worthiness, was this:—"When the said vessel left New York she was not in a seaworthy condition, in respect one of her side ports was open, or at least not sufficiently secured or fastened to prevent the influx of water into the hold; and the said port was allowed to remain open or insecurely fastened through the gross carelessness of those in charge of the vessel."

The pursuers now asked the Court to enter the verdict for them, and to find them entitled to expenses. The defenders resisted the claim for the expenses of the first trial and of the discussion following thereon, on the ground that the pursuers ought to have taken care that the question of unseaworthiness was raised by the issue, and ought not to have agreed to the adjustment of any special verdict without a finding on that point. It was no part of the defenders' duty to have raised that question.

At advising—

LORD PRESIDENT—In this case a great deal of unnecessary expense has been caused by a miscarriage, for which one or both of the parties must be responsible. We are in this unfortunate position, that while we find all the Judges in this Court and all the noble and learned Lords who delivered judgment in the House of Lords concurring in the exposition of the law applicable to this case, yet a new trial was ordered because no finding as to the fact of unseaworthiness appeared in the special verdict.

Now, in cases of maritime contract the fact of unseaworthiness is as a rule expressly put in issue. In this case, if the pursuers had relied on unseaworthiness, we should probably have made them put that in their issue; but my impression at the time of adjusting the issue certainly was that the averments as to unseaworthiness were not insisted in, and for this reason among others, that they were irrelevant; and I remain of that opinion still. If any one analyses the statement in the 5th article of the condescendence he will find, I think, that the conclusion is irresistible that the port-hole was accessible, and could have been closed at any time during the voyage, but that through the negligence of the crew it was not closed. That does not constitute unseaworthiness. We were at that time given to understand that unseaworthiness was not in the case; and, quite consistently with that, at the trial the counsel for the pursuers consented to adjust a special verdict on the footing that there was no such element in it. I cannot conceive that any one is to blame for the omission but the pursuers. They were founding on unseaworthiness, as they tell us now, and it was certainly no part of the defenders' case to see that that was put in the special verdict. Afterwards parties came here for the application of the verdict. The pursuers might even then have applied to have the verdict set aside as having been adjusted on a misapprehension. But at the discussion that then took place it was not alleged on either side that there was unseaworthiness in the case. The question then comes to be, whether the party who was in fault throughout is to pay the expenses? I think in that view that it is only reasonable and just that the defenders should pay these.

LORD DEAS, LORD MURE and LORD SHAND concurred.

The Court pronounced this interlocutor:—

"Apply the verdict found by the jury on 11th January 1878, and in terms thereof decern against the defenders for payment to the pursuers of £2793, 4s. 6d., with interest thereon at 5 per cent. per annum from 14th September 1875 till payment: Find the defenders entitled to the expenses of the first trial and of the discussion on the application of the special verdict: Find the pursuers entitled to the other expenses of the cause, including the expenses of the second trial: Allow accounts of the said expenses now found due to be lodged, and remit to the Auditor to tax the said accounts respectively, and to report; and find no expenses due since the date of the second verdict."

Counsel for Pursuers—Lord Advocate (Watson)—Balfour—Mackintosh. Agent—John Henry, S.S.C.

Counsel for Defenders—Asher—Jameson. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, February 5.

SECOND DIVISION.

[Lord Young, Ordinary.

BOGIE'S TRUSTEES *v.* BROWN AND OTHERS.

Succession — Legacy — Uncertainty — "Ragged Schools."

A testator directed his trustees to pay a share of the rents of his estate annually during the subsistence of a lease for thirty years to "The Ragged Schools in Dundee."—*Held*, in a competition between the "Dundee Industrial Schools Society" and the "Mars Training Ship Institution," which was conducted on board a vessel permanently moored in the Tay, not far from Newport, that both charities were entitled to participate in the bequest so long as the existing circumstances of each remained the same.

Alexander Bogie of Balass and Newmill died on 1st June 1870, leaving a trust-disposition and settlement, in which, *inter alia*, he provided that the rents of his properties of Balass and Newmill (amounting to £550) during the subsistence of a lease of thirty years should be divided annually among certain charities, one share to be given to "the Ragged Schools in Dundee."

The question in this action (which was a multiplepoinding raised by Mr Bogie's trustees) was, Whether the Mars Training Ship, which was anchored in the Tay, in the immediate vicinity of the town, and within the precincts of the harbour of Dundee, though without the burgh and parish, came under the description of "Ragged Schools in Dundee," and was entitled to share in the bequest? The other claimant was the secretary of the Dundee Industrial Schools Society, which schools were alleged to be popularly known as "The Ragged Schools."

The Mars Training Ship Institution was licensed on 30th September 1869 (immediately before the date of the testator's settlement), under the provisions of the Industrial Schools Act 1866. There were on board about 300 boys of the

poorest class, who received education and were clothed and fed.

