was not intentional, but was due to inadvertence, and that there was nothing in the position of the company or in connection with the issue of the shares which would have made it inexpedient or prejudicial for the company to file a contract before the issue of said shares. I have referred to the fact that not only has there been failure timeously to file a contract with reference to the 95 shares issued as fully paid-up to Mr Rodger, but also that there has never been a formal contract in writing in regard to the arrangement which was apparently come to at the meeting of directors on 5th December 1893. The two requisites prescribed by the 25th section of the Companies Act 1867 are — (1) a contract duly made in writing, and (2) that that contract be filed with the registrar at or before the issue of shares deemed to be fully paid-up in respect of a consideration other than cash. The Companies Act 1898 empowers the Court to grant relief in cases of non-compliance with section 25 of the Companies Act 1867, in so far as there has been failure timeously to file a contract, but it may be open to question whether the Act affords or was intended to afford relief in cases where there has not only been failure to file a contract but also failure, as in the present case, to reduce a contract to writing. The petitioners have referred me to the petition of *John Pollock and Another*, presented 27th October 1899, in which in very similar circumstances the prayer of the petition was granted by your Lordships on the statement of counsel at the bar, and without any further inquiry. I have been unable to find any decisions on the point by the courts either in England or in Scotland, and in the circumstances your Lordships may perhaps be disposed to follow the precedent to which I have referred."

The Court (without giving opinions) granted the prayer of the petition.

Counsel for the Petitioners—J. A. Christie. Agent—Forbes T. Wallace, S.S.C.

Tuesday, August 13, 1901.

OUTER HOUSE.

MORRICE *v.* CRAIG.

Process—Set and Sale—Public Roup of Ship—Pursuers Bidding at Roup without Leave, and without Notice to Co-Owner—Fiduciary Relation of Pursuers in Set and Sale to Co-Owner—Reduction of Sale—Trust.

A and five other persons were owners of a ship in equal shares. The five co-owners brought an action of set and sale in the Sheriff Court against A, who did not enter appearance. The Sheriff-Substitute remitted to a man of skill to fix the upset price of the ship, and subsequently granted decree for the sale of the ship by public roup at the upset price so fixed. The sale was advertised in the local newspapers and by handbills. The date of sale and upset price were intimated to A, and the articles of roup were prepared at the sight of the Sheriff-Clerk-Depute. Neither the interlocutor ordering the sale nor the articles of roup contained power to the sellers to bid, and no notice was given to A that the pursuers in the set and sale intended to bid. At the sale the ship was purchased by the pursuers in the set and sale at the upset price, they being the only bidders.

In an action brought by A against the pursuers in the set and sale, for reduction of the sale, *held* (1) that the pursuers in the set and sale had in material particulars the conduct and management of the sale; (2) that therefore they were in a fiduciary position towards A, and were disqualified from purchasing at the sale without notice to A and without leave to bid; (3) that even if this disqualification were not absolute, the proceedings with a view to sale were in fact conducted by the pursuers in the set and sale without due regard to the interests of A—and sale *reduced*.

This was an action at the instance of James Morrice, South Esplanade, East Torry, Aberdeen, against Robert Craig, 23 Wood Street, William Walker, 21 Wood Street, George Craig, 17 Baxter Street, George Main, 21 Wood Street, George Main junior, 21 Wood Street, and George Craig, Abbey Place, all in Torry, Aberdeen, and William Meff junior, ship-owner in Aberdeen.

The pursuer and the defenders had been owners of a certain steam-fishing vessel called the "East Neuk," and the defenders had purchased this vessel at a public roup carried through under an action of set and sale brought at the instance of the defenders against the pursuer. The question in this case was whether the pursuer was entitled to have this sale reduced.

The pursuer concluded for reduction of (*first*) minute of preference and enactment, dated the 27th day of June 1900, executed by the said William Meff junior, on behalf of the other said defenders, whereby he was alleged to have purchased on their behalf, at the price of £1950 sterling, the steam line-fishing vessel "East Neuk" of Aberdeen, her boats, apparelling, and appurtenances, and also by James Conner, Sheriff-Clerk-Depute of Aberdeen, at Aberdeen, judge of the roup; (*second*) the interlocutors, dated respectively 29th June, 6th July, and 11th July, all in the year 1900, and bearing to be signed by the Sheriffs-Substitute at Aberdeen, and pronounced in an action of set and sale at the instance of the defenders Robert Craig, George Craig, William Walker, George Main, and George Main junior, against this pursuer, and which interlocutors are in the following terms:—"Aberdeen, 29th June 1900.—Having considered the minute for the pursuers, grants the crave thereof—DUN. ROBERTSON." "Aberdeen, 6th July 1900. — Remits the pursuer's account of

