Authorities quoted—*Matthew*, 5 Macph. 957; *Ramsay*, 16 D. 720; *Taylor*, 17 D. 639; Sedgwick on Damages, 99; Storey on Agency, § 218; 1 Bell's Com. (M'Laren's Ed.) 382; 1696, c. 5.

The Court adhered.

Counsel for Reclaimer—Trayner and Watson. Agents—Lindsay, Paterson & Hall, W.S.

Counsel for Respondent — Solicitor-General (Clark) and G. Smith. Agents—Leburne, Henderson & Wilson, W.S.

Friday, January 30.

SECOND DIVISION.

[Lord Mure, Ordinary.

THE LONSDALE HEMATITE IRON CO. *v.* BARCLAY, GILMOUR, & OTHERS.

Contract—Copartnery—Payment of Capital—Forfeiture.

A contract of copartnery provided that should a partner fail to pay his instalments of capital when they fell due, it should be optional to the other partners either to award him a share proportioned to his payments or to declare his interest in the concern at an end, refunding him any sums he might have paid up. One of the partners did not pay up his share at the time, but having subsequently done so, the managing partner granted him a receipt. The company pleaded that the money had been raised by assigning the share, and that they were kept in ignorance of this assignation — a knowledge of which would have caused them to forfeit the share, in terms of the contract of copartnery. *Held* that this plea was irrelevant, and that the Company had nothing to do with the way in which the necessary funds had been raised by its partners.

Contract—Copartnery—Condition — Offer — Acceptance—Bona Fides.

A contract of copartnery provided that if any partner wished to retire he should have power to assign his share, on condition that he in the first place offered the same firstly to the company and then to any of the partners who might wish to become purchasers. It was pleaded by the company that the offer made to them by the defender was a fraud and not *bona fide*, the price asked being so exorbitant as to render it merely nominal. *Held* that this plea was irrelevant, and that the defender was entitled to put any price he thought fit upon the share, provided he did not sell to any one else at a price lower than that of the offer to the Company.

This was an action raised at the instance of the Lonsdale Hematite Iron Company, and James Craig, brick manufacturer and coalmaster in Kilmarnock, James Baird, now iron manufacturer at Whitehaven, in the county of Cumberland, Andrew Dunlop Stewart, clothier, Kilmarnock, and James Taylor, grocer, Kilmarnock, partners of the said company, against James Wilson Barclay, engineer in Kilmarnock, Allan Gilmour, coalmaster, Kilmarnock, John Maclatchy, M.D., residing at Woodend Cottage, Crookedholm, near Kilmarnock, Joseph Gilmour, colliery manager, residing at Rosebank Cottage, Crookedholm, near Kilmarnock, Daniel Gilmour, residing at Byton Barmoor, near Newcastle-on-Tyne, and Robert Goudie, solicitor in Ayr; concluding for the production of a "minute or pretended minute of agreement, entered into between the defender, the said James Barclay, of the first part, and the defender, the said Allan Gilmour, of the second part, dated 7th September 1871, whereby the said James Barclay sold, or contracted to sell, to the said Allan Gilmour, or any person or persons whom he should name, four-fifteenth shares of the capital of the said Lonsdale Hematite Iron Company, upon certain terms and conditions set forth in the said minute," and thereafter for reduction of the minute of agreement. There were also conclusions for declarator—(1) that the sale attempted to be made by the minute of agreement was not valid or binding upon the pursuers, and was in violation of the right of preemption and other rights conferred upon the pursuers under the contract of copartnery, and therefore could not be enforced to the effect of enabling the defenders other than James Barclay to become partners of the company; (2) That James Barclay was not entitled, under the contract of copartnery, to retire from the company, and to assign his share and interest therein to the other defenders, or any of them, at a price or value less than the amount at which he offered or might offer the same to the company, or in the event of their refusal to take the same, then to any of the partners who might be disposed to become purchasers, five weeks being allowed for acceptance or rejection of such offer; (3) That the pretended sale had been entered into for a less price and upon more favourable terms to the purchaser, in the case of the other defenders, than those offered to the pursuers by James Barclay, whereby the sale was ineffectual, in so far as the pursuers' rights were affected; (4) That Allan Gilmour was truly the purchaser under the minute of agreement, and the other defenders, excepting James Barclay, were merely Gilmour's nominees, and that, being engaged in a competitive business, nearer to the company's works than 100 miles, Allan Gilmour was disqualified from being a partner or holding any share or interest in the company; (5) That, notwithstanding any transfer, conveyance, assignment, or other deed by James Barclay, the pursuers were not bound to accept the defenders, or any of them, as partners in the Lonsdale Hematite Iron Company, and were entitled to deal with Barclay as having the sole and exclusive title to the share and interest acquired by him under the contract of copartnery. Finally, interdict was craved against the defenders carrying into effect the minute of agreement.

