or insolvent partner, his share and interest in the subject of said joint-adventure as such share and interest shall stand at the balance immediately preceding the date of such death, bankruptcy, or insolvency, with interest at the rate of £5 per centum per annum on each instalment from said date of death, bankruptcy, or insolvency till paid." This provision does not in any way affect the quality of the partner's interest.

"The minute of agreement of 23rd April 1880 does not affect the present question.

"The only remaining deed is the minute of agreement of 7th February 1884, entered into between Walter Macfarlane and Thomas Russell, the survivors of the original joint-adventurers. James Marshall, the third joint-adventurer or partner, died on 16th March 1883, and his representatives were afterwards paid out, receiving £38,732, 10s. 10d.

"The minute of agreement of 7th February 1884 proceeds on the narrative that the parties thereto were proprietors of the estate of Possilpark, subject to paying out the interest of James Marshall's representatives, in terms of the minutes of agreement already referred to, and that they were therefore "now interested in the profits and advantages derived from said estate and property as follows—The first party, 55 one hundreth parts or shares, and the second party, 45 one-hundreth parts or shares," and that they had resolved to make certain alterations on the terms of the said minutes.

"They then proceed to cancel the second article of minute of alterations of 22nd April 1879, and to make a different provision for the event of one or other of the parties dying. I need not quote these provisions in detail, but they come to this, that the survivor is to manage the estate and heritable property for behoof of himself and the assignees or representatives of the predeceaser in conformity with the two previous minutes and that minute with a view to the 'gradual winding-up of the joint-adventure.' Until the whole debts and liabilities of the joint-adventure shall have been paid neither of the parties nor his representatives or assignees is to be entitled to draw or receive payment of any money by way of share of profits except as regarded a salary payable to the second party in the event of his survivance. And lastly, on the death of the survivor provision is made for the appointment of a liquidator to wind-up the joint-adventure with all convenient speed, and for that purpose he is given various powers for the purpose of managing and realising the said estate and property.

"It does not seem to me that this deed in any way affects the quality of the partner's interests so as to make the interests of a partner one of joint-property instead of a *jus crediti* for a share of the assets of the joint-adventure.

"I do not think that the proof which has been led materially affects the question. It goes to show no doubt that the Possilpark trust was a separate concern from Walter Macfarlane & Company. But that, as I have said, is not conclusive. The only other matter disclosed by it which calls for observation is that in the carrying out and management of the joint-adventure there does not seem to have been any periodical division of profits. This fact, which is only relevant as bearing on the question whether this was a joint-purchase or a joint-adventure, is not, I think, material. The rights of parties depended on the terms of the minutes of agreement. Now, these minutes, including the last, provide for a division of profits, and if no such division was in practice made, the reason must have been that to suit their own purposes, and perhaps with a view to the arrangements for financing the concern, the partners agreed that there should in the meantime be no division of profits. But this does not, I think, affect the character of the undertaking or the resulting quality of the interests of those engaged in it. Therefore I am of opinion that Mr Walter Macfarlane's interest in the heritable property which remained undisposed of in the hands of the Possilpark trustees at the date of his death was moveable and liable in inventory-duty."

Counsel for the Pursuer—The Solicitor-General—A. J. Young. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Defenders — Graham Murray — Dundas. Agents—J. W. & J. Mackenzie, W.S.

Wednesday, January 10, 1894.

OUTER HOUSE.

[Lord Stormonth Darling, for Lord Wellwood.

GUNTER & COMPANY *v.* LAURITZEN.

Sale—Breach of Contract—Damages—Loss of Profit on Sub-sale—Purchaser's Duty to Replace Goods.

A merchant in Denmark contracted to supply a cargo of Danish hay and straw to a merchant in this country, warranted to be in sound condition on delivery. At the time of the sale it was intimated to the seller that the goods were bought for the purpose of re-sale. On arrival in this country the cargo was rejected as disconform to warranty.

In an action by the purchaser against the seller for damages for breach of contract, it was admitted that the goods were properly rejected. The purchaser claimed as part of the damage the loss of profit on a sub-sale of the goods, and proved that at the time and place of delivery there was no market for goods of the same kind and quality as those contracted for; that they were not on public sale at the time, or quoted in any public market list open to his inspection. The seller averred in de-

fence to the purchaser's claim that goods to the amount required might have been obtained by the purchaser in three separate parcels in the hands of private sellers in this country.

Held that even on the assumption that the seller's averment was well founded, the purchaser was under no duty to take other than ordinary means to replace the goods, and was entitled to the whole profit he would have made on the sub-sale.

