Friday, December 19.

FIRST DIVISION.

[Lord Lee, Ordinary.

NEILSON *v.* THE MOSSEND IRON COMPANY AND OTHERS

NEILSON JUNR. *v.* THE MOSSEND IRON COMPANY AND OTHERS.

(See *ante*, 17th July 1883, vol. xx., p. 816.)

Partnership—Executors of Deceased Partner—Right to become Partners—Difference of Opinion—Title to Sue—Action by One Executor.

By the terms of a contract of partnership, the expiry of which was at 31st May 1882, it was provided that the executors of a deceased partner might become partners of the company if they gave intimation within two months from the date of his death. One of the partners died on 24th May 1882. By his trust-disposition and settlement he conferred power on his five trustees, who were duly confirmed executors, to continue in the company, but declared that in transactions with partnerships of which any trustee was a partner, such partner should have no vote. Two were partners of the company in question. At a meeting of the three other trustees, of which the truster's widow was one, held on the 21st July 1882, the widow and one of the trustees voted for becoming partners of the company, while the third trustee did not vote but remained neutral, being of opinion that it would be more beneficial that the trust should be settled with upon the basis of the balance-sheet of 31st May 1881, and being therefore opposed to the executors becoming partners. Intimation was of the same date sent to the company on behalf of the executors that they elected to become partners. The company replied that they could not admit any right on the part of the executors to become partners, and were prepared to pay out the deceased partner's interest as ascertained by the balance of 31st May 1881. On 26th January 1883 the trustee who had concurred with the widow resigned. On 31st January 1883, without any further consideration of the position of matters by the trustees, the widow, with concurrence of her children as beneficiaries under the trust, raised an action against the company, and against her husband's trustees, to have it declared that the three trustees qualified to act in questions with the company were entitled to become partners by intimating their intention within two months, that this power had been validly exercised, and that in accordance with the intimation the whole executors had become partners in the company by the intimation of 21st July 1882; or, in the event of its being held that the executors did not become partners, to have it declared that the partnership terminated at the death of the partner (her husband) on 24th May 1882. *Held* that in the circumstances above stated the pursuer had not a title to sue, and action *dismissed.*

Partnership—Contract of Copartnery—Expiry—Partnership-at-Will—Terms of Contract carried forward.

A contract of partnership contained a provision that "If, three months before the termination of this 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 may be desirous of retiring shall be entitled to do so, and shall, immediately on the completion of the balance 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 shall be ascertained by a balance of the company's books as at the termination of the contract." The contract expired and was continued as a partnership-at-will. Thereafter one of the partners intimated that he required the partnership to be terminated as at the date of his notice, and he raised an action against the company and the other partners to have it declared that he was entitled to have the partnership wound up as at that date, and to have the defenders decerned and ordained "to concur with the pursuer in winding up the business and copartnery by realising the assets thereof and paying or discharging the liabilities thereof in order to the division of the surplus assets among the parties entitled thereto." *Held* that as the terms of the original contract above quoted were not inconsistent with the nature of a partnership-at-will, they were therefore carried forward into it, and that as they provided a special mode of winding-up in the event of a partner wishing to dissolve partnership, the pursuer was not entitled to have the assets of the company brought to a sale; *reserving* his right to have the company dissolved to the effect of his being paid out his interest in terms of the original contract of copartnery.

These were conjoined actions in regard to the partnership affairs of the Mossend Iron Company. I. The first was an action at the instance of Mrs Neilson, widow of William Neilson, iron and coalmaster, Mossend, who died on 24th May 1882. She was trustee along with Hugh Neilson, James Thomson, engineer and shipbuilder in Glasgow, and James Neilson, acting under the trust-disposition and settlement of the said William Neilson, dated 1st December 1880, and recorded 8th September 1882, and also along with James M'Creath, mining engineer in Glasgow, who accepted office and acted as trustee till 26th January 1883, when he resigned. Mrs Neilson sued with concurrence of Walter Neilson, Thomas Neilson, John Neilson, William Neilson, and Beaumont Neilson, children of William Neilson, and beneficiaries under his settlement. The defenders were the Mossend Iron Company, and the individual partners thereof, viz.:—(1) Walter Neilson; (2) Hugh Neilson; (3) James Neilson; (4) Hugh Neilson junior; and (5) the said Mrs Neilson, Hugh Neilson, James Neilson, and James Thomson, as trustees under William Neilson's settlement. The pursuer sought to have it found and declared "that at the date of the death of the said William Neilson, he and the defenders Walter Neilson, Hugh Neilson senior, James Neilson, and Hugh Neilson junior were partners carrying on business under the name of the Mossend Iron

Company, under the terms contained in a contract of copartnery entered into between William Neilson and the said defenders, other than Hugh Neilson junior, dated 22d and 28th March 1867, and in particular under the terms therein contained relative to the death of a partner of the said company, and the right of the executors of a deceased partner to become partners in the company, *or otherwise* to have it found and declared that at the date of the death of the said William Neilson, he and the defenders Walter Neilson, Hugh Neilson senior, James Neilson, and Hugh Neilson junior were partners carrying on business under the name of the Mossend Iron Company, under the terms contained in a draft contract of copartnery prepared in or about the year 1875, and bearing to relate to a proposed partnership between the said William Neilson and the defenders, and in particular under the terms therein contained relative to the death of a partner of the said company, and the right of the executors of a deceased partner to become partners in the said company; and it being so found and declared, under one or other of the alternative conclusions, to have it found and declared that the pursuer and the said James Thomson and James M'Creath (as the trustees of the deceased alone qualified to act in questions with the Mossend Iron Company) were entitled under either of the said deeds, as executors of the said deceased William Neilson, to become partners of the said company by intimating in writing to the surviving partners their intention to become partners of the said company at any time within two months after the decease of the said William Neilson, or otherwise by such intimation to make the whole executors of the deceased partners of the said company; and to have it found and declared that the power thus conferred upon the executors of the deceased William Neilson was validly exercised by an intimation in writing, dated 21st July 1882, authorised by the pursuer and the said James M'Creath, and signed by the agents of the pursuer and the said James M'Creath as executors, and despatched to each of the defenders Walter Neilson, Hugh Neilson, James Neilson, and Hugh Neilson junior on the said date, and that in accordance with the said notice the pursuer and the defenders Hugh Neilson and James Neilson, along with the said James Thomson and the said James M'Creath, became partners as executors in the said company, and that they have since the said date continued to be partners in the said company: Or otherwise, in the event of its being held that the pursuer and the defenders Hugh Neilson and James Neilson, and the said James Thomson and the said James M'Creath, did not become partners of the Mossend Iron Company, as executors, to have it found and declared that the copartnership trading under the name of the Mossend Iron Company was terminated as at the said 24th May 1882, the date of the death of the said William Neilson, or at such other date as should be fixed by the Court in the course of the process;" and to have the pursuer and defenders, along with James Thomson, authorised to wind up or sell the business of the company. There were also conclusions for accounting.

The contract of 1867 referred to in these conclusions expired in 1873, and the termination of the draft contract of 1875 was at 31st May 1882. The draft contract of 1875 contained this clause relative to the right of the executors of a deceased partner to become partners in the company—"*Tenth*, Upon the death of any partner, his executors shall be entitled, if they see fit, to become partners of the concern until the expiry of the first five years of the contract, or in their option, until the final expiry of this contract, they always being bound to continue the deceaser's capital in the concern down to the time when they shall cease to be partners, and having a voice in the management thereof; but in case such executors shall be more than one in number, they shall be obliged to exercise their voice through one only of themselves, appointed to attend the meetings of the company for that purpose; but further, in case such executors shall decline becoming partners, and elect to have the deceaser's share and interest in the concern paid out, then such share and interest (as the same shall be ascertained by a balance of the company's books as on the day of decease, if such decease shall occur during the first year of the contract, or by the immediately preceding balance if it shall occur after the first year) shall be paid out, subject to the option hereinafter given, with interest thereon at the rate of five pounds per centum per annum from the date of such balance, but under deduction of any sums paid in the interim, with interest thereon, by the company's bills, in equal instalments, at twelve, eighteen, twenty-four, and thirty months from the date of decease, with power nevertheless to the remaining partners, or a majority in value of them, if they shall see fit, to accelerate such payments under corresponding rebate of interest in such manner as they may determine. But it is understood and agreed, that if the executors fail to intimate in writing to the surviving partners their intention to become partners as aforesaid, within the period of two months after the day of decease, they shall forfeit their right to become partners, and in that case the surviving partners, or the majority of them in value, shall be entitled, in their option, either to pay out the deceaser's share and interest in the concern in manner herein above provided (and in which case such share and interest shall devolve on and belong to the surviving partners in proportion to their respective interests in the concern), and to free and relieve the executors and representatives of such deceaser of all debts and liabilities of the copartnery, whether incurred before or after the date of his decease, or to wind up the concern in manner specified in article twelfth hereof." This clause was substantially the same as the corresponding clause in the contract of 1867.

By his trust-disposition and settlement William Neilson assigned and disponed to and in favour of "Mrs Ann Yule or Neilson, my wife; Hugh Neilson, iron and coalmaster, Summerlee, near Glasgow, my brother; James Thomson, engineer and shipbuilder in Glasgow, son of the late George Thomson, engineer and shipbuilder in Glasgow; James M'Creath, mining engineer in Glasgow; and James Neilson, iron and coalmaster, Mossend, my son; and to the acceptors and survivors, and acceptor or survivor of them, the major number of them accepting and surviving and resident in the United Kingdom from time to time being a quorum, and to the nearest heir-male of the last surviving acceptor," and conferred the following powers upon his trustees—"And without pre-

judice to the powers which my trustees may have at common law, or by statute, or otherwise, but in addition thereto, I confer upon my said trustees and their foresaids the following special powers in carrying out the purposes of this settlement:—That is to say—(*First*) To carry on, for such time as they may think proper after my death, my interest in the Mossend Iron Company, and any other business in which I may be engaged at my death, alone or in conjunction with others, or continue my interest in such business, and to apply the whole or such part of my estate as they may consider necessary for that purpose." The trust-deed contained this further provision—"(*Third*) I provide and declare that in all matters in regard to which the interests of any of my trustees as an individual is in conflict with the interest of any beneficiary under these presents, and in transactions with partnerships or companies in which they are partners or shareholders, the vote of such trustee shall not be counted in the determination of such matters, but the adverse interests of any trustee, or the fact of his being an interested party, shall not otherwise affect his power to act." The trustees were duly confirmed as executors.

The Mossend Iron Company pleaded, *inter alia*, that the pursuer had no title to sue.

