*Wednesday, June 4.**

SECOND DIVISION.

[Lord Curriehill, Ordinary.

CASSELS *v.* STEWART.

Partnership —Contract —Assignation of a Partner's Share.

A, B, and C, were the sole surviving partners in an iron company. By the second article of the contract of copartnery it was provided that it should not be in the power of any of the partners to assign all or any part of his share or interest in the capital stock or profits of the company to any person or persons, or to give them a right to inspect the company's books or interfere in their business, and if any such assignation were granted it was provided that the same should be null so far as regarded the company or individual partners. A minute of agreement dated 19th May 1863 was entered into between B and C, by which B granted to C, who was his nephew, his whole right and interest in the company as at 31st May 1859 for a certain price, which was to be paid in any manner convenient to C within 20 years. In this minute of agreement it was provided that the stock sold might remain in the first party's (B) name, or be transfered to the second (C) as he might require it. In point of fact, the agreement was not intimated to A, and B continued *ex facie* a partner till his death in 1870. In an action of declarator at A's instance to have it found that the minute of agreement was entered into for behoof of the company, and of A and C as the sole partners thereof, and that the partnership accounts from 1859 to 1870 should be made up on that footing—*held* that the transaction between B and C was perfectly lawful under the copartnery, being more of the nature of a testamentary disposition than an assignation of a partnership share, and that A was not entitled to claim benefit from it in any way.

The following narrative of this case is taken from the Note of the Lord Ordinary (CURRIEHILL): — "This action is raised by Robert Cassels, one of the partners of the Glasgow Iron Company, against James Reid Stewart, the only other remaining partner of said Company, concluding for declarator 'That an agreement dated 19th May 1863, entered into by the defender with the deceased James Reid, iron merchant in Glasgow, for the purchase of the said James Reid's whole right and interest, as at 31st May 1859, in the Company concern carried on in Glasgow under the name of the Glasgow Iron Company, was made and entered into by the defender for and on behalf of the said Glasgow Iron Company, and the pursuer and defender as the whole remaining partners thereof, or must be held to have been so made and entered into; and further . . . . . that the partnership accounts of the said Company, from 31st May 1859 to 31st May 1870 inclusive, should be made up and settled on the footing that the said purchase was made for behoof of the said Company and the pursuer and defender equally as the whole remanent partners thereof.'

* Decided May 22.

There is also a conclusion for the reduction of the docquets or minutes of approval appended to the balance-sheets of the Company as at 31st May 1860 and 31st May 1864 and the intervening years, bearing to be signed by the said James Reid, the pursuer, and defender, on the footing that these three persons were all interested in equal shares at these respective balances.

"The circumstances out of which the action has arisen are shortly as follows: —The Glasgow Iron Company was originally constituted by contract of copartnership to endure for a period of seven years after 15th May 1845. The original partners were the late James Reid, ironmonger in Glasgow; James Reid Stewart, his nephew, the defender; Robert Cassels, the pursuer (then clerk to the Monkland Iron and Steel Company in Glasgow); and Noah Meese (then manager of the Govan Ironworks). The capital stock of the company was to be £15,000, whereof the said James Reid and the defender were each to contribute £5500, the pursuer £3000, and Noah Meese £1000. James Reid and the defender were each to have 5-15th shares. Notwithstanding the contemplated duration of the partnership for seven years, it was *inter alia* provided that it should be in the power of any partner at the end of five years from Whitsunday 1845 to retire and cease to be a partner on giving to the other partners six months' previous notice in writing of his intention so to retire, and that in that event it should be in the power of the remaining partners either to continue and carry on the partnership for the full period of the seven years originally contemplated, and so long thereafter as should be mutually agreed upon, or to wind up the concern.

"By the *second* article it was *inter alia* provided that 'it shall not be in the power of any of the partners to assign all or any part of his share or interest in the capital stock or profits of the concern to any person or persons, or to give them a right to inspect the Company's books, or to interfere in any way with the business of the Company; and should any such assignation or other conveyance be granted, or right given contrary to this stipulation, the same is hereby declared to be null and void and of no force, strength, or effect so far as regards the Company or other individual partners, who shall not be obliged to pay any attention thereto.' By the *fifth* article it was provided that the books should be brought to a balance by the pursuer on the 1st June annually; that copies of the balance-sheet should be entered in the books of the Company, and authenticated by the signatures or written assent of all the partners, and should regulate and constitute their respective rights and interests as at 1st June annually, and the sums to be paid to their heirs or creditors in the event thereinafter provided for. By the *sixth* article it was provided that in case of the death of any solvent partners, his heirs or next of kin might, with their consent, be assumed as partners in lieu of the deceased by the surviving partner or partners, who should, nevertheless, have the option of retaining the whole of the Company's capital stock, debts, property, assets and effects upon granting bills to the heirs of such deceasing partner or partners for the amount or value of such deceasing partner's interest in the concern as the same stood at the balance struck immediately before such death, under deduction of all sums drawn by the deceasing partner from,

and debts due by him to, the Company between such balance and death.

"The *seventh* article is as follows:—'And in like manner, in the event of any of the partners retiring from the concern as hereinbefore provided, or becoming insolvent, the remaining or solvent partners or partner shall have power to assume such other person or persons into the room and place of such retiring or insolvent partner or partners, and the remaining or solvent partner and partners shall nevertheless have the same option of retaining the Company's stocks, debts, property, assets and effects, upon granting bills to the retiring partner or partners, or to wind up the concern in manner and subject to the same conditions, terms, and declarations as is provided in the case of a deceasing partner by the immediately preceding article hereof.'

"By the *tenth* article it was provided that the partners should at all times have power by mutual consent to make future regulations for the management and extension of the business, which, when entered in the Company's sederunt book, and subscribed or assented to in writing by a majority in numbers of partners, were to be equally binding as if they had been contained in the contract.

"By minute of agreement, dated 18th January 1847, the partners assumed James Henderson Robertson as a partner. The capital stock was increased to £30,000, and it was agreed that the partners should be interested in the business as follows, viz., James Reid and the defender to the extent of 9-30th parts each, Noah Meese and the pursuer to the extent of 3-30th parts each, and James Henderson Robertson to the extent of 6-30th parts. In all other respects the original contract was ratified, approved of, and confirmed.

"The Company went on for many years unchanged, but in 1850 Noah Meese retired, and his interest was taken over by the Company and divided between the remaining partners. In 1852 the pursuer acquired one of Mr Reid's thirtieth shares by an arrangement which was not reduced to writing at the time, but was ratified by the Company by minute dated 8th October 1858, whereby the balance-sheets from 31st May 1851 to 31st May 1858, which had not been previously docquetted, were approved of and subscribed by all the partners. The pursuer's salary, which had been originally £250, was increased to £500 per annum, taking effect retrospectively as from Martinmas 1852.