The facts of the case may briefly be stated as follows:—The pursuers are partners of the Lonsdale Hematite Iron Company at Whitehaven. The only other partner besides the pursuers is the defender James Barclay, who has a share in the company of four-fifteenth parts. The company was formed under a contract of copartnery, dated 27th February and 1st March 1871. This contract provides a capital of £15,000, to be contributed as follows, viz., £5000 by the now deceased Matthew Craig, £4000 by James Barclay, £2000 by each of the pursuers James Craig and James Baird, and £1000 by each of the pursuers Andrew Dunlop Stewart and James Taylor,

Matthew Craig's share devolved by his death upon James Craig. The payments towards the capital were to be made one-fourth as on 1st September 1870, one-fourth on 1st February 1871, one-fourth on 1st April 1871, and the remaining one-fourth on the 1st of July 1871.

The fifth article of the contract provides that in the event of a partner failing to pay his full share of the capital at the several periods when the instalments thereof fell due, it should be optional to the other partners either to award to such partner a share in the business proportioned to the amount actually contributed by him, or to declare his interest or share in the concern absolutely at an end; in the latter case, however, they refunding to him such amount as he might have contributed, but that without the condition of any interest thereon; and it was further provided that the interest or share so forfeited should be apportioned among the other partners, or such one or more of them as might be agreed on, and failing these, then to whomsoever might be elected by a majority of the partners in value. Article 19 of the contract provides that in the event of any of the parties thereto wishing to retire from the concern, he should be entitled to assign his share and interest; but, in the first instance, he should be bound to offer the same to the company; and should the company refuse to take the same, then to any of the partners who might be disposed to become the purchasers; and, further, that any offer to the company or to the partners was to be in writing, and the company or the partners, as the case might be, were to be allowed a period of five weeks at least to determine as to the propriety of accepting or rejecting the offer.

The pursuers averred that Barclay did not pay any of his instalments as they fell due, and that from and after July 1, 1871, the whole of his share remained unpaid: this, however, was denied by Gilmour, who explained that the instalments payable by Barclay were met by machinery supplied by his father to the company, the price of which amounted to more than Barclay's contribution of capital. His father became insolvent, and the company became liable for payment of the price of the machinery to his father's trustee. Barclay then provided for paying up his contribution of £4000, and a receipt was granted in the following terms:—"151 *West George Street, Glasgow, 28th September* 1871.—I have this day received from James Wilson Barclay, engineer in Kilmarnock, by the hands of Anderson Kirkwood, Esq., writer, Glasgow, the sum of £4000 sterling, being the amount of contribution on account of capital stipulated to be paid by him as a partner of the Lonsdale Hematite Iron Company, Whitehaven, in the contract of copartnery, dated 27th February and 1st March 1871. (Signed) MATTHEW CRAIG, *Managing Partner of said Company. 28th September* 1871. £4000."

The case having been sent to the procedure-roll and discussed, the Lord Ordinary (MURE) pronounced the following interlocutor:—

"1*st February* 1873—The Lord Ordinary having heard parties' procurators, and considered the closed record and productions: Finds that the defence of the defender Barclay, founded on the allegation that the proposed transference of the shares in question was one in security, can only be proved by writ or oath: *Quoad ultra*, and before further answer, allows the parties a proof *habili modo* of their averments, and to each a conjunct probation; and appoints the proof to be taken before the Lord Ordinary on a day to be afterwards fixed.

"*Note.*—Assuming the allegations of the pursuers, on which the action is rested, to be proved, it appears to the Lord Ordinary that they have a sufficient title to sue, and that the action is relevantly laid. But as several of the more important of these averments are denied or not admitted, the Lord Ordinary has abstained from pronouncing any finding relative to the first and second pleas in law of the defenders Gilmour and others till the proof, which has been made one before answer, has been adduced. But he has pronounced a finding as to the mode of proof applicable to the defence mainly relied on by the defender Barclay, similar to that pronounced in the relative action at the instance of Gilmour and others against Barclay, which the Lord Ordinary understood that defender did not object to; and he has qualified the allowance of proof in this action in other respects, because as at present advised he is disposed to think that there are some averments of the pursuers which may give rise to the objection that the proof as to them may also require to be restricted, but which cannot well be dealt with at present."