expenses to the Auditor of Court to tax and report—DUN. ROBERTSON." "Aberdeen, 11th July 1900.—Approves of the pursuer's account of expenses, finds the taxed amount thereof is £32, 6s., grants warrant to and authorises the Clerk of Court to pay the amount of said expenses out of the consigned money, and decerns—GEO. WARDLAW BURNET;" and (*third*) bill of sale following upon the said pretended sale granted by the said defenders other than the said George Craig, Abbey Place, Torry, Aberdeen, or by any of them, or any other person or persons in implement of the said pretended minute of preference and enactment, as part owners of the said ship or vessel "East Neuk" of Aberdeen, in favour of the whole defenders other than the said William Meff junior, whereby it is pretended that the said William Meff junior, on or about the 27th day of June 1900, purchased on behalf of the said defenders Robert Craig, William Walker, George Craig, George Main, George Main junior, and George Craig, Abbey Place, Torry, conform to agreement and articles and conditions of roup and sale, dated the 26th day of June 1900, executed by David Littlejohn, Sheriff-Clerk of the counties of Aberdeen and Kincardine, and minute of preference and enactment executed by the said William Meff junior, and by the judge of the roup on the 27th day of June 1900, the steam line-fishing vessel "East Neuk," then lying in the harbour of Aberdeen, with her boats, apparelling, and appurtenances. The pursuer also concluded for declarator "That the purchase by or on behalf of the defenders of the said ship 'East Neuk' was illegal and inept, and that the said purchase was not a valid purchase, and the defenders ought and should be interdicted, prohibited, and discharged from registering the said ship in their names, or from doing anything as owners other than what they could have done had the said purchase not taken place."

The defenders compearing in the action were Robert Craig, William Walker, George Craig, George Main, and George Main junior.

The pursuer averred, *inter alia*, that he and the compearing defenders were owners of the steam line-fishing ship "East Neuk," each owning one-sixth part of said ship. "(Cond. 2) On or about 4th June 1900 the said defenders raised an action in the Sheriff Court of Aberdeen, Kincardine, and Banff, at Aberdeen, against the pursuer, concluding for a decree that as the said defenders (the pursuers in said action) were willing to sell to the pursuer (the defender in said action) their five-sixth shares of the said ship 'East Neuk,' Aberdeen, and her boats, furniture, and apparelling, for the sum of £1863, 6s. 8d., the pursuer should accept their offer, or otherwise the pursuer should sell, set, and give over to the defenders his one-sixth share of the said ship or vessel, her boats, furniture, and apparelling, at the price of £366, 13s. 4d., upon payment to him of the said sum; or otherwise and in the event of the pursuer being unwilling either to buy or sell, to ordain the said ship or vessel, with her boats and apparelling, to be sold by public roup, and the proceeds, after deduction of all expenses, divided among the parties according to their respective rights and interests, and to decern against the pursuer for the expenses of the said action. The *inducice* asked and allowed for entering appearance was only three days. . . . (Cond. 3) The pursuer did not enter appearance to defend the said action, and on 12th June 1900 the defenders, through their agent, R. D. Leslie, advocate, Aberdeen, asked for and obtained in the said action, *inter alia*, a warrant appointing Mr James Hunter, ship builder, Aberdeen, to make an inventory and valuation of the said ship and her boats, apparelling, and appurtenances. Mr Hunter was suggested to the Court by the defenders' said agent. The said James Hunter was appointed, and accordingly made a valuation on the instructions of the defenders' agent of the said vessel, &c., and fixed the value thereof at £1950. The said valuation was prepared by the defenders' agent. Thereafter on 19th June 1900 the defenders moved for and obtained a decree ordaining the said vessel to be sold by public roup on 27th June 1900 at the upset price of £1950, and moved the Court that the sale be advertised in the *Daily Free Press* and *Aberdeen Journal* twice at least before the day of sale, and intimation to be made by circulation of hand-bills in the locality of the harbour of Aberdeen and also to the pursuer. The Court granted the defenders' motion, and appointed the sale to proceed upon articles and conditions of roup to be prepared at the sight of the Clerk of Court, and the price to be obtained for the vessel to be deposited in the Town and County Bank, Limited, in the name of the said clerk, subject to such orders as the Court might grant. The articles of roup were prepared by the defenders' agent. They are not in the usual terms. Neither the interlocutor ordering sale nor the articles of roup contain power to the sellers to bid. The advertisements and the handbill were prepared by the defenders' said agents, who also instructed said advertisements to be inserted in the newspapers and the handbills to be distributed. The person whom they instructed to distribute the handbills was the defender William Meff junior, who was in the habit of acting as fish salesman for the defenders, and who purchased the said vessel for the defenders as afterwards narrated, His being a servant of the defenders was known to the defenders' agent. . . . No proper distribution of the said bills really took place. . . . The said sale was advertised on 22nd and 23rd June 1900, but the advertisements did not contain any reference to the upset price. . . . (Cond. 4) The defenders' said agent procured the auctioneer and instructed him, and hired the room for the sale. The said agent attended the sale. No one offered at the said sale for the said vessel excepting William Meff junior, who offered the upset price for her on behalf of

