Tuesday, June 16.

EXTRA DIVISION.

[Lord Hunter, Ordinary.

M'GOWN AND CAMERON *v.* HENDERSON.

Partnership — Dissolution — Tacit Relocation—Provisions of Contract Carried Forward into Partnership-at-Will.

A contract of copartnery of a wine and spirit business provided that "in the event of the copartnery not being renewed at the expiry thereof the licence shall then be valued by a neutral party mutually appointed, and the first party . . . shall in his option be entitled to pay out the second and third parties the amount due to them respectively." The copartnery having expired was continued as a partnership-at-will until dissolved by the first party. *Held* that the right of pre-emption so conferred on the first party was carried forward to the partnership-at-will so as to be exerciseable by him at its dissolution.

Andrew M'Gown, Mansfield, Drumchapel, and Dugald Cameron, Barns Place, Clydebank, *pursuers*, brought an action against John Ralston Henderson, wine and spirit merchant, Elderslie Bar, Yoker, residing at 8 Gateside, Paisley, *defender*, in which they claimed "that the partnership among the pursuers and defender in the business of wine and spirit merchants carried on in the premises known as the Elderslie Bar, Yoker, under the firm name of John R. Henderson, was terminated at 24th September 1913, and that the pursuers were entitled to have the said business wound up and the whole assets thereof realised and the debts paid, and the surplus, if any, divided among the parties according to their respective rights and interests."

The pursuers averred — "(Cond. 2) By minute of agreement and copartnery dated 8th September 1905 the pursuers and defender entered into partnership with one another, under the firm name of John R. Henderson, in the business of wine and spirit merchants carried on at the said Elderslie Bar. . . . It was further agreed, in terms of the said minute of agreement, that the copartnership should subsist for five years as from and after the 15th day of May 1905. (Cond. 3) The copartnership constituted by the said minute of agreement continued throughout the five years therein mentioned. Thereafter it subsisted as a partnership-at-will until 24th September 1913, when it was dissolved by notice given by the defender, through his solicitors, to the pursuers through their solicitors."

The eighth clause of the said minute of agreement was in the following terms:—"In the event of the copartnery not being renewed at the expiry thereof, the licence shall then be valued by a neutral party mutually appointed, and the first party as holder of the licence shall in his option be entitled to pay out the second and third parties the amount due to them respectively, or otherwise the licence shall be sold in the open market to the highest bidder, and the price so obtained, when received, divided among the parties in accordance with their rights and interests therein."

The defender *maintained* that the said option was exerciseable by him at the dissolution which had taken place on the 24th September 1913, and that he was entitled to have a valuation made accordingly, and he refused to concur with the pursuers in having the said business wound up and the assets thereof divided among the partners.

The Lord Ordinary (HUNTER) assoilzied the defender.

Opinion. — "The question between the parties in this case may be described as being whether or not the defender is right in his contention that he is entitled to the option indicated in clause 8 of the contract of copartnery. If he is right, then I apprehend he is entitled to absolvitor here; on the other hand, if he is wrong the pursuer would be entitled to get the declarator which he asks.

"By section 27 (1) of the Partnership Act of 1890 it is provided that where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term so far as is consistent with the incidents of a partnership-at-will.

"The contention of the pursuers is that such a provision as is contained in clause 8 of the contract of copartnership is inconsistent with the provisions of a partnership-at-will. As was contended by Mr Watson, they maintain that on a sound construction of article 8 the only event contemplated is the actual termination of the contract on the expiry of the five years, and that upon that event having occurred the right to the option ceased altogether.

"The pursuers relied mainly on two decisions, one an early decision of *Clark* in 1862, 32 Beaven, at p. 14, the other what is probably the most important and instructive case upon this branch of law that is to be found, namely, the case of *Neilson* v. *The Mossend Iron Company*, 13 R. (H.L.), p. 50. Only the latter of these two cases need be looked at. I think when looked at that it is clear that it does not support the contention of the pursuers. In that case there was a contract of copartnery entered into for a definite period of time, and after the expiration of the term the partnership had been carried on as before without a new contract. There was a provision in the original contract that if three months before the termination of the contract the whole partners of the company shall not have agreed to continue to carry on the business thereof, any one or more of them who might be desirous of retiring should be entitled to do so, and should immediately on the completion of the balance-sheet after mentioned be paid out by the partner or partners electing to continue the business his or their share and interest in the concern as the same should be ascertained by a balance of the company's books as at the ter-