The pursuers averred that this money was not actually paid by Barclay, but was advanced by the defender Allan Gilmour, under an agreement between them, of date 7th September 1871, stipulating that James Barclay was to sell and assign his share and interest in the concern to Allan Gilmour, or any person or persons he might name, in the event of the non-disposal of the share to the company or his copartners within the period specified in the contract. Further, they stated that the object of Barclay and Gilmour in entering into this agreement was to enable Gilmour or his nominees, against the will and consent of the pursuers, to become partners along with them in the concern; and that the defenders were well aware at the time that, had this agreement been divulged, the pursuers would have taken advantage, as they were entitled to do, of the option conferred upon them by the contract to declare the share and interest of James Barclay forfeited, in respect of his not having duly contributed his share of the capital; also, that it was part of the scheme that a simulate offer of these shares should be made first to the company and then to the partners, according to the letter of the contract, and that accordingly, on 5th October 1871, Barclay had written to the company stating his wish to retire from the concern, and offering his share at the price of £8000 sterling, payable on the company's acceptance of the offer. Thereafter, on 23d November 1871, he addressed a similar letter to the pursuers. To these letters the pursuers, on 18th December 1871, replied, declining to entertain the offer, on the ground, among others, that it was not a *bona fide* offer, and had been made solely for the purpose of evading both the letter and the spirit of the contract of copartnery. The defenders denied that there was any scheme to foist Allan Gilmour or his nominees upon the company, and explained that the assignation, which was *ex facie* an absolute transference, was only so because this was deemed the only form in which the security required could be given. The transfer was really only in security for the advances made by Gilmour.

By the offer made to the company and the pur

suers, the price of £8000 was to be paid on or immediately after acceptance; but by the terms of the minute of agreement made between James Barclay and Allan Gilmour the price to the extent of £4100 was to be held as paid by the payment made to the company by Allan Gilmour, together with a payment of £100 made by him to Barclay, and for payment of the balance Gilmour was to be allowed a period of six and twelve months from the date of the agreement. The pursuers maintained that in this respect the offer made to the company and the pursuers was different, and less favourable to them, and that an attempt was made to defeat the right of pre-emption prescribed by the contract. This the defenders denied, and stated that on the failure of the company and its partners to accept Barclay's offer, the defenders Dr Maclatchy, Joseph Gilmour, Daniel Gilmour, and Robert Goudie, as the nominees of Allan Gilmour, became purchasers of Barclay's share on the terms on which the same had been offered to the company and partners.

The pursuers also averred that Barclay had agreed to accept £7000 in place of £8000 as the price of the share from Gilmour. This the defenders denied.

The 12th article of the contract provided that none of the parties should be entitled to be a partner or to be, directly or indirectly, connected with any competitive business, either in England or in any part of Scotland nearer to the company's works than 100 miles, without the consent in writing of all the parties. Allan Gilmour is, and was at the date of his agreement with James Barclay, a partner in a rival company, carrying on business in the same district; but he denied having any interest himself in the Lonsdale Hematite Company, which he asserted was the concern solely of his nominees.

The defenders other than Barclay raised an action against him in the Court of Session, concluding to have it declared that he was bound to implement the minute of agreement in so far as it affected the pursuers' interests, and for decree of implement. In that action the pursuers conclude for a transfer of the shares to Allan Gilmour's nominees. The pursuers claimed to be entitled to interdict against the carrying into effect of the pretended sale and purchase to Allan Gilmour and his nominees, and to prevent their obtaining any ostensible title as partners of the company. Gilmour, in answer, stated that this action had been raised by the pursuers in collusion with Barclay, to aid him in avoiding implement on his part; and that it has been arranged between the pursuers and Barclay that in the event of the present action being successful, he should make over to the pursuers one-half of his share in the company as a return for their assistance.

The pursuers pleaded — "(1) The pretended minute of agreement of sale made between the defenders Barclay and Gilmour ought to be reduced and set aside as concluded for, in respect (1) that it is in violation of the right of pre-emption prescribed by the contract; (2) that no offer was truly made to the company and partners, in terms of their contract of copartnery; (3) that the price and terms of sale under the minute of agreement are more favourable to the purchasers than those contained in the pretended offer to the company and partners; and (4) *separatim*, that the true consideration to be given for the shares is not set forth in the agreement, and is much under the price or value at which the shares were offered to the company and partners. (2) The defender Barclay is not entitled to sell, and the other defenders are not entitled to purchase, the shares belonging to Barclay at a less price or upon terms more favourable to them than were offered to the company and its partners. (3) The sale to the defender Gilmour having been made at a less price and upon terms more favourable to him than were offered to the company and its partners, is invalid and ineffectual under the contract of copartnery. (4) The defender Gilmour being engaged in a competitive business within the limits prescribed by the contract, and the other defenders, his nominees, being merely trustees for him, neither he nor they are entitled to become partners of the company. (5) The management and conduct of the business of the company being threatened with interference in consequence of the claim of the defenders other than the said James Barclay to become partners, and their attempt to obtain an unwarrantable title, the pursuers are entitled to interdict as craved. (6) Generally, the proceedings of the defenders complained of are illegal and unwarrantable; and the pursuers are entitled to obtain the remedy sought for in the present action."

