property on his bankruptcy. On the other hand, the petitioners, in having the hearse made over to them without further payment, have received back the carvings and mouldings, without paying anything for them. But though this has been done of consent, it does not follow that this is in all circumstances to be the mode of adjustment. There may be no apparent reason why the purchaser should obtain the article more than the seller, or *vice versa*. When parties are not agreed, the practical rules for disposing of common property held *pro rata* must be applied.

I would only, in conclusion, advert in a few words to the question of compensation raised and elaborately argued before us. It was contended by the petitioners that the sum of £95 agreed to be paid for the hearse was already paid (except to the extent of about £19) by furnishings made by them to Hutton, on the price of which, as due by Hutton, they were entitled to plead compensation. According to the view which I take of the case, this question does not arise. It would only arise in the case of the petitioners being entitled to claim the property of the hearse, when they would be entitled to prove that they had already paid its price to Hutton, and that no retention could be claimed on account of non-payment of the price. In that case, so far as I can form an opinion, the plea of compensation would have availed them to the extent of the counter-furnishings. But according to the view already stated, the property of the hearse, so far as stipulated to be built by Hutton, had passed to Hutton's creditors; and if the petitioners desired the hearse, they were obliged to purchase it from these creditors, and to pay to them its price. Against the creditors, as owners of the hearse, compensation would clearly not hold on the furnishings made to Hutton. There was no *concursus debiti et crediti*.

The practical conclusion is, that the judgment of the Sheriff should be affirmed so far as it found the defence against the petition for delivery of the hearse well founded, and assoilzied the defender. The preliminary findings of the Sheriff will, however, require alteration.

Agents for Pursuers—J. & R. D. Ross, W.S.

Agents for Defender—Millar, Allardice, & Robson, W.S.

Thursday, February 17.

SECOND DIVISION.

DICKSON *v.* GRANT AND OTHERS.

Reference — Arbiter — Witness — Disqualification — Employment—Quantum meruit. Parties who had entered into a contract as to certain alterations to be executed on a church, agreed to refer disputes to the architect of the building. They afterwards disagreed; and the pursuer, who had contracted for the joiner and carpenter work, brought an action of reduction of the reference upon various grounds, with which he conjoined petitory conclusions for the value of the work done by him. In this action a proof was allowed, and the arbiter was examined as a witness for the defenders. The defenders maintained that the action was excluded by the reference, and the Lord Ordinary ultimately assoilzied the defenders. *Held* that, although originally the architect of the building was not excluded as such from being arbiter between the parties, he had become disqualified from acting in that capacity by reason of his examination as a witness, and that it devolved upon the Court to pronounce judgment on the merits.

Pursuer entitled to remuneration for his work, on the principle of *quantum meruit*.

John Dickson, joiner, Junction Street, Leith, sued the Rev. Peter Grant, Roman Catholic clergyman, Dundee, and certain other parties, the surviving proprietors in trust of St Patrick's Roman Catholic Church, Edinburgh, for £167 odds, alleged to be the balance under a contract undertaken by the pursuer for carrying out certain alterations on the said church. The defenders offered £80 odds, and pleaded that under the contract Mr Coyne, the architect of the building, should decide differences between them. The pursuer then brought an action of reduction of the reference on various grounds, and repeated in his action his petitory conclusions. He concluded that the reference should be reduced in respect—"(1) that the alleged arbiter is legally incapacitated from adjudicating upon the questions at issue between the parties by personal interest, and by having already given his opinion thereon; and (2) that it is neither holograph nor tested, wants the names and subscriptions of witnesses, and is otherwise deficient in the solemnities required by law." He further pleaded that the reference should be reduced in respect—"(1) that the pursuer in subscribing the same did not agree to refer the sums payable to him under the contract to an arbiter; (2) that he did not agree to refer the question of quantities, these being determinable by the measurement of competent persons (which Mr Coyne is not), and not being matters of opinion fitted to be left to the judgment of an arbiter who can or cannot measure; and (3) that if the pursuer subscribed such a minute or clause of reference, he did so under essential error as to its true meaning and effect, induced through the misrepresentation of the defenders or of those for whom they are responsible." There were other grounds of reduction. On the merits, he claimed for the fair value of his work, he having been employed by the defenders.

In that action the Lord Ordinary (JERVISWOODE) allowed parties a proof of their averments—under which Mr Coyne was examined as a witness by the defenders—and ultimately repelled the reductive conclusions, appointing the case to be enrolled for further procedure as to the other conclusions. His Lordship ultimately pronounced the following interlocutor:—"The Lord Ordinary having, of new, heard counsel, and considered the debate, with the proof, productions, and whole process, finds that the several heads of the claim here made on the part of the pursuer under the petitory conclusions of the summons are embraced by and fall within the clause of the reference to the architect which is contained in the specifications, and is referred to in the fifth head of the condescendence for the pursuer, with the exception of the items which are referred to in the seventh head of the said condescendence: Finds that the sum of £150, which is referred to in the tenth head of the condescendence as having been paid on the part of the defenders to the pursuer, was and is sufficient to meet and to satisfy the claims of the pursuer, in so far as the same are ascertained, and do not form the subject of existing dispute or question between the parties: *Quod ultra*, with reference to the preceding findings, and without prejudice to any pro-

ceedings which may be competent before the arbiter, under the clause of reference aforesaid, sustains the defences, dismisses the action, and decerns: Finds the defenders entitled to their expenses, of which allows an account to be lodged, and remits the same to the Auditor to tax and to report.

