Smith's Executors v. *Smith*, 1918 S.C. 772, 55 S.L.R. 716; *Dunlop* v. *M'Crorie and Others*, [1909] 1 S.L.T. 544. If the expression "all my monies and belongings" were interpreted to mean moveable estate excluding heritage the testator's wife would get practically nothing. Such an interpretation should be rejected, because it was unlikely that the testator intended that his wife should be left with nothing—*Easson* v. *Thomson's Trustees*, (1879) 7 R. 251, 17 S.L.R. 239, *per* Lord Ormidale at 7 R. 254, 17 S.L.R. 241. *Scott's Trustees* v. *Duke*, 1916 S.C. 732, 53 S.L.R. 551, was also referred to.

Argued for the first parties—The expression "monies and belongings" did not cover heritage. Unequivocal evidence was necessary to show that it did. The testator was not an illiterate person. He had previously executed testamentary writings, and knew what were the proper words to use in order to express his intentions. The word "monies" did not cover heritage—*Easson* v. *Thomson's Trustees; Dunsmure, &c.* v. *Dunsmure*, (1879) 7 R. 261, 17 S.L.R. 134. The conjunction of the words "and belongings" with the word "monies" did not add to the limited meaning of the word "monies"—*Edmund* v. *Edmund*, (1873) 11 Macph. 348, 10 S.L.R. 210. "Belongings" was an unusual word to use to describe heritable estate. The testator's intention to exclude the heritage from the bequest was not an unlikely intention. His wife was not left unprovided for. She got a liferent of the whole estate.

LORD JUSTICE-CLERK—This case raises a very sharp point, and I do not think the authorities carry us very far. But so far as the authorities do go, the judgments of Lord Kyllachy in *Macintyre* (7 S.L.T. 435) and Lord Mackenzie in *Dunlop* v. *M'Crorie* (1909, 1 S.L.T. 544) rather support the wider reading, although they cannot be said to give a decision in a case like the present where there is both heritable and moveable estates. I think the word "belongings" really means that which belongs to the person, or the property of the person. It is used here in collocation with the word "monies," and these words are prefaced by the word "all." On a fair construction it seems to me that the true interpretation of this codicil is that the man meant his wife to get all he had, and he has said that in language sufficiently clear to enable us to give that construction to the settlement. It is not without importance, I think, that there were no children, and that the only competitors would be a brother and nephews and nieces by a deceased sister.

I am therefore of opinion that we should answer the first question in the affirmative and find it unnecessary to give any answer to the second.

LORD SALVESEN—I confess that on the first review of this short will my impression was that "belongings" might have the restricted meaning for which Mr Christie contends, as it is not a word that is usually employed in common parlance as describing heritable estate; but looking to the circumstances in which the writing was executed—a day before the man's death—and the whole history of his testamentary writings, I come to be of opinion with your Lordship that the testator's intention was to make a universal settlement in favour of his wife by this short writing.

The word "belongings," like the word "property" or "estate," seems to me habile to convey both heritable and moveable estate, and I do not think that the circumstance that it is conjoined with the word "monies" necessarily takes away from the effect that would otherwise attach to it. Mr Christie, for the first party, admitted that if the words "my monies and" had been omitted he could scarcely have resisted the view that the writing had universal effect. I do not see any sufficient reason in the fact that the testator specified one class of his property to take away from the meaning that would otherwise have pertained to the word "belongings." And if authority is needed for that proposition I think we have it in Lord Mackenzie's opinion in the case of *Dunlop* v. *M'Crorie* (1909, 1 S.L.T. 544) which did, I think, unlike the previous case (*Macintyre* v. *Miller*, 7 S.L.T. 435) which Lord Kyllachy decided, embrace both heritage and moveables, although there were specialties in that case which are not present here.

I have therefore no difficulty in agreeing with your Lordship that the testator's intention was to convey his whole estate to his wife, and that he has sufficiently expressed it in this last testamentary writing.

LORD ORMIDALE—I agree, and have nothing to add.

LORD DUNDAS was absent.

The Court answered the first question in the affirmative and found it unnecessary to answer the second question.

Counsel for the First Parties—Christie. Agents—Aitken, Methuen, & Aikman, W.S.

Counsel for the Second Party—Dickson. Agent—D. C. Oliver, Solicitor.

Wednesday, July 20.

SECOND DIVISION.

[Sheriff Court at Glasgow.

DOWLING *v.* JAMES METHVEN, SONS, & COMPANY, LIMITED.

Contract—Principal and Agent—Principal's Option in Favour of Principal Terminating Selling Agency if Stipulated Sum not Reached—Failure of Agent to Effect the Stipulated Turnover—Failure of Principal to Supply the Goods Necessary for its Attainment—Right of Principal to Exercise Option of Terminating Agency—Meaning of Word "Turnover."