The defender, James Wilson Barclay, pleaded:— "(1) The pursuers are not entitled to have decree as concluded for against the present defender, in respect that he never proposed, intended, or agreed absolutely to sell or transfer his shares in the said Lonsdale Hematite Iron Company to the said Allan Gilmour or his nominees, or to give them any absolute or beneficial right or title thereto, and that he did not so sell or transfer the said shares. (2) The transference proposed to be given by this defender being merely in security of a loan, of which repayment has been offered, this defender has not contravened said contract of copartnery, and decree as concluded for ought not to be granted. (3) In the circumstances stated, this defender is entitled to decree of absolvitor."

The defenders, Allan Gilmour and others, pleaded:—"(1) The pursuers have not set forth, and do not possess, any title to sue or insist in the present action. (2) The statements of the pursuers are not relevant or sufficient to support the conclusions of the summons. (3) The statements of the pursuers being unfounded in fact, the defenders are entitled to absolvitor, with expenses. (4) In any view, the statements of the pursuers and of the other defender, in so far as contradictory of the said agreement, can only be proved by the writ or oath of the said Allan Gilmour."

Thereafter a proof was taken on the 16th July 1873, and the interlocutor pronounced was as follows:—"The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, and whole process,—Finds that the pursuers have failed to prove (1st) that the offer which was made to them in the months of October and November 1871, on the part of the defender, James Wilson Barclay, to sell the shares held by him in the pursuers' company, was not a *bona fide* offer, but was part of a simulate transaction entered into by the defenders, in violation of and with a view to defeat the pursuers' right of pre-emption under their contract of copartnery; or (2d) that the defenders, other than the defenders Allan Gilmour and James Wilson Barclay, are not truly the purchasers of the said

shares, but trustees for the said Allan Gilmour, and are to hold the shares for his behoof under the minute of agreement referred to in the record: Repels the reasons of reduction; assoilzies the defenders from the whole conclusions of the action; and decerns: Finds the pursuers liable in expenses.

"*Note.*—At the debate which took place in this case before the proof was allowed it was strongly contended on the part of the leading defenders that the pursuers had no title to insist in the present action; and that the statements of the pursuers were not relevant to support its conclusions. The Lord Ordinary was, however, unable to see any sufficient grounds for giving effect to either of these pleas. Because it appeared to him that if the pursuers could instruct the allegations made by them in the record, to the effect (1) either that the defender Allan Gilmour was in reality the only party interested in the transaction in question, and that the defenders, other than Allan Gilmour and James Wilson Barclay, had become parties to the transaction merely as trustees for Allan Gilmour, and for the purpose of holding shares which he, as manager of a competitive business, was precluded by the pursuers' contract of copartnery from acquiring, or (2) that the offer to sell the shares in question to the pursuers, which was required by the contract of copartnery to be made as a condition precedent to a sale to a third party, was made not in *bona fide*, but for the purpose of evading the contract, and in order that the shares might be disposed of at a lower price than that at which they were offered to the company, the pursuers would then be in a position, if not to set aside the agreement, at all events to seek redress in terms of some of the other conclusions of the summons.

"A proof before answer was accordingly allowed; and upon considering that proof the Lord Ordinary has come to the conclusion that the pursuers have failed to establish either of these leading allegations upon which the action is rested.

"1st, With reference to the question whether the proposed purchasers were merely trustees for Allan Gilmour, the evidence is, in the opinion of the Lord Ordinary, conclusive in favour of the defenders; and at the debate upon the proof he did not understand it to be contended on the part of the pursuers that there was evidence to instruct that branch of their case.

"2d, The question raised relative to the *bona fide* nature of the offer is attended with more difficulty. But, after repeated consideration of the evidence the Lord Ordinary has not been able to find any sufficient grounds for holding that there was any intention on the part of the proposed purchasers to deal unfairly with the pursuers, or that they were not in *bona fide* in making the offer, and in agreeing to purchase the share for £8,000 if the pursuers refused to buy them at that price; and he has come to this conclusion for the following reasons:—

"(1) The defenders for whom the purchase was made, and who (with the exception of Dr Maclatchy, who died after the action was raised). were all examined on this point, very distinctly stated that they were all along ready to pay £8,000 for the shares, and were anxious to acquire them at that price, if the company and the individual partners refused to purchase them. And the Lord Ordinary saw no reason to doubt the honesty and truthfulness of their statements to that effect.