"*Note.*—The questions embraced within the present action have formed the subject of elaborate and anxious discussion before the Lord Ordinary, at an expense to the parties, as he fears, which is much to be regretted; but, at the same time, while the Lord Ordinary is conscious that the responsibility of this rests mainly with himself in consequence of his desire to possess adequate knowledge of the facts before he pronounced any judgment, he trusts it may be found, in any stages through which the process may hereafter pass, that the costs of the inquiry have not been altogether thrown away."

The pursuer reclaimed.

CAMPBELL SMITH for him.

MACKENZIE and KEIR in answer.

The Court held that Mr Coyne, the architect of the building, was not at first excluded from being arbiter between the parties; but, in consequence of his subsequent examination as a witness in the cause, he was disqualified from now acting as an arbiter in the matter, as contended for by the defenders in their defences to the action of reduction; and therefore that the jurisdiction of the Court was not excluded by the reference. There was nothing wrong in the architect of the building being the arbiter between the parties. Railway engineers acted notoriously in that capacity, and without saying that that was the most desirable thing, it was often a matter of necessity in the exigencies of the case. But matters were now completely changed. The parties had chosen to examine the architect as a witness. He had already expressed an opinion on the question in issue. The Court would not say that, in that respect the architect had not acted quite fairly and honestly, but it would be a mockery after what had taken place to allow him to act as an arbiter in a matter which he had prejudged. The defenders had themselves to blame for this result. On the merits of the case, which the Court thought they were in a position to decide, the pursuer was found entitled to a sum of £78 odds, on the principle of *quantum meruit*. On the matter of expenses, the Court decided (1) that the defenders should get one half of their expenses up to the date of the proof; (2) that neither party should get expenses of the proof; (3) that since the date of the Lord Ordinary's interlocutor the pursuer should have expenses, subject to modification by one-fourth.

Agents for Pursuer—Douglas & Smith, W.S.

Agents for Defenders—Macdonald & Roger, S.S.C.

Friday, February 18.

FIRST DIVISION.

M'INTYRE *v.* CARMICHAEL.

Sheep-worrying—Culpa—*Evidence—Intimation*—26 *and* 27 *Vict.* c. 100. *Held*, on the evidence of one party corroborated by circumstances, that a dog had worried sheep; and that its owner was liable in damages, as intimation of the dog's worrying sheep had on a prior occasion been made to the owner's son, who resided with him.

Question—Whether, under 26 and 27 Vict. c. 100, the sole fact of sheep being worried by a dog is sufficient to import liability of the owner? *Opinion* (per Lord Kinloch)—That it would.

John M'Intyre, tacksman of certain lands in the island of Lismore, brought this action in the Sheriff-court of Argyllshire to have Duncan Carmichael and Peter M'Dugald, schoolmaster at Balliveolan in Lismore, found liable to him in damages for injury done to his sheep by the dogs of the defenders. The pursuer alleged that on three occasions, but especially on the 10th of May and 4th July 1868, the dogs of the defenders had killed, worried, or driven off his lands a considerable number of sheep, lambs, &c.; and he estimated the damages at £40. A proof was led, and the principal point of difficulty was the identification of the dogs. On the first occasion M'Millan, the pursuer's shepherd, saw the dogs amongst the sheep about 600 yards off, and he stated that Carmichael's dog had white on its tail. He did not however then know whose the dogs were. On the 17th May he again saw the same two dogs amongst the sheep, and having gone to the defenders' houses saw the dogs, and informed Carmichael's son of what the dogs had done. The guilt of the dogs was denied. The same thing occurred on 4th July; and on 20th July the action was raised. No blood was ever seen on the dogs; but after the occurrences alleged they were seen to be wet as if they had been out, though their owners denied it. There are various crofters, some of whose houses are nearer to the field where this occurred than the houses of the defenders, and all of whom kept dogs. Both defenders killed their dogs; and thereafter there were no cases of sheep being worried. Carmichael said he killed his dog because he had got another, to avoid taxation, and because of the story about the sheep.

The Sheriff-Substitute (HOME) assoilzied the defenders, holding the dogs had not been identified.

The Sheriff (CLEGHORN) found that on 4th July the acts alleged had taken place on 4th July.

Carmichael appealed.

SCOTT, for him, argued—The evidence is insufficient for identification of the dogs. Even if it were, it must be shewn that the dogs were addicted to worrying sheep. The statute of 1863 does not change the old law that *culpa* of the dog's owner must be shewn. Nor was any sufficient intimation made to the defender of the dogs having worried sheep. Authorities—Stair I., 9, 5; Elchies, Reparation, No. I.; Doddridge, 3 Br. Sup. 223; *Fleming* v. *Orr*, 2 Macq. 14; 26 and 27 Vict. c. 100, § 1.

BALFOUR, for the pursuer, was not called on.

The Court held that whether the act alleged to have taken place on 4th July occurred or not depended on M'Millan's testimony. There was nothing to shake his credibility; his not being able to speak anything but Gaelic made him only a bad witness. His evidence was sufficient, if corroborated by circumstances, and there were sufficient corroborating circumstances here. Even the defender's evidence was in some points against himself. The offence, though committed in daylight, was in its nature an occult one, and difficult of proof. The killing of the dogs *per se* might be in