The Court recalled the interlocutor of the Lord Ordinary, repelled the claims for the next-of-kin, sustained the claim for the trustees, and preferred them to the whole fund *in medio*.

Counsel for Pursuers and Real Raisers (Reclaimers) — M'Lennan, K.C. — Mair. Agents—Macpherson & Mackay, S.S.C.

Counsel for Claimants (Respondents), Jessie Baillie and Others — Macmillan. Agents—Laing & Motherwell, W.S.

Counsel for Claimant (Respondent), Mrs Morrison—Black. Agents—Dove, Lockhart, & Smart, S.S.C.

Thursday, July 9.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

GIERTSEN AND OTHERS *v.* GEORGE V. TURNBULL & COMPANY.

Shipping Law—Charter-Party—Off-Hire—"Breakdown"—Liability for Hire—Liability for Value of Coal Consumed during Off-Hire.

A steamship was chartered for six months under a charter-party which provided "that in the event of the loss of time from . . . breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire shall cease from the time the breakdown, &c., occurred until she be again in an efficient state to resume service."

In a question between the owner and the charterer, *held* (1) that a "breakdown" occurred when a defect was discovered which rendered it necessary in the opinion of a prudent navigator that he should proceed to a harbour for repairs; and (2) that in respect that under a time charter, in the absence of special exemption, the charterers must suffer the consequences of all mischances to the vessel, where as here the charter-party provided that the charterers should provide or pay for all coal, the charterers could not charge the owners with the value of the coal consumed during the time of off-hire.

Shipping Law—Implied Warranty of Seaworthiness—Time Charter—Stages of Voyage—Provision in Charter-Party for Maintaining Vessel in Efficient State.

Held (1) that an article in a charter-party binding the owner "to provide and pay for the necessary equipment for the proper and efficient working of the said steamer, maintaining her in a thoroughly efficient state for and during the service," placed the expense of maintaining the vessel in an efficient state on the owner, but did not bind him to keep the vessel in that state; and (2) that the implied warranty of seaworthiness was satisfied when the vessel was originally delivered to the charterer, and that the voyage could not be divided into stages to the effect of imposing on the owner a warranty that the vessel when it left a port to which it had been sent by the charterer was fit for the ensuing voyage.

"*The Vortigern*," [1899] P. 140, *distinguished*.

Shipping Law—Off-Hire—Computation of Period.

When a vessel is off hire for some days and a fraction of a day, *held* (by the Lord Ordinary, Salvesen, and acquiesced in) that the hire falls to be calculated by hours and half-hours.

On 24th October and 4th July 1906 Giertsen and Others, owners of the steamship "Bauta," brought two actions against George V. Turnbull & Company, charterers of that vessel, to recover certain sums, being deductions made by the charterers when settling for the hire of the vessel. Turnbull & Company brought a counter-action to recover certain sums as being over-payments when so settling. The material questions between the parties arose out of detentions of the vessel during the period of hire on three separate occasions.

By charter-party dated 26th July 1905 the charterers hired the "Bauta" from the owners for a period of six months at the rate of £270 per month, and the "Bauta" was delivered to the charterers on 23rd September 1905.

The material clauses of the charter-party were as follows—"1. That the owners shall provide and pay for all provisions and wages of the captain, officers, engineers, firemen, and crew, and shall pay for the insurance on the vessel, and for all necessary stores, including fresh water required for the engine-room, and provide and pay for the necessary equipment for the proper and efficient working of the said steamer, maintaining her in a thoroughly efficient state for and during the service. Owners to pay consular expenses of ship and crew. 2. That the charterers shall provide and pay for all the coals, fuel, port charges, pilotages, agencies, and all other charges and expenses whatsoever, except those before stated. . . . 9. That the captain, although appointed by the owners, shall follow the instructions of the charterers, who will furnish him from time to time with the necessary sailing directions. . . . 12. That in the event of the loss of time from a deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire shall cease from the time the breakdown, &c., occurred, 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 charterer's risk and expense. Charterers to have the

option of adding such time off hire to the period stipulated for under this charter. 13. . . . The Act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, and thieves, arrests, and restraints of princes, rulers, and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners. . . . 22. Average, if any, according to York and Antwerp Rules 1890."

The *facts* in the case are given in the opinion (*infra*) of the Lord Ordinary (SALVESEN), who, on 20th March 1907, after having conjoined the actions and taken a proof, pronounced this interlocutor:—"Finds that the pursuers (*i.e.*, Giertsen and Others) are not entitled to hire in respect of the following periods, namely, (1) from 8·30 a.m. on the 28th of November 1905 till 9 a.m. on the 1st of January 1906; (2) from 10 a.m. on 5th February 1906 till 6 p.m. on 7th February; and (3) from 12 noon on 24th May 1906 until 9·20 p.m. on 26th May 1906; and with these findings appoints the cause to be enrolled for further procedure."