The Lord Ordinary (Lee) on 3d July 1883 allowed to the pursuer and defenders a proof before answer, and on a reclaiming-note being presented by the defenders, the First Division on 17th July 1883 adhered to the Lord Ordinary's interlocutor, reserving the question of the pursuer's title to sue, as reported in vol. xx. p. 816.

Before the proof the defenders, the Mossend Iron Company, who had not previously disputed the averment of the pursuer Mrs Neilson that William Neilson was a partner of the Mossend Iron Company at the date of his death on 24th May 1882, obtained leave to amend their record and put in a statement that shortly prior to his death in the beginning of May 1882 William Neilson had made an arrangement with the other partners of the firm that he should retire, on the footing that his interest therein should be paid out as shown in the balance-sheet of 31st May 1881, receiving in addition to the sum to which he was entitled thereunder 5 per cent. on the balance at his credit on current account as per that balance-sheet, and 10 per cent. on his capital in lieu of profits since 31st May 1881. This agreement was not averred to have been embodied in any formal writing, but it was averred that William Neilson retired on these terms, and was thereafter no longer a partner. This statement, however, they failed to prove. There was a dispute as to whether at the date of William Neilson's death the ruling contract of copartnery was the draft contract of 1875, the stipulated duration of which expired on 31st May 1882, or whether the rights of the partners were not governed by the contract of 1867, the termination of which was at 31st May 1873, it having been according to this contention continued as a partnership-at-will till William Neilson's death. These points are dealt with by the Lord Ordinary in heads (1) and (2) of his opinion *infra*.

With regard to the intimation given by William Neilson's executors to the company of their intention to become partners of the company, the following facts were proved:—At the date of William Neilson's death on 24th May 1882 two of the five trustees appointed by him were disqualified from acting in regard to questions in connection with the company, because they were partners of the company, and therefore personally interested, viz., James Neilson and Hugh Neilson. The other three trustees—Mrs Neilson, Mr James Thomson, and Mr James M'Creath—held an adjourned meeting on 21st July 1882, the minute of which bore—"After full discussion it was resolved (Mr Thomson, who desired to be neutral, not voting) to take advantage of the provisions of the contract of copartnery of the Mossend Iron Company, and become partners in the late Mr William Neilson's stead, and the law-agent was instructed to give the necessary notices to the surviving partners.

"Mr Thomson intimated that he would not incur any responsibility or liability in connection with the foregoing resolution, or the partnership by the trustees which would result from it."

The law-agent accordingly of the same date addressed to Messrs Hugh, Walter, and James Neilson instruction of the resolution of the trustees, in the following terms—"*Glasgow, 21st July* 1882.—On behalf of the executors of the late Mr William Neilson, we beg to give you notice, that under the provisions of the contract of copartnery of the Mossend Iron Company they elect to become partners in his stead." The agents for the company reply on 25th July 1882, as follows:—"With reference to your notices of the 21st instant, addressed to Messrs Walter, Hugh, and James Neilson of the Mossend Iron Company, we shall feel obliged by your informing us under what contract of copartnery, and under what particular clause or clauses therein, the notice is given." This was followed up by another letter from the company's agents, dated 5th October 1883—"Although you have not yet favoured us with an answer to the inquiry contained in our letter to you of 25th July last, our clients, the surviving partners of the Mossend Iron Company, now instruct us to intimate to you, as acting for the trustees and executors of Mr William Neilson, that they cannot admit or recognise any right on the part of your clients to elect to become partners of the Mossend Iron Company in his stead, as stated in your letters to our clients on 21st July last; and that they treat the notice contained in these letters as of no effect. We have further to intimate that our clients are prepared to pay out the late Mr Neilson's interest in the company as ascertained by the balance preceding his death, viz., the balance of 31st May 1881, all in terms of the contract of copartnery."

On 21st November 1882 another meeting of trustees was held, at which James Neilson, Hugh Neilson, James Thomson, and James M'Creath were present, the minute of which bore:—"The following letter from Messrs Bannatyne & Company [the law-agents of the company] was read to the meeting. The law-agent was instructed to see Mr M'Jannet [of that firm], and in the event of consignation being made, to endeavour to make arrangements which would result in the least possible loss to the party proving in the wrong:—'*Glasgow, 14th November* 1882—Dear Sirs—We are instructed by the Mossend Iron Company and remaining partners to intimate to

you, on behalf of the trustees and executors of the late Mr William Neilson, a former partner, that in terms of their contract of copartnery they are ready, and now offer to pay Mr Neilson's trustees and executors the sum of £70,000 sterling to account of his interest in that company, and we are to add that if payment be not taken within eight days from this date the amount will be lodged in bank in joint names in order to stop interest at more than deposit rates." It further appeared from this minute that Mr Thomson and Mr M'Creath had made investigations and had satisfied themselves that the valuation contained in the balance-sheet of 31st May 1881, of which Mrs Neilson and the beneficiaries under William Neilson's trust complained, were fair and reasonable. On 26th January 1883 Mr M'Creath resigned, and no other meeting of trustees was held before the present action was raised on 31st January 1883.

Defences had been lodged not only, as already stated, for the Mossend Company, but also for Hugh Neilson, James Thomson, and James Neilson, the trustees, other than the pursuer, of William Neilson. The position taken up by them was stated to be as follows:—"(Stat. 1) After the death of the said William Neilson, the Mossend Iron Company . . . . proposed that the said executors should be settled with upon the basis of the balance-sheet of 31st May 1881, being the last balance prior to William Neilson's death. The present defenders as trustees were of opinion that the proposed settlement would be the most beneficial arrangement that could be made in the interests of the trust-estate. . . . . The pursuer, however, and her younger children took objections to the valuations in the said balance-sheet of 1881. And the pursuer proposed that the executors should elect, in terms of the contract of copartnery, to enter the partnership. The defenders Hugh Neilson and James Neilson were precluded by the provisions of William Neilson's trust-disposition and settlement from voting upon the question, but they objected *qua* trustees to become partners in said company, or to incur responsibility either as such or in connection with the pursuer's proceedings. Ultimately Mr M'Creath concurred with the pursuer in electing to enter the said partnership, while the defender James Thomson dissented. The letter of 21st July 1882 was then sent to the company upon the instructions of the pursuer and Mr M'Creath. (Stat. 2) Mr M'Creath resigned the office of trustee and executor in January 1883, and the defender James Thomson is thus, in terms of the said trust-disposition and settlement, the only trustee except the pursuer whose vote can be counted in the determination of any questions between the executry estate of the said William Neilson and the said company. As already stated, the said James Thomson was opposed to the executors taking up the partnership of the said William Neilson, and he is still of opinion that it is not for the benefit of the trust estate that the interest of the said William Neilson or his trustees in said partnership (assuming that the trustees were entitled to elect to become partners) should be continued, and he declines as one of the trustees to become a partner or to incur responsibility either as such or in connection with the pursuer's proceedings. The defenders are convinced from a careful examination of the Mossend works and collieries, made by the defender James Thomson and Mr M'Creath, that the objections which the pursuer and her younger children took to the valuations and the balance-sheet of 1881 are unfounded."

They pleaded—"(1) The said James Thomson having been and still being opposed to the executors of the said William Neilson continuing the said partnership, and all the trustees of the said William Neilson except the pursuer being of opinion that the settlement proposed by the said company is the arrangement most beneficial for the trust-estate, the action should be dismissed."

The Mossend Iron Company, besides pleading as already stated, pleaded—(1) No title to sue. "(3) The executors of the deceased William Neilson not having validly or timeously exercised any power competent to them to become partners of said company, the defenders should be assoilzied from the first three declaratory conclusions of the summons. (7) The said James Thomson having been and still being opposed to the trustees or executors of the said William Neilson continuing the said partnership, and all the trustees of the said William Neilson, except the pursuer, being of opinion that the settlement proposed by the said company is the arrangement most beneficial for the trust-estate, the action should be dismissed."

II. The other of the conjoined actions was at the instance of Hugh Neilson junior, as a partner of the Mossend Iron Company, and as an individual, against the Mossend Iron Company, and Walter Neilson, Hugh Neilson, and James Neilson, the individual partners, along with the pursuers, of the Mossend Iron Company, and against Mrs Neilson, Hugh Neilson, James Thomson, and James Neilson, as William Neilson's trustees and executors, to have it found and declared that from and since the expiry on the 31st day of May 1882 of the term mentioned in the draft contract of copartnery for the endurance of the copartnery trading under the name of the Mossend Iron Company, or otherwise from and since William Neilson's death on 24th May 1882, the copartnery had been carried on by Walter Neilson, Hugh Neilson, and James Neilson, and the pursuer by themselves or together with the executors of the deceased William Neilson as a partnership-at-will, and that the pursuer was entitled to have the copartnery and the business thereof wound up either as at the 4th day of May 1883 (the date of the pursuer's written notice after mentioned) or as at the date of citation, or otherwise as at the 24th day of May 1882, or as at such other date as the Court might fix, and to have the defenders decerned and ordained to concur with the pursuer in winding up the copartnery by realising the assets and paying or discharging the liabilities, in order to the division of the surplus assets among the parties entitled thereto, and to take all other steps necessary towards the winding-up.

Hugh Neilson junior, the pursuer of this action, was a son of William Neilson, and was assumed as a partner in 1875, and thereafter the terms of the contract of copartnery were embodied in the draft of 1875 above referred to. This draft contract contained the following clauses:—"*Eleventh*, In the event of the bankruptcy or declared insolvency of any of the partners during the currency of this contract, the same shall never-