The Lord Ordinary (YOUNG), on 6th July 1877, pronounced an interlocutor finding that while existing circumstances continued, the real raisers would act within their trust and according to their duty by distributing the said share of the trust-funds between the "Dundee Industrial Schools Society" and the "Mars Training Ship Institution." His Lordship added the following note:—

"*Note.*—[*After narrating the facts as above stated*]—In the argument submitted to me nothing turned on the use of the popular name 'ragged school,' which is not in fact used by either claimant. It was conceded (I think rightly) that the description of the pupils, the terms of their reception, and the character of the instruction and discipline in the ship, were such that if instead of being a ship in the Tay without the burgh, it had been a building on shore within the burgh, the name 'ragged school in Dundee' would have been applicable. The objections to its applicability were rested on the character and locality of the structure in which this ragged school is conducted.

"With respect to the nature of the structure, I think there is no validity in the objection. If an old ship affords the requisite accommodation, any kind of school may be conducted in it more or less conveniently, and the character of the school will depend precisely on such considerations as those which make this in my opinion a ragged school, as that term is popularly used.

"With respect to the locality, I think the substance of the thing is to be looked to, and, so regarded, I think this ragged school is in Dundee, although without the burgh. It is a Dundee institution. Dundee might be well provided with ragged schools although all of them were without the burgh, and I should not in that case think that this bequest must fail because of the words 'in Dundee,' for '*qui hæret in litera hæret in cortice.*' This opinion is of course only applicable while the ship, although in the water, is kept in its present place, or so close to Dundee that a school on shore equally near would, although outside the burgh, be properly and reasonably regarded as a town school. But while I have thought it proper thus to express my opinion, I have to point out that it only applies to the present time and existing circumstances, and goes no further than this—that in these circumstances, and while they remain unchanged, these trustees will be within their trust and according to their duty in admitting both claimants to participate in the bequest, in such proportions as they in their discretion shall judge proper, and I shall so express my judgment.

"It is perhaps proper, although but for some observations made in argument I should have thought it superfluous, to say that my judgment has no bearing whatever in the case of a legacy immediately payable to ragged schools in Dundee, however the bequest may be expressed. The case I am dealing with is that of the division of an annual contribution, which is exhausted year by year, and admits of all changes of circumstances being followed and attended to by the administering trustees, and my opinion on it involves no indication of opinion upon the case of a proper legacy payable at once."

Mr Swanston, the secretary of the Dundee Industrial Schools Society, reclaimed.

Authorities—*Duff's Trustees* v. *Society of Scripture Readers, &c.*, Feb. 19, 1862, 24 D. 552; *Grant* v. *Grant*, Law Rep., 5 P.C. 727; *Clergy Society*, June 7, 1856, 2 Kay and J. 615; *Wilson's Executor* v. *Scottish Society for Conversion of Israel*, Dec. 2, 1869, 8 Macph. 233.

At advising—

LORD ORMIDALE—I take it to be undoubted that where the description by a testator of the object of his bounty is ambiguous and uncertain, parole evidence is admissible to show what the testator truly meant, as is well illustrated in the comparatively recent case *in re Kilvert's Trust*, Dec. 16, 1871, Law Rep., 7 Chan. Cases 170, to which we were referred at the debate. Applying this principle to the present case, where the testator's description of the object of his bounty as regards the bequest more immediately in dispute is in some degree attended with doubt and uncertainty, I should, in the ordinary case, have been disposed to think that the proper course would have been, before deciding the question, to have allowed the secretary to the Dundee Industrial Schools Society proof of certain of his averments. But keeping in view that the case has come before us very much as a concluded one, so far as further proof is concerned; that the Lord Ordinary's remarks in the note to his judgment, that in the argument submitted to him "nothing turned on the popular name 'ragged schools,' which is not in fact used by either claimant;" and that the same remark may fairly be made in reference to the argument which was submitted to us—I am not disposed to differ from the opinion which has been expressed by the Lord Ordinary.

The LORD JUSTICE-CLERK and LORD GIFFORD concurred.

The Court adhered.

Counsel for Secretary of the Industrial Schools Society (Reclaimer)—Guthrie Smith—M'Kechnie. Agent—J. Duncan Smith, S.S.C.

Counsel for Bogie's Trustees (Respondents)—Black. Agents—Curror & Cowper, S.S.C.

Counsel for The Mars Training Ship) (Respondent)—Lee. Agent—H. W. Cornillon, S.S.C.

Tuesday, February 5.

SECOND DIVISION.

[Lord Young, Ordinary.

JACK *v.* FERGUSON, ETC.

Husband and Wife—Conjugal Rights Act 1861 (24 *and* 25 *Vict. cap.* 86), *sec.* 16—*Where the Title of the Trustee on a Husband's Sequestrated Estate was pleaded against a Wife's Claim under that section.*

A wife obtained decree of divorce against her husband in 1874. His estate was sequestrated in 1875. At the death of her father in 1872 she had become entitled to a share of the residue of his estate, which had remained in the hands of his executors,