By a contract entered into in January and February 1893, J. Lauritzen, a merchant in Denmark, undertook to deliver at Aberdeen, to Gunter & Company, commission agents in London, a cargo of Danish hay and straw, warranted to be delivered in sound condition.

On the faith of their arrangement with Lauritzen, Gunter & Company resold the cargo at a profit of £29, 1s. 4d. to Davidson & Company, merchants in Dundee, and informed Lauritzen of the re-sale at the time when the contract with him was concluded.

The cargo, on arrival at Aberdeen, was found to be so heated and damaged as to be entirely unmerchantable, and consequently disconform to warranty. It was rejected by the sub-purchaser.

In this action Gunter & Company sued Lauritzen for the loss of profit on their sub-sale of the cargo to Davidson & Company.

The defender's saverment, referred to in the Lord Ordinary's opinion, was as follows—"The pursuers, if they intended to make a claim against defender, ought to have gone into the market and bought hay and straw in implement of their alleged contract with Davidson & Company. They could at the time have bought in Scotland, and in particular at Leith or Grangemouth, Danish hay and straw, and shipped the same to Aberdeen or Dundee at a cost less than what they had agreed to pay defender."

On this averment the defender pleaded—"The pursuers being bound and being able to purchase goods in the market to supply any purchasers from them, and the prices at which they could have so purchased being less than what they had agreed to pay defender, have sustained no loss for which they can hold defender liable."

The following authorities were cited by the pursuer—*Duff* v. *Iron & Steel Fencing Company*, 19 R. 199, 29 S.L.R. 186; *Hammond* v. *Bussey*, L.R., 20 Q.B.D. 79; *Hadley* v. *Baxendale*, 9 Exch. 341.

The defender cited *Grébert-Borgnis* v. *Nugent*, L.R., 15 Q.B.D. 85; *Elbinger Actien Gesellshafft* v. *Armstrong*, L.R., 9 Q.B. 473; *Thol* v. *Henderson*, L.R., 8 Q.B.D. 457; Sedgwick on Damages (8th ed.), vol. i., p. 219, sec. 156, and p. 303, sec. 205; *Scott* v. *Boston Company*, 106 Mass. 468.

LORD STORMONTH DARLING—The defender, a merchant in Denmark, contracted to supply the pursuers with a cargo of Danish hay and straw to be delivered in Aberdeen. It was disclosed by the pursuer at the time the contract was entered into, that he was buying for the purpose of re-sale, and that a re-sale had in fact been completed. The sub-purchaser, a merchant in Aberdeen, had in his turn resold the cargo to various customers in that neighbourhood. When the cargo arrived the sub-purchaser inspected it and found it disconform to contract, and it is not disputed that it was so. The only defence which is now put forward is that contained at the end of the third answer for the defender, and in his second plea-in-law, to the effect that the pursuer could at the time of delivery have bought in Scotland, and particularly at Leith or Grangemouth, Danish hay and straw at a price less than he had agreed to pay the defender. I am of opinion that this defence is not made out. It is clear in the first place, on the principle of *Hadley* v. *Baxendale* (9 Ex. 341), that the damage which the defender was bound to make good in the event of his breaking the contract, was such as might be held to have been in contemplation of the parties at the time of making the contract, and in this case the damage contemplated was the loss of profit on the re-sale. The defender says that there is an equitable limitation to this rule to the effect that the purchaser, before he can recover such loss of profit, must show that he has taken every means to supply himself with similar goods, and unless he does so he is barred from recovering. That may be the equitable rule where the goods are of a kind currently bought and sold in the open market at the time and place of delivery. If the purchaser can go into the market and supply himself with goods of the same quality and at a price not greater than that in the contract, then he would suffer no damage, for he would be able to fulfil his contract with the sub-purchaser. But the goods in question were of a very special kind; they were specially consigned from a foreign country, and it is the result of the evidence, in my opinion, that at Aberdeen, which was the port of delivery, there was not a market for these goods at the time at all. The defender had led evidence to show, that by hunting all over the country, the pursuers might have found out that there were small parcels of Danish hay and straw at Leith and other places, which he might have picked up by private treaty; but none of these parcels were on public offer at the time, or quoted in any public market list which was open to the pursuers' inspection. In these circumstances I think there was no duty on the purchaser to make extraordinary exertions to supply himself with goods elsewhere. This is the ground on which I decide the case, but I am by no means satisfied on the proof that it could have been possible for the pursuer, even if it had been his duty, to obtain the goods at a cost less or no greater than the prices he had agreed to pay the defender. There is some evidence to show that he could have got these goods at a price very little greater than the contract price, but this evidence is offered *ex post facto*, and it

does not follow that if he had gone to the sellers at the time, and they had known he was under stress of having to fulfil a contract, they might not have demanded higher prices. The figures do not seem to sustain the defender's allegation in answer three or the plea-in-law to which I have referred; but if they did, I should still be of opinion that there was no such duty on the pursuer as that for which the defender contends.

