countenance to the view that a beneficiary under a trust may be allowed to sue the debtor of a trust-estate for payment of a debt due to the trust. I am not as at present advised prepared to follow that case, in which there was a serious division of opinion, as a conclusive authority.

On the question of relevancy I agree with the Lord Ordinary, and have nothing to add.

LORD MONCREIFF—Looking to the whole scope of the summons, I think the pursuers sue as executors for an alleged debt due to the executry, and as a majority of the executors might have raised the action, so in the absence of exceptional reasons to the contrary may they compromise it or decide in the interests of the executry not to proceed with it. I do not doubt that in some circumstances the Court may sustain the title of a minority of executors to raise or proceed with an action. But all that we see of this case leads to the conclusion that the five executors who have compromised their claim and withdrawn from the action exercised a very sound discretion in deciding not to proceed, because in my opinion their averments are utterly insufficient to infer reduction of the agreement sought to be reduced. I therefore think the Lord Ordinary's judgment should be affirmed.

The Court adhered.

Counsel for the Pursuer, James Edward Scott—Shaw, Q.C.—Cullen. Agent—Wm. B. Rainnie, S.S.C.

Counsel for the Defenders, Mrs Taylor's Executors—W. Campbell—M'Clure. Agent—R. Addison Smith, S.S.C.

Tuesday, January 19.

FIRST DIVISION.

[Lord Pearson, Ordinary.

GOVAN ROPE AND SAIL COMPANY, LIMITED *v.* ANDREW WEIR & COMPANY.

Sale—Continuing Contract—Rescission of Contract—Reparation—Measure of Damages.

In an action of damages for breach of a continuing contract of sale, which the Court after a proof found to have been wrongfully repudiated by the purchaser, *held* that there being no ascertainable market price for the goods in dispute, the true measure of damages was the difference between their contract price and the total cost to the seller of their production.

Observations (*per* Lord M'Laren) on the rights of the purchaser under a continuing contract if goods of inferior quality are tendered.

Process — Record — Amendment — Competency — Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 29.

The pursuers in an action for damages in respect of breach of contract, in their original averments estimated the loss sued for as "the difference between the contract price" of the goods to be supplied by them "and the current price" at the date of the alleged breach. They subsequently, after a proof had been led, and when the case was at *avizandum*, proposed to amend their record by substituting for this, an averment that "the loss of profit occasioned to the pursuers through the said breach of contract, amounts to the sum sued for." No alteration was proposed in the amount concluded for in the summons. The reason given for the proposed amendment was that there was no ascertainable market price for the goods at the date of the alleged breach.

Held that the amendment was necessary for the adjudication of the case, and was accordingly competent under sec. 29 of the Court of Session Act.

In March 1892 the Govan Rope and Sail Company contracted with Andrew Weir & Company, shipowners, Glasgow, to supply them with 20 tons of Manila rope.

The contract was constituted by offer and acceptance. The offer made by the Govan Rope Company was contained in a letter dated March 8th, in the following terms:—"Referring to the writer's visit this afternoon and conversation with your Mr Weir, we offer you, say 20 tons pure Manila rope at £34 per ton, less 5% dist., 1/mo., free delivery U. K. or usual Continental ports. To be taken up as required by you, but on the understanding that you will give us a share of your orders regularly and not keep it all back until your other contracts are completed." This offer was accepted by Messrs Weir & Company on the 17th in these terms:—"We accept offer made us to-day for 20 tons of Manila rope of not lower quality than good seconds, at £34, say Thirty-four pounds p. ton, delivered to our ships U. K. or Continent free. Terms, monthly account, less 5% discount." Only about half a ton of rope was taken up by the Messrs Weir & Company during the years 1892-93, in consequence of which complaints were made against them and legal proceedings threatened. The parties eventually agreed upon certain alterations in the terms of the original contract, which are contained in a letter of 2nd March 1894:—"We have yours of y'day. We confirm the arrangement come to, viz., that your clients complete their contract with ours by the close of the current year—our clients supplying yours with 'current' hemp in place of that originally contracted for."

By the 31st December 1894 Messrs Weir & Company had only ordered and obtained delivery of about 5½ tons of rope, and as they refused to take delivery of the remainder, the Govan Rope Company on 6th November raised an action against them, concluding for payment of £182 as damages in respect of the defenders' failure to take delivery.