Opinion.—"These actions all arise out of a charter-party which was entered into between the owners of the 'Bauta' and a firm of shipping agents in Leith. The charter-party is dated 26th July 1905, and was for a period of six calendar months, commencing on 23rd September of that year. The sums sued for by the owners represent certain deductions which the charterers made when settling for the hire of the vessel during the time that she was actually employed. The charterers, on the other hand, maintain that they were entitled to make larger deductions than they have actually done, and in the counter action at their instance they sue for repetition of sums paid, amounting *in cumulo* to about £200. Some of the deductions which are in dispute represent comparatively small amounts, and these the parties have arranged extrajudicially. The controversy has accordingly been substantially narrowed to this—for what periods were the charterers exempt from payment of hire during the currency of the charter-party in respect of certain breakdowns of machinery which occurred on three separate occasions, and which for the time being prevented the working of the vessel? The clause in the charter-party which regulates this matter is expressed in the following terms:—'That in the event of loss of time from a deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire shall cease from the time the breakdown, &c., occurs until she be again in an efficient state to resume her service.' On the construction of this clause as applicable to the facts in the case the controversy turns.

"The evidence with regard to the first breakdown is as follows:—On the 14th of November, while the 'Bauta was on a voyage to Jaffa in ballast to load a cargo of oranges there, the master, who was on deck, heard a peculiar sound, which is entered by the first mate in the log-book as a violent shock in the engine-room. The captain now explains that this language does not accurately express what actually took place, and that the noise in fact was such that it did not attract the attention of any of the other persons who were on deck. It was, however, an unusual sound; and although the captain does not now profess to know what caused it, he at one time attributed it to the propeller having struck some wreckage, although the evidence now led for the ship suggests that it may have been one of the knocking sounds which are a common result of some temporary derangement in the machinery. The experts examined were agreed that such noises are attributable to a variety of causes, such as the slackening of bolts, or the presence of water in the cylinders, or the like. As the steamer, however, was able thereafter to maintain her ordinary speed the captain did not attach so much importance to the occurrence as he was inclined to do at the time. The entries in the log show that on the 14th, 15th, 16th, and 17th of November the steamer was able to make on an average about 8 knots an hour, and indeed the speed occasionally rose to 8½, and even to 9 knots, under favourable conditions. At 10·40 p.m. on the 17th the vessel arrived at Jaffa, and next day she commenced to take in her cargo of oranges. In the mate's log there is no further reference to the noises in the engine-room or to anything which could give rise to any uneasiness.

"In the engineer's log, which was kept by the first engineer, the entry with regard to the same matter is in the following terms:—'At 8 p.m. a strange noise was heard in engine-room; the steam pressure was then 140 lbs. As the fires were being cleaned at the time the place whence the sound came could not be located. As the steam pressure rose rapidly the sound disappeared, and the engines were kept working under full steam pressure.' There are no remarks with reference to the 15th, 16th, or 17th of November, but on the 18th of November the engineer notes—'On arrival at Jaffa the strange sound aforenamed was again heard, but during the manœuvring nothing was heard.' The engineer, however, deponed that when the pressure got low he had heard a knocking sound, the cause of which he was unable to explain, from time to time during the period between the 14th of November and the arrival of the ship at Jaffa.

"At Jaffa the engineer made as thorough an examination of the engines as was possible under the circumstances. Jaffa is an open roadstead, and accordingly steam required to be kept up in the boilers during the whole period of loading, and I think it is proved that it would have been unsafe to have tilted the vessel so as to have made a thorough examination of the propeller and propeller shaft possible. The engineer, however, rowed round the vessel in a boat, and he also took hold of the propeller with

his hand to ascertain whether it was loose. The captain also made an inspection of the ship from a boat, but did not handle the propeller or shaft. Nothing was found to be wrong with the machinery except that two bolts at the couplings which support the propeller shaft were found to be out of order, the one being broken and the other slack. These were put right and it was hoped that thereby a recurrence of the knocking sound would be prevented. Up to that point I think the master and engineer did all that was reasonable; and I reject the view that they ought to have called a survey by engineers of other vessels, or to have gone to Port Said. The defect, whatever it was, was quite obscure; and there was no reason to apprehend at that time that it would interfere with the working of the vessel.

