suer's case was well founded. But the Sheriff-Substitute seems to have forgotten that that rule no longer exists. It ceased when the law was altered to the effect of allowing the parties to a cause to be examined as witnesses in the cause. I am surprised the Sheriff-Substitute should have forgotten this, for it is plainly laid down in the case which he cites—*M'Bayne* v. *Davidson*. The rule applicable in filiation cases is now the same as that which applies to any other kind of case which depends upon the ascertainment of disputed fact. The pursuer must prove her averments in an action of filiation just as she would require to prove her averments in an action on a contract where the alleged contract, or the alleged breach of contract or other allegation on which the action is founded, is disputed.

I would like to add one word about the defender's letter, which the Sheriff-Substitute thinks is not the letter of "an innocent man." It is at all events a distinct denial of the paternity of the pursuer's child. It does not strike me as suggesting any doubt of the defender's innocence. But is it any proof of the defender's guilt? That is the light in which it should be regarded; and I have no hesitation in answering that question in the negative.

The Court recalled the interlocutor of the Sheriff-Substitute and assoilzied the defender.

Counsel for the Pursuer and Respondent —M'Clure. Agent—A. Stewart Gray, W.S.

Counsel for the Defender and Appellant —Strachan—Baxter. Agent—John Veitch, Solicitor.

Wednesday, January 13.

FIRST DIVISION.

[Sheriff of Lanarkshire.

ALLAN AND OTHERS *v.* JOHNSTONE.

Ship—Charter-Party—Bill of Lading—Construction — Lay-Days — Part of Day—Demurrage.

The charter-party of a steamship provided, "the cargo to be brought and taken from alongside the steamer at freighter's expense and risk . . . Eleven running-days (Sundays excepted) are to be allowed the said freighters for loading and unloading . . . The 1885 bill of lading to be used under this charter, and its terms to be considered part thereof."

Five and a-half days were occupied in loading the ship.

The bill of lading was headed "Bill of Lading 1885," and provided—"All conditions as per charter-party . . . *Five and a-half* (5½) laying-days remain for discharging the whole cargo." It was a printed document with blanks, and the words in italics were filled in by the master.

The steamship arrived at her port of delivery on the 26th December, and on the same day the agents for the owners at that port wrote to the consignee, the indorsee of the bill of lading, in these terms—"As advised, s.s. 'Archdruid' is now lying at foot of M'Alpine Street, where she will be ready to commence discharging at 6 a.m. to-morrow morning, and lay-days will commence then." Discharging commenced at 7 a.m. on the 27th December, and ended at 2 a.m. on the 6th January. Sundays were excepted by the charter-party; Thursday, January 1st, was of consent treated as a non-working day; and during a certain portion of the time one of the steamer's winches broke down.

The owners brought an action against the consignee for three days' demurrage from 12 p.m. on the 2nd January.

Held (1) that the defender had five and a-half days for unloading, as by the charter-party the owners had directly empowered the master to fix the number; (2) that in terms of the letter written by the agents for the shipowners, these fell to be reckoned as periods of twenty-four hours from 6 a.m. on 27th December; (3) that an allowance of one day fell to be made for the breakdown of the winch, which extended the laying-days into Monday the 5th, and that only one day's demurrage was due.

This was an action by William Allan and others, owners of the steamship "Archdruid," against William Johnstone, grain merchant in Glasgow, and consignee of the cargo of the "Archdruid," for payment of £93, 3s. as demurrage for three days in discharging the ship at Glasgow at the rate of £31, 1s. per day.

By charter-party dated 20th October 1890 it was agreed that the "Archdruid" being in good condition should proceed to Kustendjie and "there load a full and complete cargo of wheat, seed, or grain . . . and being so loaded shall therewith proceed to a safe port in the United Kingdom . . . The cargo to be brought and taken from alongside the steamer at freighters' expense and risk . . . Eleven running-days, Sundays excepted, are to be allowed the said freighters (if the steamer be not sooner dispatched) for loading and unloading, and ten days on demurrage over and above the said lay-days at 6d. per ton on the steamer's gross register tonnage per running-day . . . The 1885 bill of lading to be used under this charter and its terms to be considered part thereof."

