

£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* assoilized Parker & Co., and assoilized 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 advocacy 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 allega-

tion 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 assoilized 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 assoilized 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 advocacy, 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 advocacy 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., music-sellers, 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