"In 1860 Mr Robertson retired, and his interest was taken over by the three surviving partners, in terms of article 7th of the contract of partnership, they paying him out, as the price of his share, the sum of £38,201, 0s. 4d., being the amount at his credit as at the previous balance of 1859, and in addition thereto a bonus of £3000, the whole being made payable in fourteen half-yearly instalments, with interest at 5 per cent. from 31st May 1859. It was further agreed that from the date of Mr Robertson's retirement each of the three remaining partners, *i.e.*, James Reid and the pursuer and defender, should have equal interests in the business.

"The terms of Mr Robertson's retirement appear to have been arranged between him and the pursuer, and they were subsequently adopted and ratified by the whole remaining partners. It appears, however, that Mr Reid, on learning what had been done, said to his nephew that there was no occasion for giving Robertson a bonus, and his retirement was voluntary; but he never formally objected, aud, as I have said, he ratified the arrangement. It is at this point that the controversy between the pursuer and defender begins. The pursuer alleges (1) that the defender reported to him that Reid was dissatisfied with the arrangement made with Robertson, and had expressed his desire, or at least his willingness, himself to retire on similar terms; and (2) that he (the pursuer) thereupon authorised the defender to negotiate for the purchase of Mr Reid's interest in the business for the Company on these terms; (3) that the defender agreed to negotiate the purchase on that footing; and (4) that the defender did, in point of fact, so purchase his uncle's interest for behoof of the Company."

The pursuer averred that the defender had purchased Mr Reid's share on lower terms than he had authorised him to purchase it for the company, and that the fact of the purchase was concealed from him till after Mr Reid's death. He further averred—"(Cond. 12) By the said agreement Mr Reid transferred his share in the said company to the defender. It made the partners two in place of three. It in reality gave the defender the practical control of the business by means of his command of Mr Reid's vote. It deprived the pursuer of Mr Reid's advice as a party interested in the same way as before in the business. It prevented him exercising the right of purchase of Mr Reid's share which he had in the event of Mr Reid's death under the then existing terms of the copartnery."

In answer to this it was explained that Mr Reid continued a partner till his death, and took as much interest in the concern after the agreement as before, and that at his death his shares in the concern were divided equally between the pursuer and defender. It was admitted that after Mr Reid's death the business of the concern had been carried on on the footing of an equal division.

The minute of agreement between the defender and Mr Reid relative to the purchase of the latter's share was to the following effect:—Reid, the first party, agreed to sell to Stewart, the second party, his whole right and interest in the Glasgow Iron Co. as the same stood on 31st May 1859, the price to be £62,400, being the amount at first party's credit at that date, to be paid as was convenient for second party, but it must be paid within 20 years, the second party to be entitled to profits on the said share after above date. After various provisions in regard to interest, it was provided that the first party should not ask for security for payment of the price except in the event of the death of the second party. It was provided (seventh) that "the right and interest or stock hereby sold may remain in the first party's name, or it may be transferred over to the second party at any time he may require it."

It was maintained on behalf of the second party that this agreement was merely part of Mr Reid's testamentary dispositions.

The pursuer pleaded that he was entitled to decree—"(1) In respect the defender agreed with the pursuer to endeavour to purchase Mr Reid's interest on behalf of the Glasgow Iron Company, and thereafter succeeded in purchasing the same. (2) In respect the defender, as a partner of the said company, was not entitled to purchase with-

out the pursuer's consent Mr Reid's interest for himself, or otherwise than on behalf of the said company."

The defender's third plea was—"The agreement in question having been lawfully entered into by the defender for his own behoof, the pursuer has no interest in or right to claim the benefit of the same."

The Lord Ordinary (CURRIEHILL), after a proof pronounced an interlocutor in which he assoilzied the defender. His Lordship added the following note:—

"*Note.*—[*After the statement of facts ut supra*]—If these statements are true, there is an end of the case, because the defender would in that view be bound by paction to communicate to his partner the benefit of his purchase. On this branch of the case the pursuer depends solely upon his own deposition in the witness-box, which not ouly is not corroborated, but is contradicted by the defender. So far as credibility is concerned, I do not think that from the demeanour of the parties either of them should be regarded as more or less trustworthy than the other. It appears to me, however, that the probabilities of the case are against the pursuer. In the first place, even if Mr Reid had ever really desired to leave the concern on terms such as Robertson had got, he did not in point of fact leave the concern at all; and the consideration given by the defender to his uncle for the right to compel the latter to retire was (as will afterwards be explained) far less than that received by Robertson. In the next place, Mr Reid by his actings in the matter showed very clearly that he did not mean to dispose of his interest to the Company on any terms, because it is clearly proved that he desired that the arrangement with the defender should not be communicated to the pursuer—and consulted his law-agent as to the necessity of making such a communication, and was advised that there was no such necessity. And in the last place, if the pursuer had really understood or believed that Reid seriously wished to retire in favour of the company, and if the pursuer had really, as he says he did, authorised the defender, and agreed with him to buy out Reid for behoof of the company, it is inconceivable that during the ten years which elapsed before Mr Reid died the pursuer should never once have mentioned the matter to the defender or asked him what progress he was making with the negotiation. In this state of the evidence, I must hold that the pursuer has failed to prove the averments upon which his first plea-in-law is founded.

"But this second plea-in-law is of a different kind, and raises questions of some delicacy and difficulty. The plea is that 'the defender as a partner of the said company was not entitled to purchase, without the pursuer's consent, Mr Reid's interest for himself or otherwise than on behalf of the said company.' Now, what was done in point of fact is fully set forth in the minute of agreement between Reid and the defender, dated 19th May 1863, whereby, on the terms and conditions therein specified, Reid agreed to sell, and sold to the defender (his nephew), his whole right and interest in the company as the said right and interest stood on the 31st day of May 1859. By the 1st article the price was fixed at £62,400, being the amount standing at Reid's credit in the books of the concern as at the said 31st May 1859, to be paid with interest within twenty years from the date of the agreement, at such times and in sums as might be convenient for the defender. By the 2d article the defender was to be entitled to the whole profits that had accrued upon Reid's right and interest in the concern from 31st May 1859, and that might accrue thereafter on the same. By the 3d and 4th articles it was provided that the interest of the price from May 1859 to March 1863, amounting to £13,993, 2s. 9d., should be paid to Reid at the term, and that the interest after that term, at the rate of 4 per cent., should be paid to him half-yearly. By the 6th article it was agreed that during the life of the defender he should not be required to find security for the said price or interest, but that in the event of his death it should be incumbent upon his representatives to grant, if required, security for whatever sum might then be due and owing. And the 7th article is in the following terms:—'The right and interest or stock hereby sold may remain in the first party's (*i.e.*, Reid's) name, or it may be transferred over to the second party at any time he may require it.'