"The 'Bauta' left Jaffa at 7 p.m. on 20th November on a voyage to Valencia. About an hour after departure (as the engineer notes in his log) 'the strange sound was again heard somewhat more pronounced when steam went down a little, but on the steam pressure going up the sound disappeared.' On the 21st the sound was again heard all through the twenty-four hours every time the pressure went below 150 lbs., and was observed to grow worse; and the same remark is made with regard to the 22nd. On the 23rd, at 1·30 a.m., the engines were stopped to examine the pumps to ascertain if the sound might originate there. A coupling bolt was then found to be out of order, and a new one was put in. At 8·40 a.m. the engines were again started, but without any improvement. On the 24th the strange sound from the engines became more observable, but no special flaw could be detected. On the 25th, as the sound became worse, it was decided to take out the piston rods, and at 8·30 a.m. the engines were stopped and all the three piston rods were examined, but were found to be in order. On the 26th the vessel apparently proceeded under full speed and steady high pressure. On the 27th the thumping noise became more pronounced and sharper, and there was great vibration in the engines when the shocks occurred, and for the first time the engineer seems to have thought that the propeller must be loose on the shaft, and that this was the cause of the persistent noise. At 8·30 on the morning of the 28th the engines were stopped in order that a new bolt might be put in the crank-shaft; and while the ship was stopped an examination was made of the propeller of a similar kind to that made at Jaffa, with the result that the engineer reached the conclusion that the propeller was loose on the shaft. The engineer then apprised the master of his discovery, and it was resolved to make for the nearest port, which happened to be Bona, under slow speed so as not to make the damage worse. This was accordingly done, and by midnight on the 30th the vessel was moored in Bona Harbour. It was there ascertained that the shafting had got out of line, and that the white-metal stern-bush had been worn down to a dangerous extent. According to the experts, the gradual wearing away of the bush was sufficient to account for the knocking sound which had continued at intervals since the 14th of November. The vessel had to lie at Bona until her machinery was again in an efficient condition, and in the meantime the cargo of oranges had to be transhipped and forwarded by another vessel.

"The owners of the 'Bauta' contend that it is only from the time that the vessel arrived at Bona until she was again efficient that no hire is due. The charterers, on the other hand, maintain that the breakdown must be held to have commenced on 14th November, and that from that time the hire ceased to be payable. In their action, however, they do not insist upon this extreme contention, and indeed, there was no evidence whatever that the defect—assuming it to have commenced on the 14th—caused any loss of time until much later. Accordingly, their main contention was that, as from the time that the vessel left Jaffa, she was not, by reason of the defects which afterwards developed so as to cause a breakdown, in full working order, and that as this caused a loss of time exceeding twenty-four running hours, the hire must be held to cease from the time the breakdown occurred.

"In my opinion this construction of the clause is unsound. The words 'a breakdown of machinery' must be construed in a popular and reasonable sense, and I do not think that the ordinary commercial man would say that the machinery had broken down because there was a defect in the machinery which did not interfere with the ordinary working of the ship, although an ultimate breakdown was attributable to that defect. In many cases it would be impossible, *e.g.*, where breakdowns arise through parts of the machinery gradually wearing out, to say when the defect commenced, and it would be most unsettling to business if a construction of a common clause in a commercial contract were to be adopted which would necessarily raise endless controversies. The vessel here was able to steam at her full speed for seven days after the alleged breakdown, because I think the small progress that she made on the 24th, 25th, and 26th November is sufficiently accounted for (apart from the occasional stoppage of the engines for purposes of examination) by the strong head-winds and high seas which she encountered. Even on the 27th November she was able to cover practically her ordinary day's journey, and it was only after 8·30 a.m. on the 28th that the speed was greatly reduced in consequence of the discovery which was then made. If she had, in the meantime, reached Valencia, I presume the charterers' argument would have been just the same, although in point of fact there would never have been a day during which a reasonable amount of work in their service was not done. It is not to be left out of view that the charterers themselves at first were prepared to pay, and in fact did pay, the hire up to the 25th of November, not-

withstanding that they had at that time before them both of the ship's logs, which contained all the evidence upon which they now rely. I also reject the shipowners' construction of the clause in question. They contended that the breakdown did not take place until the vessel arrived at Bona, and that up to that time it could not be said that a breakdown had occurred 'preventing the working of the vessel,' as she, in fact, proceeded to Bona under her own steam. In my opinion, in a commercial sense, the vessel broke down whenever the defect was discovered which rendered it necessary, in the opinion of a prudent navigator, that she should proceed to a harbour for repairs. She was not the less broken down that she was able to proceed under her own steam at half-speed, than if she had employed a tug or had managed to reach port under sail. This view appears to be in accordance with the decision in the case of *Hogarth*, 18 R. (H.L.) 10, where the breakdown was held to date from the time that the high-pressure engines broke down, although the vessel was able to reach a port under her low-pressure engines. I accordingly reach the conclusion that the owners are entitled to about three days' hire in addition to what the charterers have paid, and, of course, that involves that they are not liable to have deducted the value of the coals consumed during that period.