mination of the contract. The House of Lords, reversing the decision of the First Division, held that the provision was not applicable to the partnership-at-will which had existed subsequent to the date of the expiry of the contract period of partnership. The ground of judgment, I think, very much was that it was inconsistent with the nature of a contract of partnership-at-will that such a provision should be given effect to, because it is clear that it was impossible to give the notice which alone gave the right to the payment on the terms specified three months before the termination of a contract-at-will. Such a contract, of course, is terminable at will. In the course of his judgment, Lord Watson, at p. 54, said this —'It is not, in my opinion, inconsistent with the nature of a partnership-at-will that a member should agree upon its dissolution at any time to receive payment of his share and interest in the shape of a sum of money, to be fixed with reference to a particular balance-sheet, without having resort to a legal winding-up, and to leave the other members to carry on the business.' I find in his work on Partnership, Lord Lindley, at p. 473 (8th ed.), says in general terms— 'A clause giving a right of pre-emption is not in itself inconsistent with the incidents of a partnership-at-will, and is therefore as a general rule operative after the termination of the partnership originally contemplated.'

"I think fairly, and not unnecessarily critically, reading the language of clause 8, it is practically a clause giving a right of pre-emption at the expiry of the contract. Upon a fair consideration of the instructive judgments of Lord Watson and Lord Selborne in the case of *Neilson* I do not think that anything contrary to that view is to be found. I agree with what Mr Justice Stirling said as regards Lord Watson's judgment in the case of *Daw* v. *Herring*, 1892, 1 Ch. 284, at p. 288. That case was not taken before the Court of Appeal in England, but it was decided a considerable number of years ago, and the probability is that if it was thought to be wrongly decided the opinion of a higher Court would have been taken. It is not binding upon me, but as I agree with the decision I do not think I can do better than simply quote the passage from Mr Justice Stirling, who says—'It appears to me that the judgment of Lord Watson is founded on two propositions. The first is a general one, and may be stated precisely in his own words—"All the stipulations and conditions of the original contract remain in force in so far as these are not inconsistent with any implied term of the new contract." The second special one is this—the provisions made by the original contract for the winding-up of the partnership affairs on the termination of the original partnership remain in force, unless the special character of the stipulations is such that they cannot reasonably be applied to a contract determinable at will. The question is not, as I read Lord Watson's observations on the passage quoted from the judgment of Lord Shand, whether the language of the original contract with reference to the termination of the partnership originally constituted is strictly appropriate to the termination of a partnership-at-will, but whether the provisions as to the consequences of the termination of the original partnership are in their essence applicable or inapplicable to a partnership-at-will.'

"Now I think, using the language of Mr Justice Stirling, that one cannot reasonably contend that this provision in connection with the valuation of a licenced business is not a provision as to the consequences of the termination which in its essence is applicable to a partnership-at-will. In the case of *Daw* v. *Herring* the original contract had provided that notice to terminate might be given 'within three months after the expiration or determination of the partnership by effluxion of time,' and that in that event an option to purchase the share of the other partner was given. Mr Justice Stirling held, giving effect to the views I have indicated, that that clause was applicable to the period after the expiry of the contract term, and a similar decision I think was reached in the more recent case of *Brooks*, which was decided in 85 L.T. 453. Both the decision in *Daw* v. *Herring* and the case of *Brooks* appear to be in accordance with the views that the Court took in the case of *Cox* v. *Willoughby*, 13 Ch. Div. 863, and the case of *Essex* v. *Essex*, 20 Beaven 442. Taking the view therefore which I take as to the construction to be put upon clause 8 of the contract of copartnership, and as to the effect to be given to the provisions of section 27 (1) of the Partnership Act of 1890, I think the defender here falls to be assoilzied from the conclusions of the action."

The pursuers reclaimed, and argued—The minute of agreement and copartnery in clause 8 gave the right of pre-emption at the expiry of the contract, *i.e.*, of the written contract. Such a provision was only equitable in that it gave a definite *punctum temporis* for the exercise of the right of pre-emption. A definite period was of the essence of the contract, and if clause 8 were not applicable to a particular time and condition of pre-emption it would be meaningless—*Neilson* v. *Mossend Iron Company, &c.*, March 4, 1886, 13 R. (H.L.) 50, Lord Watson at 55-56, 23 S.L.R. 867. The rights and duties of the partners, so far as inconsistent with a partnership-at-will, terminated with the written contract—*Clark* v. *Leach*, 1863, 1 De G. J. & S. Chanc. Reps. 409, L. C. Westbury at 414; Partnership Act 1890 (53 and 54 Vict. cap. 39), sec. 27 (1). Even were a right in itself not inconsistent with a partnership-at-will, its exercise might be if a partner had impliedly agreed to refrain from using it—*Neilson* v. *Mossend Iron Company, &c.* (*cit. sup.*); *Cox* v. *Willoughby*, 1880, 13 Ch. D. 863. The expression "in the event of the copartnery not being renewed at the expiry thereof" was inapplicable to a partnership-at-will—*Clark* v. *Leach* (*cit. sup.*). The case of *Daw* v. *Herring*, [1892] 1 Ch. 284, in contrast to the present, was an instance where such a provision might be carried forward.