theless subsist and continue in regard to the solvent partners, but the partner so becoming bankrupt or insolvent shall cease to be interested in the concern, and his share shall be held to have terminated as at the date of the last annual balance preceding such bankruptcy or insolvency, and shall devolve on and belong to the remaining partners, in proportion to their respective interests in the concern; and the same shall be ascertained and fixed by that balance, and the remaining partners shall be entitled, in their option, either to pay out the bankrupt or insolvent partner's share and interest in the concern, under deduction of any sums which may have been paid to him or for his behoof, between the date of said balance and the date of bankruptcy or declared insolvency, with interest thereon, by the company's bills, in equal instalments, at twelve, eighteen, twenty-four, and thirty months from the date of bankruptcy or declared insolvency, or (in the option of the remaining solvent partners) sooner, or to wind up the concern in manner specified in article twelfth hereof. *Twelfth*, If, three months before the termination of this 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 may be desirous of retiring shall be entitled to do so, and shall, immediately on the completion of the balance 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 shall be ascertained by a balance of the company's books as at the termination of the contract to be completed, within not more than three months from said termination, and that either in cash or by his or their bills, with security; and in the event of the partners differing as to the security or as to the date at which the bills shall be drawn, or otherwise, the terms shall be fixed by the arbiter after mentioned; but if the whole partners wish, the property and assets of the copartnery shall be disposed of as follows, viz.—It shall be competent for any one of the partners, by himself, or for any one or more of them together, to give in sealed offers for the same as a going concern, but under and subject to the whole debts and liabilities of the copartnery as at the date of the dissolution; which sealed offers shall be opened at a given place and time by a neutral party to be named by the partners or by the arbiter hereinafter named; and the highest offerer shall be held to be the purchaser, and shall be bound to pay the price, and otherwise implement his part as purchaser within the time and in the manner that shall have been mutually agreed upon beforehand or been fixed by the arbiter after named, on the application of any one of the partners; and in case any two of the said offers shall be equal in amount, the parties making the same shall be entitled, if they see fit, to give in new sealed offers at the meeting fixed for opening the original offers, and the highest offerer under said new offers shall be preferred as purchaser, and be bound to pay the price, and otherwise implement the provisions as aforesaid; and in case only one offer shall be made, the same shall not be opened, but the party making it shall become the purchaser at such a price as shall thereafter be mutually agreed or fixed by the arbiter after named, and in any one of these cases the price (after deducting expenses) shall be divided among the partners according to their respective rights and interests in the copartnery, and in case no offer is made, then the said property and assets shall be realised in such way or manner as shall be mutually agreed upon, or as shall be fixed by the arbiter hereinafter named, and with the proceeds the debts and liabilities of the copartnery shall be discharged in whole, or as far as the proceeds will go, and the surplus or deficiency, as the case may be, apportioned among and paid to or by the partners according to their respective rights and interests in the copartnery." The term of expiry of the copartnery under this draft contract of 1875 was 31st May 1882. It was admitted that since then no new written contract had been executed.

On 22nd March 1883 Hugh Neilson junior, the pursuer, personally intimated to the other partners of the company that he had come to the resolution to exercise his right to have the company dissolved, and requested that a meeting should be convened. This was followed up on 4th May 1883 by a letter from the pursuer to his copartners, and to the law-agents of William Neilson's executors, requiring that the copartnery should be terminated as of the date thereof, and that the necessary steps should be taken to have its assets realised and its affairs wound up.

The pursuer pleaded—"(1) The pursuer being a partner of the Mossend Iron Company, and the same being a partnership-at-will, or otherwise having come to an end on 24th May 1882 [the date of the death of the pursuer's father William Neilson], he is entitled to have the said business wound up, its assets realised, its liabilities paid and discharged, and the surplus assets divided, all as concluded for."

The Mossend Iron Company pleaded—"(3) On a sound construction of the contract between the parties, the pursuer is not entitled to have the company wound up, but only to retire therefrom and be paid out in terms of the contract."

Defences were also lodged to this action on behalf of William Neilson's trustees and Mrs Neilson. They maintained the position respectively taken up by them in the other action.

These two actions were conjoined on 23d November 1883, and after a proof, in which the facts above stated, and those given in the opinion of the Lord Ordinary *infra*, were proved, the following interlocutor was on 7th March 1884 pronounced by Lord Lee in the conjoined actions:—"The Lord Ordinary having considered the debate, with the proof and whole cause, Finds in the conjoined actions, as matter of fact—(1) That at the date of his death on 24th May 1882 the late William Neilson was a partner of the firm carrying on business under the name of the Mossend Iron Company, and that the allegations by the defenders the Mossend Iron Company and others, and Hugh Neilson and others, to the effect that he had previously retired or agreed to retire upon the terms set forth in the amended record have not been proved; (2) that the other partners of the said firm at said date were Mr Walter Neilson and Mr Hugh Neilson, brothers of the deceased William Neilson, and also Mr James Neilson and Mr Hugh Neilson junior, two of his sons; and that the terms of the subsisting partnership were contained in the draft contract of 1875, as corrected in pencil in article seventh, to the effect

of making the salary of James, the fourth party, £1000 instead of £500; (3) that the deceased William Neilson at his death left a trust-disposition and settlement in favour of his wife, his brother Hugh, his son James, his son-in-law James Thomson, and Mr James M'Creath, mining engineer, Glasgow, and the 'acceptors and survivors, acceptor and survivor of them, the major number of them accepting and surviving, and resident in the United Kingdom, from time to time, being a quorum,' as trustees for the purposes and with the powers therein mentioned; (4) that on 21st July 1882, and at an adjourned meeting of the trustees of Mr Neilson, at which Mrs Neilson, Mr Thomson, and Mr M'Creath were present, and Messrs Hugh Neilson and James Neilson absented themselves as not having a vote on the question then to be considered, it was resolved (Mr Thomson, who desired to be neutral, not voting) to take advantage of the provisions of the contract of copartnery of the Mossend Iron Company, and become partners in the late Mr William Neilson's stead, and of the same date, by virtue of instructions given at said meeting, an intimation was given by the agents of the trust to the surviving partners that the executors elected to become partners; (5) that the said intimation, although not authorised by Mr Thomson, or by Messrs Hugh and James Neilson, who intimated that they refused to incur any responsibility in connection with said resolution or the partnership therein referred to, was authorised by a quorum of qualified trustees and executors; (6) that subsequently to the death of the said William Neilson, and to the expiry on 31st May 1882 of the contract term of the partnership, the business of the copartnership was carried on by the surviving partners without any new agreement, and without any expression of a desire on the part of any partner to retire from the concern on the terms specified in the twelfth clause of the contract: And finds in law—(1) That the power conferred by the contract of copartnership upon the executors of a deceasing partner was validly exercised by the executors of the deceased William Neilson by the intimation above mentioned, of date 21st July 1882, to the effect of making them, as such executors, partners of the said company or copartnery until the expiry of the contract on 31st May 1882; (2) that since 31st May 1882 the copartnery has been carried on as a partnership-at-will; (3) that the articles under which the partnership was carried on prior to 31st May 1882 do not exclude any of the partners from now dissolving the copartnership, and requiring the concern to be wound up in the manner specified in article twelfth; and that the pursuer Hugh Neilson junior is therefore entitled to have the said copartnery and the business thereof now wound up, as at 14th May 1883, in such way or manner as shall be mutually agreed upon, or as shall be fixed by the arbiter named in said draft contract of copartnery; and with these findings appoints the conjoined actions to be put to the roll for further procedure, and grants leave to reclaim.

"*Opinion.*—These actions were conjoined in terms of an interlocutor pronounced by the First Division of the Court on 22d November last, and a proof was allowed to the parties in the conjoined actions. Before the commencement of the proof leave was obtained by the defenders to make an important amendment on the record. The effect of it was to substitute for an admission that the late William Neilson was a partner at the date of his death, a denial of the averment to that effect, and an allegation that in the beginning of May 1882 (he died on 24th May) he had agreed to retire, and had retired.

"This allegation went to the root of the action at Mrs Neilson's instance. For if it were well-founded all other defences were superseded. If William Neilson was not a partner at the date of his death, the clause founded on as empowering his executors to become partners in his stead had no application.

"In Mrs Neilson's case, therefore, the first question is whether this new defence has been substantiated. The evidence of Mr James Neilson and Mr M'Kinnon, with the correspondence produced, is certainly sufficient to shew that the parties had very nearly concluded an agreement of the kind alleged. I think that the terms were substantially adjusted so far as that could be done verbally; and I see no reason to suppose that Walter Neilson, or any of the other partners, would have refused to concur in and carry out the arrangement if it had been presented in a complete shape for their consent. But unfortunately the evidence shews beyond all reasonable doubt that the proceedings were stopped by William Neilson's orders before all the parties concerned were conclusively bound; and I think that as long as matters were entire, and the proposed retirement was incomplete, William Neilson was entitled to stop proceedings as he did.

"2. The next question is, what was the contract under which the partners were carrying on business at the time of Mr William Neilson's death? That Hugh Neilson junior was admitted as a partner in 1876, as from 31st May 1875, and upon the terms specified in the draft contract produced, is, I think, proved. The balance-sheets furnished to him corroborate the statements of the other partners on this subject; and I think it not material that he denies having seen the draft, as he admits that he left himself in the hands of his father, a portion of whose stock was transferred to him. The fact that the draft is corrected in pencil as regards the salary of James, is not inconsistent with the statement that it embodies the terms of the new partnership. The correction was acted on in keeping the partnership accounts; and the explanation given of the draft not being extended and executed is in my opinion satisfactory and sufficient. My opinion is, that having been adjusted by William Neilson on behalf of his son Hugh, and with Hugh's authority, and having been acted on by all the partners as the regulating contract, the draft must be taken as containing the articles of the partnership.

"3. There is more difficulty about the question whether the power conferred by the tenth article upon the executors of deceasing partners was effectually exercised by the resolution and intimation of 21st July 1882. William Neilson died on 24th May. The contract term of partnership expired on 31st May. The period of two months allowed to the executors extended to 24th July. On 21st July the contract term of partnership had been expired for a period of seven weeks. The surviving partners might have resolved to wind up the concern at 31st May; or they might

have given notice to the executors that it would be wound up as at that date, in the event of the option of becoming partners being exercised by them. But I do not see how they could prevent the executors exercising within the stipulated two months their power of becoming partners 'until the final expiry of this contract.' I cannot hold that on 21st July it was too late to exercise that power, to the effect of making the executors partners at least down to 31st May, and thereby obtaining the benefit (if it should be a benefit) of the balance-sheet of that date.

"Two arguments, however, were maintained, which appeared to me to require attention, and to be attended with difficulty in the circumstances of this case. (1) That the power conferred by the contract is not given to a bare majority of executors, but is, both from the nature of it and in its expression, a joint power which could only be exercised by the concurrence of all the executors—at least of all the executors qualified to vote and act in the matter. (2) That at all events the power could only be exercised by a quorum (viz., a majority) of the whole number of executors.

"It appears to me that if the concurrence of all the executors is not required by the contract, the power of a quorum to act by a majority of their number is settled by the decisions to which I formerly [*ante*, vol. xx. p. 717] referred (*Shanks* v. *Aitken*, March 4, 1830, 8 Shaw, 639; *Blisset's Trustees* v. *Hope's Trustees*, February 7, 1854, 16 D. 482). But it is not without hesitation that I have arrived at the conclusion that the power is one which could be effectually exercised without the concurrence of all the executors qualified to vote upon the subject.

"The difficulty is well illustrated by the terms of the conclusions of the summons, which seek to have it declared that by the act of two executors the whole five became partners, and 'have since the said date continued to be partners in the said company.' But it is only 'as executors foresaid' that they are said to have become partners; and no question is raised by the circumstances of this case as to the rights or liabilities of the individual executors towards third parties.