The pursuers averred, with regard to the amount of their claim—"(Cond. 2) The difference between the contract price and the current price of the same quality of rope as at 31st December 1894 amounted to £182, the sum now sued for."

The defenders denied this, and averred that they had had occasion to complain of the quality of the rope supplied by the pursuers prior to the new arrangement of March 1894, and that after that date rope supplied by the pursuers to two of their ships had been of inferior quality

They pleaded—"(2) The fulfilment of the contract having been prevented by the pursuers' failure to supply rope of the quality therein stipulated for, the defenders should be assoilzied."

The Lord Ordinary (MONCREIFF), on 6th February 1896, allowed the parties a proof before answer.

The effect of the evidence led is sufficiently indicated in the opinions of the Court, given *infra.*

On 16th June, after the proof had been closed, and the case taken to avizandum, the Lord Ordinary (PEARSON) granted the pursuer leave to amend his record by deleting from cond. 5 the averment regarding the measure of his claim given above, and substituting for it the following averment:—"The loss of profit occasioned to the pursuers through said breach of contract amounts to the sum sued for."

On 27th June the Lord Ordinary decerned against the defenders for payment of the sum of £144.

Opinion.—"The defenders are owners of a line of sailing ships trading to distant ports. On 17th March 1892 they accepted the pursuers' offer to supply them with 20 tons of Manila rope of not lower quality than 'good seconds,' at £34 per ton delivered, 'terms, monthly account, less 5 per cent. discount.' No limit of time was expressed in the contract, but the pursuers admit that they did not expect that much of the contract quantity would be taken off during the remainder of 1892. In 1893, however, repeated reminders were sent to the defenders, of several of which they took no notice, and by the end of 1893 just over one half-ton had been taken delivery of under the contract.

"The market for the contract goods was, on the whole, a falling market both during that period and also during 1894. It appears from the correspondence that in January 1893 the defenders made a proposal for a reduction on the contract price, but being argued out of it, they did not press the suggestion, and added, 'We think it just as well to allow the matter to remain dormant.

"When December arrived, and only a small fraction of the contract quantity had been taken up, the pursuers remonstrated strongly. They insisted that if the contract was to go on, a definite time limit must be fixed, namely, 31st December 1894, by which date delivery should be taken of the balance contracted for, and they were willing, on the other hand, to agree to supply a better and dearer description of rope known as 'fair currents, at the original contract price, the difference being about £2 per ton. After a long correspondence these terms were ultimately agreed to by the defenders on 1st March 1894 under a threat of litigation.

"When 31st December 1894 came round the quantity which had been requisitioned and delivered under the contract amounted in all to less than 5½ tons. A small additional quantity of rope was in July 1895 ordered and delivered as under the contract, making the total contract deliveries as near as may be 5½ tons, a deficiency of more than 14½ tons on the contract quantity.

"The pursuers now sue for damages on the ground of the defenders' failure to take full delivery. The measure of damages originally stated on record was 'the difference between the contract price and the current price of the same quality of rope as at 31st December 1894.' The measure of damage to which the proof was directed is the difference between the contract price of the 14½ tons or £493, and the cost of the raw material delivered in Glasgow plus cost of manufacture, or £348, 14s. 6d. The difference is £144, 5s. 6d. The defenders objected to this change of front on the pursuers' part, but made no motion for time to meet the pursuers' evidence on the subject, and I think these figures may fairly be taken as correct, whether as applied to the date limited by the contract or to the year 1894 generally, or to July 1895. The case of *Russell, Hope, & Company,* December 7, 1895, was referred to as showing the incompetency of amending the record to the effect proposed, but the circumstances necessitated an amendment of the conclusions of the summons by the addition of an alternative conclusion for an amount larger than any of the four sums originally sued for. Here there is no such necessity.

"The defenders further object to the measure of damages thus resorted to by the pursuers as being untenable in law. They maintain that the true measure of damages in such a case is not loss of profit on the particular contract, but on the difference between contract price and market value at the date of the breach. The latter test is appropriate where the seller either keeps the goods in stock, or buys them *in forma specifica* to enable him to fulfil his contract for delivery, but it does not apply in the case of the seller being a manufacturer of the contract goods, and making them up out of the raw material from time to time as deliveries are asked for, which was the position of the sellers here as regards the quality of rope to be supplied under this contract. It appears to me that the criterion of damage now adopted by the pursuers is in accordance with the principle which governs the whole law on the subject, namely, that the party observing the contract is to be put as nearly as possible in the same position as he would have been if the contract had been performed.