A wholesale firm concluded an agreement with a selling agent whereby the latter was to receive a certain commission in the event of the sales effected by him amounting to a specified sum. The

stipulated "turnover" not having been reached the firm terminated the agreement. The agent thereupon brought an action of damages against the firm, averring that the orders secured by him were in excess of the specified sum, that any failure on his part was due to the firm's failure to supply the goods required, that the firm was in possession of goods which it could have conveniently supplied, but which it had deliberately diverted to others, that in these circumstances the firm was in breach of the agreement, and that accordingly it was not entitled to terminate the agency. *Held* (*diss.* the Lord Justice-Clerk) that it was an implied condition of the agreement that the defenders should supply the goods required, that they could conveniently have done so, that their failure to supply them disentitled them from exercising their option to terminate the agreement, and that accordingly they were liable to the pursuer in damages.

Opinions that the word "turnover" meant completed sales, or sales resulting in the actual transfer of goods.

James Thompson Dowling, confectionery agent, 59 Oswald Street, Glasgow, *pursuer*, raised an action in the Sheriff Court at Glasgow against James Methven, Sons, & Company, Limited, wholesale confectioners, Eastcheap, London, and carrying on business in Scotland, *defenders*, concluding for decree for £5000 in name of damages sustained by him by reason of the defenders' failure to implement an agreement to pay him certain commissions on sales effected by him, the defenders having given notice terminating the agreement.

The pursuer averred, *inter alia*—"(Cond. 1) The pursuer was appointed as from 1st February 1914 sole selling agent for the goods of the defenders in Scotland, excluding certain small areas, under agreements with them dated 27th and 30th March 1914 and 19th and 25th August 1915, and the defenders are wholesale confectioners carrying on business in London, Liverpool, and Glasgow. (Cond. 2) It is provided by the first-mentioned agreement, *inter alia*, that the period of said agreement should be five years from said 1st February 1914, and that if it should be found at the end of three years from said 1st February 1914 that pursuer had not increased each year the previous year's turnover by at least 10 per cent. on a basis of £12,000—that is, a total increase of £3972 for said three years—the defenders should be entitled to terminate the agreements upon giving pursuer notice in writing to that effect. (Cond. 3) On or about 24th February 1917 the pursuer received a letter from the defenders, dated 23rd February 1917, intimating that in consequence of his sales for said period of three years not having reached the stipulated figure they terminated the agreements. Subsequent to that letter the defenders have declined to supply any further goods for sale and to recognise the pursuer as their agent in terms of said agreements. . . . (Cond. 4) The pursuer denies that his turnover has not reached the figure stipulated for in the first-mentioned agreement, *i.e.*, a total for the said period of three years of £39,972. Pursuer avers that his turnover for said period of three years considerably exceeded this sum, and defenders are called upon to produce a statement of said turnover as alleged by them. Said termination of the agreements by the defenders is accordingly entirely without justification, and is a breach of said agreements on their part. Defenders' statements in answer are denied. The statement of pursuer's turnover as produced by defenders for said three years is inaccurate in respect that they have taken the net sales as representing said turnover. Pursuer avers that said turnover amounted to £53,460, 7s. 8d., made up as follows, viz.—(1) £38,910, 17s. 6d., being his gross sales for said period; (2) £673, 2s. 5d., being the sum allowed on adjustment for July and August 1915 under clause 8 of the supplementary agreement of 1915; (3) £277, 18s., being the amount of goods forwarded by pursuer from his Glasgow stock to defenders' places of business in England on their instructions, to which allowance he claims to be entitled in virtue of Mr Judd's award of 12th May 1917; (4) £1790, 11s., being the selling price of a consignment of goods from the Hershey Chocolate Company in July 1916 to implement sales made by pursuer and returned by pursuer to defenders, he having had to cancel all his sales thereof; (5) £1743, 2s. 9d., being the amount of orders for goods taken by pursuer prior to 31st January 1917 and executed by delivery thereafter; and (6) £10,064, 16s., being the amount of orders for goods taken by pursuer from customers in his district during the four months ending 31st January 1917, as against which he had ordered during said period in defenders' name from various manufacturers goods to the value of £16,332, 15s. 9d., of all which defenders were well aware. . . . But for the delays in delivery, over which pursuer had no control, the greater part of the goods would have been delivered and the orders implemented before the end of said period of three years. Pursuer wrote to defenders repeatedly as to these delays. Pursuer believes that certain of these orders have since been implemented by defenders, who are called upon to produce a statement thereof. . . . (Cond. 5) Alternatively the pursuer avers that if it is held that the pursuer's turnover for said three years did not reach the figures stipulated for in the 1914 agreement, the defenders were themselves in breach as aftermentioned of the said agreements between parties, and were therefore debarred from exercising the right therein contained in their favour in the event foresaid to terminate same at the end of said period. During the period of the said agreements pursuer, by arrangement with the defenders, forwarded orders for goods direct to certain manufacturers, copies of which orders were at the same time transmitted to defenders. By article 2 of the said agreement the defenders undertook to supply to the pursuer goods as theretofore supplied by them, *i.e.*, confectionery goods, and pursuer between 1st February 1914 and 31st January 1917 placed