"The general rule as to the construction of nominations for the exercise of a trust power is, that if indefinite the majority are entitled to act (*Campbell and M'Intyre* v. *M'Intyre*, January 12, 1824, 3 S. 126; *Grant* v. *Campbell's Representatives*, 1764, M. 14,690). The case of mandatories *inter vivos* is different. Erskine, iii, 3, 34, and the case of *Lag* (M. 14, 689) referred to by Erskine, iii, 9, 40, in support of the doctrine that all of the executors must concur where two or more are conjoined, seems not to have been a case of indefinite nomination but of a joint nomination. Besides, it implies that one of four executors can act if the rest should refuse to assist, and has always been so regarded.

"It was said, however, that in this case the terms of the nomination require concurrence on the part of all the executors, firstly, because it is only 'if they see fit,' that the executors have power to become partners. This, it is argued, excludes the idea that a bare majority was to be allowed to decide the question; secondly, because in case such executors should be more than one in number, it is required by the contract that they should be obliged to 'exercise their voice through one only of themselves appointed to attend the meetings of the company.' This, it is argued, proves the meaning of the contract to have been that the executors should be united. There is much force in these arguments. But I am unable to adopt the conclusion that they are sufficient to show that the contract was intended to deprive the executors of a deceased partner of the power of acting according to his appointment in the ordinary way. I therefore repel the objection to the validity of the resolution arrived at on 21st July, so far as founded upon the objection that all the executors qualified to vote upon the question did not concur, and upon the argument that at least a quorum of the whole body must concur.

"But it was also maintained that the resolution of 21st July, when considered in the light of all that passed upon the occasion, could not be regarded as a final decision of the point. It was said to have been intended only for the purpose of keeping the matter open. My opinion is that this contention is negatived by the proof, which I think clearly substantiates the accuracy of the minutes.

"On the whole, therefore, I sustain the intimatiod of 21st July as a valid exercise of the power conferred upon executors.

"(4) Assuming that the power conferred by clause 10 was exercised, the question remains, to what effect has it been exercised? and the first observation which occurs under this head is, that the proviso of clause 10 applicable to the case of a failure to intimate the intention to become partners takes no effect. There was no failure to intimate the intention of the executors. The case is therefore not one in which an option is given to the surviving partners, or the majority of them in value, to decide whether they should pay out the deceaser's share or wind up the concern in manner specified in article 12. I think that the effect was to make all the executors as a body partners of the concern in the place of the deceased. Any one executor who wished to refuse to become a partner as one of the body, was, I think, bound to retire from the executry. Indeed, I think he should never have accepted the office unless he was prepared to exercise the powers conferred, if it should be for the interest of the executry to do so. But my view is that the exercise of such power could do no more than make the executors partners for the remainder of the contract term. The executors' notice would necessarily give to the surviving partners an opportunity of making a counter intimation that the partnership was not to be continued after the expiry of the stipulated period. If the partnership was allowed to go on after 31st May, it was a partnership-at-will, and because no such counter intimation was made, I can find nothing in the contract which would entitle the executors (supposing their intimation to have been accepted without dispute) to insist on the concern being carried on after the expiry of the contract by the surviving partners along with them. Such a compulsory continuance or renewal of the contract would have required very clear provision. The articles do not seem to me to have contemplated anything of the kind. And therefore in both actions I find that subsequent to 31st May 1882 the copartnery was carried on as a partnership-at-will.

"(5) The only other question which requires to be noticed is that raised by the action of Hugh Neilson junior, who demands that the concern shall be wound up. Having regard to the risk of causing serious injury to the interests of the leading partners by giving effect to the pursuer's, Hugh Neilson junior's demand, and to the evidence on that subject, I was very unwilling to pronounce for a winding-up if it could be avoided. I am bound, however, to say that I have been unable to find any defence established. The plea that an individual partner is only entitled to retire in terms of article 12 is not supported in my judgment by the contract of copartnery. The 12th article I think gives to every partner a right to retire, but it does not exclude any partner (as I think it might lawfully have done) from demanding a dissolution and winding-up at the expiry of the contract.

"I therefore sustain so far the claim of Hugh Neilson junior. But I think that in the meantime he is not entitled to a decree for winding-up in the manner required by the conclusions of the summons. My opinion is that the letter as well as the spirit of the 12th article requires that the partners should have an opportunity of mutually agreeing upon the manner of winding-up, and that in the event of a difference of opinion the arbiter named by the contract ought to be called in to fix the manner of winding-up.

"I think it right to note that in the argument before me it was not disputed that the trustees of William Neilson were, at the date of the alleged intimation, his 'executors' within the meaning of the 10th article of the contract of partnership. They are not expressly nominated executors by the trust-disposition and settlement, but they appear to have been confirmed as such prior to 25th August, and in practice it appears to be understood that it is not essential to confirmation as executor-nominate that there should be an express nomination. — See Alexander's Practice of Commissary Courts, 67."

The Mossend Iron Company reclaimed, and argued:—I. *Mrs Neilson's Action*—The pursuer had no title to sue. It was unnecessary to consider whether a majority of the executors could sue. This was an action in which one only of two qualified executors was suing, while the other declined because he differed on a point of trust-management. That has raised quite a different question from what the Lord Ordinary had decided. Apart from the merits, the fact that both did not concur was enough to exclude the action. When the differences between the executors was ascertained the objection was stronger. Mrs Neilson might have had a title to become a partner, but it did not follow that she was entitled to pursue, the non-concurring executor not even having been consulted as to the raising of the action. No minute of the trustees had been produced from which it appeared that question of raising of the action had been considered. The difference was one of opinion. It was not to be assumed Mr Thomson was wrong, and, on the other hand, it was quite clear Mr Thomson was within his rights. Therefore it could not be said that this was the case of an executor suing alone on account of the fraud or unreasonableness of the co-executor. There was no authority adduced by the other side for such a proceeding. Moreover, it was not clear that this was a valuable asset to the executors. How could Mrs Neilson ask a declarator that all the executors were partners of the company when the others declined to become partners? If she had a title to force them to become partners, then she ought to constitute her claim, but ought not to ask the company to try that question. *On the merits*—As the terms of the contracts of 1867 and 1875 were practically the same in regard to this question, it was not of much consequence which was considered to be the ruling one, but the company contended that the draft of 1875 was. The summons contained a conclusion that they were partners from the date of the intimation, but no conclusion that they became partners at William Neilson's death, which was what the Lord Ordinary had found. On a sound construction of the contract of 1875, the period for giving notice expired on 31st May 1882, so that the notice of 21st July 1882 was not timeous. There never was an agreement by the executors to come into the company. Co-executors must be unanimous, and in this respect differ from a body of trustees—Ersk. Inst. iii. 9, 40; Ersk. Prin. iii. 9, 20; Bell's Prin. sec. 1993; *Inglis* v. *Meine*, 1738, M. 16,115. The quorum here must have been three out of five, and this qualified quorum must not only have resolved to become partners, but to enforce their resolution—*Morrison* v. *Gowans*, Nov. 1, 1873, 1 R. 116. II. *Hugh Neilson junior's Action*:—The pursuer was not entitled to have the company wound up. He was only entitled to be paid out. The terms of a partnership contract were to be carried forward into a partnership-at-will, so far as not inconsistent with the nature of a partnership-at-will—Lindley on Partnership, 823; *Cox* v. *Willoughby*, 13 Ch. Div. 863; *Yates* v. *Phin*, 13 Ch. Div. 839. This was a partnership-at-will after 31st May 1882; but article 12 of the draft-contract of 1875 was not inconsistent therewith, and therefore must be carried forward. Article 12 provided for two events, continuing or retiring; if any of the partners did not agree to go on, then he might take the alternative and retire. In that case the clause provided a mode of ascertaining the retiring partner's share of the assets. The clause was in favour of the continuing partners.

Counsel for William Neilson's trustees adopted the argument of the reclaimers in both actions.

Argued for Mrs William Neilson:—I. *Mrs Neilson's Action*—Either the contract of 1867 was the ruling contract or the draft of 1875. In either case, the notice given by the executors on 21st July 1882 was a valid intimation, sufficient to make them partners of the company. If the provisions of the contracts were not applicable, then the partnership was terminated by the death of William Neilson, and was thereafter carried on as a partnership-at-will. The executors were therefore entitled to have the business wound up. An objection had been taken to a winding-up, on the footing that they were not partners at all. It was sufficient that all the qualified executors had come together and considered the matter—*Blisset's Trustees* v. *Hope's Trustees*, Feb. 7, 1854, 16 D. 482; Kames ii. 286; *L. Lynedoch* v. *Ochterlony*, Feb. 15, 1827, 5 S. 358; *Grant* v. *Campbell*, M. 14,690.

Argued for Hugh Wilson junior:—II. *Hugh Wilson junior's Action*—On the footing that he was a partner, and that the draft of 1875 was the ruling contract: After the expiry of the contract

the partnership was carried on as a partnership-at-will. Article 12 did not in terms exclude a common law winding-up of the company. But even if it could be read so as to exclude such a winding-up, it could not apply to a partnership-at-will—(*Dickie* v. *Mitchell*, June 12, 1874, 1 R. 1030; Lindley on Partnership, 823)—for no clause in the contract inconsistent with a partnership-at-will could be carried forward into it. This clause, so interpreted, would be inconsistent, for it was of the essence of a partnership-at-will that any partner could dissolve the partnership at any time—*Clark* v. *Leitch*, 32 Beav. 14, *aff.* 1 De G. J. & S. (1863) 409. It was said that article 12 was a clause for providing a mode of winding-up, but this construction of the other side implied an obligation on the partner and a privilege to the company—*Featherstonhaugh* v. *Fenwick*, 17 Ves. 307.

At advising—

LORD SHAND—There are here two conjoined actions, the first of which was raised in January of last year, at the instance of Mrs Anne Yule or Neilson, widow of the late William Neilson, in the character of trustee of her late husband, with concurrence of certain of her children, against the Mossend Iron Company; the second action was raised about six months later at the instance of Mr Hugh Neilson junior, the son of Mrs Neilson, and is also directed against the Mossend Iron Company.

The general purpose of the first of these actions is to have it in result found that the trustees of the late William Neilson, who died upon the 24th of May 1882, are entitled to be paid out of the firm or business upon the footing finally of the balance-sheet under the then existing contract of copartnery—I mean the balance-sheet of 31st May 1882—and not upon the balance-sheet of 31st May 1881. There is an alternative conclusion, I see, in the summons, to the effect that if the pursuers should not succeed in the former, it should be found and declared that the copartnery was terminated altogether on the 24th of May 1882, but I do not think that that claim was strongly pressed, or indeed that it was pressed upon the Court at all in the course of the discussion that occurred.