The "Archdruid" arrived at Kustendjie on 30th November 1890, commenced loading on 1st December at 7·30 a.m., and finished at 11 a.m. on the 6th. She sailed that day and arrived at Glasgow at 1·30 p.m. on the 26th.

The bill of lading was dated 6th December 1890, and was in the following terms—"Mediterranean, Black Sea, and Baltic Grain Cargo Steamer. Bill of Lading 1885.

Shipped in good order and condition . . . *say twenty six-thousand, ten hectolitres barley, produce of Kustendje, dry and in good condition* . . . all conditions as per charter-party dated *in London the 20th October* 1890 . . . *Five and a-half* (5½) laying-days remain for discharging the whole cargo."

The bill of lading was a printed document with blanks and the words printed in italics were filled in by the master.

Messrs Dixon & Harrison, the shipbrokers in Glasgow for the "Archdruid," on 26th December wrote to William Johnstone, the onerous indorsee of the bill of lading, in the following terms — "As advised, s.s. 'Archdruid' is now lying at foot of M'Alpine Street, where she will be ready to commence discharging at 6 a.m. to-morrow morning, and lay-days will commence then."

Discharging commenced at 7 a.m. on the 27th December and was finished at 2 a.m. on Tuesday 6th January 1891, overtime being worked from 6 p.m. on the 5th to 2 a.m. on the 6th January 1891. Sundays were excluded by the charter-party, and Thursday 1st January was held as a holiday by mutual consent.

On 8th January 1891 Dixon & Harrison presented an account to William Johnstone for £72, 9s. for two days and eight hours' demurrage from 6 p.m. on Saturday 3rd January to 2 a.m. on Tuesday 6th January, and on refusal of payment the pursuers raised this action. William Allan and others, the owners of the "Archdruid" raised an action in the Sheriff Court of Lanarkshire at Glasgow against William Johnstone, concluding for payment of £93, 3s. for three days' demurrage.

They averred that eleven lay-days had been allowed by the charter-party for loading and unloading the ship, and that six of these had been occupied in loading at Kustendjie.

William Johnstone, the defender, averred that by the bill of lading he was entitled to five and a-half days for discharging the cargo, and that the additional detention in discharging was caused by the defective condition of the steamer's winches, which had frequently broken down, and to the irregular discharge given by the ship's stevedores. He, however, without prejudice to his pleas, tendered £50 in full settlement of the pursuers' claims.

On 26th March the Sheriff-Substitute (GUTHRIE) allowed a proof, from which it appeared that the master had inserted five and a-half days in the bill of lading as the result of a compromise between him and the merchant who shipped the cargo, the master holding that six days had been occupied in loading and the merchant only five. It further appeared that the steam winches at the three hatches for discharging the vessel were old but in fair condition, that there had been some slight stoppages of the winch at No. 2 hatch, and that the winch at No. 3 hatch had broken down on Tuesday 30th December from 3·30 p.m. for the remainder of the day, and again on the 31st from 8·30 to 10·40 a.m., and from 1 p.m. for the remainder of that day. It also appeared that the regular hours for work in winter were 7 a.m. to 5 p.m., and that there had been some irregularity of work owing to the New Year holidays.

On the 14th July 1891 the Sheriff-Substitute (GUTHRIE) pronounced the following interlocutor — "Finds, for the reasons stated in the note, that the pursuers' steamship the 'Archdruid' finished discharging at Glasgow on Tuesday, January 5th, and that allowance being made for detention, due to the defective working of the ship's winches, the vessel is entitled to one day on demurrage over and above the lay-days allowed by the charter-party: Therefore decerns against the defenders for the sum of £31, 1s., with interest thereon as sued for: In respect that the defenders before action tendered the sum of £50 in full of the pursuers' claim, Finds the pursuers liable in expenses, &c.