with defenders, or in their knowledge with the manufacturers with whom they dealt, orders for such goods amounting to £53,460, 7s. 6d., which orders defenders have failed to implement to the extent of £16,332, 15s. 9d., notwithstanding that defenders were able to get delivery in large quantities for their other agents during the last year of the currency of the said agreement, during which year the pursuer in his correspondence with defenders referred frequently to the constant delays occurring in delivery of his goods, and to the prejudicial effect these delays had in his business, as these goods were required by pursuer in the knowledge of defenders to implement orders taken by him during the said three years. Further, it was understood and agreed between the parties, and it is a custom well known in the trade, that they should intimate to him what goods falling under the agreement they were dealing in, and where necessary supply him with samples thereof. The pursuer has ascertained that the defenders were dealing, *inter alia*, in cocoa, cocoa butter, caramels, caustic soda, egg yolk, glace cherries, and other confectionery goods in the ordinary course of their business as confectionery agents, but failed to intimate same to pursuer or supply him with samples thereof. The defenders by these failures to implement their obligations under or arising out of the said agreements seriously prejudiced pursuer in his carrying out of said agreements. Pursuer believes and avers that this failure on their part was intentional, and for the purpose of keeping down pursuer's turnover, in order that they might be able at the earliest possible moment to take over the Glasgow business again for their own behoof, defenders being well aware that in view of the new accounts opened by pursuer, and the large increase done by pursuer, he was making a large profit as against the percentage falling to them. . . . (Cond. 6) Through the defenders' unjustifiable termination of said agreements as above condescended on the pursuer has suffered substantial loss, injury, and damage. His income from the agency amounted to fully £2500 per annum, and he believes and avers that during the last two years of the agreement his turnover would have increased very considerably and so earned him a greater income. Further, defenders' action seriously and adversely affects pursuer's business prospects. Pursuer estimates the loss, injury, and damage which he has suffered through the fault of the defenders as above stated at £5000, being the sum sued for, which is fair and reasonable in the circumstances."

In their answers the defenders averred that the pursuer's turnover for the three years only amounted to £39,179; that it ought to have been £43,692; that the pursuer's turnover was only so large because of the enhanced prices existing at the time and not because of an increase in business done; that the pursuer accordingly had not earned his commission; that any shortage of supplies was due to the conditions existing at the time, *e.g.*, the stoppage of the import of confectionery, and not to any failure of duty on the defenders' part, and that accordingly the defenders were entitled to terminate the pursuer's agency.

The pursuer *pleaded, inter alia*—[Plea 1a was added at the discussion before the Second Division]—"1. The pursuer having suffered loss through the defenders' unjustifiable termination of said agreements as condescended on he is entitled to damages, and decree should be granted as craved. 1a. The defenders not having supplied the pursuer with goods necessary to enable him to make the stipulated turnover, the defenders are not entitled to terminate the contract in respect of the pursuer not having made the required turnover. 2. The defenders having been in breach of the agreements as above condescended on, they are not entitled to terminate the agreements as they have done, and are liable in damages therefor."

The defenders pleaded, *inter alia*—"The pursuer's agency having been properly terminated within the provisions of the agreement, the defenders are entitled to absolvitor with expenses."

The minute of agreement of 1914, between the defenders (therein called the first parties) and the pursuer (therein called the second party), provided, *inter alia*—"(*First*) The second party is hereby appointed sole selling agent for the goods of the first party in the district of Scotland to the south of but including Dundee. . . . Said agreement shall begin operation as from first February Nineteen hundred and fourteen and shall continue notwithstanding the date hereof for five years subject to the option to terminate hereinafter mentioned. If it should be found at the end of three years from first February Nineteen hundred and fourteen that the second party has not increased each year the previous year's turnover by at least ten per cent. (that is, a total increase of three thousand nine hundred and seventy-two pounds at least, on the basis of twelve thousand pounds after mentioned, for the three years subsequent to first February Nineteen hundred and fourteen) the first party shall be entitled at once to terminate the agreement with the second party upon giving him notice in writing that he is to terminate the same, and upon such notice being given the agreement shall thereupon terminate. The increase of ten per cent. for the first year shall be based upon a sum of twelve thousand pounds as the yearly turnover. (*Second*) The first party undertakes to supply to the second party goods as heretofore supplied by the first party excepting those of Karl Frazer of Helsingfors, Finland, and the Manufacturing Company of America, Philadelphia, hereinafter specially provided for and which the second party undertakes to buy exclusively from the first party. The said goods shall be obtained by the second party from the first party at the nett cost prices paid for same by the first party plus five per cent., but in the case of the goods of Henry Heide such cost price is excluding such five per cent., the first party having always got from the said Henry Heide a rebate or commission of five per cent., which is not shown