the defenders, who were thereupon declared by the Clerk of the Court, who acted as judge of the roup, to be the purchasers of the said vessel. . . . Immediately on the said purchase being made, the defenders lodged in the said action a minute craving the Court to limit the consignation to be made in terms of said articles to the pursuer's share (£325) of the price offered by them for the vessel, and on 29th June 1900 the Sheriff issued an interlocutor granting the request. This motion was contrary to the former interlocutor of the Court, which had been intimated to the pursuer. Thereafter consignation was made of said £325, and the said defenders, on 11th July 1900 obtained warrant to uplift from it the sum of £32, 6s., being the expenses incurred by them in connection with the said action. . . . The whole procedure under the said action was carried out in the absence of the pursuer. . . . (Cond. 5) The said alleged purchase by the defenders was to the prejudice of the pursuer, and was illegal and invalid. The pursuer had no suspicion that the defenders intended to purchase for themselves the said vessel. The defenders were in a fiduciary position as regards the pursuer. They had it in their power to bring on the sale tardily, or at a time suitable to themselves. The defenders, other than the said George Craig, were the sellers of the said vessel, and were legally incapable of making or authorising anyone to make on their behalf an offer for the purchase of the said vessel, or any share of it. . . . The whole of said proceedings were carried out with undue haste, and were prejudicial to the interests of the pursuer. There was not sufficient advertisement or notice given to the public, and if there had been, a much higher price would have been realised. The defenders, when bringing the said action, valued the ship at £2200, and the pursuer's share at £366, 13s. 4d. It, however, was of much greater value than that put upon it by the defenders. If it had been properly sold it would have fetched a much higher price than that brought at the alleged sale, the value of said vessel being at least £2200."

The compearing defenders admitted that they and the pursuers had been joint-owners of the said ship, and that the action of set and sale had been brought by them in the Sheriff Court. The process and interlocutors in the Sheriff Court were referred to. They explained that the Sheriff fixed the *inducice* at three days, as in his view it was important that the sale of said ship should be carried out with despatch. They explained (Ans. 3) that James Hunter, after inspecting said ship, dictated his report to Mr Leslie, and that it was thereafter revised by Mr Hunter and sworn to by him in an affidavit before the Sheriff-Clerk-Depute. The articles of roup were revised by the Sheriff-Clerk-Depute, and the handbills were widely circulated. They also explained (Ans. 4) that the auctioneer and judge of the roup was Mr Conner, the Sheriff-Clerk-Depute, appointed by interlocutor of 19th June 1900, under whose supervision said sale was carried out; that the pursuer had ample opportunity of appearing during the course of said action; and the place and date of sale were intimated by the agent for defenders sending to him in a registered letter a copy of the interlocutor of 19th June 1900, authorising said sale and intimation thereof to pursuer. (Ans. 5) "Explained that the valuation placed on said ship by defenders was too high, as is shown by that fixed by Mr James Hunter. Further, explained that the whole proceedings connected with the sale were conducted throughout under the orders of the Court. The pursuer has not suffered any damage whatever through the procedure complained of." *Quoad ultra* the averments of the pursuer were denied.

The pursuer pleaded — "(1) The defenders other than the said George Craig, Abbey Place, Torry, and William Meff junior, having, as sellers of said ship, been disqualified from purchasing her without the consent of the pursuer, the alleged purchase is illegal and invalid, and ought to be reduced, with expenses. (2) The pretended purchase of said vessel by the defenders is void and inept in respect (1st) that it was incompetent for them to purchase the said vessel, because they were part owners with the pursuer; (2nd) that it was incompetent for the defenders to purchase at a sale conducted at their own instance, and mixed up as they were with the whole arrangements in reference thereto; (3rd) in respect that their conduct at and in reference to the sale was calculated to and did secure the vessel to themselves at an inadequate price, to the pursuer's prejudice."

The defenders pleaded—"(1) No relevant case. (2) No title to sue. (3) The pursuer not having suffered any loss or damage through the defenders, has no interest to insist in the action. (4) The material averments of the pursuer being unfounded in fact, the defenders should be assoilzied."

The Lord Ordinary (PEARSON) allowed a proof. The evidence, so far as material, and the arguments of the parties, are sufficiently set out in the opinion of the Lord Ordinary.

The Lord Ordinary, by interlocutor of date 13th August 1901, reduced, decerned, and declared in terms of the conclusions of the summons.

