The claim of a child against its parents arises *ex iure naturæ*, but when the mother performs the whole obligations which are prestable equally against both parents, she has then a claim against the father. But this claim rests, not on the law of nature, but on the ordinary principle of civil law, that where one or two *correi debendi* pays the whole debt, he has an action of contribution against the other; and therefore when the question arises in this shape, it is no doubt a civil debt. This is well explained in 1 Bell's Com., p. 635. With all possible respect for the opinions expressed in the case of Thomson (February 26, 1842), I have a strong conviction that there was much of this confusion running through the opinions expressed in that case. I think it is impossible to read the opinions of the Judges, especially that of Lord Ivory, without being convinced that they are confusing two things which are quite distinct. I cannot, therefore, attach that weight to their judgment which I should otherwise be bound to do. On the whole matter, I have come to be clearly of opinion that the obligation which arose, at the marriage of the husband and wife, to aliment her father and mother is incumbent on the husband, because it was a debt of his wife constituted before marriage, or, to speak more correctly, an obligation of the wife existing and binding before marriage, though not prestable till after marriage.

The other Judges concurred. In his opinion, Lord Neaves expressly reserved his opinion as to the effect that might be produced on the husband's liability on the death of the wife.

The judgment of the Sheriff was accordingly adhered to.

Agents for Advocator—Murray & Beith, W. S.

Agent for Respondent — Alexander Morison, S.S.C.

Saturday, July 14.

At the meeting of the Court to-day, George Patton, Esq., presented Her Majesty's letter appointing him Lord-Advocate for Scotland, and Edward S. Gordon, Esq., presented her Majesty's letter appointing him Solicitor-General for Scotland. Both gentlemen took the oaths and their places within the bar.

FIRST DIVISION.

PARKER AND CO. *v.* HANDYSIDE AND OTHERS.

Ship—Carriage—Damage to Cargo—Onus probandi. The *onus* of proving that damage to a cargo was occasioned by causes exempting him from liability lies on the shipowner. Circumstances in which held that the *onus* had not been discharged.

These are counter advocations of counter actions raised in the Sheriff Court of Glasgow. In the one action, Handyside & Others, as owners of the screw-steamer United Kingdom, a trader between Montreal and the port of Glasgow, sued Parker & Co., soap manufacturers in Glasgow, for payment of £105, 12s. 9d., being a balance of freight due to them in respect of goods, consisting of peas, flour, and wheat, consigned to the defenders, and carried on a voyage from Montreal to Glasgow which that vessel made, arriving in Glasgow on 13th December 1862, and "which goods were duly delivered to the defenders." In the other, Parker & Co. sued the shipowners for payment of £76, 15s. 8d., the value of goods carried by said vessel on said voyage, consigned and deliverable to the pursuers in Glasgow, but which the defenders failed to deliver in terms of the bill of lading, and loss sustained by the pursuers through damage done in the course of the same voyage to other goods, which damage was occasioned through the fault or negligence of the defenders, or others for whom they are responsible, and in breach of their duty as common carriers. Parker & Co. pled the same grounds in defence to the action for freight.

The Sheriff-Substitute (Strathern) found it expressed in the bill of lading, that, *inter alia*, said peas were shipped in bags at Montreal, and were received there in good order and condition, and were to be delivered from the ship's deck at Glasgow in the like condition; that on the ship's arrival at Glasgow, delivery was given of the goods contained in the bill of lading, with the exception of one barrel flour and eighteen bags wheat (the value of which has been admitted), and of eight bags peas containing 3,190-280 bolls; that twelve bolls farther of said peas were landed so completely damaged by dampness and coal culm that they were left on the quay as valueless; and 55½ bolls were landed also damaged from the same cause, but not to the same extent. He found, with respect to the question of liability for the damaged goods, that as the peas were shipped in good order, the owners of the vessel, as public carriers, were bound to deliver them in the same state, or to prove that the damages were occasioned by peril of the sea, exempting them from liability, the *onus probandi* being on them; that they had failed, however, to prove that the peas were damaged through any such exempting cause, and they were therefore liable in the value; and that the admitted and proved short delivery and damages amount to £76, 15s. 8d., the sum sued for by Parker & Co., and to which extent they were entitled to compensate the claim for freight. He further found the shipowners liable to Parker & Co. in expenses in both actions. The Sheriff-Substitute referred in his note in regard to the question of *onus* to 1 Bell's Com., p. 466; Jones & Co. *v.* Ross and Others, 12th February 1830, 8 S. 495; and Rae *v.* Hay and Others, 7th February 1832, 10 S. 303.

The Sheriff (Alison) found it to be proved that the damage done to the peas in question arose partly from the improper stowage thereof, and partly from the excessive stress of weather during the voyage, and that neither of these causes taken singly would have produced the disaster; that in these circumstances it would be unjust to ascribe the proved damage done to the cargo, solely and exclusively either to the improper stowage or to the stress of weather, but that it falls to be ascribed to the effects of the two jointly; that there are no materials in process for determining which of the two causes produced the most damage; and that in these circumstances the presumption is for equality in the causes of the mischief, which leads to the shipowner being responsible only for one-half of the damage; that the total amount of the damage claimed by Parker & Co. in the action at their instance is £76, 15s., and that the defenders, Handyside and Others, admit the first two items in the account sued for, amounting to £12, 4s. 8d., which leaves the sum of £64, 10s. 4d. as the damage done to the peas in dispute between the parties. He therefore found the defenders, Handyside & Henderson, liable in £32, 5s. 2d., being the one-half of the damage done to the peas in question, which sum, added to the item of £12, 4s. 8d., made the gross amount found due to the parties, Parker & Co., under the action at their instance,

£44, 9s. 10d. This sum being deducted from £105, 12s. 9d., the amount of the freight concluded for, left a balance due to the owners of £61, 2s. 11d., for which sum he decerned against Parker & Co., and *quoad ultra* assoilzied Parker & Co., and assoilzied also Handyside and others from the action at Parker & Co.'s instance beyond the sums found due by them, and deducted from the freight claimed by them. He found Handyside and others entitled to expenses in the action at their instance up to the date of the conjunction; and Parker & Co. to half costs in the conjoined actions subsequent to the conjunction.