on the invoices and which commission or rebate the first party will continue to receive. The second party shall be entitled to sell such goods at the best prices which he can obtain but not at any less selling price than that which is being sold by the first party elsewhere and as the same may be advised by the first party to the second party."

On 26th February 1919 the Sheriff-Substitute (CRAIGIE), after sundry procedure in which it was held by the Sheriff-Substitute, and by the Sheriff (MACKENZIE) on appeal, that the term "turnover" in the agreements included only sales effected by the pursuer during the three years subsequent to 1st February 1914, and did not include the value of goods ordered by customers but not delivered and paid for till after the expiry thereof, allowed a proof before answer of the averments in condescendences 5 and 6 and the answers thereto.

Thereafter on 15th July 1920 the Sheriff-Substitute (D. J. MACKENZIE) pronounced the following interlocutor:—"Finds (1) that the pursuer is a confectionery agent at 59 Oswald Street, Glasgow, and that the defenders are a limited company of wholesale confectioners at 2 Talbot Court, Eastcheap, London; (2) that in March 1914 an agreement was entered into between the pursuer and defenders, that in said agreement it was provided [the agreement is quoted *supra*]; (3) that on 19th and 25th August 1915 a second agreement between the parties was entered into by which certain alterations were made on the original agreement, the principal of which was that the balance sheet between the pursuer and defenders should be made up monthly instead of every six months, and that certain adjustments were made as to the turnover for the months of July and August 1915, which was to be taken as £1100 for each of said months; that the provisions in the first agreement as to turnover were ratified; (4) that on 23rd February 1917 the defenders wrote to the pursuer the letter in which they say—'We have to advise that owing to your sales for the three years from 1st February 1914 to January 31st, 1917, not having reached the figures provided by agreement, we hereby give notice to terminate the agreement. You will therefore note it is terminated accordingly on receipt of this advice;' (5) that as at 1st February 1914 the pursuer's turnover had not reached the figure specified in the agreement; (6) that it is not proved that the defenders are in any way responsible for the failure of the pursuer to reach the agreed-on turnover at the end of the first three years of the agreement, but that this was mainly due to the disturbance of traffic and shipping accommodation owing to the war: Finds in law that the defenders were not in breach of their agreements with the pursuer, and are not liable to him in damages for any such breach: Therefore assoilzies the defenders from the conclusions of the action," &c.

The pursuer appealed to the Sheriff (A. O. M. MACKENZIE), who on 18th November 1920 refused the appeal.

The pursuer appealed, and argued—The defenders were not entitled to put in operation against the pursuer the forfeiture clause in the agreement as he had not exhibited any lack of zeal or been unable to obtain insufficient orders. Where, as here, the necessary amount of orders had been secured, the defenders were not entitled to terminate the agency merely because the goods had not been paid for. The word "turnover" meant the total volume of business done within a given time. Assuming, however, that the pursuer's turnover had failed to reach the stipulated figure, that was due to the failure of the defenders to supply the goods required to meet the orders. The defenders were not entitled to rescind the contract on account of the pursuer's failure, for which they were responsible. They could not take advantage of their own wrong. The pursuer, moreover, having done all in his power to implement the terms of the contract, and the defenders having failed to do so, the pursuer was excused from further performance of it. The defenders had not only failed to supply the pursuer with the goods necessary for the fulfilment of his agreement, but had actually delivered them to other customers. The following authorities were cited—New Oxford Dictionary, "Turnover"; *Dick & Stevenson* v. *Mackay*, 1880, 7 R. 778, 17 S.L.R. 565, and 1881, 8 R. (H.L.) 37, *per* Lord Watson at p. 45, 18 S.L.R. 387; *Taylors* v. *Maclellans*, 1892, 19 R. 10, 29 S.L.R. 23; *Roberts* v. *Bury Commissioners*, 1869, L.R., 5 C.P. 310; Pollock on Contract (8th ed.), 452.