"The defenders, however, take up this position, that the pursuers were themselves

in breach of the contract, and that, in the circumstances, they were justified in declining to requisition for further deliveries within the contract period, and the pursuers are barred from recovering damages.

"The only breach alleged by the defenders, as known to them before the expiry of the contract period, occurred early in October 1894, with reference to the supply of two coils of rope to the ship 'River Falloch,' then lying in Liverpool. The actual order was given in Glasgow on 1st October by telephone to the pursuers' office. The parties are agreed that what was asked for was 'fair currents,' but they differ widely as to what followed. The defenders maintain that the order was accepted. The pursuers, on the other hand, assert that they telephoned in reply that they had no 'fair currents' of the required size in stock in Glasgow, but would deliver their ordinary staple quality (*i.e.*, good seconds) out of their Liverpool stock, and they sent their traveller M'Nair to the defenders' office next morning to confirm the order and see that it was all right. The documents here are entirely against the pursuers, for not only did the defenders write to them the same evening confirming the telephonic message as for two coils Manila hauling lines 'fair currents,' but the pursuers themselves invoiced the rope as 'fair currents,' though they explain this as being a clerical error of their invoice clerk.

"But what followed is material on the question of breach of contract. If the pursuers had stood to it either that the rope supplied was 'fair currents,' or that the 'good seconds' which were delivered were in implement of the current contract, the defenders might have been in a position to make good their plea. But after an ineffectual attempt on the part of the pursuers to induce them to keep the rope on being allowed the difference in price, the defenders sent back the rope and received two coils of fair currents in place of it, as under the contract, which they stated they would carry on 'in the meantime.'

"This incident seems to have filled the minds of the defenders with suspicion. They suspected or believed that the pursuers had intended to pass off the inferior rope as within the contract, and had backed out of a false position on being found out, and therefore, although the defenders say they could, even at that late period, have taken deliveries of the whole contract quantity before 31st December, they placed their orders, or the bulk of them, elsewhere, with the result above stated.

"But the defenders here take wider ground, They assert that the tackle supplied to several of their ships, as under the contract, at various times during the year 1894 has, since the expiry of the contract period, proved to have been disconform to contract. They found their right to state this plea, even as regards instances coming to their knowledge during the dependence of the action, upon general law, and also upon the specialty that as late as July 1895 the pursuers delivered rope to the defenders as under the contract, thus showing that they were keeping open the contract for their own advantage. Even assuming this to be the defenders' true legal position, I think it fails on the facts. Undoubtedly they make out a strong case, especially as regards the ship 'Gowanbank,' against the sufficiency and endurance of the rope supplied. Tackle which should have lasted eighteen months or two years became useless or at least unsafe in six or nine months, involving the defenders in considerable loss, both of time and of sails. But I do not think that either this evidence, or the evidence of experts which was adduced, is sufficient to displace the presumption arising from the acceptance of the rope by the defenders as under the contract. It was received on board the 'Gowanbank' at Dundee, and Malcolm Wright, the chief officer who received it, says, 'I know about ropes and the different kinds of them. There is the yacht rope, the fair currents, and the brown hemp comes next; these are the three I am acquainted with. . . . On arrival on board the vessel an inspection by anyone would tell the difference between the "fair currents" and brown hemp. This rope was delivered on board the ship at Dundee to myself; I thought it was an inferior quality of rope; I thought that after it had been rove for about a week. At the time of delivery it looked right enough. You could not tell the difference. I detected no inferiority until we had started on the voyage, and it started to show signs of weakness about a fortnight after it was rove. That was after we had left Rio.' This evidence suggests that the material was right enough, but that, either through faulty manufacture or otherwise, the rope had a considerably shorter life than average ropes of the same material. The cause of this, however, does not appear to me to be made out with sufficient clearness to fix on the pursuers a breach of this contract.

"On the whole, I hold that the counter case set up for the defenders has failed, and that the pursuers are entitled to decree for the amount above mentioned, with expenses.