Both parties advocated.

SHAND (with him CLARK) was heard for Parker & Co., and

WATSON (with him YOUNG) for the shipowners.

At advising—

The LORD PRESIDENT—The real question betwixt the parties is as to the cause of the damage done. The evidence on this point is very short. I think there are some things which might have been made more clear if there had been a more thorough expiscation, and there are some remarkable disagreements in the evidence. The goods were to be delivered by the shipowners in good order, except in certain events specified in the bill of lading. The *onus* is on them to prove that the damage was caused by one or other of the causes so excepted, and the *onus* might shift in the course of the proof. But it does not appear to me that the shipowners have in this case discharged themselves of that *onus*. I think the preponderance of the evidence is the other way. I therefore think the interlocutor of the Sheriff-Substitute is substantially correct. The view taken by the Sheriff was not maintained by either party. I don't think it necessary therefore to go into the question raised by him as to what would be the law if the evidence was as represented by him, which it is not.

The other Judges concurred.

The interlocutor of the Sheriff was therefore recalled, and findings pronounced in accordance with that of the Sheriff-Substitute. Parker & Co. were found entitled to expenses in both Courts.

Agents for Parker & Co.—J. W. & J. Mackenzie, W.S.

Agents for Handyside and Others—Hamilton & Kinnear, W.S.

GARROW *v.* FORBES.

Reparation — Breach of Contract — Measure of Damages. Circumstances in which held that a breach of contract had been committed, and observations in regard to the measure of damages due.

This was an advocation from Aberdeenshire. The respondent Alexander Forbes, preserver of fresh provisions, Aberdeen, sued the advocator James Garrow, fishmonger there, for the sum of £89, 11s. 4d., being damages sustained by him "in consequence of the defender, in breach of his contract with the pursuer, having delivered to the pursuer only 4252 pounds weight in place of 15,000 pounds weight of grilse, at 8d. per pound, during the grilse season of 1862, the quantity undelivered by the defender thus being 10,748 pounds weight, on which undelivered quantity the pursuer would have realised a profit of 2d. per pound."

The defence was that as the pursuer had failed to implement his part of the contract, he could not recover damages from the defender for resiling from it. This defence depended upon an allegation by the defender that on 24th July 1862 the defender had furnished 1282 pounds of grilse, the full price of which the pursuer refused to pay on the ground that only 1182 pounds had been delivered. He therefore contended that the sum of £3, 6s. 8d. had been retained by the pursuer in breach of the contract, and that he was therefore entitled to resile.

After a proof in regard to whether 1282 or 1182 pounds had been delivered, the Sheriff-Substitute (Watson) found that 1282 pounds had been delivered, and he therefore assoilzed the defender.

The Sheriff (Davidson) reversed, and found that the defender had failed to prove his allegation that 1282 pounds had been delivered.

Thereafter a proof was allowed and led in regard to the damage sustained, and the Sheriff-Substitute again assoilzied the defender in respect that the pursuer had not proved any direct, but only consequential, damage.

The Sheriff again reversed, and decerned for damages to the extent of £67, 3s. 6d., being at the rate of three-halfpence a pound on the quantity not delivered.

The defender advocated.

A. R. CLARK and WATSON supported the note of advocation, and argued that the defender had proved the delivery of 1282 pounds, and that in any view the damages awarded were excessive.

YOUNG and BIRNIE appeared for the respondent in support of the interlocutors advocated.

At advising—

Lord ARDMILLAN delivered the judgment of the Court. He concurred with the Sheriff-Depute that the advocator had failed to prove the delivery of 1282 pounds, and thought it was clear that only 1182 pounds had been delivered. It was therefore unnecessary to consider whether the allegation of the advocator, if it had been well founded, would have been sufficient ground for breaking the contract. In regard to the measure of damages, he could not adopt the rule that the damages should be limited to the difference betwixt the contract price and the market price of the day when delivery should have been made. The amount of damage was to be ascertained from a view of the whole circumstances of the case, and fixed as a jury question in such a way as to do justice to the party wronged. His Lordship referred to the cases of Watt *v.* Mitchell, 4th July 1839, 1 D. 1157; and Dunlop *v.* Higgins & Co., 6 Bell's Ap. 195.

The reasons of advocation were therefore repelled, with expenses in both Courts.

Agent for Advocator—William Miller, S.S.C.

Agent for Respondent—Morton, Whitehead, & Greig, W.S.

CADBY *v.* GORDON AND CO.

Bankruptcy—Partnership—Process. On a petition for sequestration of a firm and an individual, "the only known partner," the Lord Ordinary sequestrated the estates of the individual, but not those of the firm. The Court remitted to him to sequestrate the estates of the firm also.

Charles Cadby, pianoforte and harmonium manufacturer in London, applied for sequestration of the estates of Gordon & Co., musicsellers, George Street, Edinburgh, and of Alfred R. Gordon, "the only known individual partner thereof." Gordon also applied for sequestration of his estates "as sole partner of said firm of Gordon & Co., and also as an individual." The Lord Ordinary