do so. Some other arrangement had to be come to. Well, then, it was for the shipowner, if he intended to claim hire for the time the ship was on her voyage from Las Palmas to Harburg, to make it plain in the agreement that his ship was in an efficient condition, or that she was made so by the engines of the tug being taken instead of her own, so that hire would have run on. He did not make any such arrangement, and in my opinion he cannot get out of the clause in the charter-party by saying he sent out the tug to bring her home.

The principal thing is that the ship was not in a position to earn hire under the conditions of the charter-party during the period from 18th to 31st October. Now, the Lord Ordinary's view is that she was in an efficient condition, and he states so in his note—"The service which the steamer was bound to render the defenders under the charter-party was to carry the cargo to the port of delivery. That the 'Westfalia' was in a condition efficiently to render this service is best proved by the fact that she did it." I am not only not moved by that, but I think that it is disproved by the whole evidence. She did not make that voyage alone; she was not fit to make

any voyage by her own power. On the argument that as she made it along with the tug she was efficient, I do not find any provision as to hire going on for that time in the agreement between the parties. I therefore concur in your Lordship's opinion that hire cannot be claimed for that time.

But that leaves another question for decision as to her position as a wage-earning vessel in the port of Harburg. She was efficient for the only purpose for which the defenders needed her, viz., the discharge of the cargo, and in my opinion something ought to be allowed for that time. I think we have evidence to enable us to fix what should be given. I refer to the letter of the pursuers' of 7th November 1887, in which they complain that the stevedore had taken a "whole week, or at least double the time that should have been spent." I therefore think that four days may be allowed as the time necessary for discharging the cargo, and that hire ought to be allowed for that time.

The Court recalled the Lord Ordinary's interlocutor, found "the defenders liable to the pursuers in the sum of £60 sterling, ordained them to make payment thereof, and *quoad ultra* assoilzied them with expenses."

Counsel for the Pursuer — Dickson — Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders—Sol.-Gen. Darling, Q.C.—Graham Murray. Agent—David Turnbull, W.S.

Friday, March 15.

FIRST DIVISION.

THE STEEL COMPANY OF SCOTLAND (LIMITED) *v.* TANCRED, ARROL, & COMPANY.

(*Supra*, p. 305.)

Process—Appeal to House of Lords—Execution pending Appeal—Caution.

In a petition for execution pending appeal to the House of Lords, the respondents argued that the appeal would shortly be heard; the amount decerned for was unusually large, and could only be raised and transferred at great expense, which would be lost if the judgment was reversed on appeal. *Held* that as the application was only granted on caution being found for repetition, in the event of the judgment appealed against being reversed, no sufficient reason had been assigned for departing from the ordinary rule.

In the action at the instance of the *Steel Company of Scotland* v. *Tancred, Arrol, & Company*, reported *supra*, p. 305, the Lord Ordinary (TRAYNER), after sundry procedure, pronounced an interlocutor on 13th June 1888 in these terms —"Interpones authority to the joint minute No. 516 of process, and in respect thereof decerns against the defenders for £14,850 sterling; finds the defenders liable to the pursuers in expenses."

Tancred, Arrol, & Company reclaimed against this interlocutor, and their Lordships of the First Division on 1st February 1889, *inter alia*, recalled the interlocutor of 13th June 1888, in so far as it found the defenders liable in expenses, and in place thereof found the defenders liable in expenses with the exception of the expenses of the proof, and remitted the account to the Auditor to tax and report.

The Auditor taxed the account of the said expenses at £241, 10s. 1d. Tancred, Arrol, & Company presented a petition of appeal to the House of Lords against the various judgments in the cause.

On March 13th 1889 the Steel Company of Scotland presented the present petition for interim execution pending appeal in terms of 48 Geo. III. cap. 151, sec. 17, and praying the Court to approve of the Auditor's report on their account of expenses, and to decern therefor; and further, to allow decree for the taxed amount of the said expenses, and also decree in terms of the various interlocutors in their favour, to go out and be extracted, and execution to proceed thereupon, notwithstanding the appeal, to the effect of enabling the petitioners to recover payment of the sums of principal, interest, and expenses due to them, in terms of the said decrees, with the expenses of extract and of this petition, and that upon caution in common form, to repeat the same, in the event of the interlocutors above recited being reversed in the House of Lords.

The Act 48 Geo. III. cap. 151, sec. 17, declares —"That when any appeal is lodged in the House of Lords, a copy of the petition of appeal shall be laid by the respondent or respondents before the Judges of the Division to which the cause belongs; and the said Division, or any four of the Judges thereof, shall have power to regulate all matters relative to interim possession or execution, and payment of costs and expenses already incurred, according to their sound discretion; having a just regard to the interests of the parties as they may be affected by the affirmance or reversal of the judgment or decree appealed from."

Argued for Tancred, Arrol, & Company that the appeal to the House of Lords would shortly be heard and disposed of; that the amount carried by the decrees was very large, and that the expenses of raising and transferring the money would be great; and in the event of the judgment of the Court being reversed by the House of Lords this expense would all be thrown away, as there would then require to be a re-transfer; that as the Court had the amplest discretion as to the regulation of all matters relative to interim possession, it was not in the circumstances desirable that execution should pass.

At advising—

LORD PRESIDENT—I do not think that Mr Jamieson has suggested any good reason why we should depart from the rule which we ordinarily follow in cases like the present.

If execution pending appeal is granted, this of course is only done upon caution being found that in the event of our judgment being reversed the money thus handed over will be repaid; whereas if we refuse the present motion, the petitioners have no security that the money to which we have found them entitled will be forthcoming in