In the subsequent action at the instance of Mr Hugh Neilson junior, he seeks that in respect of a notice which was served by him on the 4th of May 1883, or otherwise in respect of the demand which he makes in the conclusions of this summons, it should be found that the company has been dissolved, that he is entitled to have the whole assets realised, and the surplus assets divided amongst the partners.

It appears to me that at the date of the death of Mr William Neilson, which, as I have said, occurred on 24th May 1882, the other partners of the Mossend Iron Company were Mr Neilson's brothers Walter and Hugh, and his sons James and Hugh Neilson junior; the term of the contract under which the company was then being carried on was just about to expire, the expiry of that deed being 31st May 1882, and the interest of the pursuer as representing the trust estate of William Neilson is this, that if upon the death of Mr William Neilson on the 24th of May 1882 his estate consisted of his interest in the business of the company, then in terms of the contract the balance upon the interest was fixed, and fell to be paid upon the previous balance of 31st May 1881. Mrs Neilson, as the representative of the trust-estate, maintains that it would be better for her interest that she should be paid out on the subsequent balance-sheet, and she therefore claims the benefit of the notice which the trustees transmitted within two months of Mr Neilson's death, in terms of the article in the contract of copartnery requiring that that should be sent, as conferring on the trust-estate the right to the later balance.

The question between the parties is, whether that right subsists in the trust-estate, and can be vindicated in this action? The Lord Ordinary at the outset of his judgment has dealt with the point which I think should very properly be cleared away as preliminary to the other questions between the parties. And, first, upon the amendment made at a very early stage of this case. The defenders, Neilson's trustees and the Mossend Iron Company, made an amendment on their case, in which they averred, as excluding the claims in this action altogether, that the late Mr William Neilson before his death had made a concluded and binding arrangement by which he had accepted finally of the balance of 31st May 1881, and of course if that had been established, the action for payment upon a subsequent balance would plainly have been excluded. But I agree with the Lord Ordinary that the proof on that subject entirely failed to substantiate the statement made on amendment. I do not think it was seriously maintained at the bar that that averment had been established.

The next question with which the Lord Ordinary deals—and of course it had to be disposed of before any further progress was made—is this, What was the ruling contract between the parties at the date of Mr Neilson's death? Upon that subject the Lord Ordinary has found in the first of his findings, "that at the date of his death on the 24th May 1882, the late William Neilson was a partner of the firm carrying on business under the name of the Mossend Iron Company, and that the allegation by the defenders, the Mossend Iron Company and others, and Hugh Neilson and others, to the effect that he had previously retired or agreed to retire upon the terms set forth in the amended record, have not been proved; that the other partners at said date were Mr Walter Neilson and Mr Hugh Neilson, brothers of the deceased William Neilson, and also Mr James Neilson and Mr Hugh Neilson junior, two of his sons; and that the terms of the subsisting partnership were contained in the draft contract of 1875, to the effect of making the salary of James, the fourth party, £1000 instead of £500." It appears that the contract dated in 1867 expired in 1873, and the business was continued under its provisions for two years without any new deed being written out. In 1875 a new draft of the contract was prepared, modifying to some extent the provisions in the deed of 1867, and the Lord Ordinary has held that that draft contract, although never executed, really regulated the rights of parties after its date, with the single alteration to which he specially refers, in the passage which I have quoted, by which there was made an enlargement of the salary of Mr James Neilson, who was taking an active part in the business, from £500 to £1000. Now, I do not mean to go into the evidence on

that matter. It was touched upon in the course of the discussion, but scarcely pressed upon us. I am clearly of opinion that the Lord Ordinary is right in that finding, and that it was the contract contained in that draft upon which the parties were carrying on their business. Perhaps it is of comparatively little consequence which of these contracts was really held to be the regulating one, because so far as I can see, clauses 10, 11, and 12, which formed the subject of discussion in the present action, are substantially to the same effect, whether you take the one contract or the other.

But having cleared away these matters, the next question that arises is as to the effect of an intimation given by the trustees of the late William Neilson, that they elected to become partners in this company after Mr Neilson's death. Upon that matter the Lord Ordinary has, in the first place, in the third finding in his interlocutor referred to the trust-disposition and settlement under which the pursuer and the other trustees act, and the powers which it contains as to the meetings of the trustees which followed after Mr Neilson's death. The trustees gave intimation that they claimed to become partners under the contracts of the Mossend Iron Company. But before noticing the facts in regard to that matter, it is necessary to observe what are the terms, in the first place, of the contract of copartnery of the Mossend Iron Company as to the power of executors of a deceased partner becoming partners in the business, and in the next place, to examine what power William Neilson gave to his trustees to become partners if they should think fit. Now, the first of these matters is dealt with by article 10 of the contract, which is to this effect, that upon the death of any partner his executors shall be entitled, if they see fit, to become partners or not, until the expiry of the first five years of the contract, or, in their option, until the final expiry of the contract, they being bound to continue his capital in the concern down to the time when they shall cease to be a partner in the concern and have a voice in the management thereof. Then follows a provision that in case such executors shall be more than one, they shall exercise a voice through only one of them. And then there is this further provision for the case of the executors not desiring to become partners —"In case such executors shall decline becoming partners, and elect to have the deceaser's share and interest in the concern paid out, then such share and interest (as the same shall be ascertained by a balance of the company's books as on the day of decease, if such decease shall occur during the first year of the contract, or by the immediately preceding balance, if it shall occur after the first year) shall be paid out, subject to the option hereinafter given, with interest thereon at the rate of five pounds per centum per annum from the date of such balance, but under deduction of any sums paid in the interim, with interest thereon, by the company's bills in equal instalments at twelve, eighteen, twenty-four, and thirty months from the date of decease." That is the case here. They were to be paid out with interest at the rate of five per cent. per annum from that time, and with interest thereon, by the company's bills as therein stated. So that the effect of the provision was this—At the time when Mr Neilson died, taking it that the company was then current till 31st May 1882, his executors were entitled to elect either to become partners of that company till the final expiry of the current contract, or if they thought fit to do so, to have it declared that they were then entitled to be paid out as on the preceding balance, which was only a year before. If they, on the one hand, thought fit to elect to become partners, the result was to give them right to profits since the preceding balance and down to the expiry of the contract, which was to occur a few days afterwards. If, on the other hand, they did not elect to become partners, then their rights were, to obtain payment of their share in the concern, with interest from 31st May 1881, as stipulated in this article, and that by the company's bills as therein provided. Now, in order to test whether the executors did make such an election or not there follows a provision which I have not referred to, and which is in these terms—"But it is understood and agreed that if the executors fail to intimate in writing to the surviving partners their intention to become partners as aforesaid, within the period of two months after the day of decease, they shall forfeit their right to become partners, and in that case the surviving partners, or the majority of them in value, shall be entitled, in their option, either to pay out the deceaser's share and interest in the concern in manner herein above provided (and in which case such share and interest shall devolve on and belong to the surviving partners in proportion to their respective interests in the concern), and to free and relieve the executors and representatives of such deceaser of all debts and liabilities of the copartnery, whether incurred before or after the date of his decease, or to wind up the concern in manner specified in the article twelfth hereof."

Now, that was a provision of the partners among themselves. And now turn to the trust-deed of Mr William Neilson in order to see what was the power he gave to his trustees with reference to the exercise of this power on their part. We have it printed, and the clause is quite clear. It is to this effect. He says—"Without prejudice to the powers which my trustees may have at common law, or by any statute, or otherwise, but in addition thereto, I confer upon my said trustees and their foresaids the following special powers in carrying out the purposes of this settlement: That is to say — (*First*), To carry on for such time as they may think proper after my death my interest in the Mossend Iron Company, and any other business in which I may be engaged at my death, alone or in conjunction with others, or continue my interest in such business, and to apply the whole or such part of my estate as they may consider necessary for that purpose." Shortly stated, that is a power given to his trustees, to whom he conveyed his whole estate, heritable and moveable, with an authority to exercise their power of election which is referred to in the contract of copartnery.

Now, it appears that Mr Neilson having died on the 24th of May, intimation was given by his trustees that they would exercise that power of election. The Lord Ordinary has dealt with that in two of the findings succeeding those I have read. He finds in the third finding with reference to the disposition and settlement in favour of his wife, his brother Hugh, his son James, his son-in-

law James Thomson, and Mr James M'Creath, mining engineer, Glasgow, "and the acceptors and survivors, acceptor and survivor of them, the major number of them accepting and surviving and resident in the United Kingdom from time to time being a quorum," as trustees for the purposes and with the powers therein mentioned; "(4) that on 21st July 1882, and at an adjourned meeting of the trustees of Mr Neilson, at which Mrs Neilson, Mr Thomson, and Mr M'Creath were present, and Messrs Hugh Neilson and James Neilson absented themselves as not having a vote on the question then to be considered, it was resolved (Mr Thomson, who desired to be neutral, not voting) to take advantage of the provisions of the contract of copartnery of the Mossend Iron Company, and become partners in the late Mr William Neilson's stead, and of the same date, by virtue of instructions given at said meeting, an intimation was given by the agents of the trust to the surviving partners that the executors elected to become partners." Then his Lordship further finds (5) that "the said intimation, although not authorised by Mr Thomson, or by Messrs Hugh and James Neilson, who intimated that they refused to incur any responsibility in connection with said resolution or the partnership therein referred to, was authorised by a quorum of qualified trustees and executors."

Now, I think these findings are justified by the facts which are before us in this case. It appears from the clause in the trust-deed of Mr William Neilson, subsequent to that which I read, that two of his trustees were disqualified from voting or acting in a question whether the trust-estate of William Neilson should be made a partner in the business of the Mossend Iron Company for the obvious reason that they were personally interested in that matter. The resolving trustees were Mrs Neilson, Mr Thomson, and Mr M'Creath, and from the evidence it appears that—apparently at the instance of Mrs Neilson—the trustees were very hurriedly called together on the day before this notice fell to be given, if it was to be given at all, and at that meeting Mr Thomson undoubtedly took up the position I have mentioned, but, on the other hand, Mrs Neilson and Mr M'Creath agreed that it was proper that the notice should be sent to the Mossend Iron Company that the executors of William Neilson were to take advantage of their power to become partners of the company, and that this might be done, and in order that Mr M'Creath might be present, an adjourned meeting took place at five o'clock in the afternoon, and at that meeting Mrs Neilson and Mr M'Creath were present, as was also Mr Thomson; from the minute it appears that "after full discussion it was resolved (Mr Thomson, who desired to be neutral, not voting) to take advantage of the provisions of the contract of copartnery of the Mossend Iron Company, and become partners in the late Mr William Neilson's stead, and the law-agent was instructed to give the necessary notices to the surviving partners. Mr Thomson intimated that he would not incur any responsibility or liability in any connection with the foregoing resolution or the partnership by the trustees which would result from it." This minute does not appear to be signed, but from the evidence it would appear to be quite a correct record of what took place at the meeting. Following upon that we have the notice or intimation sent by the law-agents of the trustees to the law-agents of the Mossend Iron Company, in these terms—"*Glasgow, 21st July* 1882.—On behalf of the executors of the late Mr William Neilson we beg to give you notice that under the provisions of the contract of copartnery of the Mossend Iron Company they elect to become partners in his stead."