LORD PEARSON—"In June 1900 the pursuer and the five compearing defenders were owners of the steam fishing vessel 'East Neuk' in equal shares. The pursuer now seeks to reduce a sale of the vessel which was carried through by public roup in an action of set and sale in the Sheriff Court of Aberdeen, whereby the compearing defenders became the purchasers at the price of £1950. The parties had bought the vessel in Arbroath about fifteen months previously at the price of £2400. It is not suggested that they paid more than a fair price for her. On the contrary, Mr Meff, fish salesman in Aberdeen, who took part

in the negotiations for purchase and inspected her in Arbroath, expressed the opinion that they 'had got a good ship and a very good bargain.' So says the pursuer, and it is not contradicted.

"Each of the owners paid £200 towards the price, the remainder being borrowed from bank, and each was to serve on board as one of the crew. They so fished from Aberdeen until January 1900, when owing to some disagreement with his partners the pursuer left the boat and did not return to it. This necessitated the hiring of a man in his place. But this proving unsatisfactory, the pursuer was approached more than once with a view to his share being acquired by the other owners. The pursuer seems to have been willing to sell his sixth share at first on the basis of the price which had been paid (£2400), and afterwards on a basis of £2200; but for some reason they could not settle their differences, and the defenders say the pursuer's last word on the subject was that they might do anything they liked with her.

"The defenders thereupon consulted Mr Meff, their fish salesman, who advised them to put the matter into the hands of his law-agent, Mr Leslie, advocate in Aberdeen. Mr Leslie, with the view of avoiding litigation, suggested that the vessel should be exposed to public roup, and drafted a mandate to that effect to be signed by the six owners. The mandate bore (as the pursuer points out) that any of the parties might bid for the vessel at the roup. On this being presented to him by his co-owners, the pursuer refused to sign it, and the result was that Mr Leslie advised his clients to raise an action of set and sale in the Sheriff Court, which was done on 4th June.

"In that action, which was at the instance of the present defenders, the petition bore that they were willing to sell their five-sixth shares, or to buy the present pursuer's one-sixth share, on the basis of a value of £2200, one-sixth of which is £366, 13s. 4d. The Sheriff-Substitute having remitted to a shipbuilder in Aberdeen to report on the upset price, the ship was exposed on 27th June at £1950 (the figure named by him), and was knocked down to the present defenders at that price, they being the only bidders. Thus having come into Court with a virtual offer of £366, 13s. 4d. for the present pursuer's share, they acquired it for £325. Of course, they being the purchasers, the only thing that was really sold was the present pursuer's one-sixth share. *Quoad ultra* they as purchasers paid themselves, whether the price was large or small.

"The pursuer now brings this action to have the sale reduced. He does so on two grounds—(1) that one co-owner is *ipso facto* disqualified from bidding for the joint property at an auction without the consent of the others, and that in particular he is so when he is pursuer of the action of sale, and so virtually the seller of the subjects, and has not obtained leave to bid; and (2) that the defenders, notwithstanding the sale was a judicial one, were in fact so vested with the conduct and management of it as to be in a fiduciary position towards the pursuer, and were thereby disqualified from becoming the purchasers. A third ground of challenge is, that the whole proceedings, including the sale, were in fact carried through without due regard to the interest of the defender, and to his loss and damage. This, however, is hardly separable from the second ground, for it assumes that the defenders were charged with the pursuer's interest in the matter; and if they were, it is not necessary (though it may strengthen the pursuer's case) to show actual misfeasance or actual damage.

"The pursuer urged that his first plea-in-law was sufficient for the decision of the case, and that a proof was unnecessary. That plea, however, is founded on the defenders' position 'as sellers of the ship,' and it having been a judicial sale, the plea, if sustained without inquiring how far and to what effect they were so, would affirm the radical incompetency of the pursuer of a set and sale, or of a division and sale, becoming the purchaser at the roup. It would be strange if a disqualification so absolute could be removed by the simple expedient of obtaining leave to bid, though the fact that this is commonly applied for in practice, suggests strongly that it is not a matter of course, but is a thing to which the attention of the Court ought to be specially called.

"On the other hand, the defenders urge not merely that a judicial sale is not to be lightly disturbed, but that the court of the sale is charged with the interests of all concerned, and that no imputation should be allowed upon the procedure unless it can be shown that the court itself was misled. They point more particularly to the position of the present pursuer in the matter. It was through his conduct that the sale became necessary, and he had told them to do as they liked. He was duly served with the petition, and did not even enter appearance. He had special intimation of the interlocutor fixing the day of sale and the upset price, and he simply did nothing. I must say this goes far to neutralise any sympathy that might be felt for the pursuer's case. But there are two considerations which show that it is not conclusive. In the first place, the defenders state no plea of bar. And secondly, I do not find anything proved which should have suggested to the pursuer that the defenders were likely to bid, or were entitled to bid, much less that they had made up their mind to do so.