"The contention of the defender is that this transaction between him and his uncle was not truly of the nature of a purchase by him of his uncle's share in the partnership as a going concern, so as to increase the defender's interest in the company from one-third to two-thirds, and was not an assignation of Reid's share to the defender for the purpose of enabling the defender to take Reid's place in the company, but was truly part of his uncle's testamentary arrangements. He was the only nephew of Mr Reid, who appears to have had a warm regard for him; and it is proved that Reid, instead of making the defender one of the beneficiaries under his last will and testament, intended by this *inter vivos* arrangement to confer during his own life an immediate benefit upon the defender; and that an immediate benefit was so conferred upon the defender is undoubted, because at the date of the agreement there was a sum of accrued profits of at least £25,000 at the credit of Reid over and above the price of £62,400, which was the balance standing at his credit in the company's books at the date of Robertson's retirement on 31st May 1859. The profits, moreover, were annually increasing, and amounted to a very large sum at the death of Reid in 1870. It is quite clear that if Mr Reid had by his settlement bequeathed his interest in the company to the defender, whether gratuitously or for an onerous consideration, such an arrangement could not have been objected to by the pursuer. Now, does it make any substantial difference that by this private arrangement between the uncle and nephew the latter became entitled during his uncle's lifetime to all the stock and profits belonging to his uncle? I think that question must be answered in the negative.

"In the first place, Mr Reid did not in consequence of the agreement cease to be a partner in the company. On the contrary, he continued to be a partner, and apparently an active partner, until his death in 1870. It is true that by the agreement he had put it in the power of his nephew to compel his retirement at any time. But that power was never exercised, and if it had been exercised by the defender during his uncle's

lifetime the result would simply have been that the pursuer and defender, as the remaining partner, would then have been obliged to pay out to Mr Reid the amount standing at his credit at the immediately preceding balance, or the company would have been dissolved and wound-up, in which case the full sum standing at Mr Reid's credit at the date of dissolution would have been paid to him. Under the agreement, no doubt Reid would have been bound to pay the amount so received by him to the defender; but that is a matter with which, in my humble opinion, the pursuer would have had no concern, unless, indeed, he could have shown that it was illegal for the defender to enter into such an agreement. But, as I have said, the power was not exercised by the defender, and Reid remained a partner until his death, and in terms of the 6th article of the contract of copartnership the amount at his credit at the preceding balance became then payable to his representatives, and so far as the pursuer is concerned it is of no moment whether these representatives acquired Reid's interest by an onerous deed *inter vivos*, by a *mortis causa* settlement, or as intestate succession. In each case Reid's share had to be paid out by the company, and the pursuer and defender, as the sole remaining partners, might either dissolve the concern or continue the business. They chose the latter course, each having an interest to the extent of one-half.

"But the defender says that the transaction was illegal—first, because it is prohibited by the contract of copartnership, and, secondly, because it is in itself a fraud upon the company. As to the first objection, which is founded upon the clause in the second article of the contract prohibiting the partners from assigning their shares, my opinion is that the objection is not well founded. The object of the prohibition was to prevent any partner from violating the *delectus personæ* which is involved in every partnership, by assigning his share without the consent of the other *socii*, to the effect of introducing a stranger into the concern, who should have right to inspect the books or interfere with the business of the company. But the clause does not declare such an assignation to be absolutely null and void, but merely 'so far as regards the company or other individual partners, who shall not be obliged to pay any attention thereto.' In other words, as regards the assigning partner and his assignee, the transaction may be binding and effectual, but the company and the other partners may, if they please, refuse to give effect to the assignation by refusing to admit the assignee into the company. It would, in my humble opinion, be an unwarrantable straining of the words of the contract to hold that on the death or retirement of the assigning partner the remaining partners, or any of them, would be entitled to refuse to pay out the balance at the credit of the assigning partner merely because he had assigned or become bound to pay that balance to a stranger. Still less would the company or other partners be entitled to object, in virtue of this clause of the contract, to pay such balance to a copartner to whom the same had been assigned, seeing that such copartner had already an interest in the concern, and was entitled, irrespective of the assignation, to inspect the books in his own right, and to take part in the management of the business. Indeed this contract does little more than declare the common law applicable to such cases. The law is nowhere better stated than in Erskine, III. iii. sec. 22:—'As partners are from a *delectus personæ*, or the reciprocal choice they make of each other, united in a kind of brotherhood, no partner could by the Roman law transfer his interest or share in a society to a third person without consent of the company—L. 19, 59, pr. *Pro. soc.*; but copartneries, even private ones, may be now so constituted by a special article for that purpose that the partners are left at liberty to transfer their shares to whom they please. If any of the partners shall assume a third person into partnership with them, such assumed person becomes partner, not to the company, but to the assumer—L. 19, 20, *eod. tit.* The company are not bound to regard the second contract formed by the assumption, which is limited to the share of the partner assuming. He still continues, with respect to the company, the sole proprietor of that share, and must sustain all actions concerning it.' Thus it appears that although a partner may not communicate his interest in the concern to a third party, to the effect of intruding that party into the company, the transaction is in itself legal and will receive effect as between the parties to the arrangement, although the company may refuse to recognise the third party except through their own partner. Such, I take it, was the position held by the defender under his agreement with Reid.

"But the defender says, in the second place, that although such an arrangement might not have been expressly prohibited by the contract, it was unlawful for the defender as a partner of the company to make such an agreement for his own individual benefit; that he must be held to have done so for behoof of the company; and that he must now communicate that benefit to the company. The law of Scotland and the law of England do not differ as to the general rule upon which the defender here founds, and which is thus stated by *Lindley* in his Treatise on Partnership, vol. i. p. 571:—'Good faith requires that a partner shall never obtain a private advantage at the expense of the firm. He is bound in all transactions affecting the partnership to do his best for the common body, and to share with his copartners any benefit which he may have been able to obtain from other people, and in which the firm is in honour and conscience entitled to participate—*semper enim non id quod privatim interest unius ex sociis servari solet, sed quod societati expedit.*' There are two modes in which more especially partners attempt unfairly to acquire gain at the expense of their copartners, viz., (1) by directly making a profit out of them; and (2) by appropriating to themselves benefits which they ought to have acquired, if at all for the common advantage, for themselves and others.'

"It is under the second of these heads that the pursuer would place the transaction of which he now complains. But as I understand the law, the private benefits which it discountenances are those which are derived from the acquisition by an individual partner—whether clandestinely or openly—of property in which the company is interested. Any such property acquired by him during the subsistence of the company is held to be acquired for behoof of the company. The application of this rule where a partner has before

