The plea is not one of *pactum illicitum*, but it is that this is by statute an action which we are not entitled to entertain.

Lord Benholme—I confess that this case has given me a great deal of trouble and uneasiness. It was my wish, if possible, to see a reason for this Court being debarred from sustaining the action, that was satisfactory to my own mind upon its logical foundation. But I think I am bound to obey a statute the policy of which I cannot see. The statute presents some things which on ordinary principles of legislation seem to be inconsistent. It states that these unions from the date of the statute are to held not to be illegal in respect of their imposing a restraint on trade. It defines what is a trade union, and seems to admit that that is an essential part of a combination, for it states that that essential element does not henceforth render them illegal. But it prescribes to us, as a Court of Law, the duty of refraining from entertaining actions in support of a variety of matters, amongst which are the enforcement of benefit to members. It is clear that we are debarred from entertaining this action, although the object of it seems to me in terms of the statute not to be illegal, but on ordinary principles to be benevolent and highly to be commended, and if possible enforced. But whilst I cannot reconcile to my own mind the contradiction that seems to me to been involved, I cannot shut my eyes to the positive enactment which debars us from entertaining such an action. Therefore I think we must sustain the objection to the competency of this action, and throw it out as being beyond our power to entertain.

Lord Neaves—I concur in the opinions which have been delivered. I think this Act of Parliament requires great consideration, particularly if it is desired to reconcile it to abstract principles; but it speaks so plain a language that we have nothing to do but obey it. I agree that, anterior to this Act, this association would have been an unlawful one, in the sense that it would not have been recognised. The current of decision on that point is plain. It was said that in one sense of the word a strike was not necessarily unlawful. That is to say, if persons were to agree that they would not work except on certain terms, and confined it to so long as they were of that opinion, that would not be an illegal conspiracy to enforce their common opinion. But the law held that an arrangement by parties to affect the labour market in that way, and to enforce it after they had changed their minds and wished to labour, was illegal and improper. But a great hardship arose upon that, and it became a gross scandal, particularly in England, that where a secretary or treasurer of a society of that description embezzled its funds he could not be prosecuted for what was very nearly theft, at all events breach of trust. There were also other legitimate considerations, leading to the appointment of the Commission out of which this legislation rose. The object of the present Act is to take away from these unions the stigma of criminality or illegality in a certain sense; but though it does make them cease to be unlawful, it is provided that nothing contained in it shall entitle certain things to be done that could not be done before. These things are enumerated in the 4th section; and if we could enforce any one of these things, I don't see what should hinder us from enforcing them all; because the direction of the Act against recognising claims for benefits is not more explicit than that about an agreement between the members that they shall not sell their goods, transact business, employ or be employed, except on certain terms, or an agreement about the application of the funds to certain purposes. The things enumerated in that section are forbidden to be enforced, and one of these is providing benefits to members. I think it is plain that while the Legislature did not wish to stigmatise these as illegal or unlawful things, they did not mean to encourage them; but at all events it is plain that under that section we are debarred from enforcing the claim made in this action.

The Lord Justice-Clerk—Then your Lordships find that, in terms of the Act of Parliament. the claim of the pursuer cannot be enforced in this Court.

Mr Balfour—I ask additional expenses.

The Lord Justice-Clerk—I do not think that the plea is one which, although sustained, should be followed with expenses.

Counsel for Pursuer—Brand and M'Kechnie. Agent—T. Lawson, W.S.

Counsel for Defenders—Watson and Balfour. Agents—Rhind & Lindsay, S.S.C.

Saturday, January 31.

SECOND DIVISION.

[Lord Shand, Ordinary.

STIVEN *v.* WATSON.

Damages—Breach of Gratuitous Obligation—Bankruptcy—Preference—Statute, 1696, *c.* 5.

Where A agreed to receive and hold certain goods for behoof of B, to be forwarded by C, and failed to intimate the delivery order of the goods, in consequence of which C got delivery within sixty days of his becoming bankrupt: In an action for damages at the instance of B against A,—*Held* (1) that the transaction did not constitute an illegal preference contrary to the Act 1696, c. 5. (2) That A was liable in damages for breach of obligation.