"It is certainly not to be left out of account that this was a judicial sale, and that the whole proceedings were *ex facie* regular, and (as the Sheriff-Clerk Depute puts it) were 'carried out in the usual way.' But he can only remember one other action of set and sale in his large experience in the Sheriff-Clerk's office; and as to the sale being 'judicial,' it must be kept distinctly in view (as the evidence clearly shows) that in many material re-

spects the conduct and management of such a sale rests with the party petitioning and his solicitor. It does so indirectly, for he it is who moves the Sheriff at each stage of the process, and therefore the question of speed or delay is largely in his hands. And it also does so directly as to all those preliminary matters which are not prescribed in detail in the Sheriff's interlocutors, but which are of great practical importance in securing competition, and are in practice worked out by the pursuer of the action. The practical grounds on which the sale is here challenged fall within one or other of these two categories. And it will be found that by some strange fatality, as often as two courses were open, the one tending to promote competition and the other to stifle it, the latter course was taken. I desire to say—and to say emphatically—that in my opinion there is no ground for reflecting on the conduct of any of the officials concerned, or on the character of the solicitors. It is perhaps specially necessary to say so, seeing that the pursuer has made certain statements on record which might be read as reflecting on the character of the solicitors, and which are disproved. I refer chiefly to the averment that Mr Hunter, shipbuilder, to whom the Sheriff remitted for report, was suggested to the Court by the defenders' agent, and that that agent also 'prepared' Mr Hunter's valuation. On the contrary, Mr Leslie had arranged to suggest a shipbuilding client of his own as reporter, when he learned that the Sheriff had appointed Mr Hunter—a circumstance which throws a curious light on the delicacy of the situation; for if Mr Leslie had had his way in this matter, he would have furnished the pursuer with a strong additional ground for attacking the sale. I believe that he acted in good faith and in the interest of his clients, unconscious that by virtue of their position they and he were bound to act with due regard to the interest of the pursuer, which was a conflicting interest.

"It must be borne in mind throughout that from the very beginning of the negotiations there was never any question of the pursuer buying out the defenders. He says indeed, naturally enough, that if he had had any idea that they were to bid on an upset of £1950 he would have attended the sale and bid against them. But all that passed between the parties previously was on the footing that the defenders were to buy him out; from which it follows, that his objection to their figure of £2200 was, and was known to them to be, not that it was too large, but that it was too small. They were indeed bound, according to the form of process in a set and sale, to come into Court offering either to sell or buy at a given figure; for without that their petition would have been incompetent (1 Shand's Pract. 417). But in substance and in fact the position was that they had offered and were still offering to buy his share on the basis of a £2200 value, and that he was holding out for more. How in these circumstances did the defenders get an opportunity of purchasing the vessel for £1950?

"Of course, we know how the upset price came to be fixed at that figure. It was the figure reported to the Court by Mr Hunter, a gentleman of standing and experience as an iron shipbuilder, as being 'the sum at which the vessel may be set up in a judicial sale.' In fixing this sum Mr Hunter considered but one thing, namely, the value of the ship. He was not even furnished with a copy of the Sheriff's interlocutor remitting to him, but was simply told by Mr Hay where he would find the vessel, and 'that he had been appointed by the Sheriff to value it.' In the interlocutor of remit he would have found nothing at all about value but only about upset price, except in a phrase at the end of it, which is plainly inaccurate and is not in accordance with the form as given in the Juridical Styles (iii., 183). Of course, in the ordinary case the proper upset is the value, or even a little less than the value, so as to induce competition. And I rather think that at this point the case was treated as if it were an ordinary action of sale of a ship, and not an action of set and sale. Mr Neill in his Maritime Practice, which was referred to, does not, in treating of set and sale, give the procedure at length (p. 178), but contents himself with referring to the case (p. 89) of a petition for the sale of an arrested ship. In such a case there is no guide to value except the report of an expert, and there is no reason for fixing the upset at any figure except the estimated value. And so it would be in an action of division and sale of *pro indiviso* property. But in an action of set and sale there is the peculiar feature already noticed, that the petitioner must come into Court with an offer. The figure upon which that offer is based is his estimate of the true value; for he is willing either to buy or to sell at that figure. In such a case, where the value arrived at by the expert differs materially from the petitioner's figure, it is matter for consideration upon the facts what is the proper upset. Assuming that the reporter had nothing to do but to value, then it falls to the petitioner to acquaint the Court with any circumstances bearing upon that question. In the absence of any such information the Sheriff would assume that the parties desired that there should be a fair competition and that the highest price should be obtained. That would be a correct assumption if neither party were to bid at the sale. But the evidence shows that the defenders had made up their minds from the first that they would bid. Robert Craig puts it thus—'When did you make up your mind that you would buy it?—(A) Very likely our minds would be made up all along, if we would not have to give too much for it.' Now if the petitioners had informed the Sheriff (1) that it was they who wanted to buy out the present pursuer, but that he thought their figure too small, and (2) that they were minded to bid at the sale, I suppose he would have fixed the upset in view of these facts. I think he would have asked 'Then why should the upset be less than your own

offer? Why should you have an opportunity of acquiring your partner's share (for that is all that you would be really purchasing) for less than you as petitioners express yourselves willing to pay for it?' And then the question of leave to bid would at once have come up.