"The next matter in controversy is the amount to be deducted for the breakdown that occurred on the 5th of February 1906, while the 'Bauta' was on a voyage from Grangemouth to Cullera. The main facts are contained in the joint-minute of admissions for the parties. This breakdown was due to a fracture in the main steam-pipe, which is admitted to be a very serious matter. The fracture was first observed at 10 a.m. on 5th February; but although the crack was 1½ in. long, the engineer seems to have at first thought that the vessel might proceed after the speed was reduced. This was accordingly done, and the pressure on the steam-pipe correspondingly diminished. The crack, notwithstanding, rapidly increased, and by 10 p.m. it was found to be 5 in. in length, and the master then determined to go into Vigo to repair. The charterers propose to deduct hire, and to charge the coal consumed as from 10 a.m. until the vessel was again rendered efficient by the repair of the main steampipe in Vigo, and I think they are right in so doing. If the crack had been a very slight one, such as a prudent engineer might reasonably anticipate would not seriously interfere with the vessel's progress until she reached her port of destination, I should not have thought that the breakdown was necessarily coincident with the first appearance of the crack. But here the crack was so serious that speed had to be at once materially reduced, and I think it was the duty of a prudent master to have at once made for Vigo, instead of continuing for twelve hours under reduced steam with consequent loss of time. The opposite view would involve that the charterers were to be responsible for delay caused by fruitless and imprudent attempts to repair the main steam-pipe. The fact that the moment this defect was discovered, it was recognised as so serious that the speed had to be at once reduced, differentiates it from the case with which I first dealt.

"The third breakdown is connected with another crack in the steam-pipe, which was observed at 12·30 a.m. of 23rd May 1906, while the 'Bauta' was on a voyage from Newcastle to Almeria. The engineer, according to his log, at once started clamping the pipe 'in order to put patent metal round the pipe to stop the leakage. When this had been done, proceeded under reduced speed until midnight.' As the leakage did not increase, it was decided to proceed on the voyage. It does not appear that this crack was nearly so serious as the crack which was noticed on 5th February; and so little did it interfere with the speed of the vessel that on the 24th she was able to make her ordinary speed of 8 knots during several of the watches. By 12 noon, however, the engineer found that the leakage had increased, so that he had to 'shut off further on the main steam-valve to the main boiler until ¼-turn. Proceeded with this speed until midnight.' Now I think at that point it ought to have been realised that the injury to the main steam-pipe was one that required repair before the vessel could continue on her voyage; and, in accordance with my previous decision, I think this is the point of time from which the breakdown must be reckoned to commence. No doubt the ship made from 5 to 6 knots an hour for some twenty hours longer, with the leakage from the pipe always increasing; but the very fact that speed had to be materially reduced shows that those in charge of her realised that she was not in the efficient condition in which it was the owners' duty to maintain her. It may be said that during this period the charterers actually derived some benefit from the distance which the vessel travelled; but, on the other hand, their liability for hire recommenced when she was rendered efficient again at Cadiz, although it involved a certain amount of steaming before she could reach the position at which she would have passed that port had a deviation not been rendered necessary by the breakdown.

"I was informed that if I made findings with regard to the three periods during which no hire falls to be paid, the parties would be able to adjust not merely the sums to be deducted in respect of these periods, but the value of the coals consumed by the ship while off hire. I shall accordingly only meantime make such findings, and leave the parties to adjust the figures."

On 18th July 1907 the Lord Ordinary pronounced a further interlocutor finding that the owners of the "Bauta" were entitled to payment for the coal consumed while the ship was off hire on the Vigo and Cadiz voyages, and that the period off hire was to be calculated by hours.

Opinion.—"Two questions remain to be decided. The first is whether during the

periods when, according to my previous judgment, payment of hire ceased, the coals consumed on board the 'Bauta' fall to be charged against the shipowners or the charterers. The latter contended that it was inequitable that during the time when they were deriving no benefit from the ship they should nevertheless be liable for the cost of the coal used to enable the vessel to steam to a port of safety from the spot where the actual breakdown took place. In my opinion the decision of this question depends not on general considerations of equity, but on the terms of the charter-party. By article 2 the defenders were taken bound to provide and pay for all the coals, fuel, &c., used during its currency. But for the stipulation contained in article 12 they would also have been liable to pay the hire, for the misfortunes of a ship under a time charter primarily affect the charterer. It does not, however, follow that because they have stipulated that the hire shall cease from the time a breakdown occurs, that the other expenses for which they are liable shall also cease to run, and the implication from the stipulation in article 12 points in the contrary direction. There is no express decision on this matter, but the dictum of Mr Justice Phillimore in *Vogemann*, 6 C.C. 253, accords with my own opinion. I hold that the general obligation on the charterer to provide and pay for coals is not subject to any implied limitation during the time that the vessel is broken down.