This was an action at the instance of Edward Baxter Stiven, merchant, Dundee, against Alexander Don Watson, flax-spinner, Fife, for £100 in name of damages, with interest from 19th October 1872. The facts out of which the suit arose were as follows:—On 16th August 1872 the pursuer purchased from Messrs Annan & Co., Fife, 2,000 spindles yarn, to be delivered as he might require, and granted a bill to them for £200 as the price, payable two months after date, which bill was duly returned by the pursuer to the holder to whom it had been indorsed. Annan & Co. delivered part of the yarn, but after 3d September 1872 made no deliveries. On 2d October 1872 Annan & Co. undertook to forward five tons of tow represented by them as their property, and lying in Dundee, to Dairsie Station, and to grant delivery order therefor in favour of the defender or his firm of Alexander Watson & Son, in order that the firm should hold the tow for behoof of the pursuer until delivery by Annan & Co. to the pursuer of the remain-

der of the yarn purchased by them or make payment of the price. The defender agreed to receive and hold the tow accordingly. Annan & Co. purchased the tow, and directed it to be forwarded in their name by railway to Dairsie, and handed to the pursuer delivery order in the following terms:—"Pitscottie Mains, October 2, 1872. To the station-master, Darsie.—Dear Sir, Please deliver to Messrs Alex. Watson & Son, Blebo Works, say five tons tow forwarded from Dundee on our account.—Yours truly (signed) James Annan & Co." The pursuer sent this order of the same date to the defender with a letter to the following effect:—"In accordance with our arrangement to-day, I send you order for five tons tow, from Mr James Annan, which please receive and hold for my account until he pays me for or delivers the yarn already paid for." The defender received the order but failed to intimate the order to the station-master at Dairsie, in consequence of which Annan & Co. obtained delivery of the tow. They became bankrupt on or about 18th October 1872. The damages sued for in this action were these caused by the failure of the defender to intimate said delivery order.

The pleas in law for the pursuer were—"(1) The defender having agreed to receive delivery and hold possession of said tow for behoof of the pursuer, and having failed to do so, he is liable for the loss and damage which the pursuer has sustained in consequence. (2) The defender having wrongfully failed to intimate the delivery order for the tow in question, and allowed the same to be removed without the knowledge or consent of the pursuer, he is liable to make payment of the sum concluded for; and decree should be pronounced accordingly."

The main plea for the defender was—"(2) *Esto* that the said tow had been delivered to the defender, the transaction, as averred by the pursuer, was null and void, as being a security or satisfaction given by Annan & Co. to the pursuer in preference to his other creditors within sixty days of bankruptcy; and the pursuer has not suffered any loss or damage through the alleged failure of the defender to intimate said delivery order."