Argued for the respondent—The minute of agreement and copartnery, clause 8, referred to the expiry of the copartnery, not of the written contract. Clause 7, which provided for the termination of the partnership by the death of one of the partners, being obviously intended to be carried forward, it was absurd that clause 8, which contemplated another method of termination, should not similarly be carried forward. In *Neilson* v. *Mossend Iron Company, &c.* (*cit. sup.*) the clause of pre-emption provided for its exercise three months before the termination of the contract, and obviously could not apply to a partnership-at-will the termination of which was uncertain. The cases of *Daw* v. *Herring* (*cit. sup.*) and *Brooks* v. *Brooks*, 1901, 85 L.T. 453, were both similar to the present, both being instances of partnerships terminable by the effluxion of time.

LORD DUNDAS—The question in this case is certainly a short one, and does not lend itself to any elaboration of statement. The decision depends, as in each case of this sort it must depend, upon the construction to be put on the language of the particular instrument under consideration.

The pursuers maintain—I quote from a passage in the Lord Ordinary's opinion which I think it was admitted correctly describes their argument—"that on a sound construction of article 8 the only event contemplated is the actual termination of the contract on the expiry of the five years, and that upon that event having occurred the right to the option ceased altogether." That view appears to me to be unsound, and I am for my part entirely satisfied with the way in which the Lord Ordinary has dealt with the matter, and with the grounds upon which he has based his judgment. I find it unnecessary to say more than this, that I think the interlocutor is right, that the Lord Ordinary has proceeded upon the right grounds, and that neither Mr Constable nor his learned junior, who I am confident have said all that could reasonably be said in support of their case, has stated anything that should, in my opinion, lead to a contrary conclusion. I accordingly am for adhering to the interlocutor.

LORD MACKENZIE—I am of the same opinion. I have listened attentively to the argument of Mr Constable, and also to that of Mr Graham Robertson, and I am quite unable for my part to see any ground for differing from the conclusion at which the Lord Ordinary has arrived. Of course, as Lord Selborne points out in the case of *Neilson* v. *Mossend Iron Company*, 13 R. (H.L.) 50, the first thing to be done is to construe the clause in question; and considering the 8th article of this contract of copartnery, I am unable to find anything in it to exclude the idea that the right of pre-emption was to be carried forward. I think the present case is like the case of *Daw* v. *Herring*, [1892] 1 Ch. 284, but I do not think the case is like the case of *Neilson*.

LORD CULLEN—I concur. The complainers do not dispute the soundness of the rule stated in the passage quoted by the Lord Ordinary from Lord Lindley's work on Partnership, 8th ed., p. 473—"A clause giving a right of pre-emption is not in itself inconsistent with the incidents of a partnership-at-will, and is therefore as a general rule operative after the termination of the partnership originally contemplated."

It is true that in any particular case the right of pre-emption may be so specially conditioned as to be capable of exercise only at the expiration of the original contract, or it may be created in such terms as to show that the bargain of parties was that it should apply solely at the period of the expiry of the contract so as to exclude it from being carried into a partnership-at-will, but if the parties by the original contract do no more than simply agree that on a winding-up of the affairs of the partnership taking place, at its expiry the partner shall have the right of pre-emption as an alternative to open sale, I can see nothing to prevent the right being carried forward. As article 8 of the present contract seems to me to import no more than this, I am of opinion that the Lord Ordinary has come to a right conclusion on the matter, and that his judgment should be affirmed.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—Constable, K.C.—T. Graham Robertson. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Defender (Respondent)—Moncrieff, K.C.—D. P. Fleming. Agents—Bruce & Stoddart, S.S.C.

Friday, June 19.

FIRST DIVISION.

(BILL CHAMBER.)

M'CONNACHIE, PETITIONER.

Diligence — Arrestment — Process—Ship—Maritime Lien — Form of Process for Making Maritime lien Effective.

Where special application by petition is made by a person averring that he has a maritime lien over a ship, it is competent for the Lord Ordinary on the Bills to grant warrant to arrest the ship.

On 19th June 1914 Peter M'Connachie, writer, Greenock, presented a petition to the Lord Ordinary officiating on the Bills (Lord Anderson). He averred that he was the holder and endorsee of a promissory-note, dated 15th May 1914, for the sum of £850 granted by W. Grunberg, master of the German s.s. "Wm. Eisenach," for value received for necessary disbursements owed by his said ship at the port of Stettin; that the period of payment was ten days after arrival (or upon collection of the freight if sooner made) of the said ship at the port of Greenock, or any other place at which her voyage might terminate; that the said ship arrived at Greenock (where her voyage