Argued for respondents—The defenders had done all they reasonably could to expedite deliveries of goods to the pursuer. There lay on them no obligation with regard to time except that the goods should be supplied within a reasonable time. There was nothing in the contract whereby the pursuer was to have a preference or privilege over other persons with whom the defenders had dealings. The defenders were not bound to dislocate their business in general for the benefit of the pursuer in particular. The defenders had the right under the agreement to terminate the contract in the event of the pursuer's failure to effect a particular turnover. "Turnover" meant the sale and delivery of goods, and was usually measured in terms of money. The onus lay on the pursuer of proving that he had thus turned over sufficient goods to entitle him to his commission, and he had failed to discharge this onus. The defenders were accordingly justified in exercising the right which they had reserved to themselves of terminating the agreement. There was, moreover, no evidence that the pursuer had suffered any damage through the defenders' action. Counsel referred to *Hick* v. *Raymond & Reid*, [1891] 2 Q.B. 626, [1893] A.C. 22; *Tennants (Lancashire), Limited* v. *C. S. Wilson & Company, Limited*, [1917] A.C. 495; *Rickinson, Sons, & Company* v. *Scottish Co-operative Wholesale Society*, 1918 S.C. 440, 55 S.L.R. 412.

At advising—

LORD SALVESEN—In the view I take of this case it is unnecessary to recapitulate the facts which, with one exception to which I shall subsequently refer, I think have been correctly stated by the Sheriff-Substitute. I am, however, unable to reach the conclusion in law which has led to both Sheriffs assoilzieing the defenders. It is, in my view, not primarily a question whether the defenders were in breach of their undertaking to supply goods so as to entitle the pursuer, had the agency continued, to have sued them for damages in respect of commissions which he might have earned had the defenders implemented their undertaking contained in the second clause of the agreement. Assuming that the circumstances were such from October 1916 to 23rd February 1917 as to justify them in their failure to fulfil the undertaking, it did not, in my opinion, entitle them to avail themselves of the option which they exercised of terminating the agreement under the first article. The two clauses are so interrelated that I think it was an implied condition of the defenders exercising the option of terminating the agreement that they should have fulfilled the undertaking expressed in the second article. It was conceded that the pursuer had placed sufficient orders with the defenders for goods, such orders being given sufficiently in advance of the expiry of the third year of the agreement as under normal circumstances to have permitted their execution within the term prescribed. Now I hold that where an option is given a principal of terminating an agreement with his agent if the agent does not do a specified amount of work, that option cannot be exercised to the agent's detriment where his failure is in no respect attributable to his own act or omission, but is entirely due to the failure of the principal to give him the facilities or supplies which the principal has contracted that he will afford. Thus, to take a concrete illustration, if a servant is engaged upon the footing that he should be dismissable if he fails to do a certain piece of work which he cannot perform without the co-operation of the master, I apprehend that the option to dismiss him could not be exercised if the master had failed to give him such co-operation, even though his failure was attributable to accident or misfortune, and was in no sense attributable to fault or negligence. The master in such a case impliedly contracts that he will make it possible for the servant to perform the stipulated work, and he cannot dismiss the servant because of his own inability to perform his contract. The option which was reserved here was intended to protect the principal against the inefficiency of the agent, although that inefficiency might be in no sense attributable to personal fault. But if the agent has demonstrated his efficiency, and the result that ordinarily would have been achieved does not follow simply through the failure of the principal to perform what he undertook, I consider that it would be contrary to all fair dealing and to a fair construction of the contract itself if the principal sought to avail himself of the option, and so to penalise the agent for the misfortune which has prevented the principal from fulfilling his own obligation. Such misfortune may excuse him in an action of damages for breach of the agreement on the principle that he has only contracted to give delivery within a reasonable period, and that in the circumstances he has performed his obligation within such reasonable period looking to the circumstances which actually prevailed at the time, but cannot, I think, lead to the further conclusion that he is entitled to penalise the agent for failing to reach a stipulated turnover, which failure is entirely attributable to the inability of the principal to supply the agent with the means of fulfilling his part of the contract.

This ground is sufficient for the disposal of the case, but I may add that I was also impressed with the argument for the pursuer that the defenders could perfectly well have supplied to the extent of £4701 the orders which were given in October, November, and December 1916, or at all events to the extent of much more than the deficiency of £672, which would have enabled the pursuer to have reached the specified turnover. In point of fact the defenders imported goods of the kind to which their contract with the pursuer applied during the four months preceding the termination of the agency to an extent very greatly in excess of £4700 — indeed, I think, to an amount of something like £11,000. The reason why they did not implement the pursuer's orders to the extent to which there was a deficiency in his turnover was simply that they preferred to deliver them to other agents and customers with whom they were in the habit of doing business. Their failure to do so would not have involved any breach of contract. They had come under no obligation, as I read the evidence, to such agents or customers such as they had undertaken in the second article of their agreement to the pursuer. I think it is no answer to him to say that they gave him a larger percentage of his orders than they gave to agents or customers whose orders they chose to accept during the period in question. In short, there was no reason, even looking to the difficulties in shipping that prevailed at the time, why the pursuer should not have obtained the implement of his orders except that the defenders chose not to give him such implement and found it more profitable or more advantageous for the purposes of their general business to supply the goods to others. It might have been different if the other agents and customers had had similar contracts to those of the pursuer, in which case a *pro rata* fulfilment of the total orders would probably be all that could have been demanded. Had it been necessary I should have been prepared to decide the case on this separate ground.