The Lord Ordinary pronounced the following interlocutor and note:—

"*Edinburgh*, 24*th October* 1873.—The Lord Ordinary having considered the cause—Finds that on 16th August 1872 the pursuer purchased from Messrs James Annan & Co., Pitscottie Mills, Fife, 2000 spindles yarn, to be delivered as he might require, and granted a bill to them for £200, as the price thereof, payable two months after date, which he duly retired when it fell due, by payment to the holders thereof, to whom the same had been endorsed: Finds that the said James Annan & Co. delivered to the pursuer 1020 spindles of said yarn, the last delivery having been on or about 3d September 1872, but failed to make further deliveries though repeatedly called on to do so by the pursuer: Finds that on 2d October 1872 the pursuer having required the said James Annan & Co. at once to complete the delivery of yarn purchased by him, and having threatened to take legal proceedings to compel delivery, the said James Annan & Co. undertook forthwith to forward a quantity of five tons or thereby of tow represented by them as belonging to them, and lying in Dundee, to Dairsie Station, and to grant delivery order therefor in favour of the defender, or his firm of Alexander Watson & Son, Blebo Works, in order that the defender should hold the tow under the delivery order for behoof of the pursuer until Messrs Annan & Co. should deliver to the pursuer the remainder of the yarn purchased by him, or should pay him therefor, and that the defender agreed and undertook to receive and hold the tow to be forwarded for behoof of the pursuer accordingly: Finds that, in consequence of this arrangement and the said undertaking by the defender, the pursuer refrained from adopting legal proceedings against James Annan & Co.: Finds that on said 2d October James Annan & Co. having completed a purchase of tow about which they had been previously negotiating with Samuel Thomson, commission merchant, Dundee, directed the same to be forwarded in their name by railway to Dairsie, and in implement of the arrangement above mentioned handed to the pursuer a delivery order in the following terms:—'*Pitscottie Mills*, 2*d October*, 1872. To the station-master, Dairsie.—Dear Sir, Please deliver to Messrs Alex. Watson & Son, Blebo Works, say five tons of tow forwarded from Dundee on our account.—Yours truly, (signed) Jas. Annan & Co.': Finds that on the same date the pursuer sent this delivery order by post to the defender, with a letter in the following terms:—'Memorandum.—From Edward Baxter Stiven, Coupar's Alley, to Alexander D. Watson, Esq., Blebo Works, Dundee. *Dundee*, 2*d October*, 1872. My Dear Sir, In accordance with our arrangement to-day, I send you order for five tons tow, from Mr James Annan, which please receive and hold for my account, until he pays me for, or delivers, the yarn already paid for.—Yours very truly, (signed) E. Baxter Stiven,' and that the defender received the delivery order and letter on 3d October: Finds that Mr Thomson, between 3d and 7th October, forwarded as directed upwards of five tons of tow by railway to the address of James Annan & Co., at Dairsie: Finds that the defender, in breach of his undertaking to the pursuer, failed to intimate the delivery order above mentioned to the station-master at Dairsie, and to receive and hold the said tow for behoof of the pursuer in terms of his undertaking, and that in consequence of his failure duly to intimate the delivery order Messrs James Annan & Co. were enabled to obtain delivery of the tow and took delivery thereof without having previously delivered to the pursuer the remainder of the yarn purchased by him, or paid to him the price or value thereof; and that on or about 18th October they became bankrupt: Finds that in consequence of the defender's breach of his said undertaking to the pursuer, the pursuer has sustained loss and damage to the extent of £100, with interest from 19th October 1872, at the rate of five per cent., but under deduction of the sum of £32, 10s. received by him as a dividend on a claim lodged by him on the sequestrated estate of James Annan & Co.: Therefore decerns against the defender for the sum of £100 and interest, under deduction as aforesaid; the pursuer on obtaining payment being bound to assign to the defender his right to any further dividend payable in respect of his claim on said estate: Finds the defender liable in expenses, of which allows an account to be given in, and remits the same when lodged to the Auditor to tax and report.

"*Note*.—In the present action the questions raised for decision are, whether the defender undertook the obligation libelled, and committed a breach of it? and whether, even assuming a breach of the obligation, any damage has resulted to the pursuer?

On these questions the Lord Ordinary is of opinion that the pursuer has established his averments on record.

"On the 2d October 1872 Messrs James Annan & Co., who became bankrupt on the 18th of the same month, were under obligation to the pursuer to deliver him 980 spindles of yarn, being part of a quantity of 2000 spindles purchased in August previously, to be delivered when required. The pursuer, who had granted his acceptance for the price, had repeatedly demanded delivery of the yarn. He had before the 2d October received two delivery orders, one upon the North British Railway Company at Dundee, and the other upon Mr James Guthrie, commission broker there, both of which had turned out worthless, as neither of these parties held yarn belonging to Annan & Co. On that day he called at Annan & Co.'s premises, pressing for delivery, and insisted that they should give him a quantity of yarn, which he saw they had in their warehouse. The defender, who is connected by marriage with both parties, was therefore waited on by Mr Annan, and after some conversation it is proved, in the opinion of the Lord Ordinary, that he became a party to the arrangement, which the Lord Ordinary has found by the preceding interlocutor was entered into, and that in consequence the pursuer refrained from taking any legal steps against Annan. There is a conflict between the evidence of the pursuer and defender, who are the only persons able to speak to what took place at the meeting on the 2d October, (Mr Annan having become insane) but on the whole the Lord Ordinary is satisfied that the pursuer was more accurate in his recollection of what occurred, and he is completely corroborated by the documents written on the day of the meeting, and which refer to the arrangement made, and were received by the defender without any observation to the effect that they were not in accordance with what had been agreed to. The agreement was, not that the pursuer should accept the tow to be held by the defender as a substitute for the yarn which he had purchased, but that the tow should be held for the pursuer's account until Mr Annan should deliver the yarn, or pay its price or value to the pursuer. The defender got the delivery order and the pursuer's letter on the 3d of October. His place of business is about a mile from Dairsie Station, and the order might have been intimated to the stationmaster at once, but it was never intimated at all, and in consequence Annan & Co. were enabled without any impediment to obtain delivery of the tow which was forwarded between the 3d and 8th October, and improperly applied for and took delivery of it. The Lord Ordinary is of opinion that the defender's failure to intimate the delivery order was a breach of his undertaking to the pursuer, and that if the order had been duly intimated in fulfilment of the defender's obligation the stationmaster would have been able to retain either the whole of the tow or a large part of it, and *would have been bound to do so.* It was pleaded for the defender that Annan & Co. having at once taken delivery in the course of the 4th October of a great part of the tow forwarded immediately after its arrival on that day, the intimation of the delivery order would have been of no avail, but the Lord Ordinary is of opinion that the defender was bound under his undertaking to have intimated the delivery order on the morning of the 4th October, in which case he would have detained all the tow, and it is clear that intimation even between that date and the 7th would have laid an embargo on a considerable quantity of the goods.