The defenders reclaimed, and argued—(1) The amendment was incompetent on the principles laid down in *Russell, Hope, & Company* v. *Pillans*, December 7, 1895, 23 R. 256, on the ground that the damages were laid on a different basis, and the sum arrived at on a different principle from that of the original record. Accordingly, this was not one of the amendments admissible under the 29th section of the Court of Session Act. (2) They were entitled to plead the bad quality of the rope supplied as warranting their repudiation of the contract even though the badness was not discovered till after the date of the repudiation. Accordingly, as the pursuers were proved from the evidence to have supplied bad rope on several occasions, and so to be themselves in breach of contract, the defenders were justified in declining to take further deliveries. (3) The measure of damages proposed by the pursuers was quite an incompetent one, the true mea-

sure being the difference between contract and market price, which might easily have been ascertained—*Warin & Craven* v. *Forrester*, November 30, 1876, 4 R. 190, *affirmed* June 5, 1877 4 R. (H. of L.) 75; *Roper* v. *Johnson*, February 6, 1873, L.R., 8 C.P. 167.

Argued for respondents—(1) The amendment was made at the suggestion of the Lord Ordinary, and an opportunity had been given to the defenders to re-open their proof. The case of *Russell, Hope, & Company* did not apply, for no larger sum was claimed by the amendment, and it necessitated no change either in the summons or pleas. (2) The defenders were not justified in repudiating an executorial contract, unless they could show that the defects alleged to have existed in certain consignments would be applicable to all future consignments. That was the case in *Turnbull* v. *M'Lean & Company*, March 5, 1874, 1 R. 731, but it was not even averred here; all that the pursuers could aver being that certain ropes were bad. (3) The measure of damages proposed in the amendment was the correct one in cases where there was no available market for the goods in dispute, and accordingly no "market price" to compare with the contract price—Sale of Goods Act 1893 (56 and 57 Vict. c. 71), sec. 50; *Cort* v. *Ambergate Railway Company*, June 4, 1851, 20 L.J., Q.B. 460. That being so, the pursuers were entitled to the profit which they would have naturally made, or, in other words, to the difference between the contract price and the cost of production.

At advising—

LORD ADAM—The original contract between the parties in this case is contained in a letter by the pursuers to the defenders, of date 8th March 1892, and in their reply thereto of same date.

It will be observed that by the terms of this contract, the rope was to be taken up as required by the defenders, but that there was no limit of time specified, within which the orders or requisitions for rope should be made by the defenders.

It appears that only about half a ton of rope had been taken up by the defenders during the years 1892-93. This led to complaints on the part of the pursuers of non-implement of the contract on the part of the defenders, and a threat of legal proceedings being taken against them. The matter was then put into the hands of the agents of the parties, which resulted in certain alterations of the terms of the original contract. These are to be found in a letter of date 2nd March 1894, by the pursuer's agents to the defenders, which is in these terms:—"We have yours of yesterday. We confirm the arrangement come to viz., that your clients complete their contract with ours by the close of the current year—our clients supplying yours with 'current' hemp in place of that originally contracted for."

By the contract as thus modified, therefore, the pursuers were bound to supply the defenders in place of with good seconds, with 'currents', which was a better class of rope, and on the other hand the defenders were bound to implement the contract by taking delivery of the whole rope by 31st December 1894.

That being the contract, it appears that when that date arrived, the defenders had ordered and obtained delivery of about 5½ tons of rope, leaving upwards of 14½ tons of which they had not taken delivery. It is to recover damages in respect of the defenders' alleged breach of contract in this respect that the present action has been raised. The defence on the merits is that the defenders were justified in not asking or taking delivery of the rope in question, because the rope which had been previously furnished to them by the pursuers under the contract was not of the quality contracted for but of an inferior character, and no doubt if the defenders succeed in establishing this they will not be liable.

[*His Lordship here reviewed the evidence upon this point, holding that the defenders had failed to prove that on the two occasions specified the rope supplied was disconform to contract.*]

As regards the measure of damages, it was originally stated on record to be the difference between the contract price and the curreut price of the same quality of rope as at 31st December 1894. The pursuers were allowed by the Lord Ordinary to delete that, and to insert in place thereof a claim for the loss of profit occasioned to the pursuers through the breach of contract; the reason for making the amendment, as I understand, being that there is no current or market price for the kind of rope contracted to be supplied, with which the contract price can be compared.

It was objected that this amendment was incompetent. I do not think so. The 29th section of the Court of Session Act of 1868 enacts that the Court may at any time amend any error or defect in the record, and directs that all such amendments shall be made as may be necessary for determining in the existing action the real question in controversy between the parties—that is, in this case, the true amount of damage, if any, due to the pursuers. I think the amendment is necessary for that purpose, and does not subject to the adjudication of the Court any larger sum than is specified in the summons.