Holding as I do that the defenders were not justified in terminating the agreement on 23rd February, it follows that they are liable to the pursuer in such damages as he has instructed. [*His Lordship then dealt*

with the amount of damages.] In the whole circumstances, and looking at the matter from the point of view of a jury, I understand your Lordships who agree with me are disposed to assess the pursuer's loss at not more than £250.

LORD DUNDAS—I have had a good deal of difficulty as to the proper disposal of this appeal, and the difficulty has been greatly increased by the condition into which the parties have allowed the case to drift.

The pleadings appear to me to be very vague and unsatisfactory. A new plea was added during the debate at our bar by Mr Macmillan for the pursuer. I am not satisfied that his averments, which he did not propose to alter or amend in any way, are sufficient to support this plea, assuming it to be well founded in law, or are even consistent with it. The proof as we find it seems to be largely irrelevant, and also to be deficient in regard to the more material points at issue. The accountants' report, so much founded on in argument, does not seem to have been properly made evidence, nor is there parole proof to supplement or explain its reservations or *lacunæ*. A correspondence which we are told is in process, and which is intermittently referred to by witnesses, is not printed. Evidence as to the pursuer's damage is scanty to the verge of non-existence.

On the case as presented to us I find it difficult to form a confident opinion, but I am not prepared to differ from the conclusion arrived at by my brother Lord Salvesen, and I concur in that result.

LORD ORMIDALE—I concur generally in the opinion of Lord Salvesen.

The two articles of the agreement of primary importance with reference to the present question are the first and second. By the first the pursuer is appointed the sole selling agent for the goods of the defenders in the district named. The agreement is to continue in operation for five years, subject to an option on the part of the defenders at once to terminate the agreement if it should be found at the end of three years that the pursuer has not increased each year the previous year's turnover by at least 10 per cent. By the second article the defenders undertake to supply goods to the pursuer. On 23rd February 1917 the defenders gave notice to terminate the agreement owing to the pursuer's sales for the three years prior to 31st January 1917 not having reached the figures provided by the agreement. Those figures it is not now disputed were £39,972. The total sales effected by the pursuer amounted to £39,328, showing a deficiency of £644.

The pursuer contended that a further sum of £4701, being the value of goods ordered by him in the months of October, November, and December 1916 from the defenders or Heide, their manufacturer, to meet sales made by the pursuer to his customers, which orders the defenders failed to implement, fell to be added to his "turnover" for the year, but I agree in thinking that "turnover" has reference to completed sales, *i.e.*, sales resulting in the actual transfer of goods. It appears, however, to be indisputable that before the supply of raw materials and the transport of goods from America were adversely affected by war conditions the £4701 orders could have been easily implemented prior to the close of January 1917.

Notwithstanding the shortage of £644, the pursuer maintains that the defenders were not entitled to operate their option to terminate the agreement. At our bar the pursuer amended his pleadings by adding the following plea-in-law:—"The defenders not having supplied the pursuer with goods necessary to enable him to make the stipulated turnover, the defenders were not entitled to terminate the contract in respect of the pursuer not having made the required turnover." The plea is very faintly and indefinitely supported by the averments remitted to probation, but parties joined issue on it. In my opinion the plea falls to be sustained.

The obligation on the pursuer to achieve the stipulated amount of "turnover" postulates, in my opinion, the supply to him of a sufficiency of goods wherewith to effect it. It is not said that he failed from want of diligence or business capacity to do all that it was incumbent on, or indeed possible for, him to do. No personal fault is imputed to him. But he was in terms of the agreement dependent on the defenders for the goods which he was able to turn over. They were his sole source of supply, and if they failed him then he was deprived by them of the power to carry out the agreement. They did fail him, and so hindered the execution of the agreement as to make it impossible of fulfilment. This did not necessarily render them liable as for a breach of contract. If, as they allege, the only reason for their inability to supply the pursuer with goods was something beyond their control and in no way due to any fault or negligence on their part, then that would probably be a complete answer to an action for breach. But because of their failure to supply goods sufficient to effectuate the requisite turnover, whatever the reason of their failure may have been, they are debarred, it seems to me, from terminating the agreement as they did. In other words, a sufficient supply of goods by them was a condition-precedent to the exercise of their option—a condition which they failed to satisfy.