"How would a proposed upset price of £1950 present itself to the mind of the present defenders according as they were or were not to bid at the auction? If they were not to bid they would have been loud in their protests, for it would be giving an outsider the chance of buying for £1950 what they were willing to buy at the figure of £2200. The loss which has accrued to the pursuer would then have been multiplied by six, and would have accrued to each share. But if they were to bid, then the less said about it meanwhile the better, for if only there were no competition they had themselves the chance of getting for £1950 what they were willing to buy at £2200. Now, take this from the evidence of one of the defenders, George Main, whom I thought the ablest witness among them —'We did not instruct Mr Leslie to bid for us, because we did not want Mr Leslie to know whether we were going to buy or not. (Q) Why was that?—(A) We tried to keep it within ourselves. (Q) Were you afraid that he might communicate with the pursuer?—(A) We kept that to ourselves whatever. (Q) Why?—(A) Because we did so. When we had made up our minds that we were going to bid for the ship we did not want anybody to know it. We were not going to say whether we were going to buy the ship or not. (Q) You did it to keep down competition?—(A) Not exactly. (Q) Have you any other reason to suggest than that?—(A) I believe it was a little that way.' Thus one of the most material considerations in the fixing of a fair upset price as between the parties was concealed by the defenders, even from their own solicitor, and so had no chance of reaching the mind of the Sheriff.

"It is but just to the defenders to point out that their interest was not entirely and in every event adverse to that of the pursuer. It appears that even down to the date of the sale, notwithstanding Mr Hunter's valuation, they were quite ready to go up to their own figure of £2200. Two days before the sale (for it was not till then that they disclosed their intention to anybody) they instructed Mr Meff to attend and bid for them up to that figure. 'They told me,' says Mr Meff,' to get it as cheap as possible, and they gave me liberty to go up to £2200.' Now, had there been competition beyond that figure, their interest and that of the pursuer would have been identical; the higher the price the better for all of them, if a stranger were to buy. But then they would have been left without their boat at the best part of the fishing season, and in her place a sum of between £2000 and £3000 in bank. That would plainly not have suited them, and therefore from the first they made for the other alternative, to keep the thing as quiet as they could, and to get her 'as cheap as possible.'

"Now, the two things which would most favour this desire of the defenders were speed and secrecy. For a fair competition publicity was the first essential. And fishermen being (according to the evidence) slow in making up their minds to a bargain, a reasonably long time was required, that the matter might be duly talked over. On these requirements I have in mind chiefly, though not exclusively, the evidence of Mr Johnston, a most capable and business-like witness, with no trace of exaggeration. I content myself with setting out briefly the proved facts bearing on the question how far these conditions of a fair competition were within the control of the defenders, and how far they were secured.

"As to hastening the procedure, special instructions to that effect emanated directly from the defenders, though I do not suppose that the solicitors saw the full significance of them. To them it would appear natural that the defenders should desire to end as soon as possible a difficult situation which the pursuer had brought about. Accordingly Mr Leslie, in his examination-in-chief, puts it thus — 'In carrying out the procedure in connection with the sale, so far as I am concerned I acted independently of any advice from the defenders. They merely instructed me to raise and carry out the action of set and sale, and they took no further part. (Q) Did they press you to hurry on the sale?—(A) All that they said, if I remember, was that they would like it to be carried through as quickly as possible, to get the matter over. (Q) It must have been some casual remark? — (A) Yes; to get it carried through as quickly as possible.' Then this 'casual remark' is duly handed on by Mr Leslie to Mr Hay in instructing him to take up the proceedings — '(Q) Did you give Mr Hay any instructions as to getting a short *inducice* upon the petition?—(A) I may have said to him to get the thing carried through as quickly as possible. Probably I did; but it is impossible to remember these small matters. (Q) So far as you remember, had you any special reason for requesting Mr Hay to get a special *inducice*?—(A) Nothing except to get the work carried through as quickly as possible.' Mr Hay acted on these instructions; for his first step was to get the *inducice* shortened from the statutory seven days to three days, on cause shown. The cause shown was that the defenders were in a difficulty, having to hire a man to take the pursuer's place, and that they wanted to get out of their difficulty as soon as possible; and, further, that they had no means of livelihood except the vessel, which he explains as meaning that the Sheriff might order the vessel to be laid up until the sale, and that the defenders would not get out to sea. On these arguments the Sheriff (as Mr Hay says) 'recognised the urgency and granted the motion.' It is not suggested that the pursuer would have been more likely to enter appearance in seven days than in three. But at all events the result was that the ordinary procedure

was cut short by four days. I need not enlarge further on this topic, for, indeed, the whole cross-examination of the pursuer's witnesses is based on the theory that speed was urgently required. To take one example, Mr Johnston is asked, 'If the "East Neuk" was the only means of livelihood which the defenders possessed, is it not of the most urgent importance that the proceedings should have been carried through as quickly as possible?' Mr Johnston's reply shows that the question of fair competition at once occurs to him—'(A) One would say yes to an industrial party, but fishermen are not of that nature. (Q) If they are earning at the rate of £30 to £40 a-week, is it not important that the whole proceedings should be carried through as quickly as possible?—(A) I should say if they got such a good bargain they would not be particular to a day or two.'