"The remaining question is, whether the pursuer has suffered damage from the defender's failure to fulfil his undertaking? On this point it was argued for the defender, that even if he had detained and taken possession of the tow, the pursuer would in the end have been no gainer, for Annan & Co.'s bankruptcy having followed within sixty days, the tow could not have been retained for the pursuer's security, but must have been given up to their creditors, or to any one of them (the defender himself being one) who might challenge the transaction as a preference contrary to the Act 1696, and that the transaction was truly the giving of security for a prior debt, to the prejudice of other creditors. The Lord Ordinary deems it unnecessary to form a definite conclusion on the question whether, if the goods had been detained and held by the defender till Annan & Co.'s bankruptcy occurred, the pursuer could have retained them in the security of his claim or debt in a question with that firm's creditors. His opinion rather is that the creditors could have insisted on the goods being given up to them. But it is not the pursuer's case that he wished or expected as the result of the fulfilment by the defender of his obligation that the goods should be kept even for the time which elapsed before the sequestration. His object was to put a pressure on Annan & Co. which would induce them immediately to fulfil in its terms their obligation to him, by delivering the remainder of the yarn they had purchased, or paying him its value; and if either of these things had been done, no question of illegal preference could have occurred. The goods were to be held by the defender till delivery of the yarn, or payment therefor, and the defender himself states that he expected delivery would be made without any delay. It is obviously, in Annan & Co.'s circumstances, a powerful spur or incentive to make such delivery that by doing so they would remove an embargo on a valuable parcel of goods to be used in their manufacture; and the probability is that if the defender had fulfilled his undertaking and detained the goods, the pursuer would have got delivery of his yarn or payment of its price from this cause. The security given by Annan & Co. on the 2d October was not at its date an illegal preference, for the bankrupts were then carrying on business as before, and, though in difficulties, did not contemplate bankruptcy, and when the defender, founding on the fact that bankruptcy occurred within sixty days after, maintained that thereby the security became a preference, it is, in the Lord Ordinary's opinion, a complete answer, that in the meantime, if the defender had fulfilled his obligation, the pursuer might, and probably would, have had his contract duly fulfilled, and Annan & Co. would have obtained delivery of the tow given as security. The Lord Ordinary is therefore of opinion that the pursuer sustained loss and damage to the amount claimed through the defender's failure to fulfil his obligation. There is some evidence about a quantity of tow held for the pursuer by the bankrupt's brother, but it appears to the Lord Ordinary that the pursuer never made any agreement to take this tow, and that he is not bound to do so. He must, of course, give to the defender any rights he may have to this or any other security against the bankrupt's estate on receiving payment of his present claim."

The defender reclaimed.

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

The Court adhered.

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

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

Friday, January 30.

SECOND DIVISION.

[Lord Mure, Ordinary.

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

Contract—Copartnery—Payment of Capital—Forfeiture.

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

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

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

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

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