"The second question relates to the method of counting periods of time shorter than a day. One of the periods during which I held that the hire ceased to be payable extended over two days and eight hours; and the shipowners maintain that the succeeding period of sixteen hours must be treated as a full day. The contention is based on cases like *Angier*, 1 C. & D. 357, and *Hough*, 6 R. 961. The former case referred to a time charter which had expired, and it was held that there was no smaller unit for estimating the hire payable than a day. The latter was a case of demurrage, in which again the day was taken as the unit. So far as I am concerned the question is no longer open, because I have already found that the pursuers are not entitled to hire in respect of certain specified periods of time during which the vessel was through breakdowns inefficient for her service. Apart from this I would reject the argument as contrary to the charter-party, the terms of which are quite explicit. The vessel must be more than 24 hours disabled before suspension of hire takes place, but it would be a strange thing to construe this provision as meaning in effect that only one day's hire shall be deducted whether the vessel was disabled for 24 hours or for 47 hours. Nowadays demurrage is generally calculated by hours, to avoid the inconvenience of the rule established by the Courts, and I see no difficulty except one of elementary arithmetic in giving full effect to the literal language of the charter-party. I accordingly hold that the hire payable falls to be calculated by hours or half-hours up to the point of time when early breakdown occurred, and commenced to run again from the moment when the vessel was efficient for her service."

The charterers reclaimed, and argued—(1) The Lord Ordinary was in error in taking 28th November as the date from which the pursuer was relieved of his obligation to pay hire. It was proved that the "Bauta" was not in a seaworthy condition when she arrived at Jaffa on 18th November, and therefore from that date, or, alternatively, from 20th November, when the vessel left Jaffa, hire ceased to run. There was an implied warranty in every contract of this kind that the vessel should be seaworthy at the commencement of the voyage—*Kopitoff* v. *Wilson*, 1876, 1 Q.B.D. 377; *Steel* v. *State Line Steamship Company*, July 20, 1877, 4 R. (H.L.) 103, L.R. 3 App. Cas. 72, 14 S.L.R. 734; *Cohn* v. *Davidson*, 1877, 2 Q.B.D. 455; Abbott's Law of Merchant Ships and Seamen (14th ed.), pp. 492, 493. The voyage commenced when the "Bauta" began to load at Jaffa—"*The Carron Park*," 1890, 15 P. 203; and if a voyage consisted of several stages, then the warranty required that the vessel should be fit for each stage as it was entered upon—"*The Vortigern*," [1899] P. 140; Carver on Carriage by Sea (3rd ed.), sections 19b and 21. In time charters where several voyages were included in one charter the shipowner was held to undertake that his ship was seaworthy on leaving each place where he had an opportunity to remedy unseaworthiness—Scrutton on Charter Parties and Bills of Lading (5th ed.), p. 74. Now the master of the vessel had an opportunity at Jaffa to remedy any defect, but he failed to take sufficient steps to discover and remedy it. Accordingly, the owners here being under an obligation both at common law and under the express terms of article 1 of the charter-party to provide a ship reasonably fit for the service required, and having failed to do so, could not sue the charterers for hire—*Turnbull* v. *M'Lean & Company*, March 5, 1874, 1 R. 730, 11 S.L.R. 319. Further, by article 12 of the charter-party it was provided that hire should cease from the time of "the breakdown." A "breakdown" occurred when the ship was found to be inefficient for the service required—*Hogarth* v. *Miller, Brother, & Company*, December 1, 1890, 18 R. (H.L.) 10, 28 S.L.R. 583. It was not necessary that the vessel should be so disabled as to be unable to proceed, nor was the date to be taken that at which the defect was completely diagnosed, as the Lord Ordinary had assumed. It was sufficient if there was a defect, and if that defect were perceived. (2) As to the claim for the coal consumed, article 12 of the charter-party supported the claim. Detention arising through stress of weather or accident to the cargo was to be at the charterer's expense, from which it followed that detention for other reasons was at the owner's. And the last clause of the article showed that the time off hire was to be cut

out from the period of hire, and that the ship then was to be at the owner's risk. *Vogemann* v. *Zanzibar Steamship Company*, July 31, 1902, 7 Commercial Cases, 254, affirming 6 Commercial Cases, 253, was decided with reference to the special terms of the charter there in question. Moreover, by article 22 of the charter-party average was to be according to York and Antwerp rules. These rules provided (Rule 9) that where cargo was burnt for fuel, it should be admitted as general average, provided an ample supply of coal had been supplied, but the estimated quantity of coals that would have been consumed was to be charged to the shipowner. This showed that the shipowner was liable for the coal. The other questions of breakdown were immaterial.