"(2) The parties upon whose advice these defenders were thus prepared to act were the defender Allan Gilmour, and his uncle John Gilmour, who is also engaged in the iron trade. These witnesses seem both to have formed a clear opinion at the time that the price, though high, was a fair one; while Mr John Gilmour, who was in reality the adviser of both parties, having been originally applied to by Andrew Barclay to advise him in the matter, was further of opinion that the shares were worth even more than the sum at which they were offered to the company.

"(3) It is in evidence that the price of iron was beginning to rise at the time the agreement was entered into. This is proved by Mr Baird, the manager of the pursuers' company; and it was the expectation that this rise would continue, coupled with the knowledge that John and Allan Gilmour had of the prosperity which had attended a business of the same description in which they were themselves concerned, which appears to have led them to advise that the money of their relations and of the defender Mr Goudie should be invested in purchasing the shares.

"(4) It appears from the minutes of the company that, at a meeting which was held in the beginning of August 1872, at which it was arranged that the company should act in concert with the defender James Barclay and his father in endeavouring to prevent the sale of the shares from being carried out, the shares were actually valued at £12,000; and it is stated by Mr Baird that on the 1st of September thereafter the balance-sheet of the company showed a profit of 50 per cent. on the paid-up capital, although they had only begun to manufacture iron at their own works on the 1st of May 1872.

"(5) In these circumstances, and having regard to the fact that the question as to the prospective value of the shares in such a work must in a great measure depend upon speculative opinion, the Lord Ordinary has been unable to come to the conclusion that the price fixed was not a fair price, or that the offer to sell at that price was not made *bona fide*, merely because the company thought the price too high, and because Allan Gilmour and the defender Goudie thought it probable that neither the company nor the partners would, in the then position of their funds, gave £8000 for the shares, and were even in hopes that they would reject the offer, in order that the shares might be acquired at that price under the agreement. This expectation—that an offer of pre-emption may in all probability be rejected—must, it is thought, exist more or less in most cases where parties are anxious to acquire shares in a company, by the rules of which such offers require to be made. But it humbly appears to the Lord Ordinary that this is not enough to show that an offer is not *bona fide*, where parties are, as here, ready to give the price at which the shares are offered; and nothing, it is thought, short of the most distinct evidence that the price was fixed solely with a view to cause the rejection of the offer, coupled with the intention to sell the shares at a lower rate to a third party, ought to be considered sufficient to stamp the transaction as simulate, and as made in *mala fide;* and it appears to the Lord Ordinary that there is in the present case no sufficient evidence of this description.

"(6) Neither does the Lord Ordinary think that the delivery which occurred in the earlier part of 1872 in adjusting the proposed assignation, and in endeavouring to obtain some information as to the position of the company, can be held, as was con-

tended for on the part of the pursuers to show that the purchasers had not at that time fixed to go on with the transaction, but were deliberating whether they should avail themselves of their right to purchase the shares. For although there are expressions in the correspondence which might be so interpreted, it appears to the Lord Ordinary that the evidence of Mr Goudie on this point, coupled with the fact that on the 28th of December 1871 he took a draft assignation, in which the price of £8,000 was inserted, to Mr Kirkwood, as the agent of the defender Barclay, with a view to its adjustment at a meeting at which Mr Andrew Barclay was present, and which draft is substantially the same in its terms as the one which was sent to Mr Kirkwood on the 12th of March 1872, is sufficient to show that the purchasers were then ready to take the shares at the price at which they had been offered to the company, and so to complete their part of the transaction,—the more so as the communications with the company, which led to the delay, appear to have originated on the suggestion of Mr Kirkwood that it would be desirable to ascertain the terms of the leases which the pursuers held off Lord Lonsdale, with a view to the adjustment of the assignation. But for this suggestion, and the consequent delay, the Lord Ordinary sees no reason to think that the transaction would not then have at once been proceeded with and completed, as no objection was at that time, nor for several months thereafter, taken to it by the defender Barclay, or his father, nor does it appear that any such defence as that since raised by them, to the effect that the transference was to be in security only—but of which there is no evidence—was ever hinted at by the defender or his agent Mr Kirkwood, who corresponded with Mr Goudie on the subject.