the dissolution of the company obtained in his own name a renewal or extension of a lease held by the company is illustrated by the well-known English case of *Featherstonehaugh* v. *Fenwick*, 17 Vesey 298, and the recent case in this Court of *M'Niven*, 7 Macph. 181. But the present case appears to me to be entirely different. The subject-matter of the agreement is entirely outwith the scope of the Company business. It relates exclusively to the stock and profit belonging to one of the individual partners, who is communicating these on extremely liberal terms to his own nephew, who no doubt happens to be also a partner in the concern, but who does not thereby acquire any advantage over the Company or the remaining partner, or make any profit which the Company or remaining partner would have made if there had been no such agreement. I fail to see how it can be maintained that the share of the stock and profits which Mr Reid thus handed over, substantially as a gift, to his nephew is a benefit 'in which the firm is in honour and conscience entitled to participate.' It is absurd for the pursuer to maintain that by the arrangement with his uncle, the defender, instead of having only a third share of the business, virtually held two-thirds, and had thereby, and by having the control of Mr Reid's vote, a preponderating influence in the management. In the first place, the pursuer cannot condescend upon a single instance in which that alleged preponderating influence was ever used or felt at all, still less to the prejudice of himself or the concern. Indeed, he admits that on no occasion did any question arise requiring to be put to the vote of the partners. In the second place, Mr Reid remained a partner so long as he lived; and it was undoubtedly his interest after 1863, as much as it ever was previously, to see that the business was conducted advantageously for all concerned, both because he was liable to the public for all the obligations of the Company, and because upon the continued prosperity of the Company depended his chance of payment by the defender of the sum of £62,400 stipulated for in the agreement. And, in the third place, in point of fact the business continued to be extremely prosperous; for although the figures were, for obvious reasons, not disclosed at the proof, the parties concurred in stating that the sum appearing at Mr Reid's credit at the balance immediately preceding his death in 1870 very largely exceeded the said sum of £62,400, which was the amount at his credit on 31st May 1859, and for payment of which by the defender he transferred his interest to him. I strongly suspect that this circumstance has been the origin of the present claim by the pursuer, taken in connection with the undoubted fact that the agreement was concealed from and not communicated to him during Mr Reid's lifetime, and only came to his knowledge accidentally about a year after Mr Reid's death. But if the agreement was not in itself legal, and if it was not, as I think it was not, a duty incumbent on the defender or Mr Reid to communicate it to the pursuer, the concealment of the transaction cannot aid the pursuer's claim.

"On the whole matter, therefore, I am of opinion—(1) that in point of fact Mr Reid's interest was not purchased by the defender in pursuance of any arrangement between the pursuer and him that it should be purchased for behoof of the Company; (2) that in point of fact it was purchased by the defender solely for his own behoof; (3) that such purchase was not prohibited by the contract of copartnership; and (4) that the benefit which the defender undoubtedly acquired by the purchase is not one which he is in law, honour, and conscience bound to communicate to the Company, or to the pursuer as the only other partner hereof. If I am right in these views, it follows that the defender is entitled to absolvitor from the whole conclusions of the action, with expenses."

The pursuer reclaimed, and argued—(1) Mr Reid's share was in point of fact acquired by the defender in terms of an arrangement with the pursuer that he should acquire it from the company. (2) It was in breach of the contract of copartnery in Mr Reid to assign his share as he did without the knowledge of the other partners. (3) The subject-matter of the agreement was one in which the Company was interested, and by common law a partner was barred from acquiring it for himself, but was bound to do so for the Company. The first question was a matter of fact, and it was submitted that the reclaimer's view of it was proved. In regard to the second point, there was nothing in the contract between Reid and Stewart to indicate that it was other than an absolute contract of sale, which was directly forbidden by the contract of copartnery when without the knowledge of the other partners. It was illegal in a partnership to assign *ab ante* a partner's whole future interest or profits in a concern; it invested the assignee with the interest of a partner. The qualifications of partnership were—(1) patrimonial rights, the ownership of stock, and participation in profits and losses; (2) duties—to give the best of his time or skill in aid of the business, and not to acquire any benefit for himself from his position as a partner. Applying these tests, Reid had ceased to be a partner under this minute of agreement. (3) At common law this agreement was illegal. The passage in Erskine quoted *infra*, implied that an assignation of one's right in a partnership could not be granted unless there was an express power to this effect in the contract, and that a partner could not assume another in place of himself. Lindley (i. 229) said that a transfer of interest was a cause of dissolution. The fact that Stewart was already a partner made the matter worse, for it gave opportunities for concealment, and upset the balance of power in the concern. A partner must in all cases communicate the benefit of his influence, business connection, &c., to the company, both within and without the company's business; the principle of good faith simply was that persons in a fiduciary relation getting a benefit should be made to communicate it.

Authorities—Ersk. iii. 3, 22; Lindley, i. 229, and 569-577, and cases there cited; *Russel* v. *Austwick*, Nov. 1826, 1 Simon 52; *Featherstonhaugh* v. *Fenwick*, 17 Vesey 298; *Clegg* v. *Clegg*, 3 Giff. 322; *Eaglesham & Co.* v. *Grant*, July 15, 1875, 2 R. 960.

Argued for respondent—The agreement here between Mr Reid and Mr Stewart was quite legitimate; it was merely part of Mr Reid's testamentary dispositions. He did not withdraw himself from the firm entirely; though he gave over his share from a certain date, he remained bound to do all he could for the firm—give his advice, &c., just as previously. The bargain in substance came to this—Mr Reid said, "You will get my share in the

concern at my death, and I undertake that I wont retire during my life unless you ask me."—*Lonsdale Hematite Iron Co.* v. *Barclay, &c.* Jan. 27, 1874, 1 R. 417.

Authorities—Quoted *supra*, and *Kelly* v. *Hutton* 1868, L.R., 3 Chan. App. 703; Lindley, i. 654-698.

At advising—

LORD JUSTICE-CLERK.*

LORD ORMIDALE—The circumstances in which the dispute in this case has arisen being stated, I think, with sufficient fullness and accuracy by the Lord Ordinary in the note to his interlocutor reclaimed against, it is unnecessary for me to repeat them. I shall at once, therefore, proceed to deal with what appear to me to be the essential points upon which the controversy turns.

It was maintained by the reclaimer, who is pursuer of the action, that the agreement which was entered into by the late Mr Reid and the defender, of date 19th May 1863, was illegal as between these two parties, and must therefore be treated as if it had been executed for the benefit, not of the defender alone in accordance with its terms, but of him and the pursuer as the two remaining partners of the Glasgow Iron Company. This was maintained on the assumption and footing that the now deceased James Reid must, as a consequence of the agreement, be held to have ceased to be a partner of the company, and that the pursuer and defender as the remaining partners came into the whole rights of the copartnery. But in order that effect may be given to this contention, it must first be ascertained whether the agreement was illegal as between Reid and the defender Stewart or not? If it was not, it is unnecessary to consider what would be the rights or remedies of the pursuer on the footing or assumption that it was illegal.

