of opinion that the share of the late David Carruthers vested in him when he became major, and was consequently carried by his settlement to the pursuer.

The Court adhered.

The LORD JUSTICE-CLERK was absent.

Counsel for Reclaimer — Ure — Clyde. Agent—A. C. D. Vert, S.S.C.

Counsel for Respondent—Dundas—Craigie. Agents—Mackenzie & Black, W.S.

Tuesday, December 14, 1893.

OUTER HOUSE.

[Lord Wellwood.

LORD ADVOCATE *v.* MACFARLANE'S TRUSTEES.

Revenue—Heritable or Moveable—Interest in Joint-Adventure—Inventory or Succession Duty.

In partnership proper a subject in itself heritable, if forming part of the assests of the company for the purposes of their trade, is held to be moveable as regards the interest of each individual partner. In this respect joint trade or joint-adventure does not differ from proper partnership.

In joint-purchase it is otherwise. If there is no contribution for the purpose of joint-profit, there is no partnership, and the rules peculiarly applicable to partnership do not apply. The subjects of the joint-purchase retain their natural qualities *quoad* the interests of the joint-owners, and do not undergo conversion.

Held that the joint-interest of a deceased in certain heritable estate was, under a proper contruction of the terms of the deeds by which the estate was acquired and held, an interest as joint-adventurer, and not as joint-owner, and that his interest was therefore moveable, and subject to inventory-duty.

The late Walter Macfarlane, ironfounder, Glasgow, died on 18th October 1885. At his death he was possessed of valuable heritable and moveable estates. He left a trust-deed and settlement dated 26th May 1884, by which he conveyed his whole estates to trustees for the purposes therein mentioned.

The present action was brought at the instance of the Inland Revenue against the accepting and surviving trustees acting under this trust-deed, and raised the question whether Mr Macfarlane's interest in certain heritable estate was at the date of his death heritable or moveable.

Mr Macfarlane carried on business as an ironfounder in Glasgow, in partnership with the late James Marshall of Carlston, Kelvinside, and Thomas Russell of Ascog, under the firm of Walter Macfarlane & Company.

In 1868 the partners of the firm, taking into consideration the growth and necessities of their business, acquired an extensive tract of ground forming part of the land and policy of Possil, and of the farm of Keppoch. The title to the ground so purchased (referred to hereafter as the Possil-park estate or trust) was taken in the name of the partners and the survivor, as trustees and trustee for behoof of themselves and the heirs and assignees of deceasers. The trust was constituted by a minute of agreement dated 1st April 1869, the terms of which, so far as material to the case, are recited in the Lord Ordinary's note. Part of the property, required for the site of a new foundry work, was, in terms of a stipulation in the minute of agreement, conveyed by the trustees to themselves as partuers of the firm of Walter Macfarlane & Company. There were also subsequent transactions between the Possilpark trust, and the firm of Walter Macfarlane & Company, but, as stated in his note, the Lord Ordinary held on the documents and on the oral evidence led in the case, that these transactions had not the effect of identifying the firm and the trust as the same concern.

With regard to the property not conveyed to the firm, certain modifications were made in the purposes of the trust as set forth in the original minute of agreement, by the minute of alteration of 27th April 1879, the minute of agreement of 23rd April 1880, and by the minute of agreement of 7th February 1884, referred to in the Lord Ordinary's note.

In 1879 Mr Marshall and Mr Russell retired from the firm of Walter Macfarlane & Company, and thereafter Mr Macfarlane assumed two new partners, and retained his interest in the new firm until his death in 1885. Subsequently to his retirement from the firm, and up to the date of his death Mr Marshall remained a trustee of the Possil estate. After his death the trust in the hands of the two survivors was reconstituted by the minute of agreement, already referred to, of 7th February 1884. Under this agreement the Possilpark estate continued to be held till the date of Mr Macfarlane's death.

Mr Macfarlane's interest, as at the date of his death, in the firm of Walter Macfarlane & Company and in the Possilpark trust was vested in the defenders as trustees under his trust-disposition and settlement.

The following authorities were cited in the argument—*Murray*, November 6, 1739, M. 5115; *Pyper* v. *Christie*, 6 R. 143: *White* v. *M'Intyre*, 3 D. 334; *Lockhart* v. *Moodie*, 4 R. 856; *Lockhart* v. *Brown*, 15 R. 742; *Davidson* v. *Robertson*, 3 Dow 218; Bell's Comm. ii. 539; Bell's Prin., sec. 392; *re Hulton*, 62 Law Times 200; Lindley on Partnership (6th ed.) 25, 26.

On 14th December 1893 LORD WELLWOOD pronounced the following interlocutor:—"Finds that the interest of the late Walter Macfarlane in the Possilpark estate, in so far as remaining in the hands of the Possilpark trustees, was moveable at the date of his death, and that therefore it is liable in

inventory-duty: Appoints the defenders to lodge an additional inventory accordingly, and that within a month; meantime reserves all questions of expenses, and grants leave to reclaim.