"The fact, moreover, that both these draft assignations bore to proceed upon payment of £8000, is, in the opinion of the Lord Ordinary, sufficient to obviate any difficulty which might otherwise have been felt relative to the price, in consequence of the conversation spoken to as having taken place at a meeting at Troon in the end of March 1872, during which the defender Allan Gilmour is said to have maintained that the price to be paid for the shares was £7000, and not £8000. Because the business was at that time no longer in Gilmour's hands, but in those of Mr Goudie, as agent for himself and the other purchasers. And having regard to the fact that the assignation, in which the price was fixed at £8000, had then been for some time in the hands of Mr Kirkwood for revisal, it appears to the Lord Ordinary very unlikely that the defender Gilmour would deliberately make any such statement; and not improbable that what he admits he said about claiming a commission for himself from Mr Andrew Barclay upon the transaction, the effect of which would be that £7000 only of the £8000 would fall to be retained by the Barclays, may have been misunderstood as meaning that only £7000 was to be paid by the purchasers for the shares, which was not the true nature of the arrangement.

"(7) As against the view which the Lord Ordinary has thus taken of the case, the evidence mainly relied upon by the pursuers is that of the defender James Barclay and his father, who say that the offer was fixed at £8000 in order to ensure its rejection. But the Lord Ordinary has not been able to attach much weight to the evidence of either of those witnesses. For the defender James Barclay was not present at any of the meetings at which the matters were arranged, and admits he knows nothing of what took place except what his father told him. Then, the recollection of the father, as he himself stated, is evidently not very accurate about several matters connected with the business. And although he says in his examination-in-chief, that he thinks the offer was not a fair one, he explains, in cross-examination, that he did not intend 'to deceive or cheat the company' when the offer was made, but that he thought it dishonest, as he was not to receive £8000 for the shares. But in this he is not corroborated by any of the parties present at the meeting of the 4th Sebtember when the matter was talked over and £8000 fixed in Mr Kirkwood's office, and in his presence, as the price at which the shares were to be offered to the pursuers, and sold to the proposed purchasers, should the pursuers decline to take them. This is proved by Mr Goudie and Mr A. Gilmour, and Mr Kirkwood is not called to contradict them; and it is certainly not to be presumed that a person of Mr Kirkwood's position would sanction any such scheme as that of fixing the offer at a sum to ensure its rejection, in order to sell the shares at a lower rate; or be a party to the preparation of a deed of *ex facie* absolute sale, with no back-letter to protect his client if the transaction was not one of sale. but of the nature of a security for a loan, which Mr A. Barclay now wishes it to be inferred was the only object the parties had in view.

"Upon these grounds, the Lord Ordinary has come to the conclusion that the pursuers have failed to instruct the averments which alone gave relevancy to their action, and that the defenders are therefore entitled to absolvitor."

The pursuers reclaimed, and in the Inner House no appearance was entered for the defender J. W. Barclay.

At advising—

LORD JUSTICE-CLERK—In this case we have had a very full argument, and the questions arising under the action are certainly not without some nicety, and of considerable importance; but the conclusion I have come to is substantially in accordance with the opinion of the Lord Ordinary, and as the note of his Lordship very clearly brings out the facts, I do not think it necessary to do more than to indicate, as I shall shortly do, the grounds upon which I have arrived at that result.

I am clearly of opinion with the Lord Ordinary that the pursuers have failed to prove, *first*, that the offer made to the company by James Barclay was not a *bona fide* offer; and *secondly*, that the other defenders were not truly purchasers of the shares, but merely trustees for Allan Gilmour. If it had been made out that the parties named by Mr Allan Gilmour were mere trustees for him, and were not truly assignees in their own right, then it is quite clear, under the contract, that the whole transaction would have been at variance with its precise terms, because it is admitted that, as Mr Allan Gilmour was a rival manufacturer, he was excluded by the contract of copartnery from becoming the assignee. But that, I think, is not made out, and it was not maintained that it was no part of the argument addressed to us was directed to this point, and on the proof I am satisfied it has not been established. I think that, even if it had, there is no ground upon which we

could have come to the conclusion that those persons who were nominated by Mr Allan Gilmour were not *bona fide* assignees. I think they were. At all events that ground upon which the Lord Ordinary has decided was not pleaded to us.

There were three grounds pleaded to us, and pleaded with very considerable earnestness and force.