"*Note.* — The first question argued is whether the master of the 'Archdruid' had authority as such to fix the number of lay-days occupied in loading at Kustendjie at five and a-half, thus leaving five and a-half lay-days for discharging the cargo under the charter-party. It is said that part-days do not count in the calculation of lay-days under such a charter-party, and that in breaking up a day into halves, the master was innovating on the contract made by his owners in the charter-party. I cannot help thinking this rather a captious contention. I do not think that it is a material alteration of the contract if it be an alteration at all. It is rather carrying out the contract in a reasonable way. There seems to have been some controversy at Kustendjie with the shippers of the cargo, and that controversy was probably settled by the master in a reasonable way for the benefit of his owners. In any view, the owners object to the arrangement only when they come into Court, and not when it is first brought to their knowledge.

"If the consignees are entitled to five and a-half lay-days, then the ship having been ready to discharge on Saturday morning December 27th, and Sunday, under the charter-party, and January 1st by consent, being discounted, demurrage would properly begin to become due on Saturday January 3rd at noon. But it is conceded that a certain deduction ought to be made for stoppages in discharging at two of the holds in consequence of the winches breaking down. The pursuers allow, I think, six hours for this. I am of opinion that the winch at hatch No. 3 was defective, and that a larger allowance ought to be made for delay, due to the ship's want of winch power. This allowance may fairly be stated at a day and a-half, taking us on to Monday, and in this way, as the ship did not finish her discharge till Tuesday the 5th, one day's demurrage, taking into account the defender's hand-winch and overtime, appears to me to be due at the lowest computation. I therefore decern for one day's demurrage, and as the defenders tendered a larger sum than the pursuers recover, the

defender is entitled to expenses.

There is much recrimination as to the manner in which the men employed by the ship, and the consignees respectively, did their work. I think the real evidence is at least as favourable to the defender as to the pursuer; but, perhaps, considering the season of the year and all the circumstances, it may be held, without much risk of injustice, that the pot and the kettle were, as they both maintain, just about equally black. I, at least, am not prepared to give either a preference."

The pursuers appealed, and argued—The charter-party stipulated for days not hours, and therefore in reckoning lay-days half-days counted as whole days—*Hough and Others* v. *Athya & Son*, May 27, 1879, 6 R. 961; *Commercial Steamship Company* v. *Boulton*, June 17, 1875, L.R., 10 Q.B. 346. Six days therefore fell to be reckoned as the time occupied in loading the ship, and only five remained for unloading. The master could not innovate on the owners' contract by allowing five and a-half—*Holman* v. *Peruvian Nitrate Company*, February 8, 1878, 5 R. 657. His statement was therefore either false in fact or a wrong inference in law. Further, the bill of lading specially incorporated the charter-party, and the defender as indorsee must be held cognisant of the terms of it. The lay-days for unloading therefore began at 12 p.m. on the 26th December and expired at 12 p.m. on 2nd January. Three days demurrage was accordingly due. Delay had no doubt been caused by the breakdown of the winch at No. 3 hatch. That was not however due to faulty construction, and the defender must bear the loss, as he had undertaken an absolute obligation and was bound to fulfil it unless the owners were personally in fault—*Postlethwayte* v. *Freeland*, May 7, 1880, L.R., 5 App. Cas. (H.L.) 599; Carver on Carriage at Sea, 611; *Badgett & Company* v. *Binnington & Company*, 1891, 1 Q.B. 35. Even if, however, some allowance must be made for the delay, six hours was ample, and these fell to be deducted from the period of demurrage. In any view, if the half day was to be allowed, and six hours were to be added to the lay-days, that would only extend the time to 6 p.m. on the 3rd January, and demurrage for a period of two days and eight hours down to 2 a.m. on the sixth was accordingly due.