Argued for the owners (who acquiesced in the Lord Ordinary's interlocutor) — The charterers had claimed on general average, and had recovered four-fifths of the freight from the cargo owners. By making this claim they admitted that the ship was on hire, and they were therefore barred from refusing to pay under the charter-party, With reference (1) to the payment of hire. there was admittedly an obligation to supply a seaworthy vessel, and the respondents had fulfilled this obligation when they handed over the "Bauta" on 23rd September 1905. It could not be said that the service commenced at Jaffa. The case of the "*Vortigern*," *sup.*, was inapplicable to the circumstances of the present case. The doctrine of "stages" in voyages had never been applied to a time charter or to any question except the supply of coal; and further, as the "Bauta" proceeded to Jaffa under the pursuers' directions it was not in fact a stage in the journey. Hence the cases cited as to the implied warranty were inapplicable, because in this case the defect emerged during the voyage, and there was no implied undertaking that the ship should continue fit after sailing—Carver on Carriage by Sea, sec. 21. It was settled law that even where there was a contract by the owner to maintain the ship in seaworthy condition the charterer could not withhold freight, but must seek his remedy by means of an action of damages—*Havelock* v. *Geddes*, 1809, 10 East. 555; *Ripley* v. *Scaife*, 1826, 5 B. & C. 167; *Inman Steamship Co.* v. *Bischoff*, 1882, L.R., 7 App. Cas. 670. And in such action the charterer would require to prove that his loss was occasioned through the ship's unseaworthiness—"*The Europa*," [1908] P. 84; *Joseph Thorley, Limited* v. *Orchis Steamship Co., Limited*, [1907] 1 K.B. 660. The pursuers had not shown this here. The necessary repairs could not have been made at Jaffa, and therefore the defender was not in breach of any obligation unless it could be shown that it was his duty to deviate from the course. The circumstances here would not have justified deviation — Carver on Carriage by Sea, secs. 287, 288, 289; Abbott's Law of Merchant Ships and Seamen, p. 522. That was the opinion also of the master of the ship, and his opinion was not lightly to be disturbed on a question of this kind—*Phelps, James, & Co.* v. *Hill*, [1891] 1 Q.B. 605. In any event, the defenders were entitled to recover *quantum meruit*—Lord Watson in *Hogarth* v. *Miller, Brother, & Co.*, *sup. cit.*; and the pursuer having paid in full knowledge of the facts could not now recover what he had paid. With reference to article 12 of the charter-party, it was plain that "breakdown" referred to the time when the vessel was unable to perform the required service, and not to the date at which the accident which ultimately led to her being inefficient took place. The vessel made its normal speed up to the 28th November, and there could be no breakdown prior to that date. A charterer who was bound to pay in proportion to the time the ship was in his employment could not make any deduction for time during which she was laid up for repair, unless this was stipulated for — Carver on Carriage by Sea, sec. 572; *Ripley* v. *Scaife*, *supra*—and article 12 merely contained this stipulation. (2) On the question of coals it followed that if the defenders were right in their contention as to hire they were not liable for the coal consumed. Clause 12 of the charter-party did not refer to coal in any way, for coal did not go into general average—*Vogemann* v. *Zanzibar Steamship Co,, Limited*, *supra*, was applicable and should be followed.

LORD ARDWALL—The three actions now conjoined, in which the interlocutors reclaimed against have been pronounced, arose out of a charter-party of the vessel "Bauta" entered into between the owners, Mathilde Giertsen and others, and George V. Turnbull & Company, Leith, as charterers. The vessel was hired out for six calendar months beginning in September 1905, and it was stipulated that the charterers should pay for the use and hire of the said vessel at the rate of £270 sterling per calendar month.

The two questions which formed the subjects of the discussion on the reclaiming note were—First, What was the period on the vessel's voyage from Jaffa to Bona during which the said vessel is to be regarded as off hire within the meaning of the 12th article of the charter-party? and Second, Whether the charterers were entitled to escape paying for the coals used during the time that the said vessel was off hire on the voyage from Jaffa to Bona, and on the Vigo and the Cadiz voyages?

The facts of the case are set forth with great clearness and correctness in the Lord Ordinary's opinion, and I require only to refer to them incidentally in connection with the contentions presented to us on behalf of the charterers.