"Then the day of sale had to be fixed, and it was fixed by interlocutor of Tuesday, 19th June, for Wednesday week, the 27th. It is said that it was fixed by the Sheriff, and, indeed, it seems to have passed almost as matter of course. In point of fact it was postponed for a day, owing to the solicitor having an engagement for the 26th. But this only shows that the Sheriff would have been quite open to suggestions; and I must say my impression is that a well-advised owner wishing to sell the ship well, would have asked for a longer time. It was a £2000 transaction. One class of likely offerers—the fishermen—would be at sea during the greater part of the interval, besides not being very quick at a bargain. And the other likely offerers were the trade generally, particularly fish salesmen all up and down the coast. These and similar considerations were not necessarily within the cognisance of the Sheriff or the sheriff clerk; but I feel certain that a very slight inquiry would have disclosed their importance to the solicitor of a selling owner desirous to make a good sale, and not controlled by instructions to push it through as quickly as possible. Even the day of the week (Wednesday) was the worst possible, for the steam line fishers leave port on Monday morning, and are at sea till Friday.

"But the interval might have proved sufficient if full use had been made of it in the way of publishing the sale. The Sheriff's direction on this head in the interlocutor was—'Appoints the sale to be advertised in the *Daily Free Press* and *Aberdeen Journal* newspapers twice at least before the day of sale; and, further, appoints intimation of the sale to be made by handbills circulated in the locality of the harbour of Aberdeen.'

"Again, it is said that this is all prescribed by the Sheriff, in conjunction it may be with the sheriff clerk. But again I say that on the evidence before me a seller who was anxious to do his best would have made very little inquiry before he discovered, in the first place, that though the journals named were doubtless the leading advertising *media* for Aberdeen and neighbourhood, it would have been well worth while to advertise the sale more widely up and down the East Coast. This sale of a £2000 steam line fishing boat is not a merely local matter. In this very case there was what I think was a *bona fide* inquiry from London; it is proved that men go to South Shields and such distances in search of such boats; and the defenders themselves—Aberdeen fishermen—had gone to Arbroath to negotiate for the 'East Neuk.' Further, it would have been discovered that the papers named were not the best *media* for reaching the fishing population, their papers being *The People's Journal* and the two Aberdeen evening papers — *The Express* and *The Gazette*. As to *The People's Journal*, Mr Johnston's evidence, to which I would specially refer, is explicit and uncontroverted. As to the others, it is proved that they are the fishermen's local favourites; and it is significant that the defenders Craig and Main, in speaking of having seen the advertisement, think they saw it in the evening papers, although it is not shown that it ever appeared in either. I cannot doubt that the Sheriff would have gladly accepted a motion for a slightly more extended advertisement on these lines in addition to the two papers which he named.

"But even within the lines of the Sheriff's interlocutor it is plain that much was left in the power and discretion of the defenders and their solicitors. The Sheriff appointed the advertisement to be 'twice at least' in the two papers. The solicitors read this as meaning 'twice at most.' The interlocutor was on a Tuesday, fixing the sale for the Wednesday week. Exclusive of these two days, there might have been twelve insertions. Adopting the Sheriff's minimum they are content with four. Again, there is (for some unexplained reason) no insertion on Saturday, the day of all others when the fishermen are at home.

"Next come the handbills which were to be circulated, and of which fifty were ordered. Through a mistake of the solicitors they were not ready for distribution until the Friday, and thus three of the available eight days were lost so far as handbills were concerned. Then they delegate the circulation of them to Mr Meff, the same person who was instructed on the Monday following to bid for the defenders at the sale. Mr Meff delegates the circulation to his clerk Mr George, who had been barely two months in his employment; Mr George delegates it to the office-boy (who is not called) and partly to a labourer, who delegates part of his distribution to another labourer. In these circumstances Mr Meff's certificate as to the due distribution of the handbills is somewhat courageous. Here again 'at least 50 copies' means 'at most,' for no more were printed. And the assertion that the bills were 'distributed and exposed in the week immediately preceding the 27th' is true in a literal sense but in no other. The same expression would have served if none had been 'distributed and

exposed' till the 26th. There are other details in the evidence on this matter into which I need not enter, particularly as to the exposure of the bill at Torry pier-head and in Mr Johnston's window. On the whole I am very far from satisfied that the distribution of the bills was effectively or even conscientiously done, and I feel certain that no shipowner, taking the evidence of the defenders' witnesses at the best that can be made of it and applying it to his own case, would accept it as showing that the thing had been carried through with a due regard to his interests.