"*Note.*—The only question which I have to decide at present is, whether the interest of the late Walter Macfarlane, who died on 18th October 1885, in the Possilpark estate was at the date of his death heritable or moveable? The pursuer maintains that it was moveable, and thus liable in inventory-duty; the defenders Mr Macfarlane's trustees maintain that it was heritable, and only liable in succession-duty.

"There is not, I apprehend, any dispute as to the general law on the subject. In partnership proper a subject in itself heritable, if forming part of the assets of the company for the purposes of their trade, is held to be moveable as regards the interest of each individual partner, the reason being that the right of a partner who is to be paid out, or the representatives of a deceased partner, is not in right to a share of the specific subjects held by the company, but a *jus crediti* against the company for a share of the whole assets, heritable and moveable. Thus the acquisition of heritable subjects by a company for the purposes of its trade operates conversely, and makes the heritable property so purchased personal *quoad* the interests of the individual partners.

"In this respect joint trade or joint-adventure, which is just a limited partnership, does not, so far as I am aware, differ from proper partnership. It is true that in a few particulars the rules applicable to joint-adventure differ from those applicable to proper partnership, but in other respects joint-adventure has the same qualities in law as partnership. This is Mr Bell's opinion—1 Bell's Comm. (7th ed.), p. 538 *et seq.*; and Lord Eldon in *Davidsons* v. *Robertson*, 1825, 3 Dow, 218.

"In joint-purchase it is otherwise. If there is no contribution for the purpose of joint-profit, there is no partnership, and the rules peculiarly applicable to partnership do not apply. The subjects of the joint-purchase retain their natural qualities *quoad* the interests of the joint-owners, and do not undergo conversion.

"The question raised in the present case falls to be decided mainly, if not entirely, by the terms of the deeds under which the Possilpark estate was acquired and held. On a consideration of those documents I am of opinion (1) that although Possilpark property was acquired partly for the purposes of the old firm of Walter Macfarlane & Company, that estate, in so far as not actually conveyed to Walter Macfarlane & Company, cannot be regarded as an asset of that partnership; but (2) that in so far as not conveyed to Walter Macfarlane & Company the Possilpark estate constituted a separate joint-adventure in which Messrs Macfarlane, Marshall, & Russell were the partners or joint-adventurers. The defenders have a hard task to establish the contrary, because throughout the deeds the concern is called a joint-adventure, and the parties interested in it are sometimes termed partners. But apart from the terms used, the whole scope of the minute of agreement indicates that it was a joint-adventure or limited partnership. This is so clear that I do not propose at this time to examine the agreements in any great detail. In the first agreement, 1st April 1869, after providing that the parties to the joint-adventure should sell to themselves as partners of Walter Macfarlane & Company such portions of the lands acquired as should be found necessary for the purposes of that firm, it was provided, 'Second, that the remainder of the said land shall be held, and shall from time to time be disposed of, either for prices in cash or under burden of ground-annuals, into which the prices shall be converted, and that at such prices as may be resolved on by a majority of the parties hereto.' Then by the fifth article it was provided—'The share or interest of the said parties respectively in all the profits and advantages to be derived from the said ground is hereby declared to be as follows:—That of the said first party 40 one hundredth parts, that of the said second party 30 one hundredth parts, and that of the said third party 30 one hundredth parts." The proportions here stated were the proportions in which the joint-adventurers were interested in as partners in the estate of Walter Macfarlane & Company. The sixth article provides for the division of profits and the apportionment of losses. The eighth article provides for the payment to the representatives of a deceased partner of the share of such deceaser by six bills of equal instalments, payable at intervals of six months. And the ninth article provides for the paying out of the share or interest of a bankrupt or insolvent partner in the same way.

"This deed seems to embody the usual provisions of an ordinary partnership, and in particular provides for the division and apportionment of profit and loss and the paying out of the representatives of a deceased partner with cash. Unless it was materially altered by subsequent deeds, there can be no doubt that under it the interest of a deceased partner was moveable.

"The minute of alteration of 27th April 1879 cancelled the eighth and ninth articles of the minute of agreement of April 1869, and provided, *inter alia*—"Second, On the death, bankruptcy, or declared insolvency of any of the parties to the said agreement, his share and interest in the lands, ground-annuals, and others forming the subject of the joint-adventure between the parties according to the immediately preceding balance-sheet, shall devolve exclusively upon the surviving or solvent parties, but subject always to such surviving or solvent parties paying out (but subject always to the declaration after expressed) by equal instalments at six, twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, sixty, sixty-six, and seventy-two months from the date of such death, bankruptcy, or insolvency, to the representatives of such deceasing bankrupt

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-