Now, there is no doubt, in the first place, that this notice, although sent, I think, on the last day that it was open to the parties to give notice, was in time. It was within the two months specified in the clause to which I have referred. And then, again, it is a notice which plainly appears to have been sanctioned by a majority of the trustees, who had at that time been confirmed as executors of the late Mr Neilson; and that being so, it appears to me that the notice, *prima facie* at least, was effectual in all respects. It was followed up by the Mossend Iron Company by a letter from their law-agents, in which, in the first place, they request to know under which contract the notice was given, and under what particular clause of the contract the notice was given. There seems to have been a good deal of correspondence between these parties at intervals, and although that matter was not cleared up by any letter from the agents of Mr William Neilson's trustees, we find that at the close of the correspondence the position of the Mossend Iron Company is taken up in a letter dated 5th October 1882, in which they write in these terms—"Although you have not favoured us with an answer to the inquiry contained in our letter to you of 25th July last, our clients, the surviving partners of the Mossend Iron Company, now instruct us to intimate to you, as acting for the trustees and executors of the late Mr William Neilson, that they cannot admit or recognise any right on the part of your clients to elect to become partners of the Mossend Iron Company in his stead, as stated in your letter to our clients of 21st July last, and that they treat the notice contained in these letters as of no effect. We have further to intimate that our clients are prepared to pay out the late Mr Neilson's interest in the company as ascertained by the balance preceding his death, viz., the balance of 31st May 1881, all in terms of the contract of copartnery." In a subsequent letter, I think, it is said that a large sum of money was consigned on the footing that they [the trustees] were not entitled to make that demand, and that declinature having been insisted in, the present action has been raised, and the defenders the Mossend Iron Company state various objections to the validity of the notice to which I have referred, and which have been considered and dealt with by the Lord Ordinary.

The first of these objections that was pressed upon us was, I think, that the executors who gave the notice were not entitled to do so, because they were not executors-nominate in the deed. It was maintained that even if they could be regarded as executors they could only act by acting unanimously, and could not act by a quorum; and thirdly, it was maintained that a notice of this kind could not be effectually given, as it was after the time when the endurance of the contract, as contained in the written deed, had expired. The Lord Ordinary has held that these objections are not well founded, and I agree with him in regard to all of them.

It appears to me, in the first place, that the conveyance of the estate, heritable and moveable, to a body of trustees who are entitled to obtain confirmation as executors, and who had obtained confirmation as executors, brought them into the position of being able to exercise that option and give that notice. The power was just like any other power that a trustee gets, or a body of trustees get, which may be exercised by the single trustee or by a majority of the number of trustees. And in regard to the argument that the notice could not be effectual because it was given after the expiry of the contract, I think that argument cannot be sustained, because upon the plain meaning and effect of that contract the purpose which the parties had in view was to give to the executors of the deceasing partner the right to become partners till the final expiry of the contract. The balance that had been last made before Mr William Neilson's death was on 31st May 1881. The business had been carried on nearly a year after that, and the contract was within five or six days of its expiry when Mr Neilson died, and when a new balance would have been made upon the profits of that year, and it becomes a very important question whether, within two months of the final expiry of the contract or within a few days of that, the executors of any partner should have the power to elect whether they should have the benefits of the profits that might be made during the year of the death of such partner or not, or that they should have right to a share of profits on the expiry of the contract. But I confess I am unable to see any good reason for holding that if an election was made on the day two months that the contract required that the right should be exercised, it was invalid because that day two months happened to be two months beyond the term of endurance of the contract itself. The notice was given within the time required by the contract. It was given for the legitimate purpose of demanding a share of the profits up to 31st May 1882, if the pursuers desired it, and I see no reason for holding it to be ineffectual.

Now, that being the state of matters at the date of the notice, there is a very serious question raised by the defenders in this action, arising out of a certain circumstance, viz., that after that notice was given it appears that a difference of opinion has arisen between the only trustees who have come to be the acting trustees in this trust. We have had an argument upon that point, which has special reference to the seventh plea-in-law for the Mossend Iron Company, which is in these terms—"The said James Thomson having been and still being opposed to the trustees or executors of the said William Neilson, continuing the said partnership, and all the trustees of the said William Neilson except the pursuer being of opinion that the settlement proposed by the said company is the arrangement most beneficial for the trust-estate, the action should be dismissed." And it is necessary very carefully to consider the point raised by that plea. And let us bear in mind the letter which I have read, in which the Mossend Company declines to recognise the right on the part of William Neilson's executors to elect to become partners in the company. It appears that after that letter Mr M'Creath, one of the trustees and executors, resigned office, with the result that the only acting trustees and executors left were Mrs Neilson and Mr Thomson. The evidence shows that Mr Thomson had looked fully into the matter, and had formed the conclusion that it was not desirable for this trust-estate that they should become partners under the notice by which they had elected to be partners, and that it was not desirable for the trust-estate that they should be involved in any questions of any balance subsequent to the balance of May 1881. This seems, indeed, to have been a matter about which there was investigation made by Mr Thomson. Several of Mrs Neilson's sons had represented to Mr Thomson and Mr M'Creath that they should make an examination with reference to the valuations of the company's property. And it was stated in the representations so made that it would be found that there was something entirely wrong about the balance of 1881, and that it was therefore desirable that the balance of 1882 should be resorted to. The result was, as I have indicated, that Messrs M'Creath and Thomson made careful inquiries, and Mr Thomson satisfied himself that it was really for the benefit of the estate that they should not propose to insist upon payment as at the balance of 1882, but to take the balance of 1881. And accordingly the position of matters before the action was raised came to be this—That Mr Thomson, one of the trustees desired that the executors should not be partners of this company, while Mrs Neilson, another of the trustees, desired that the executors should become partners.

In that state of matters Mrs Neilson has raised this action in her own name only as one of these trustees. She was not entitled to use any other. She has, I repeat, raised this action in her own name (as trustee along with certain persons therein named), with the concurrence of certain of her sons. But the action has been raised, as we find, not only without the concurrence of a co-trustee, but the co-trustee is against the claim that is now being made, he being of opinion that it is not desirable for the trust-estate that they should become partners as is proposed by Mrs Neilson.

In these circumstances the defenders have stated a plea that this lady is not entitled alone to maintain this action. It appears to me that the point has not been specially considered by the Lord Ordinary, and it also appears to me that that plea is sound. After the executors had given their intimation, if it appeared that the Mossend Iron Company had immediately closed with the intimation and said, "We agree to admit you as partners; we adopt the intimation you have sent, and you are admitted as partners," it might be a question whether the trustees of William Neilson could thereafter take up a different position, even with the Mossend Iron Company consenting. I am not prepared to say that even in those circumstances, if the Mossend Iron Company had allowed the intimation to be cancelled, the trustees of William Neilson, being of opinion that it was desirable that they should not become partners, I am not satisfied, I say, that the trustees could not have so arranged it. But it must be noticed what was the position of matters when this action was raised. An intimation had no doubt been sent on the one hand, and there had been a distinct notice by the Mossend Company. In such circumstances it was open to the trustees of William Neilson to reconsider the question whether it was desirable that they should or should not become partners of the company. The terms of

their trust are these, that they should have power to "carry on for such time as they may think proper after my death my interest in the Mossend Iron Company." If the trustees after getting that notice to which I have referred, had formed the resolution that it was better that they should not carry on that business—that is, taking up a share in the Mossend Iron Company—I think it is very plain that they would have been entitled in the performance of their duty in the trust to carry out that resolution. What is the position of matters before they come to be partners. In the first place, they must resolve to enforce the notice they have given, and they must become involved in an action with the Mossend Iron Company, in which a number of legal questions of difficulty are in prospect. One of the trustees declines to move in the direction of raising these questions, first, because he thinks it inexpedient that the parties should become partners, and secondly, because he thinks it undesirable that the estate should be involved in any litigation. The question thus arises, Has a trustee the right to maintain an action against the wish of a co-trustee? It humbly appears to me that looking to the circumstances that the matter was still open, that although notice had been given, the trustee might be still of opinion upon further consideration that it was undesirable that they should become partners of that company, it appears to me, I say, that if one of them formed this latter opinion and declined to go on, the other has no power to force it on. Of course if it could be represented that by virtue of that notice a valuable interest had been acquired by William Neilson's estate, and that the trustees were not each of them acting in *bona fide* in what they were doing—if it could be represented with good grounds of success that Mr Thomson in taking up the position he did was acting in *mala fide*, and desiring to serve only the purpose of the Mossend Iron Company and the partners of that company—the case might probably be a different one. But no suggestion of that kind has been made. It is not disputed that Mr Thomson was honestly of opinion that the trust-estate of William Neilson should not become partners of this company. He was neutral on that question for a time, but further examination led him to form a decided opinion in the direction I have indicated. If that be so, are the trustees in the position of shewing that they think it proper to continue the interest of the deceased in the Mossend Iron Company, or were they in that position when the action was raised? It is my opinion that they were not. And I think, therefore, that this action at the instance of Mrs Neilson—at her instance alone—cannot be maintained. I think the Mossend Iron Company would not have been safe if they had not acted as they did. They find an action presented in Court brought at the instance of one of a body of trustees only. They were for their own safety bound to state the point which has been raised in regard to the question I am now dealing with. The result of the consideration of that question is, that Mrs Neilson has not the power which she claims. And that being so, as I have already said, the action so far as she is concerned —the substance of her plea—cannot be sustained. It has been observed, I am quite aware, that some of the beneficiaries are parties to the action. That again would have been of great consequenc if there had been any want of *bona fides* on th part of Mr Thomson, or if it could have been shewn that he was deliberately throwing away what was a valuable asset of the estate. But there is no suggestion of anything of the kind; and therefore it is that I do not think the presence of the beneficiaries as pursuers in any way strengthens the title of Mrs Neilson. Upon that ground I think it will be necessary to recal the interlocutor of the Lord Ordinary in the action at Mrs Neilson's instance, and that we should find that she has no title to sue. In regard to that I should propose to your Lordship to find in these terms—[*reads findings in interlocutor, quoted infra*, p. 281].