It it were necessary I should be prepared further to hold that the defenders were in default in respect that having goods which they might, prior to the end of January 1917, have supplied to the pursuer, they failed to do so. It was maintained by them that there being no time specified within which they were bound to supply goods, it was enough that they supplied them within a reasonable time—that is, reasonable having regard to the circumstances existent at the date when the supply fell to be made. This defence would, it appears to me, have been sufficient if there had been no goods with which they could deal other than those under order by them and the pursuer from Heide. But that was not the fact. It

appears from the evidence that at the time when they failed to supply the pursuer they were distributing among other agents and customers considerable quantities of confectionery goods, a portion of which, relatively small but sufficiently large to make it possible for the pursuer to achieve the stipulated turnover, might have been diverted to the pursuer without the defenders incurring any risk of claims from the customers and agents from whom the goods were diverted. The observations made *obiter* in the case of *Tennants (Lancashire) Limited* v. *C. S. Wilson & Company* ([1917] A.C. 495), to which we were referred, do not apply. In that case all the customers had similar contracts. In the present case the agreement with the pursuer was unique. As Mr Methven says—"It would be possible for us to deliver these goods from our London shipment if we had broken faith with our other customers and other agents. We had no other agents similar to the pursuer on the same terms. . . . We had ordinary agents but none to complete a certain turnover, and our contracts with them were subject to being able to deliver. . . ." And again—"(Q) You would not be responsible for damages if they were not delivered?—(A) Not some contracts, but generally speaking, no. We had no agency whereby we could be responsible if not delivered to these others." Accordingly it seems to me that they could within reasonable time have supplied the pursuer with such a quantity of goods as would have enabled him to reach the stipulated turnover.

There remains the question of damages. [*His Lordship dealt with the amount of damages.*] The proof as to the loss suffered by the pursuer is very scanty and most unsatisfactory, but that he suffered some damage is to my mind sufficiently instructed, and without examining in detail the few relevant passages in the evidence I concur in thinking that an award of £250 is reasonable and sufficient.

LORD JUSTICE-CLERK — This appeal is presented to us in a very unsatisfactory state. The proof which was allowed by the Sheriff-Substitute was of articles 5 and 6 of the condescendence. Article 5 the Sheriff-Substitute says was amended more than once, and in its latest form it is not at all a model of pleading. When senior counsel for the appellant was making the third speech, he considered it proper (and I think for the argument he was then urging it was necessary) to add a new plea which I understood was to raise a point not depending on breach of contract. But no change was made in the averments of fact which remained, as was, I understood, conceded, based on breach of contract corresponding in this respect to the pleas originally stated. A plea without a basis of fact seems in the circumstances of this case rather a useless novelty. The parties lodged specifications for the recovery of documents and got rid of executing the diligence in ordinary form by the joint letter addressed to a firm of accountants who prepared a report. The report is, in my opinion, not truly proof or even equivalent to proof, and there is no minute making it so. Moreover, on the face of it, it bears to be incomplete and defective, and that in regard to matters, some of which are most material to the issues of fact which we have to determine, and particularly as to the amount of business the pursuer could have done in the two years following the defenders' letter terminating the agency, and the profits which the pursuer could have made during these two years. Reference is made in that report to an affidavit by Mr Heide. But such an affidavit is not evidence with us, and there is no minute adopting it as evidence supposing that had been a competent proceeding. The oral proof which was taken makes no attempt to fill up the hiatuses in the report. Moreover, it is full of references to correspondence and other papers which have not been put before us. The result is that though I have read the whole proof there is much of it which I have been unable fully to understand. In my experience it is quite a novelty to have the proof presented in the shape in which the proof has been put before us in this case, and I hope it will in this respect remain unique.

Some questions of law were raised on the construction of the written agreement. In the first place what is the meaning of "turnover"? On this point I think the Sheriffs are right. In my opinion the mere taking of orders by the pursuer does not constitute by itself a measure of the turnover. The goods must also be delivered, and I think that they ought also to be paid for, or at least be sold under a contract which for its due fulfilment would have required them to be paid for during the year the turnover of which was in question.

In the second place a question was raised as to the effect of the defenders' obligation to supply goods to the pursuer. As I read that obligation no time is fixed for its performance (this was not disputed), and it would therefore fall to be fulfilled in what was a reasonable time in the circumstances. It was asked at the debate whether the £4701 worth of goods (which were the only goods founded on before us) had never been delivered, or had only been delayed in delivery. The proof does not in my opinion establish which of these alternatives was the right one, and I cannot accept the use of the phrase "unfilled orders" in the accountants' report as enabling me to determine the point. But it seems to me that this is not immaterial in arriving at the true consequences of the agreement. The pursuer's counsel seemed to realise the difficulty of maintaining the action on the pleas as they stood, and accordingly there was added an additional plea which, whatever it was based on, did not, as I understood, infer any breach of contract on the part of the defenders. But I gather from your Lordships' opinions that you proceed on some breach of contract on the defenders' part. As the evidence stands at present I could not have determined what the breach, if any, was, and it was just because of this difficulty that the new plea was added. It seems to me that if there was no breach of contract there was no ground for finding the defen-

ders liable in damages, but as the evidence stands, the failure to provide the pursuer with goods was a misfortune which left any loss to remain where it fell, because the pursuer failed to establish that it inferred any liability for damages on the defenders.