Before, however, entering into the inquiry whether the agreement was or was not illegal, I may notice in a few words a point which the pursuer endeavoured to make, to the effect that the agreement, notwithstanding its terms, was in reality made for behoof of the company. This view was not attempted to be supported by any direct evidence, but rather by inference partly of fact and partly of law. It was said that the pursuer authorised the defender to purchase for behoof of the company Reid's share and interest therein, and that the defender acting on this authority did acquire for the company—that is, for behoof of himself and the pursuer as the only remaining partners thereof—Reid's right and interest, and that he did so by obtaining from Reid the agreement in question. If such was truly the fact, it is difficult to understand why the object was not accomplished directly and expressly, in place of by an agreement which, according to its terms, bears a very different construction—terms according to which Reid's share or interest in the company was transferred, not to the company, or to the pursuer and the defender as the only partners thereof, but to the defender alone. It seemed to be suggested, however, that Reid would only part with his share or interest in the concern in the manner and to the effect expressed by him in the agreement, and that the defender having so obtained the share was bound to communicate the benefit of it to the pursuer, it being the fact that it was obtained by him on that footing and for that purpose in virtue of the authority which was conferred on him by the pursuer as averred in his condescendence. But I am quite clear that no such fact has been proved. There is, indeed, no trustworthy evidence that the defender was authorised by the pursuer to acquire Reid's share for behoof of the company or that he agreed to do so. The only evidence bearing on the matter is the statement of the pursuer himself, but that statement, besides being somewhat vague, is not only not corroborated, but positively contradicted, by the defender. So standing this matter, it is in vain for the pursuer—the more especially considering that the *onus* lay upon him to establish his case—to contend that Reid's share and interest in the company was as matter of fact acquired by the defender, not for himself alone, but for the pursuer along with him as the two remaining partners.

Whether, however, and independently of that, there is any rule or principle of law in respect of which Reid's share and interest, although in fact acquired by the defender for himself in terms of the agreement in question, the company and the pursuer as well as the defender are entitled to the benefit of it, is a different question, which will be afterwards noticed.

But in the meantime, taking the agreement as it stands, was it illegal and *ultra vires* of Reid and the defender to have entered into it? In considering this question it is important to keep in view that the agreement was never acted upon in any way whatever till the death of Reid, ten years after its date. The partnership continued as it had previously been—that is to say, Reid along with the pursuer and the defender acted and transacted in all matters as the three partners in the Glasgow Iron Company precisely as they had done previous to the date of the agreement. This, indeed, is made matter of distinct averment by the pursuer himself in his condescendence. He no doubt also avers that the agreement was not acted on in order that its existence might be concealed from him and the company. But it rather appears to me that it must be assumed that the reason why Reid and the defender did not make the agreement known to the pursuer and the company was that it was not intended to be acted upon till after the death of Reid—that, in short, the object of the agreement being more of the nature of a testamentary arrangement by an uncle in favour of a nephew, not only did not require to be declared and made known to others during the life of the granter, but, agreeably to the ordnary practice in such matters, was kept entirely latent. Accordingly, the agreement never was intimated to the company or the pursuer, which it required to be before it could operate as an assignation or transmission of Reid's share or interest in the company to the defender. In short, intimation to the company and the pursuer was essential to the completion of the deed, for till then it could have had no operative effect against the pursuer or the company (Erskine, b. 3, t. 5, secs. 3 and 4). But if the deed had been completed by intimation, and so attempted to be carried into operation to the effect of ousting Reid from the company and

* The Lord Justice-Clerk's opinion will be found separately in a subsequent number.

substituting the defender in his place, the pursuer could then at once have interposed and rendered any such attempt abortive, on the ground that no such change on the copartnery could be made without his consent. The pursuer could have done so, if not in respect of his right at common law, at anyrate in virtue of the second article of the contract of copartnery, by which it is declared that (*quotes ut supra*). Reid as well as the defender must be held to have been quite aware of this article of the copartnery, and, being aware of it, they abstained from violating it by postponing till the death of Reid the completion of the agreement by intimation. It remained practically, so far as the company and the pursuer were concerned, a dead letter.

How far therefore the agreement, if it had been completed and at once carried or attempted to be carried into operation as against or so as to affect the pursuer and the company, could be considered legal or not, does not in the actual circumstances of the case arise for determination. That it would be legal and unobjectionable after the death of Reid, and to the effect of regulating the disposal of his interest in the company as it then stood, is, I apprehend, undoubted, and at any rate it is a matter which has not now to be determined.

But the pursuer maintained, as I understood his argument, that whether the agreement was carried into effect or intended to be carried into effect during the life of Reid or not, the fact of its existence ten years prior to that event entitled him and the company to the benefit of it from the date when, according to its terms, it might have been attempted to be put into operation. He argued that although the right to Reid's share and interest in the company as from the 31st of May 1859 was acquired by the defender for himself, he must in law be held to have acquired it for the company and the pursuer, and that they are consequently entitled to the benefit of it. This argument proceeds necessarily on the assumption that the defender did, whether legally or not, *de facto* acquire Reid's share or interest as on the 31st of May 1859, but if I am right in holding that until the agreement was completed by intimation no such acquisition was made, then it follows that there never was anything to the benefit of which the pursuer could lay claim. And at any rate the right under the agreement, supposing there was one, which might have been made available to the defender independently of intimation to the pursuer and the company, must in that view and to that extent have been quite legal and unobjectionable, and therefore not claimable by the company or the pursuer. That it was quite competent for Reid and the defender to have arranged that all the profits in the company pertaining to the former should be made over to the latter I cannot doubt; and that the agreement in question was intended to do more, is, I am disposed to think, not the true view to take of its nature and effect.

But further, I am not satisfied in any view that can be taken of the agreement, and even supposing it were illegal as between Reid and the defender, that there is any sufficient ground either in law or fact in respect of which the pursuer could insist that he and the company are entitled to have the benefit of it communicated to them. This I think is not the remedial result which would accrue to the pursuer even on the assumption that the agreement was illegally entered into. The only remedy which on this assumption would be available to the pursuer is that prescribed by the second article of the copartnery which I have already quoted—an article expressly intended, as it appears to me, to meet the present case, supposing it to be such as the pursuer, erroneously as I think, represents it to be. The transaction between Reid and the defender embodied in the agreement was not of the class or description to which the principle or rule of law relied upon by the pursuer in this part of his argument has any application. I can very well understand the principle or rule of law whereby the benefit of a purchase or acquisition made or obtained by one of several partners of a company of something falling under the scope of the company's business might be claimed by the other partners of the company, or whereby a partner cannot stipulate for any private and individual advantage at the company's expense or to their loss and injury; and I am aware that there are many examples or illustrations of this rule, some of which were cited in the argument for the pursuer. But I am unable to see how the acquisition by the defender of Reid's share or interest in the company in question can be held to fall under the rule or principle referred to, for in no correct sense, can it be held that it was the business of the company to deal in the shares of copartnery, or that the agreement was obtained at the expense of or to the loss or injury of the company. Nor do I see how the rule can apply to a purchase or acquisition such as that in question, which was made in respect of personal considerations, which have no application to the pursuer or any individual whatever other than the late Mr Reid and the defender.

The only remedy, as it appears to me, that could be made available to the pursuer against the agreement in question in the present or any such case was to deny its validity and resist any attempt to enforce it during the life of Reid. But I can see no intelligible ground on which the pursuer can maintain the validity of the agreement to the effect of converting it into one not for the benefit of the defender, as his uncle the late Mr Reid intended it to be, but for the benefit of the company of which he is a partner. If injury had arisen to the pursuer through or in consequence of the agreement, he might have had his claim for damages, but he has not averred any such injury and claims no such damage. His present action is not of that nature at all.