That leaves only for consideration the other action, which is at the instance of Mr Hugh Neilson junior. As I have said, that is an action raised upon quite a different ground. Mr Hugh Neilson sent an intimation upon the 4th of May 1883—the intimation which is in the print. He held but a small interest indeed in the copartnership, but he intimated that, treating it as a partnership-at-will, he desired that it should be dissolved, and he claimed that the business should be disposed of and the surplus assets divided among the partners. Now, the defenders maintain in answer to that action—in answer to that notice, and the action which has followed upon it—that while they admit that the partnership was one at will, they contend that Hugh Neilson junior was not entitled not merely to determine the partnership but to have the whole assets disposed of in the way proposed by the conclusions of the summons.

Upon this question it is necessary to refer to the provisions of the contract of copartnership, but before doing so I may say that all parties are agreed that after the 31st May 1882 the copartnery which was admittedly carried on under the articles of copartnership then current was a partnership which any one of the copartners had it in his power to determine and bring to an end. The question however remains—and it is a serious question—whether, as between the partners, that right to determine the copartnership involved this further, that the partner bringing the company or copartnery to an end should have the power to require the assets to be disposed of, either in the general way provided for in article twelve of the contract, or of having them otherwise disposed of as the Court may order. Upon that question, I repeat, it is necessary to refer to the provisions of the contract; these are to be found in the twelfth article of the deed. The language of that article cannot be said to be happily expressed—I do not think it can be suggested that it should form a model clause for a contract of copartnership in any mercantile concern. But it is necessary to see what the effect of the provisions are which the contract contains, as I think it may be said to contemplate three different occurrences. The first of these occurrences is, that the parties may all agree to go on. That seems to me to be contemplated as one of the possible events. The second is that one or more of the partners may desire to cease to be partners. The third is that all the partners may resolve that it shall be wound up. I think these are the three cases provided for. The deed then proceeds:—"If three months before the termination of this 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 may be desirous of retiring shall be entitled to do so, and shall immediately on the completion of the balance 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 shall be ascertained by a balance of the company's books, as at the termination of the contract, to be completed within not more than three months from said termination, and that either in cash or by his or their bills, with security; and in the event of the partners differing as to the security or as to the date at which the bills shall be drawn or otherwise, the terms shall be fixed by the article after mentioned, but if the whole partners wish, the property and assets of the copartnery shall be disposed of as follows." Then follow the provisions by which offers shall be given in for the business, and provisions also as to how they shall be dealt with.

Now, the Lord Ordinary in dealing with this clause of the contract says in his note—"The only other question which requires to be noticed is that raised by the action of Hugh Neilson junior, who demands that the concern shall be wound up. Having regard to the risk of causing serious injury to the interests of the leading partners by giving effect to the pursuer's Hugh Neilson junior's demand, and to the evidence on that subject, I was very unwilling to pronounce for a winding-up if it could be avoided. I am bound, however, to say that I have been unable to find any defence established. The plea that an individual partner is only entitled to retire in terms of article 12 is not supported in my judgment by the copartnery. The 12th article, I think, gives to every partner a right to retire; but it does not exclude any partner (as I think it might lawfully have done) from demanding a dissolution and winding-up at the expiry of the contract."

Now, the first question to be considered is, whether that view of the Lord Ordinary of the contract is a sound one? I have formed a different opinion upon the point. The case his Lordship puts is that of the contract having been still subsisting but coming to an end or about to come to an end. The view he has there taken is that it gives every partner a right to retire, and that in addition to giving him a right to retire it gives him a right to demand a dissolution and winding-up of the company. In that I do not agree with the Lord Ordinary. I quite agree with him in thinking that it confers upon the partners a right to retire, but I cannot concur in holding that it was the intention or the effect of this clause, which I must admit is obscurely worded, to give the retiring partner the right to say to his fellow partners that the business shall no longer be carried on by them, but be wound up and disposed of under the articles of the deed. It appears to me that the sound construction of this contract is, that at the termination, if the parties have not agreed to carry on the business as they have been doing before, and if they have not all of them resolved—as under the third alternative course which I mentioned—that the business is to be brought to an end and disposed of, then the intermediate clause comes into operation. The parties may all agree that the business is to be wound up, and then there is an end of it, or otherwise, they may agree that the business is to go on. In that case the contract would be continued, but if neither of these events occurs, then it shall be in the power of any one or more desirous of retiring to retire from the business, and to be paid out as on the preceding balance.

I think that is the whole scheme in this contract, so that we have the same thing substantially in article 10—the case of a partner being paid out. The business has been in existence for a great number of years. It had been in this family of the Neilsons for a long time, and I think the whole view of the deed was that so long as there were any partners of the company desirous of carrying it on they should be allowed to do so, and that those who sought to go out—anyone seeking to go out—should be allowed to go upon a certain payment. In the case of the death of a partner, election was given to the partners to continue or to go out, but there was no power to dissolve. In the case of the bankruptcy of a partner there is no power of dissolution, but again he is to be paid out. So that I think the fair reading of this clause—article 12—was to the effect that if the parties did not agree to wind up, and in the case of any partner seeking to go out, he must go out on the preceding balance.

We were informed that the goodwill of the business appears in the balance-sheet of the company, and that shows that no injustice would be done to any of the partners by requiring that he should go out upon that balance, because in the balance he gets the benefit of goodwill. But even if that element were not in the case, and we were not told that that was the fact, my judgment on the true construction of the clause would be the same.

There remains only the question, whether supposing that to be the sound construction of the contract, it is not to receive effect because the company went on as a partnership-at-will? Now, in regard to that matter, I think the principle of law is this, that if the parties go on under a contract which has been in subsistence for a number of years—continue to go on with the business without entering into any new contract—all the provisions of the contract which are not inconsistent with a partnership-at-will continue to apply to the partnership so carried on. I do not know any case or authority in which the principles are better brought out than in the opening part of Mr Justice Fry's opinion in the case of *Cox* v. *Willoughby*, 13 Chan. Div. 863. Mr Justice Fry says—"I conceive that the general statement of the rule in Mr Justice Lindley's book on Partnership is accurate. He says, 'If a partnership originally entered into for a definite time is continued after the expiration of that time without any new agreement, the articles under which the partnership was first carried on continue, so far as they are applicable to a partnership-at-will, to regulate the rights and obligations of the partners *inter se*.' The rule is also stated by Sir Anthony Hart, Lord Chancellor of Ireland, in *Booth* v. *Parks* [1 Molloy 465], thus, 'We know that after the expiration of the term first agreed upon, partnerships frequently continue without a new agreement, and the effect of that is that the partners after the expiration of the partnership term continuing to carry on the trade without a new deed, all the old covenants are infused into the new series of transactions, with the single

exception of the covenant for duration, for either may instanter dissolve the prolonged partnership, but all the other original stipulations are continued." And then there is this sentence, which brings out the rule very well—"The exception I think does not apply only to the covenant for duration, but to every stipulation in the original deed which is inconsistent with a new partnership at will;"—and accordingly if the pursuer Mr Hugh Neilson were able to show that the provisions of article 12 were inconsistent with the partnership-at-will, then I think he would be entitled to succeed in this action to have the company not only determined—brought to an end—but to have its assets disposed of either by common law as the Court might direct, or under article 12 as the Lord Ordinary seems to have held. But is there anything in this particular article that is inconsistent with a partnership-at-will? Suppose a case which I believe has occurred since this reclaiming-note was originally presented; suppose the business to go on as it had been doing, and that one of the partners dies, as the business in that case was being carried on under a contract, would not section 10 of this contract apply? A partner so dying has to be paid out on the balance, if there was no election on the part of his representatives to continue as a partner. Then, again, let us consider the case of bankruptcy. Undoubtedly, this being a partnership-at-will, the pursuer Hugh Neilson is entitled under section 12 to bring the company to an end—that being an essential of copartnership-at-will. I am unable to see any good ground for holding that if he does bring it to an end, and if the construction of section 12 be what I have already said it is, he has a right not merely to bring the company to an end so far as regards himself to the effect of getting paid out, but that he can compel the other partners to go on to have the business entirely wound up, notwithstanding the stipulation in the contract which was intended to avoid that very result.

Upon these grounds it appears to me that Mr Hugh Neilson's action must fail, and I propose to your Lordships that in addition to findings in regard to the other action we should further find in the action at the instance of Hugh Neilson junior in these terms—[*reads findings in interlocutor relating to Hugh Neilson's action, as quoted infra*, p. 282]. I have only to add what I have said before, that I do not, in reference to this article 12 of the contract, attach importance to the expression "three months." It was intended, no doubt, that the parties should consider the matter three months before the expiry of the contract, but I can see no difference in substance as to the rights of the parties if they did not consider it for two or three months. It would have been all the same had it been three days. I attach no weight to these words.

On these grounds I propose that we should dismiss the action at the instance of Mrs Neilson with the reservations I have mentioned.

Lord Mure—I concur in the result at which Lord Shand has arrived, as well as in the views which he has fully and accurately expressed. I concur with him in regard to both points which he has discussed.

Lord President—The Lord Ordinary has very fully and accurately stated the facts of this case, and I do not think there is anything in the statement of them to which it is possible to take exception. But the questions of legal right arising out of these facts are very important, and in some degree they are of a novel aspect; and therefore, although I do not in any degree differ from the result at which your Lordships have arrived, I think it right to state the precise grounds on which I have reached that result.

The notice given by the trustees of Mr William Neilson was on the 21st of July 1882, and is in very simple and plain terms—"On behalf of the executors of the late Mr William Neilson, we beg to give you notice that under the provisions of the contract of copartnery of the Mossend Iron Company they elect to become partners in his stead." There was a correspondence followed upon that, relating chiefly to the question under what contract it was that the trustees claimed this right, whether under the original contract between the parties, or the draft of 1875, and that is a question that was never cleared up. The trustees declined to say under which contract it was that they maintained their right. In these circumstances the agent for the Mossend Company on 5th October 1882 wrote to the agents for the trust, stating that they could not "admit or recognise any right on the part of your clients to become partners as stated in your letters to our clients of 21st July last, and that they treat the notice contained in these letters as of no effect. We have further to intimate that our clients are prepared to pay out the late Mr Neilson's interests in the company as ascertained by the balance preceding his death, viz., the balance of 31st May 1881, all in terms of the contract of copartnery."