The Lord Ordinary has held that the period for which the vessel was off hire on the voyage from Jaffa to Bona was from 8·30 a.m. on the 28th of November 1905 till 9 a.m. on the 1st of January 1906, the former date being the time when it was discovered that the propeller of the vessel was loose on the shaft. As a consequence of this discovery the voyage on which the vessel then was from Jaffa to Valencia was in-

terrupted and the master resolved to make for the nearest port, which happened to be Bona, at slow speed. The vessel arrived at Bona by midnight on the 30th of November, and it was then ascertained that the shafting had got out of line, and that the white metal stern bush had been worn down to a dangerous extent, consequently the vessel had to lie at Bona till her machinery was repaired.

It seems tolerably clear on the evidence that the accident which originally led to the propeller and shaft getting out of order was the propeller striking some wreckage on the 14th of November while the vessel was on her voyage to Jaffa. It was contended before the Lord Ordinary by the owners that they were entitled to hire until the time when the vessel arrived at Bona, but on the reclaiming note they acquiesced in the judgment of the Lord Ordinary, and I need say nothing more on that point than to refer to the Lord Ordinary's opinion regarding it, in which I concur.

The charterers, on the other hand, while they maintain that the breakdown must be held to have commenced on the 14th of November, yet only insist on their action on non-liability for hire from the time when the vessel left Jaffa, and they claim this exemption from hire on two grounds. In the first place, they plead that under the first clause of the charter-party the owners were bound under the clause of maintenance to have the vessel in a seaworthy condition at the commencement of each voyage that she might undertake, and that the "Bauta" not having been seaworthy in the proper sense of the word at Jaffa, the owners thereby committed a breach of their contract and cannot on their part claim remuneration in respect of the voyage from Jaffa to Bona. In support of this contention they relied upon the case of the "*Vortigern*," L.R., 1899, P.D. 140. That was a case in which a ship ran out of coal and was forced in consequence to burn 50 tons of cargo, the value of which the freighters successfully claimed to deduct from the amount of freight on the ground that the implied warranty of seaworthiness had been broken by the vessel not having a sufficient quantity of coal to continue her voyage. But it is plain from the opinions delivered in that case that it is only with reference to supplies of coal that a ship must be put in a seaworthy condition at the commencement of each stage of a voyage, because it is usual in long voyages that the vessel has leave to call at certain ports for the purpose of coaling, and accordingly the vessel must be made seaworthy at the commencement of each stage of the voyage by being supplied with sufficient coal at starting, and if she is not so supplied then the warrant of seaworthiness is held, as in the case of the "*Vortigern*," not to have been complied with. But at the same time it is made plain in the judgment in that case that except in such cases the warranty of seaworthiness is satisfied by a vessel being put in a seaworthy condition when starting on her voyage, or, in the case of a vessel being hired, when she is handed over to the charterers.

I am accordingly of opinion that the charterers' contention on this point is ill-founded; that the implied warranty of seaworthiness was complied with when the vessel was handed over to the charterers in a seaworthy condition at the commencement of the period of hiring, and that the maintenance clause in article 1 of the charter-party is inserted merely for the purpose of laying upon the owners the burden and the expense of maintaining the vessel during the period of hire in a thoroughly efficient state, including of course the expense of all necessary and proper repairs. Therefore if the charterers had been at the expense of repairing the steamer at Jaffa or elsewhere, they would have recovered that expense under this clause, but there is nothing in it to suggest that the payment of hire is to cease merely because the vessel at some time during the currency of the time charter requires repairs to put her in a thoroughly efficient state.

The only article of the charter-party which deals with the cessation of payment of hire is article 12, and that article prescribes that the hire is to cease when, *inter alia*, there is a breakdown of machinery or damage preventing the working of the vessel for more than twenty-four working hours, and it is further provided that the payment of hire shall cease from the time "when the breakdown occurred until she be again in an efficient state to resume her services." On this clause the charterers maintained that in the present case the breakdown must be held to have occurred at Jaffa, because at that time the vessel was suffering from the defect in the machinery which led on the 28th of November to her discontinuing her voyage. They argued that to make the question of the occurrence of the breakdown depend merely upon the opinion of the master of the vessel on the question when it was prudent to discontinue the voyage was to put the matter on a wrong basis by making the time of the occurrence of the breakdown depend upon an opinion, and not, as they contended it ought to do, upon fact. They therefore maintained that it being now ascertained by sufficient evidence that when at Jaffa the shaft and propeller of the vessel were in a condition to render her not fit for the voyage on which she was starting, the breakdown within the meaning of the charter-party must be held to have occurred at Jaffa.