In these circumstances, and for the reasons now stated, as well as those so ably enforced by the Lord Ordinary, I am of opinion that the interlocutor reclaimed against is well founded, and ought to be adhered to.

Lord Gifford—The circumstances attending this case are in many respects very special and exceptional, and I have not found the questions arising out of them to be unattended with difficulty. The concealment from the pursuer Mr Cassels of the arrangements which were made and concluded between the other two partners of the firm—that is, between the late Mr James Reid and the defender Mr James Reid Stewart—was at first sight calculated to produce an unfavourable impression against the defender, and there seems

to be little doubt that had the pursuer known of these arrangements at the time they were entered into, or at any time before the death of Mr Reid, he might have terminated the copartnership or might have insisted on having a larger interest therein than one-third share. I do not wonder that the pursuer complains that the arrangement between Mr Reid and the defender was concealed from him, and am not surprised that he should attempt to do now, and by means of the present action, what he says he would have done if he had known of the minute of agreement between Mr Reid and the defender of 19th May 1863.

Still the pursuer's appeal is, and must be, to his legal rights as a partner of the firm, and after full consideration, and with the benefit of the exhaustive argument which was submitted from the bar, I have come to be of opinion that the agreement between the late Mr Reid and the defender was in itself legal, and was not challengeable by the pursuer either as a partner of the Glasgow Iron Company or otherwise. I am further of opinion that the pursuer is not entitled to claim any benefit or any right under or in virtue of the said agreement of 19th May 1863, to which he was no party, and of which he had no knowledge. I think that agreement, which was never intimated, did not operate as a dissolution of the company, and did not directly or indirectly transfer any part of James Reid's interest in the company to or for behoof of the pursuer. It follows that the pursuer cannot insist in the conclusions of the present action, and that the interlocutor of the Lord Ordinary should be affirmed.

The present action concludes—[*His Lordship then narrated the conclusions of the action.*] Now, these are the whole conclusions of the action. It is not an action of damages founded upon an alleged wrong or breach of contract committed either by the late James Reid or by the defender, and seeking reparation for loss sustained. The action seeks, and seeks solely, to have the reconstitution of the partnership declared, as in 1859, as a partnership between the pursuer and the defender alone as at that date, and as a consequence of this the equal division of the profits ever since. Now, I find myself quite unable to reach this conclusion in whole or in part, and the result must be absolvitor from the present action.

It is not the same question whether the pursuer might not have a remedy of some kind in another form; and on this question of course I can give no decision under the present action. I think it fair to say, however, that if I am right in holding that the agreement of 1863 between the defender and Reid was not illegal, and was not challengeable by the pursuer, and that the pursuer took no right or interest under that agreement, then I cannot at present see how he has any ground to complain either by action of damages or otherwise that that agreement took effect as between Reid and the defender.

The contract of copartnery under which the Glasgow Iron Company was originally constituted is dated 15th May 1845. There were originally four partners—the late James Reid, the defender James Reid Stewart his nephew, the pursuer Robert Cassels, and Noah Meese. The duration was to be seven years from Whitsunday 1845, but power was given to dissolve at the end of five years from that date on giving six months' notice. Several alterations took place in the firm. In 1847 a Mr Robertson was assumed as a partner, in 1850 Mr Meese retired, and in April 1860 Mr Robertson retired as at 31st May 1859. On the occasion of Mr Robertson's retirement a minute of agreement was prepared dated 31st May 1860, but not signed till March 1864, that the three remaining partners, namely, the late James Reid the pursuer, and the defender, should each have an equal share in the company's business as from the date of Mr Robertson's retirement, and that the pursuer's salary as managing partner should be raised to £1000 per annum. This minute was acted upon down to Mr Reid's death in October 1870. The docquets which followed upon it are sought to be reduced, but there is no challenge of the agreement itself. As I have already noticed, neither is there any challenge of the private agreement between James Reid and the defender of 1863. On the contrary, the pursuer founds upon that agreement and claims that in virtue thereof he is entitled to half of the whole profits since Whitsunday 1859.

In 1863, then, I think it may be taken that the Glasgow Iron Company consisted of three partners each equally interested in the concern—James Reid the pursuer, Robert Cassels, and the defender James Reid Stewart. They carried on business under the old contract of 1845 with the various minutes of alteration annexed thereto. But the original period of endurance of that contract had long expired. The full period of seven years had elapsed in 1852, no new period of endurance had ever been agreed upon, and the result was that though the contract was in force so far as applicable to the existing circumstances, the partnership was a mere partnership at will, dissolveable by any of the partners at any time provided reasonable notice was given, and provided no undue advantage was taken by any partner operating dissolution at an unfair crisis. It is of importance to keep in view that this was the position of the three partners in 1863, and prior to the date of the private agreement between two of them James Reid the senior partner, and the defender James Reid Stewart his nephew.

So standing matters then, what was the private agreement which was entered into between the said James Reid and his nephew the defender James Reid Stewart on 19th May 1863. The terms of the deed have been subjected to a minute and severe criticism, but I cannot help thinking that in substance the true nature of the deed is comparatively simple. James Reid, it appears, was an elderly gentleman, and at the very date of this agreement was arranging his family settlements. Professor Roberton proves that he was consulting his law-agents regarding his settlements from 1863 to February 1865, when the settlements were finally completed. The defender was Mr Reid's only nephew, and though he had other relatives, it appears he wished to make some provision in favour of the defender, who besides being his only nephew had long been his partner in business. Naturally enough he contemplated providing for his nephew in connection with the firm and his interest therein rather than by giving him separate and unconnected funds or estate. I see no reason to doubt the defender's statement on this point. He explains in his evidence that his uncle Mr Reid told him what his settlements were to be, and

mentioned that he, the nephew, was not to get anything under the former will, but was to get the benefits under the agreement instead; but if confirmation is necessary, I think the agreement itself abundantly confirms this view, for I have only to read the agreement to see that it confers upon the nephew very large pecuniary advantages. It gives to the nephew, the defender, the whole past accumulated profits in the firm amounting to £25,000, it gives him the whole future profits of the business, amounting to a very large sum, apparently many thousands per annum; it gives Mr Stewart the benefit of Mr Reid's whole capital, amounting to £62,400, and that if Mr Stewart chose for twenty years at only four per cent. interest. Mr Stewart was not to be bound to pay any part of the capital for twenty years unless he should find it convenient to do so. Mr Reid knew quite well that he was giving this enormous pecuniary benefit to his nephew, and he said so to Professor Roberton, his own agent, whom he, Reid, alone had employed to prepare the deed. Professor Roberton tells us that Mr Reid in adjusting the deed said, "That is a good bargain" (meaning a good bargain for the present defender), it is "worth a hantle more than that, but James (that is, the defender) and I have been long connected and he deserves it for all that he has done for me." The agreement was prepared by Professor Roberton on the sole instructions of the late James Reid. The present defender never saw it till it was sent to him in draft, having apparently only been told of it by Mr Reid on the morning of the same day, and of course the defender was willing to accept of what he must have regarded as a very handsome and generous gift by his uncle. I think it manifest that although the deed of May 19, 1863, is in the form of a minute of agreement, it is in reality and in substance a deed of gift and quasi-settlement and provision by old Mr Reid in favour of the defender his nephew. It was granted from favour and affection to the defender on the part of Mr Reid, and was never intended either by Mr Reid or by the defender to give any pecuniary benefit whatever to the present pursuer, who was an entire stranger to Mr Reid, although he happened to be the third partner of the firm. I think nothing can be clearer than that it would have been contrary and opposite to every intention of the late Mr Reid that any part of what was in substance his testamentary bounty should go to the pursuer, who was simply the salaried managing partner of the firm. There is no equity therefore, so far as I have gone, in the demand of the present pursuer. If the late Mr Reid had anticipated such a demand as the present he would certainly, so far as we can judge, have effected his purpose of favouring his nephew in some other way.