The first is, that at the date of this agreement the cedent, Mr James Barclay, had not paid up the amount of his share of capital; that consequently the company were at that time in a position to have forfeited his share in terms of one of the provisions of the contract; and it would have been so forfeited had they known of the agreement. It is also said that this payment of capital at the time it was made was not a *bona fide* payment, because the person who paid it never intended to become a partner of the concern, but meant and was under obligation to assign his share. I am of opinion that, even if the facts warranted this plea, it is irrelevant. The company had no concern whatever with the way in which the partners might raise the funds by which their share of the capital was to be paid. It was of no moment to them, and they had no right to inquire whether it was upon condition of assigning the share in the company's concern or on any other condition. As any partner was entitled to assign his share, so any partner might agree to pledge himself to assign, even although he thereby obtained and acquired the power of paying up the amount of his capital, provided he obeyed the conditions of the contract of co-partnery. I think this an entire mistake upon the terms of the contract, as introducing into it an element which never could and never ought to have arisen between the partners and the company.

It is said that the company, if they had known of this agreement, would not have accepted payment of the share, and would not have taken the £4000. There certainly was no obligation to disclose the agreement. The protection to the company itself is that contained in the 19th clause of the contract of co-partnery, and there is no other. But I do not think that the company could, in the circumstances, have with any plausibility proposed to forfeit these shares, because the fact is all against the plea. The real truth is that Andrew Barclay, father of the nominal partner, was the real partner in the concern. It was agreed that his amount of capital should be paid by machinery furnished by himself—the son being nominally the partner: and that machinery was furnished, but Andrew Barclay having become bankrupt, the trustee on his sequestrated estate challenged this transaction about the machinery, and succeeded in carrying it off, whence it became necessary that fresh capital should be put in. The company in the circumstances were bound to give him reasonable time to pay the £4000, and within a reasonable time the £4000 was paid. I am quite clear that even if the conclusion here had been relevant the company could not have proposed with success to forfeit these shares in respect of the non-payment of the capital, and they could not fail to surmise, if they did not know, that the money had been raised by making use of the power of assignment.

The second ground pleaded was, that the offer which was made to the company was a fraud, and was not a *bona fide* offer, seeing that the price named was so exorbitant as to make the offer merely nominal, and that it was known and must have been known that the company would reject it. The company, before a partner was allowed to assign his share and interest to a third party, were entitled under clause 19 of the contract to have the same offered to them, and if they refused to take it, then to any of the partners who might be disposed to become the purchasers; and any offer to the company or the partners must be in writing, and they were to name five weeks in which to make up their minds upon it. Now, under the 19th article the plea here is irrelevant, for I think a partner is entitled to offer his shares to the company at any price that he chooses, whether it is an exorbitant price or not. The only result is, that if he does make that offer, and the company reject it, he cannot then assign his share at any lower price to a third party—a private individual. The company suffer nothing; they have their opportunity as any other person has; and therefore it does not signify in the least to say that the partner when he made the offer knew that the offer would not be accepted. The company were no worse off than the individual to whom an assignation might thereafter be made.

It was suggested that although £8000 was an exorbitant sum in August 1871, it became a reasonable sum before this offer was rejected in December 1871. I think that also is not relevant, because when an offer has once been made under the 19th section, and the company refuse to take their chance of the market, whatever the price may be, the partner becomes entitled absolutely to the chance of the market, and is not bound to make any fresh offer, provided he does not sell at a lower price than the amount which the company refused to give. This is perfectly reasonable and equitable; for although the market may have risen, the chance of that rise rested with the partner, and not with the company; and consequently, the spirit of the contract is entirely fulfilled if the ultimate assignment is made at the same price at which it was offered to the company. When the company rejected the offer they rejected also the chance of the market.

It is said that the terms on which the offer was made to Gilmour were not precisely the same as those of the offer to the company; and to some extent there is a certain amount of verbal accuracy in the statement — that is to say, the agreement which was made with Gilmour was to the effect that a portion of the price should only be payable by instalments of six and twelve months, and no such stipulation entered into the offer to the company. But it is necessary to look a little more closely at the nature of the transaction with which we are dealing. This agreement, which it is sought to reduce, did not operate as a concluded sale; it was only an agreement to sell, and an agreement to sell upon terms which are not fully expressed. As far as it went it was binding, but the price at which the sale was to be made is not mentioned at all, and it was perfectly open to the parties under the agreement to stipulate subsequently not only about the price, but also about the terms on which the sale should be made. As the offer to the company was made with the consent of Allan Gilmour, we must presume that this condition was superinduced on the original agreement. Of the stipulated £8000 Gilmour had advanced £4000 in August 1871, and in that respect he was necessarily in a different position

from the company, which had advanced nothing. Interest, of course, was running upon this £4000; so that it would seem to have been contemplated that the other half of the price, the £4000, should be payable in instalments of six and twelve months. Whether that would of itself have been such a variance between the offer to the company and the sale to him is a question. But the answer to this objection is that when they came ultimately to adjust the bargain between Barclay and Gilmour, as is proved by the draft of the agreement, the assignation which was made out on Gilmour's instructions departs altogether from that provision about the instalments, and makes it an assignment for a price paid. That, I think, it was quite competent for the two parties to agree upon, and I think it proved that they did agree upon it, and that therefore there can be no challenge now of the transaction on any such ground.