Argued for the defender—The defender was here an onerous endorsee, and the bill of lading was his contract with the owners, and must be taken as it stood—*Gardener* v. *Trechmann*, December 16, 1884, L.R., 15 Q.B. 154; *Mercantile Exchange Bank* v. *Gladstone and Others*, June 1, 1868, L.R., 3 Exch. 233; Scrutton on Charter-Parties, &c., 42; *Mitchell* v. *Scaife*, 4 Camp. 298. Whatever effect it might have with the charterers, it could not now be gone behind, as when endorsed over it was no longer a receipt but a contract—*Leduc* v. *Ward*, February 11, 1888, L.R., 20 Q.B. 475. Further, the bill of lading was in the form specially referred to in the charter-party; and by giving the master a printed form with a blank clause in it, the owners had given him authority to fill it up—*Holman* v. *Peruvian Nitrate Company, supra*. There were therefore five and a-half days for discharging the ship. These must be reckoned as periods of twenty-four hours, and from 7 a.m. on December 27th when work began. The owner's letter of December 26th was conclusive against them on this point. The lay-days consequently expired at 7 p.m. on the 3rd January. To this fell to be added the period allowed for the breakdowns, which extended the time into Sunday 4th January. Sunday being excepted from the lay-days as a working day, demurrage accordingly began on Monday the 5th. There was therefore only one day's demurrage due, and the defender had tendered a sum in excess of that.

At advising—

LORD PRESIDENT—The first question for us to decide in this case is as to the number of days which the consignees were entitled to for unloading the vessel—whether they were entitled to five days or five and a-half days. Now, in my opinion that depends on the terms of the bill of lading which was granted by the master. The bill of lading sets out that "Five and a-half laying-days remain for discharging the whole cargo." It is clear that this clause is not a mere statement of fact that five and a-half days had been consumed in loading the vessel. On the contrary, it appears from Mr Dickson's argument that there being in the charter-party a provision that eleven running-days should be allowed for loading and unloading, the bill of lading, which was granted in the form authorised by the charter-party, apprised the consignee how much time he had left for discharging the cargo, and there is no doubt that the captain made provision in the bill of lading that there should be five and a-half days for that purpose.

Now, that the captain had authority for doing so is demonstrated by the fact that the charter-party provided for what was called 1885 bills of lading being used. An 1885 bill of lading was undoubtedly a bill of lading in this form, and it leaves a blank for the captain to fill in the number of laying-days that remain. Therefore the captain was directly empowered by his principals to do the very thing which in point of fact he has done. I am therefore of opinion that this contract was entered into by a lawfully constituted agent, binding on his owners, and that five and a-half days consequently remained for discharging the vessel.

The next question for our consideration is the mode in which those days are to be computed. If they are to be counted from 6 a.m. on the morning of the 27th, then the owners are in this position—that the time is extended on to Sunday the 4th, and the action in consequence fails. Now, on this point I do not understand how they can get over the letter of 26th December 1890, which Messrs Dixon & Harrison, their

agents at Glasgow, wrote to the defender—"As advised, s.s. 'Archdruid' is now lying at foot of M'Alpine Street, where she will be ready to commence discharging at 6 a.m. to-morrow morning, and lay-days will commence then." The ship commences discharging at that time on the 27th, and if five and a-half days are given for that, and an allowance made for the failure of the winch, we get in to Sunday, and only one day's demurrage is then due. An allowance must be made for the failure of the winch, as it is part of the contract that the ship is to be in good condition. From the proof it appears that one winch was disabled, and on the most moderate estimation of the time during which it was so disabled we reach the period I have already stated. I do not doubt that the obligation of the charterers is as stated in the case of *Postlethwayte*, but that leaves out of consideration that it is the duty of the owners to provide a ship in good condition and fitted to perform her duties.

I think therefore that it is clearly made out that one day's demurrage alone is due. It is satisfactory from the smallness of the sum that we can concur with the Sheriff's judgment, but we have considered the case as closely as if the pecuniary amount involved had been very much larger.