Lastly, I cannot find any sufficient proof of damages. [*His Lordship then dealt with the amount of damages.*]

In my opinion the Sheriffs were right in assoilzieing the defenders.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutors of 15th July and 18th November 1920 appealed against: Find in fact in terms of the first five findings in fact contained in the interlocutor of 15th July 1920: Find in fact (6) that the failure of the pursuer was due entirely to the defenders' failure to supply him with the goods ordered by him in due course during the currency of the agreements, and that if the defenders had implemented the pursuer's orders he would have largely exceeded the stipulated turnover; and (7) that the defenders have not proved that their failure to supply said goods was due to circumstances over which they had no control: Find in law that the defenders were not entitled to terminate the pursuer's agency as at 23rd February 1917, and that they are liable in damages for having done so: Assess the damages at the sum of two hundred and fifty pounds sterling: Decern against the defenders for payment to the pursuer of that sum in full of the conclusions of the initial writ."

Counsel for the Pursuer (Appellant)—Macmillan, K.C. — Aitchison. Agent—James A. B. Horn, S.S.C.

Counsel for the Defenders (Respondents)—Sandeman, K.C.—Russell. Agents—J. & J. Ross, W.S.

HOUSE OF LORDS.

Friday, November 18.

(Before Lord Buckmaster, Lord Atkinson, Lord Shaw, Lord Sumner, and Lord Wrenbury.)

TAYLOR *v.* CORPORATION OF GLASGOW.

(In the Court of Session, December 18, 1920, 1921 S.C. 263, 58 S.L.R. 158.)

Reparation—Negligence—Injuries to Children—Poisonous Shrub in Public Park—Averments—Relevancy.

A father brought an action of damages against the Corporation of Glasgow as proprietors and custodians of the Botanic Gardens there, which were open to the public as a public park, for the death of his child aged seven. The pursuer averred that in close proximity to a portion of the gardens used as a playground for children there was a plot of ground which, though enclosed by a fence, was open to the public, access being obtained by a gate in the fence; that in this plot there was growing along with specimen shrubs of various kinds a belladonna shrub bearing berries rather similar in appearance to small grapes, and presenting a very alluring and tempting appearance to children, but which were in fact poisonous; that no precautions to protect children were taken by the defenders, though they, the defenders, were well aware of the poisonous character and inviting and deceptive appearance of the berries; that his child when in the gardens with some of his companions picked the berries and ate them, and in consequence thereof died; and that the accident was due to the negligence of the defenders in failing to take the necessary precautions for the safety of children. *Held* (*aff.* judgment of the Second Division) that the pursuer had relevantly averred fault on the part of the defenders, and that the case must go to trial.

The case is reported *ante, ut supra.*

The defenders appealed to the House of Lords.

At delivering judgment—

LORD BUCKMASTER—[*Read by Lord Shaw*]—It would have been less easy to find the correct pathway through the difficulties which this case presents were it not that the road has already been travelled by learned Judges who have left clear and definite signposts by which to guide our feet. I do not propose to leave the beaten track thus pointed out, and shall content myself with saying that according to these directions, which are in my opinion correct, this appeal ought to fail. The case arises on a plea-in-law raised by the defenders, who asserted that the averments in the pursuer's condescendence were irrelevant and insufficient to support the conclusions, and that the action should be dismissed. The Lord Ordinary sustained this plea, but the Lords of the Second Division recalled his interlocutor and approved the issue proposed by the pursuer. From that judgment the present appeal is brought.

The case, as alleged in the pursuer's condescendence, is this—That the Botanic Gardens of Glasgow were a public park open to the public and in the custody of the defenders, the Glasgow Corporation. On a small piece of fenced ground in the gardens the appellants grew, among other botanical specimens, a shrub known as *Atropa belladonna*, whose berries present a very alluring and tempting appearance to children. Notwithstanding the fence, the piece of ground on which this shrub grew was open to the public. There was no isolation of the shrub, nor warning that could be seen of its dangerous character. The spot where it grew was frequented by children, and according to the pursuer's allegations the circumstances were such that the defenders knew that it was probable, and indeed practically certain, that children would be tempted and deceived by the appearance of