It is true the minute of agreement is a deed *inter vivos*, although I think it clear that in substance it was a gift and settlement by the late Mr Reid. It contains a present conveyance in favour of the defender of Mr Reid's whole right and interest in the company concern carried on under the firm of the Glasgow Iron Company, and it is to take effect, not at its date in May 1863, but from May 31, 1859, four years preceding, with all the profits that had accrued since that date, and all the profits that might thereafter arise. The price is £62,400, being the amount of stock standing at Mr Reid's credit in the books as at May 31, 1859, and this price is to be paid anytime within 20 years as may be convenient for the nephew Mr James Reid Stewart, and it is only to bear interest at four per cent. The 7th article specially provides that the whole interest and stock may remain in Mr James Reid's name, and it is only to be transferred to the name of the nephew if the nephew shall require it. I think this virtually amounts to a stipulation that James Reid shall continue a partner in the existing firm so long as the defender may require it. Accordingly, it appears that Mr James Reid did continue a partner of the firm down to his death in 1870. He signed periodical docquets on the balance-sheets dividing profits—he drew and discharged his share of profits as partner, although he may have handed over these to his nephew. He continued a partner of the firm down to the date of his death in exactly the same way as if the minute of agreement with his nephew had never been executed. That minute was never intimated to the firm or to the pursuer; the pursuer never knew thereof; and so far as the pursuer was concerned, it made no difference whatever in any of the relations which the pursuer had either to the late Mr Reid or to the defender, and did not affect in any way the pursuer's rights and interests in the existing copartnery.

The pursuer no doubt founds upon the alleged concealment of the minute as having been to his prejudice, but if the agreement was really of the nature I have indicated, the pursuer had no interest therein and it did not require intimation. It could not in any way affect his rights, and if, although in the form of an *inter vivos* gift, it was really of the nature of a *mortis causa* settlement or provision, as I am satisfied it was, this really explains why it was not published during Mr Reid's life, but was left to take effect and be carried out only on his death. I confess I was at first somewhat impressed by the concealment which the defender kept up even after Mr Reid's death, but I have come to think that this in no way affects the rights of parties. I think there was no obligation either on Mr Reid or on the defender to disclose the deed.

The pursuer's first contention was, that the minute of agreement operated, not in favour of the defender alone, but in favour of the defender and the pursuer equally as the two remaining partners of the firm. In order to make out this the pursuer must establish that the defender in entering into the agreement or in accepting his uncle's munificent gift acted in a trust or in a fiduciary capacity, and was bound to communicate to himself and to the pursuer as the trust beneficiaries or *cestuique* trusts all the benefits secured by the agreement. I think the pursuer has entirely failed to do this. It was suggested that on the occasion of Mr Robertson's retirement Mr Reid thought that Robertson should not have received any bonus, and said this to the defender. This being reported to the pursuer, he said to the defender that he was willing to pay out Mr Reid on the same terms as Mr Robertson, and an attempt is made to infer from this that the pursuer employed the defender to buy Mr Reid out on the same terms as Mr Robertson, or on as much better terms as he could get. It is then urged that the deed of agreement of 1863, four years later, must be

held as the execution of this mandate, and must be taken as if it had been a retirement of Reid in favour of the pursuer and defender jointly. The pursuer and defender are the only witnesses as to the import of the conversation, and I cannot hold it proved either that the pursuer employed the defender to buy out Mr Reid or that the defender either accepted or acted upon any such employment. Still further, I think it impossible to hold that the agreement of 1863 was in any sense a retirement of Mr Reid from the firm. On the contrary, I think it an essential part of that agreement that Mr Reid was not to retire from the firm, but to continue a member thereof with all the rights and responsibilities of a partner so long as the defender should choose, although no doubt the pecuniary interests and benefits of the partnership were to be made over by Mr Reid to his nephew under what I have ventured to call the gratuitous and *quasi-mortis causa* settlement and provision embodied in the deed of agreement. I cannot hold therefore that the defender in accepting of the benefits conferred by the minute of agreement was in any sense a trustee or acting in a fiduciary character either for the firm or for the pursuer. The defender, and the defender alone, was the sole beneficiary under the minute of agreement. It would never have been entered into by Mr Reid on any other footing. I cannot help thinking that the pursuer's attempt to share in what was substantially Mr Reid's testamentary bounty, —and that to the extent, it is said, of upwards of £50,000,—is really unconscionable.

But the pursuer next says that the minute of agreement so far as operating an entire transfer of Mr Reid's stock and interest in the company is illegal and null and void. The pursuer maintains that it was *ultra vires* of Mr Reid to make over his interest in the firm in favour of the defender. Now, this is not the case put on record, which assumes the validity of the deed and simply claims the benefit of it for the pursuer equally with the defender. But supposing this objection to be got over (which is difficult), wherein consists the illegality of the assignment? No doubt Mr Reid had no power to introduce a new partner into the firm, or to give the defender a larger say in the firm than the contract permitted, but while the contract subsisted and the whole original partners survived and acted as such there was nothing to prevent the partners, or any of them, from assigning their pecuniary rights in whole or in part to any body they chose. The pursuer's fallacy is, that he regards the assignation, as a transference of Reid's right of partnership—as a substitution by Reid of a new partner in place of himself—but this is not so. Reid notwithstanding the agreement remained as much a partner as he had ever been, and he continued so to the end. It is the pursuer's own case that he acted as partner, signed docquets, and drew profits till his death. It is quite fixed law that the interest of a partner may be assigned or attached without the consent of the other partners, although this will not affect the rights of other partners under the contract. The familiar instance of this is the constitution of sub-partnerships, whereby individual partners, without the knowledge, or against the consent, of the other partners, communicate shares of their individual interests to sub-partners with themselves, and the company has nothing to do with such sub-partnerships. In the case of *Barrow*, 1815, 2 Rose 252, Lord Eldon said—"I take it to have been long since clearly established that a man may become a partner with A where A and B are partners, and yet not be a member of that partnership which existed between A and B." It could hardly be disputed that if Mr Reid had made a sub-partnership with the defender, and given the defender a half or three-fourths or nine-tenths of his (Reid's) share, this would have been a good sub-partnership, and the pursuer could not have objected, his interest being no way affected thereby. I do not think it makes any difference that Mr Reid gave his nephew the whole profits, stipulating only for four per cent. on the capital which he left in the concern. Indeed, the bargain between Reid and the defender was really a sub-partnership as to Reid's share, by which the defender took his chance of the profits, whatever they might be, and agreed to give Reid, as his share thereof, a fixed return of four per cent. on the capital of Reid's share. I cannot see how the defender can object to this.