LORD ADAM—The question in dispute is whether demurrage for one or for three days is due, but the stake is still smaller owing to the tender which has been made. We have nevertheless, as your Lordship has remarked, considered the case as if as many thousands had been involved. Now, the decision as to the number of days for which demurrage is due depends on three questions—1st, Are five or five and a-half lay-days to be counted? 2nd, At what hour is the day to commence—whether at midnight of the 26th or 6 a.m. on the 27th? and 3rd, what amount of time, if any, is to be allowed in respect of the breakdown of the winch or defect of the vessel?

On the first question, whether the shippers are to have five or five and a-half days, I am of your Lordship's opinion. There are here two documents which decide the question, the charter-party and the bill of lading. The charter-party provides that "eleven running days (Sundays excepted) are to be allowed the said freighters (if the steamer be not sooner despatched) for loading and unloading." The clause in the bill of lading which affects the question is this —"Five and a-half (5½) laying-days remain for discharging the whole cargo." The contention of the shipowners is that it was *ultra vires* of the master to alter the terms of the charter-party, and they further say that the consignee must have been aware, from this statement in the bill of lading, that five and a-half days had been consumed in loading which were counted as and equivalent to six days, as no part days can be allowed, and they add that therefore the inference which must necessarily be drawn from this statement is that five days only were left for unloading. The answer to that is, that the clause in the bill of lading alone rules. This was within the competency of the master, and as he has fixed this number of five and a-half days, that is binding on the shipowners. I agree that that is the right view, and that the master had power to so fix the number of days. A blank has been left for him to fill up, and he has so filled it up, and therefore the bill of lading must be held to have been so handed to the shippers by the shipowners as complete and binding. Therefore on the first question I am of opinion that the charterers had five and a-half days for discharging the ship.

The next question is, when do the days begin? If there had been nothing special here, I should perhaps have concurred with the argument that they run from 12 p.m. to 12 p.m., but it is always a question of circumstances. Your Lordships referred to the letter written by Messrs Dixon & Harrison on 26th December 1890. That letter is conclusive of the matter, and it is not material to the decision of this case that the ship was not ready for discharging till 7 instead of 6 o'clock in the morning. How in the face of this letter can the owners say that the period commenced not at 6 a.m. but at 12 midnight. I think if whole days were to be granted, the charterers might have said that this 27th was accordingly a broken day, as the ship was not ready till 7 a.m., and that they would not commence on it. But here on every showing the days commence at 6 a.m. on the 27th.

The last question is that of the allowance of the time to be made for the breakdown of the winch. It is maintained, on the authority of the case of *Postlethwayte*, that the shipper took the risk of defects in the ship. That is not my opinion of that case, and I think the shipowner takes the risk of these defects, and that the time lost by them must be deducted.

Therefore to sum up. The five and a-half days, reckoning from 7 a.m. to 7 a.m., and excluding Sunday the 28th and Thursday the 1st January, began at 7 a.m. on the 27th and ended at 7 p.m. on Saturday the 3rd January. There is next to be added the time allowed for the defect in the machinery, which on the smallest computation takes us into Sunday, and thus there is only one day's demurrage due. I accordingly concur in your Lordship's judgment.

LORD M'LAREN concurred.

LORD KINNEAR—I am of same opinion. The first question depends on a construction of the bill of lading taken along with the charter-party, and I do not think the reading of the documents can be at all affected by any evidence we have seen. By the bill of lading five and a-half laying-days are allowed for discharging the cargo, and though according to the general rule laying-days mean whole days, yet there is nothing to prevent parties from stipulating for hours or portions of days. Have they then so stipulated here? The answer to that is apparent. The bill of lading is im-

ported into the charter-party, subject to the condition that the master is to have power to fix the time allowed to the merchant for unloading. The master thus authorised fills up the clause in the bill of lading by stating that five and a-half days remain for unloading, and takes the cargo on the condition so expressed. It is therefore out of the question for the shipowners to say they are not bound by the master's act, or that the statements amount to anything else than a stipulation as between the onerous indorsee and the owners that the former is to have five and a-half days for unloading before demurrage begins to run.