Decree was accordingly granted for £29, 1s. 4d.

Counsel for the Pursuers—Shaw—Crabb Watt. Agents—Wishart & Macnaughton, W.S.

Counsel for the Defender—A. S. D. Thomson. Agents—Dowie & Scott, S.S.C.

Tuesday, January 30.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

WILLIAM DIXON, LIMITED *v.* SEWELL AND OTHERS (DIXON'S TRUSTEES), AND OTHERS.

Landlord and Tenant—Lease—Minerals—Lease of Minerals with Right to Occupy Houses.

The proprietor of a mineral estate, and of certain detached pieces of ground on which stood workmen's houses, let the minerals with the usual enabling rights for working the same, with right also to the tenant to use and occupy the said houses, the tenant paying and so relieving the proprietor of all feu-duties and taxes, and undertaking to repair and insure. For which causes and on the other part the company bound themselves to pay a yearly sum of fixed rent, or in the option of the proprietor certain specified lordships.

The proprietor died, and his testamentary trustees by his directions conveyed to his sister the mineral estate subject to the existing leases.

The detached portions of land on which the said houses were built remained the property of the testamentary trustees. For some years the whole of the stipulated lordships, greatly in excess of the fixed rent, were paid to the sister, but subsequently the testamentary trustees claimed that the rent stipulated by the lease was paid for the whole rights conferred thereby, including the use of the houses, and therefore that part of the rent was payable to them.

Held, on construction of the whole lease, (*diss.* Lord Young) that the rent was payable for right to work the mineral estate, and that the occupation of the houses was a separate right the consideration for which was payment of feu-duties, taxes, and repairs.

In 1851 William Dixon of Govan Colliery, Glasgow, became proprietor of the mineral estate of Carfin. He subsequently acquired various detached pieces of land in the immediate neighbourhood of the estate. In all these latter cases, however, the surface only was acquired, the minerals being reserved by the seller or superior.

In 1851 William Dixon proceeded to sink pits and lay out a colliery for the working of the minerals in Carfin, and erected partly upon the Carfin estate, but mainly on these detached pieces of land, stores, manager's house, and dwelling-houses for the use of the workmen and others employed in the colliery.

William Dixon died on 23rd February 1859, and by his directions his trustees in November 1873 conveyed the lands of Carfin and the detached pieces of land in their neighbourhood to his son William Smith Dixon.

In 1873 the business of iron and coal-master carried on by William Smith Dixon was converted into a limited liability company under the name of "William Dixon, Limited," Mr Smith Dixon taking a large interest therein as one of the shareholders. He subsequently granted a lease to the company for thirty-one years as from 1st September 1872, of the coal, ironstone, &c. still remaining in the lands of Carfin, with the usual enabling rights for working, winning, and carrying away the same. "With right also to the said second party, the company, during the currency of this lease to use and occupy the stores, manager's house, and dwellings for workmen, and other houses and gardens attached thereto, situated at Carfin, the second party paying and so relieving the first party and his foresaids of all feu-duties payable to their superiors in respect of those held by them from other parties in feu, and also paying to the first party and his foresaids a ground rent for those built on land belonging to them forming part of Carfin estate, at the same rate as the rent payable by the second to the first party for land under the separate lease of Carfin farm and others, and paying and relieving the first party and his foresaids of all public and parochial burdens and taxes of every kind in respect of the said houses and others, whether exigible from landlord or tenant, and also insuring the stores and managers' houses against fire, and also maintaining the said houses in a proper state of repair during the currency of this lease . . . For which causes, and on the other part, the second party bind and oblige themselves to content and pay to the first party, and his heirs, executors, and assignees the yearly rent or lordships after specified, and that half-yearly on the last days of February and August respectively in each year, by equal portions, beginning the first payment as on the last day of February 1873 for the half-year preceding, and the next payment as on the last day of August following, and so forth half-yearly thereafter during the currency of this lease, with a fifth part more of each half-year's payment of liquidate penalty in case of failure in the punc-