On this question I entirely agree with the Lord Ordinary in holding that the words "a breakdown of machinery" must be construed in a popular and reasonable sense, and that in such sense the vessel broke down when a defect was discovered which rendered it necessary in the opinion of a prudent navigator that she should proceed to a harbour for repairs. This does not mean, as was suggested by counsel for the charterers, that the question of when there is a breakdown is made to depend entirely

upon the opinion of the master. The master's opinion is of course of great value as a piece of evidence, but should it turn out that that opinion was wrong, it may be corrected by other evidence in any particular case. If the contention of the charterers were given effect to, it appears to me that it would put matters in a very uncertain and undesirable position as regards the application of a clause of this kind in a charter-party, because according to that contention, not the time when a vessel has to go to a port for repairs is to be taken as the time of the breakdown, but the time when the defect in her machinery—which, when fully developed, ultimately led to her having to discontinue her voyage—can be ascertained or conjectured to have first come into being. It would be most undesirable that the liability or non-liability for hire of a vessel should be made to depend upon the result of investigations of the kind—investigation, for instance, as to whether a hairy crack in some piece of the machinery were old or new? and if old, how old? and so on.

Therefore in the present case I have no hesitation in holding that the breakdown did not occur on the 14th of November, when the original damage probably was done to the machinery, or when the ship left Jaffa, but on the 28th of November, when, after having progressed so far upon her voyage perfectly satisfactorily as regarded speed and safety, it was discovered that the propeller was loose on the shaft, and that it was necessary to go to port for repairs.

The second question to be considered is, whether during the periods when payment of hire ceased in terms of article 12 of the charter-party, the coals consumed on board the "Bauta" are to be paid for by the shipowners or the charterers. It was contended for the charterers that it was inequitable that they should be charged for the coal which was needed to enable the vessel after the breakdowns which occurred on the three voyages to proceed to port for repairs, and that it was a necessary corollary from the cessation of payment of hire that payment for coals should also cease over the same periods. I agree with the Lord Ordinary that this question must be determined on the terms of the charter-party and the nature of the contract.

Now in a contract constituted by time-charter, in the absence of special exemption, the charterers have to suffer the consequences of all mischances that may happen to the ship. In the present case there is a stipulation that in certain circumstances the hire shall cease, but there is no stipulation that the other expenses for which the charterers are liable shall also cease to run, and accordingly, there being nothing in the charter-party to exempt the charterers from payment of the charges for coal and other expenses mentioned in article 2 of the charter-party during the cessation of hire provided for by article 12, it follows that the general obligations contained in article 2 still rested upon the charterers notwithstanding the breakdown of the machinery. An opinion to this effect was, as noted by the Lord Ordinary, delivered by Mr Justice Phillimore in the case of *Vogemann*, 6 C.C. 253, and this opinion was approved of by the Court of Appeal in 7 C.C. 254, and although it was *obiter* as regarded the case then under discussion, yet it is entitled to great weight considering the eminence of the judges who delivered it.

On the whole matter I entirely agree with the interlocutors of the Lord Ordinary and the reasoning by which he has supported them. I accordingly am of opinion that we should refuse the reclaiming note, and adhere to the whole interlocutors of the Lord Ordinary.

The LORD JUSTICE-CLERK, LORD STORMONTH DARLING, and LORD LOW concurred.

The Court adhered.

Counsel for Reclaimers (Charterers)—Dickson, K.C.—C. H. Brown. Agents—A. Morison & Company, W.S.

Counsel for Respondents (Owners)—Horne—W. T. Watson. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Friday, July 17.

FIRST DIVISION.

[Lord Dundas, Ordinary.

M'EWAN *v.* M'EWAN.

Husband and Wife—Divorce—Desertion—Statutory Period—Interruption—"Reasonable Cause"—Action of Separation and Aliment at Defender's Instance—Relations of Friendship between the Parties—Arrangements Made in View of Living Apart.

In an action of divorce for desertion at the instance of the husband, *held* that the running of the statutory period of desertion had not been interrupted, in the circumstances of the case, by the defender's raising and carrying on, but unsuccessfully, an action of separation and aliment.

Circumstances in which *held* that the statutory period was not prevented from running, either by the subsistence of friendly relations between the parties, or by temporary arrangements being made as to the custody of the child of the marriage.

Husband and Wife—Divorce—Desertion—"Reasonable Cause"—Act 1573, *c.* 55.

The case of *Mackenzie* v. *Mackenzie*, May 16, 1895, 22 R. (H.L.) 32, 32 S.L.R. 455, decided that nothing less will afford "reasonable cause" for desertion in the sense of the Act of 1573, c. 55, than that which would be sufficient as a defence to an action of adherence; but it did not decide whether in an action of adherence a wife can successfully defend herself upon any other