That being so, what the pursuers now claim as the loss of profit is the difference between the contract price of the 14½ tons and the cost of the raw material required for its manufacture delivered in Glasgow, *plus* the cost of manufacture. I think this claim is right. I think, in the words of the 50th section of the Sale of Goods Act of 1893, it is the loss directly and naturally resulting in the ordinary course of events from the defenders' breach of contract. As I have already said, there is no current or market price for the goods in question with which the contract price can be compared.

I think the Lord Ordinary's interlocutor should be adhered to.

LORD M'LAREN—I am not sure that the law is clearly settled as to the remedy or

remedies open to a purchaser under a continuing contract for the supply of goods at such times as he may require them. If on one occasion the seller should tender goods inferior to contract quality, the purchaser would not in ordinary circumstances be justified in rescinding the whole contract, though he would be entitled to return the particular lot of goods which were objectionable. But if a seller systematically sends goods which are not conformable to contract, and the contract is for successive deliveries, I do not doubt that where such conduct is persisted in so as to make it evident that the seller does not intend to fulfil his contract, the purchaser may rescind the contract and refuse to take further deliveries.

That is the case which the purchasers allege in the present action. They say that all the ropes supplied to them were inferior to sample, and had one after the other to be sent back; that their ships were endangered by reason of defective cordage, and that accordingly they were entitled to rescind the contract of sale. It may be admitted that, if the ropes supplied were of inferior quality, the remedy desired by the shipowners would be open to them, but it must be borne in mind that a buyer claiming right to rescind on such grounds must preserve evidence of the alleged faults. It does not appear from the report of the evidence or from the log that any care was taken to preserve evidence as to the quality of the rope complained of. On the contrary, it is plain to my mind that this objection was an afterthought, and was only put forward when the purchasers' ship returned home and it was found inconvenient to take further supplies of rope under the contract.

I agree with Lord Adam in his statement of the case and in his conclusions. The defenders having failed to prove that the Manilla rope supplied was systematically defective in quality have broken their contract by refusing to take further deliveries of rope, and are liable in damages.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuers—Ure—Clyde. Agent—J. A. Cairns, S.S.C.

Counsel for the Defenders—A. Jameson—Younger. Agents—J. & J. Ross, W. S.

Wednesday, January 20.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

MACKAY *v.* JOHN WATSON, LIMITED AND ANOTHER.

Reparation — Master and Servant — Relevancy.

An action was raised by a bottomer in a coal pit against his employers, and also against the engineman in charge of the engine by which the coal was raised to the surface. It was averred that while the pursuer was engaged at the pit-bottom in replacing a hutch which had fallen off the rails, owing to their defective condition, the engineman, without receiving a signal to do so, began to lift the cage, that the pursuer was caught by the cage as it rose and carried up the shaft between the cage and some scaffolding for about three feet, until the cage stopped, when he fell back into the pit-bottom, and in consequence sustained injuries. The pursuer also averred that the accident was due to a want of checking-power in the engine, and to the want of sufficient qualification on the part of the engineman, "his previous experiences not warranting such a responsible position." *Held* that these averments were irrelevant as against the employers, in respect (1) that the defective condition of the rails was not alleged to have been the cause of the accident; and (2) that the averments as to defect in the engine, and want of qualification on the part of the engineman, were not sufficiently specific.

This was an action at the instance of Walter Mackay, bottomer, against John Watson, Limited, Earnock Colliery, Hamilton, and John Bolton, engineman there, brought in the Sheriff Court of Lanarkshire at Hamilton. The pursuer craved decree against John Watson, Limited, for £500, or alternatively for £186 under the Employers Liability Act, and against Bolton for £500, or otherwise for decree against both defenders jointly and severally or severally for £500.

The pursuer averred that up to 29th July 1896 he was a bottomer in No. 1 pit, Earnock, of which John Watson, Limited, were the owners, and at which the defender Bolton was engineman; that the lower pit-bottom where he worked was approached by a double line of rails, upon which the hutches were brought and run into their proper places on a winding-cage, with a view to the coal being raised to the surface; that some weeks before the accident to the pursuer, the rails got out of repair, and that though repaired by the defenders, John Watson, Limited, they soon became defective again, the result of which was that the hutches in running along them, fell off the rails. The pursuer