Therefore, on these two matters I am of opinion that the action must fail. It is of no moment in this inquiry at what precise time this became a concluded and absolute and specific obligation to assign. I do not see that the company have any interest in that matter. It is sufficient that James Barclay, the cedent, was validly and effectually a partner of the concern; and secondly, that he validly and effectually obtained the right to assign by an offer which he made to the company at the price of £8000. If those two things are proved this action has failed, for it is an action to set aside the agreement as being contrary to the provisions of the contract of copartnery.

Those are, shortly, the views that I take upon those matters that were argued to us, and I do not think it necessary to go into any part of the proof, because I think the ground that I have suggested really stands apart from the specific facts.

The third objection, which was not pleaded to the Lord Ordinary, and which is not raised by the record, is, that the contract of copartnery does not warrant the splitting up of shares or an assignation to more than one assignee—in other words, that while there is power to assign the share and interest of a partner there is no power to increase the number of the partners of the company by assigning to a variety of individuals. Not only is this not pleaded on the record, but it is not covered by the conclusions of the summons. This copartnery, which was not a joint-stock company, but a copartnery of certain persons with certain shares in the capital of the concern, did admit a certain power of assignment by a partner of his share and interest. It does not necessarily follow, however, that he can assign a part of his share and interest and retain the rest, nor does it necessarily follow that he can assign the share and interest in portions. And, what is perhaps more material, it is impossible to understand from the facts in this case whether the share which it has been attempted to assign is a *pro indiviso* share or a separate share. It is said, and said quite truly, that the general purpose of the contract is that the votes of the partners are to be according to capital; that therefore the numbers do not signify, seeing that a larger number of partners had after all no more than the vote for the amount of capital they represented. I do not wish to give any opinion upon how far that is absolutely the construction of this contract, but it does not necessarily follow that any number of persons may have a seat at the board of the company, or may have a voice in its administration, even under any rules. I have thought it right to indicate that there may be thus a question of very considerable importance behind the matters that we have now been discussing. But no such question is raised by this record, because the object of the action is to set aside the agreement. The agreement to assign to a nominee of Mr Allan Gilmour is quite consistent with an obligation to assign to only one person. I propose that we should adhere to the interlocutor of the Lord Ordinary, reserving this last objection, which arises only when the assignee comes to demand admission to the company and a right to interfere in its concerns. And that probably may also have this advantage, that on the one hand it is manifestly an objection which the parties have it in their own power to meet and obviate if they think fit; and, on the other hand, it will be for the pursuers in this action to consider whether, having failed in their main object, which was manifestly to prevent the influence of a rival manufacturer being felt in their concern, they have any interest in proceeding further.

Lord Benholme—I agree in thinking that the interlocutor of the Lord Ordinary ought to be affirmed, and as the grounds of my opinion have been so fully and, to my mind, so satisfactorily stated by your Lordship, I do not mean to add anything to that expression of opinion.

Lord Neaves—I am in the same situation. I concur in the opinion delivered by your Lordship, and in the grounds of it, and have nothing to add to what has been so distinctly and correctly stated.

The Court pronounced the following interlocutor:—

"The Lords having heard Counsel on the reclaiming-note for the Lonsdale Hematite Iron Coy. and others against Lord Mure's interlocutor of 15th September 1873, Refuse said note, and adhere to the interlocutor complained of, reserving any question as to the obligation of the pursuers to receive and admit as partners of the concern more than one assignee, in respect of the share and interest of a partner; find the pursuers liable in additional expenses, and remit to the Auditor to tax the same and to report."

Counsel for Pursuer—Watson and Moncrieff. Agents—Maconochie & Hare, W.S.

Counsel for Defenders (Gilmour and Others)—Solicitor-General (Clark), Q.C., Asher, and Jameson. Agents—Fyfe, Miller & Fyfe, W.S.

Tuesday, February 3.

SECOND DIVISION.

SPECIAL CASE.—LORD ADVOCATE (ON BEHALF OF THE COMMISSIONERS OF BOARD OF TRADE) AND JOHN GRANT.

Statute 17 *and* 18 *Vict. c.* 104, *part iii.* § 228, *s.* 1. Under 17 and 18 Vict. c. 104, part iii. § 228, s. 1—*Held* that the liability of the owner of a vessel lost at sea terminates with the cure of the seamen disabled in the service of the vessel.

The parties to this case were the Lord Advocate