£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

(Mure) conjoined the two petitions, and sequestrated the estates of "Alfred R. Gordon, trading under the firm of Gordon & Co., of which firm he is sole partner, and also of the said Alfred R. Gordon as an individual."

Cadby reclaimed.

F. W. CLARK, for him, stated that the Lord Ordinary should have sequestrated the estates of the firm of Gordon & Co., of which firm there was at least one other partner besides Mr Gordon.

No appearance was made for Mr Gordon.

The Court, while explaining that in the proceedings (which are *ex parte*) the Lord Ordinary had been misled by the reclaimer's own statement in the petition, that Mr Gordon was the only known partner of the firm, recalled the interlocutor, and remitted to the Lord Ordinary to sequestrate the estates of the firm, and also those of Mr Gordon, without finding that Mr Gordon was the sole partner. The prayer of the reclaiming-note was that the two petitions should be disjoined, and a remit made to the Lord Ordinary to appoint intimation of the reclaimer's petition, and to proceed therein in terms of the statutes; but the Court refused to disjoin the petitions.

Agent for Reclaimer—L. Mackersy, W.S.

DOWNIE *v.* DOWNIE'S TRUSTEES.

Heritable and Moveable—Jus Relictæ—*Stat.* 1661, *c.* 14—*Mortgage.* In an action by a widow against her husband's trustees for payment of *jus relictæ*, held (1) that a mortgage granted by the Glasgow Corporation Water Commissioners was heritable, and (2) that a mortgage over property in Australia was moveable, its character falling to be determined by the law of Australia.

This action was raised by Mrs Downie against the trustees of her deceased husband for payment of the sum of £12,000 sterling, being the amount or value of her *jus relictæ*, or the just and equal one-third part or share of the free moveable means and estate left by her said deceased husband under the charge of the defenders as trustees foresaid; or of such other sum as the said *jus relictæ* or share may amount to, as the same shall be ascertained in the course of this process; together with the sum of £3000 sterling as the amount of the fruits, profits, or interest which have accrued or may yet accrue on the said share of the said estate in the hands of the defenders, or such other sum as may, in the course of this process, be ascertained to be the amount of such fruit, profit, and interest; and there was also a conclusion that for the purpose of ascertaining the extent of the pursuer's rights, and the amount of the *jus relictæ* or share of the said moveable estate payable to her, and accruing fruits, profits, and interests, the said defenders, as trustees foresaid, ought and should be decerned and ordained, by decree foresaid, to exhibit and produce a full, true, and particular account of the said moveable estate, and of the profits and interests which have accrued or may yet accrue thereon, and of the intromissions had by them therewith, together with all writs and vouchers necessary to instruct the same.

The pursuer averred that she was entitled to *jus relictæ* out of, or to one-third of the following sums belonging to her deceased husband at his death, and constituted by the following documents of debt, viz.—(1) The sum of £10,000, being the balance of a bond or mortgage for £14,000, granted in his favour by Henry Langlands, Melbourne, dated 29th January 1855, and rent or interest thereof due at the deceased's death amounting to £619, 2s., together with one-third of the interest due thereon. (2) The sum of £5000, being the amount of a bond or mortgage granted in his favour by the Glasgow Waterworks Commissioners, dated 11th March 1858, and interest thereon from the date of the last payment thereof prior to the truster's death, and to fall due thereon in time coming. (3) The sum of £700, being the amount of a bond or mortgage granted in his favour by the Glasgow, Dumbarton, and Helensburgh Railway Company, dated 23d March 1860, and interest thereon from the date of the last payment thereof prior to the date when the same was paid off, and of the said principal sum thereafter. (4) Rent due by Alexander Downie, farmer, for land belonging to the deceased at Yanyean, Victoria, from 1st October 1858 to 20th February 1862, at £80 per annum, less received to account, £233. (5) Amount due on mortgage by James Callender, merchant, Melbourne, £100.

The defenders admitted the pursuer's right to *jus relictæ* out of Mr Downie's moveable estate, but they pleaded that her claim was untenable, in so far as participation was sought—(1) in property which is not moveable; and (2) in sums which have not been recovered, and cannot be dealt with as available assets.

It was considered advisable that the law of Australia, with reference to the heritable or moveable character of the mortgages over property in that colony, should be ascertained before judgment. Accordingly a case was prepared on the subject, and submitted to W. W. Mackison, Esq., barrister-at-law, for his opinion.

The Lord Ordinary (Jerviswoode) thereafter found, with reference to the particulars of the pursuer's claim, as above set forth, that the five sums specified by her formed part of the moveable estate of the deceased, and were affected by her *jus relictæ*, with the exception of the sum second mentioned, being that contained in the bond or mortgage granted by the Glasgow Corporation Waterworks Commissioners, which he held to be heritable, as respects the rights of the pursuer as relict. He added the following

Note.—The only question of real difficulty here is, as the Lord Ordinary thinks, that which has relation to the claim of the pursuer to the one-third of the sum of £5000 under bond or mortgage granted by the Glasgow Waterworks Commissioners. Looking to the terms of the bond under which the debt is constituted, it appears to the Lord Ordinary that prior to the Statute 1661, cap. 32, that debt must have been held as heritable, as being in its character a bond for the payment of the principal sum at a certain term—viz., 15th May 1861—and with a stipulation of interest at 4 per cent. per annum from the date of the bond until the principal sum shall be fully paid and satisfied.

On this question the Lord Ordinary has adopted the views, as he understands them, expressed by Professor Bell in his Commentaries, vol. ii. p. 7, sec. 12; in his Principles, sec. 1495; by Mr Erskine, b. 2, tit. 2, sec. 10, and b. 3, tit. 9, sec. 22; and by Lord Stair, b. 3, tit. 4, sec. 24.

C. B.

Both parties reclaimed.

After hearing oral argument, the Court on 16th March 1866 appointed the parties to lodge cases.

Argued for the pursuer—1. *In regard to the mortgage by the Glasgow Water Commissioners.* This debt is moveable in its own nature. If it is heritable *quoad* the rights of the pursuer, it must