"Then again, the terms of the advertisement and the handbill were left to the discretion of the defenders. How was the discretion used? In the first place, no upset price was mentioned—an unfortunate omission if competition were desired, seeing that in the defenders' view the upset fixed was £250 below her true value. In the second place, it bore that she was to be on view on the 25th, 26th and 27th, that is, the Monday, Tuesday, and Wednesday, three days out of a possible seven, the sale being at 3 p.m. on the Wednesday. And this although she had come in from sea on the 16th, and (as I understand the evidence) lay in harbour from that day until the sale. No explanation is offered why she should not have been on view from and after the 19th. In the third place, intending purchasers were referred for further particulars to the defenders' solicitor. This in a sense was quite natural. But again the result is unfortunate, for the only applicant, Mr Henwood of London, wrote Mr Leslie the post-card of the 23rd June, and did not get his reply in London until the 27th, the day of the sale. The post-card must have been received at latest on Monday morning, but Mr Hay says he 'was away,' and that he answered it by letter on the 26th. No explanation at all is given why in his absence he left the inquiries of 'intending purchasers' to look after themselves; why Mr Leslie did not peruse the post-card which was addressed to himself and attend to it, which there was ample time to do; and above all, why Mr Hay, if he alone could attend to it, did not telegraph his reply on the 26th, which could have been done for two shillings. If this had been done Mr Henwood would have been in a position to telegraph to some man of standing in Aberdeen—say Mr Peter Johnston, a leading fish-salesman and shipowner, to inspect the boat and advise him as to the value. Had he done so he would have been advised to bid up to £2400 or £2500 for her, but for the fact that Mr Johnston was prepared to bid that for her himself. He says he knew the boat thoroughly; that at that particular time he was himself on the outlook for such a boat, and bought one a week later; and he adds, 'Knowing this boat as I did, and being on the outlook at that time, I would have been prepared to give £2400 or £2500 for the "East Neuk" without any doubt, and I would have thought I had a bargain.' Thus of the two likely offerers known to us, the one gets his information too late, and the other, though on the spot, never gets it at all.

"In short, at every step in the proceedings at which it was possible for the defenders to do something to ensure a good sale, whether by informing the Sheriff's mind on the facts of the case, or by giving the sale a wide publicity, or by assisting inquirers, the the wrong turn was taken, and the interests of the pursuer were in fact sacrificed.

"My opinion upon the evidence is, that the defenders, having in material particulars the conduct and management of the sale were in a fiduciary position towards the pursuer, and were therefore disqualified from purchasing his interest, at least without notice and without leave to bid. Secondly, if the disqualification is not absolute, and it is incumbent on the pursuer to show breach of duty on the part of the defenders, then I hold that the proceedings with a view to sale were in fact conducted by the defenders without due regard, and indeed without any regard, to the interests of the pursuer.

"As I can see that there may be some difficulty in working the matter out upon the conclusions of the summons, I should have been quite disposed, if any suggestion had been made to that effect, to supersede meanwhile pronouncing decree in the reduction, and to content myself with findings so as to give the parties an opportunity of settling their dispute by some reasonable payment to the pursuer. But as no such suggestion was made by the defenders, I think I ought to give decree as concluded for.

"I do not find it necessary to pronounce upon the abstract incompetency of the pursuer of an action of set and sale, or of division and sale, bidding at the roup, without at least having obtained liberty to do so. There is singularly little authority in our law on the subject; but the practice has I think been to move for leave to bid if it is desired, though it may be that if all concerned joined in the motion it would be granted as matter of course. It is not surprising, however, to be told by pursuer's counsel—and he seemed to make good his proposition on the authorities—that according to English practice in analogous cases the Court will on no account grant leave to bid to the party who has the conduct of the sale. They appear to extend in that direction our own common law rule that a heritable creditor or a poinding creditor, being the exposer, is absolutely disqualified from becoming the purchaser, though with us this rule has been modified by statute in the case of a poinding.

"In our own law the authorities mainly discussed before me were *York Buildings Company* v. *Mackenzie*, M. 13,367, 3 Paton, 378; *Elias* v. *Black*, 1856, 18 D. 1226; *Darling* v. *Adamson*, 1838, 1 D. 213; 2 Bell's Com. 250, and notes; *Shiell* v. *Guthrie's Trustees*, 1874, 1 R. 1083; *Jeffrey* v. *Aiken*, 1826, 4 S. 728; *Taylor* v. *Watson*, 1846, 8 D. 400; *Faulds* v. *Corbet*, 1859, 21 D. 587."

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