But, further, even an out and out assignation of Reid's interest was quite lawful provided Reid continued a partner and fulfilled all the conditions of the contract. I think the law is quite accurately laid down by Mr Justice Lindley (Lindley, i. 698), and the doctrine is amply supported by the authorities cited. His words are—"Although a partner cannot by transferring his share force a new partner on the other members of the firm without their consent, there is nothing to prevent a partner from assigning or mortgaging his share without consulting his partners, and if a partner does assign or mortgage his share, he thereby confers upon the assignee or mortgagee a right to payment of what, upon taking the accounts of the partnership, may be due to the assignor or mortgagor. But the assignee or mortgagee acquires no other right than this, and he takes subject to the rights of the other partners, and will be affected by equities arising between the assignor and his copartners subsequently to the assignment." I take this to be an accurate summary of the result of the cases and authorities, and into these I do not deem it necessary to go.

Indeed, it seemed ultimately, though certainly not very willingly, to be admitted, or at least not very seriously disputed, that if this agreement had been made, not with the defender, but with an entire stranger to the firm—a third party—say some other relative of Mr Reid's—the pursuer could not have objected. It must have received effect. But it was urged that though such a bargain could have been made with a third party, a stranger to the firm, it could not be made with the defender, because he was a partner of the principal firm. No authority was quoted for this proposition, and although ingenious reasons were suggested founded on the increased influence which a partner would thus obtain, I am not prepared to hold that what can be lawfully given to a third party without the knowledge or consent of the partners cannot be given to one of these partners themselves. It would come to this, that while a single partner may take all the world into a sub-partnership with himself, he cannot include in the sub-partnership one or more of the original

partners. This would be a strange result. Equally ingenious, and I rather think more cogent, reasons could be given for excluding strangers as sub-partners or as assignees than for excluding individual partners themselves.

The analogy from the rights of creditors affords a strong plea in support of the defence. A creditor of a partner cannot force himself into a partnership, because that would be a violation of the *delectus personæ*, which forms the essence of partnership in private companies. But the creditor can attach his debtor's share and interest in the firm provided he does not injure or affect the other partners, and where there is no clause making bankruptcy or insolvency a dissolution of the contract or a forfeiture, the creditors of a partner may arrange with their debtor that he shall continue a partner and carry on for their benefit so long as the partnership endures. The creditors will not be partners, but they will reap the whole benefits which accrue, and the other partners, apart from special stipulation, cannot object.

I think these views are sufficient for the decision of this case, and I concur in all the observations which your Lordships have made, but I desire also to rest my judgment on the special circumstances attending and characterising the agreement and assignation in the present case as being really a personal gift and provision made by the late James Reid to his nephew James Reid Stewart as a *persona predilecta* whom the granter wished and intended to favor, and in the advantage of which gift and favor the pursuer neither in law nor in equity is entitled to participate. The pursuer's interest in the copartnery is neither greater nor less than it would have been had the late James Reid instead of making over his separate share to the defender retained it to himself. It is no concern of the pursuer to whom the late Mr Reid chose to give what was his own property—his own share and interest in the Glasgow Iron Company.

The time that has elapsed, the transactions that have taken place, the division of profits which have been made, the use of the capital which has been had, make it impossible to go back now and effect a dissolution either as at 1863, the date of the agreement, or as at 1859, to which date the assignment drew back. Mr Reid's capital was allowed to remain in the concern only on the footing that the profits were to go to his nephew, he himself being contented with four per cent. interest. The pursuer was in no way prejudiced by this, and I think it would be unjust, now that Mr Reid is dead, to go back twenty-one years and redistribute in a different way the very large profits which no doubt partly by the use of Mr Reid's name and influence as well as from his capital have been realised and divided.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Balfour—Asher—Jameson. Agents—J. & J. Ross, W.S.

Counsel for Defender (Respondent)—Kinnear—Mackintosh. Agents—Hamilton, Kinnear, & Beatson, W.S.

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*Wednesday, June 4.**

FIRST DIVISION.

[Lord Young, Ordinary.

CITY OF GLASGOW BANK LIQUIDATION—(*HUNTER'S CASE*)—HUNTER *v.* LIQUIDATORS OF THE CITY OF GLASGOW BANK.

Public Company—Winding-up—Liability of One holding Stock as Trustee for a Bank.

A was prevailed upon by B, the manager of an incorporated bank, to allow certain stock of the bank to be purchased in his name and held by him as trustee for the bank. Shortly afterwards A requested B to remove his name from the register, so that it might not appear in the published list of shareholders. The name was therefore not published, but it was not removed from the register. The bank failed, and calls were made upon A in respect of the stock. In an action against the bank at A's instance to have it declared (1) that he was not a partner of the company, and that his name should be removed from the register; and (2) that the defenders were the true proprietors of the stock and bound to relieve him of all liability he had incurred in respect of it—*Held* that as the pursuer was the proprietor of the stock the action must be dismissed, but reserving to him any claim of relief he might thereafter be able to establish against the bank or its shareholders after its debts had been paid.

Mr John Hunter was at the date of the failure of the City of Glasgow Bank registered as owner of stock to the amount of £3600, the warrant being two transfers dated in the year 1877 and accepted by him. In January 1877 Mr Stronach, the manager of the bank, had asked Mr Hunter, who was employed in the bank, to allow some shares of the bank to be taken in his name. He agreed to this and the shares were bought in the open market in his name. About May or June of that same year Mr Hunter called on Mr Stronach and requested him to keep his name out of the printed list of shareholders, which was published annually in June, and to remove his name from the register. Mr Stronach promised that this should be done. His name did not appear in the published lists, but when the bank failed it was found that it stood still on the register. Mr Hunter received no dividend warrants or notices of any kind regarding the stock, and no money ever passed between him and the defenders. In these circumstances, he presented a petition to the Court of Session praying for a rectification of the list of contributories. He also brought an action of declarator before Lord Young, the conclusions of which were as follows:—"That the pursuer is not a member or partner of or shareholder in the defenders' company, and that the entry or entries on the defenders' register of members, whereby it is made to appear that the pursuer is proprietor of £3600 of the stock of the said City of Glasgow Bank, are erroneous and unauthorised, and altogether invalid and ineffectual against the pur-

* Decided February 28, 1879.