Next as to the period when the laying-days began. That is fixed by the information given by the shipowners' agents that the ship would be ready to discharge at 6 a.m. on the 27th. That is conclusive against them. On the question of fact I agree with your Lordships, and have nothing to add.

The Court dismissed the appeal.

Counsel for Pursuers and Appellants—Jameson—Younger. Agents—J. & J. Ross, W.S.

Counsel for Defender and Respondent—Dickson—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, January 15.

SECOND DIVISION.

[Sheriff of Dumfries and Galloway.

M'QUILLAN *v.* SMITH.

Husband and Wife—Affiliation and Aliment of Illegitimate Child—Wife Suing without Husband's Concurrence—Title to Sue.

Held that a married woman whose husband was abroad and had not been heard of for six years, had a title to sue an action of affiliation and aliment for a child borne by her, without the concurrence of her husband, and without having a curator *ad litem* appointed.

Mrs Susan Armstrong or M'Quillan, residing in Lennox Close, Portpatrick, brought an action of affiliation in the Sheriff Court at Stranraer against James Smith, fisherman, Blair Street, Portpatrick, for aliment for an illegitimate child born on 19th December 1890, of which she averred that the defender was the father.

It was stated in the condescendence that her husband "Joseph M'Quillan, a seaman, sailed for Australia seven years ago, and has not since been heard of by the pursuer, and she has no knowledge as to whether he is dead or alive."

The defender pleaded—"(1) The pursuer being a married woman is not entitled to sue this action without the consent and concurrence of her husband. (2) The child in question being the offspring of a married woman, her husband is presumably the father thereof; therefore it is incompetent to prove the paternity against the defender without making the husband a party to the action."

Upon 28th May 1891 the Sheriff-Substitute (WATSON), before answer, allowed the pursuer a proof of her averments.

"*Note.*—The pursuer of this action of filiation is a married woman. She avers that her husband sailed for Australia about seven years ago, and has not since been seen or heard of by her. The defender does not admit the truth of that averment, but pleads that the pursuer has no title to sue unless she either brings positive proof of the death of her husband or obtains his consent to and concurrence in her action. The defender's contention was founded mainly on certain *dicta* of Lord Justice-Clerk Moncreiff and Lord Young in the case of *Wilkinson*, November 9, 1880, 8 R. 72. These *dicta*, however, were uttered prior to the passing of the Married Women's Property Act 1881, and even under the former law they seem hardly reconcilable with some earlier decisions of the Court, such as *Jobson*, May 31, 1832, 10 S. 594. In that case a wife whose husband had been abroad for several years was found entitled to sue for aliment the alleged father of a child begot before but born after the marriage. It is true that in that case a curator *ad litem* was appointed to the wife, and the husband was also called in the summons for his interest. But it appears to the Sheriff-Substitute that the reasons which made these precautions necessary under the former law do not now exist, for the husband has now no right of administration in reference to such a claim as the present. The Sheriff-Substitute is therefore of opinion that if the pursuer's averment in regard to her husband is true, she has a good title to sue. He has accordingly allowed a proof before answer."

The defender appealed to the Sheriff (VARY CAMPBELL), who upon 19th June 1891 refused the appeal.

"*Note.*—Assuming that the pursuer can prove that her husband has been absent from her for seven years without contributing to her support, and that it is now uncertain whether he is living or dead; further, that if he is alive, she does not know where he is to be found—I cannot refuse to sustain her title to sue. If the husband is dead, there can be no question of her right. If he turns out to be alive, nevertheless I think there is authority for sustaining an action of this nature by a married woman. The class of cases to which I refer are those relating to the actions and obligations competent to and against a married woman thrown upon her own resources either by wilful desertion of her husband or by his permanent separation from her without keeping up a home for her or making any provision for her support.

"A woman in such a situation must have some legal capacity to act and contract, to sue her debtors and be sued, else she must starve. Such capacity has accordingly