Now, the result of this answer was that the trustees of Mr William Neilson were put to consider whether, in the face of this opposition, they would maintain their position which they had taken up on the 21st of July, which appears to me to be a very different question from the question whether they could give the notice of 21st July. It is all very well if parties think they have a right to give such a notice, that they have a right to insist on becoming partners of this company, and to preserve this right by giving notice within two months of the death of the truster, but if the company into which they desire to enter as partners set their face against receiving them, it is a very different question for trustees acting in the exercise of their trust discretion to say whether they will proceed to enforce their rights, of which they have given notice, at the expense of a costly litigation. Now, so far as I can see, that question was never formally considered by William Neilson's trustees at all. The matter was brought up at a meeting of trustees on 21st November 1882, at which the law-agent was instructed to say to the agent for the company—I shall read, however, in the first place, the letter to which that had reference—a letter from the agent of the company that was read to the trustees at that meeting on 21st November 1882, in the following terms—"We are instructed by the Mossend Iron Company and remaining partners to intimate to you, on behalf of the trustees and executors of the late Mr William Neilson, a former partner, that in terms of their contract of copartnery they are ready and now offer to pay Mr Neilson's trustees and executors the sum of £70,000 sterling to account of his interest in that company, and we are to add

that if payment be not taken within eight days from this date, the amount will be lodged in joint names in order to stop interest at more than deposit rates." Now, the instructions that the trustees gave were these—"The law-agent was instructed to see to Mr M'Jannet (the agent for the company), and in the event of consignation being made, to endeavour to make arrangements which would result in the least possible loss to the party proving in the wrong." That was a very judicious and unexceptionable course to take, and I have no doubt the law-agent in the trust followed up the instructions which he there received; but, be it observed, that the trust at this time continued exactly in the same position in which it stood at the time the notice of 21st July was given—that is to say, there were five trustees, two of whom — James Neilson and Hugh Neilson— were disqualified from acting in this matter, which reduced the trustees who were capable of acting to the number of three, viz., Mrs Neilson, Mr Thomson, and Mr M'Creath. On the 21st of July the resolution to give the notice had been carried by a majority of two to one of these qualified trustees. Mr Thomson was against giving notice. Mr M'Creath and Mrs Neilson thought that the notice ought to be given—that is to say, Mr Thomson had declared himself to be neutral, his view afterwards being the same as in this last minute of meeting of trustees before this action was raised, and there is no appearance of any communication having passed between Mrs Neilson and Mr M'Creath and Mr Thomson upon the subject before the institution of this action. But still there was a resolution duly carried to give the notice of 21st July. There was no consideration of the position of the trust after the rejection of this notice by the company, and no resolution formed to carry on this action or to institute this action for the purpose of enforcing the right of which notice had been given. In the meantime, and before the action was raised, this further important event occurs—Mr M'Creath resigns his office of trustee, and the effect of that was to reduce the qualified trustees to the number of two only, viz., Mrs Neilson and Mr Thomson, and we have the evidence of Mr Thomson to the effect that he throughout was of opinion that it was inexpedient that the trust should embark in this company affair, and above all that he was very decidedly of opinion that no such action as this should be taken, and that no litigation should be embarked in for the purpose of enforcing that right or supposed right. Now, it is in these circumstances that Mrs Neilson, one of the qualified trustees, raises this action, and the question is, whether she is entitled to exercise the powers of the trustees by enforcing the right which is supposed to be vested in the trustees to become partners of this company without the concurrence of her other trustee, she being one of two trustees? Upon that matter I confess I am at a loss to understand what right Mrs Neilson ever had to raise this action to enforce this right, or why it was raised except by the trustees of William Neilson duly represented by a qualified majority of these trustees, and therefore I am of opinion that the defenders are entitled to be assoilzied from this action, or at least to have it dismissed as not having been brought by the parties entitled to have it insisted in.

With regard to the other question raised by Mr Hugh Neilson junior, that belongs to a very different legal category. There is no doubt that after the expiry of the contract, which was embodied in the draft to which reference has been made, the company continued to carry on business, and the copartnership thereafter was a copartnership-at-will. But it is not disputed, I presume, that in so far as regards all the important provisions of the original contract under which the company was constituted these continue to regulate the partnership-at-will. And I think it is also pretty well settled that no such partnership-at-will, following upon the expiry of a term appointed by a written contract, differs in its terms from the terms which would have been operative if the written contract had been continued in operation, except in so far as these terms of the written contract are not consistent with the existence or circumstances of the partnership-at-will.

Now, Mr Hugh Neilson gave notice upon 22d March 1883 that he desired to have the company dissolved, and no notice of that having been taken by his other partners, he on the 4th of May addressed to them a letter requiring that the copartnery should be terminated as at that date; and in doing so, I apprehend that Mr Hugh Neilson did what he was quite entitled to do, because it is of the essence of a copartnership-at-will that any one of the partners shall be entitled to say that at a given date the company shall be dissolved. But then the conclusions of his action are not merely directed to a finding or declaration that the company shall be dissolved or wound up as at that date, but there is also this conclusion, that "the defenders ought and should be decerned and ordained by decree of our said Lords to concur with the pursuer in winding-up the said business and copartnery by realising the assets thereof, and paying or discharging the liabilities thereof, in order to the division of the assets among the parties entitled thereto." That is to say, he asserts his right to have the assets of the parties brought to sale, the creditors paid, and the surplus divided amongst the different parties; and the question is, whether he has right as a partner of a partnership-at-will to go that length, or whether he is restricted from taking that course by any agreement binding upon him? In the absence of any agreement binding upon him, I quite admit that that is the necessary result of the dissolution of a partnership-at-will, and, indeed, I might go further and say that in the absence of any special agreement binding on him that is the effect of the dissolution not only of a partnership-at-will but of all partnerships.

If a contract of copartnery—if a partnership for a term—does not provide for any particular mode of winding-up, then the dissolution, when it takes effect, will have the effect of giving a partner the right to have the assets all sold, the creditors paid, and the surplus divided. But that only shows that this rule of law—which provides for a mode in which the company is to be wound up in the absence of any special agreement as to the mode of winding-up—this only shows that that rule has no special application to a partnership-at-will. It is a rule of law of general application, and it seems to me that the fallacy of Mr Hugh Neilson's argument is this, that he confounds these two things, or rather that he does not sufficiently discriminate between these two things—his right to dissolve at any moment,

being a partner of a partnership-at-will, and secondly, his right to insist on a particular mode of winding-up—for these are two perfectly separate and distinct things. The rule that a partnership is to be wound up where there is no agreement for any special mode of winding-up, by selling the estate and dividing the surplus proceeds among the partners, is founded on very sound legal principle. The partners are joint-owners of the partnership estate. They have created that joint property for a special purpose, and whenever that special purpose has been served or come to an end, then the joint property falls to be distributed among them in the proportions in which they have contributed. Nothing can be clearer in point of principle than that, but that only shows again that the rule founded on has no special application to a class, but is applicable to every kind of partnership unless there be in the contract of copartnership something to provide for another mode of winding-up.

Now, then, the question arises, supposing the original contract to have provided for a special mode of winding-up, and after the expiry of the term the company has been carried on as a partnership-at-will, are these clauses in regard to a special mode of winding-up part of the regulations which affect the partners while they are carrying on as under a partnership-at-will? In short, are these regulations carried forward into the partnership-at-will just like the other articles of a copartnery regulating rights and interests of the different partners. I confess I see no reason in the world why they should not. I am not very much disposed to attach weight here to the English cases which have been cited to us. I do not think they are very consistent with one another, and I think the opinions of the different Judges do not harmonise very well. But I put it thus, on the broad principle, would it not be perfectly competent in a partnership-at-will constituted by written articles to put into these articles special provisions for the mode of winding-up? And if that be so, how can it be said to be inconsistent with the existence of a partnership-at-will that a partner dissolving the company at a particular date in terms of his undoubted right should be restrained from having the company wound up by a sale by the terms of these very arrangements in the original contract? A partnership-at-will necessarily implies that any one can put an end to it any day he pleases. I am not aware of any other particular characteristics of a partnership-at-will which contrasts with other partnerships, or rather, I should say, which contrasts with partnerships for a term. Because both one and the other may be either with or without a written contract. The difference between the one and the other is simply that the one partnership shall subsist down to a certain date, and that the other may be terminated at any time by the will of any of the partners. There is no other difference that I am aware of between the two cases. In these circumstances I cannot say it is of the essence of a partnership-at-will, not only that no partner shall be entitled to bring it to an end any time he pleases, but also that he should be entitled to have it wound up in any particular mode. I find no law for that, and I think all principle is against it. It does not arise necessarily out of the nature of copartnership-at-will, and, as I said before, it would not be in the least degree inconsistent with a partnership-at-will constituted by an original contract to insert in that contract a declaration that the winding-up, when it happens, shall not be by a sale of the assets but by valuation or division, or by paying out one partner by the copartners, or by any other mode.

Now, applying these views to the present case, one looks back at the draft of 1875 to see what were the articles that it is said to carry forward into the subsequent dealings of these parties. It is not by any means confined to one article. There are various other articles affecting the mode of winding-up. The tenth article applies to this matter in the case of a deceasing partner. The eleventh article makes complete provisions for the case of the bankruptcy of a partner or the declared insolvency of a partner, and prescribes a particular mode of paying him out. Then we come to the other clauses, and there is one specially applicable to the case on hand. Is it to be said that none of these articles regarding the mode of winding up the company are carried forward into the partnership-at-will? It seems to be conceded that the tenth is so applicable, and why the eleventh should not be so applicable does not seem to be clear. It provides for the case of bankruptcy, and yet there is a special principle there of division when the company is so dissolved; and at common law the bankruptcy of a partner would dissolve the company, and it would be necessary to sell and have a division of the estate. I think the whole of these articles are quite consistent with the conclusion that this company is a partnership-at-will, and are as binding on the partners after the expiry of the original term as they were before.

The Court pronounced this interlocutor:—

"The Lords having heard Counsel on the reclaiming-note for the Mossend Iron Co. and others against Lord Lee's interlocutor of 7th March 1884, Adhere to the first five findings of the Lord Ordinary's interlocutor: *Quoad ultra* recal the said interlocutor, and find (6) that the Mossend Iron Co. declined to admit or recognise any right on the part of the trustees and executors of William Neilson to elect to become partners of the company in his stead as claimed in the said notice or intimation, and in reply thereto stated that they treated the said notice as of no effect, and further intimated that they were prepared to pay out the late Mr William Neilson's interest in the company as ascertained by the balance preceding his death, viz., the balance of 31st May 1881, all in terms of the contract of copartnery; (7) That thereafter, and in or about January 1883, and before the institution of the present action at Mrs Neilson's instance, Mr M'Creath resigned the office of trustee under the trust-disposition and settlement of the said William Neilson, and since that date the trustees and executors under that deed have been the pursuer Mrs Neilson and the defenders Hugh Neilson and James Neilson and James Thomson, and that of these trustees and executors the pursuer Mrs Neilson alone maintains the present action, while the defender James Thomson was opposed to the raising thereof, having before the same was instituted formed

the opinion, which he still holds, that it is not for the benefit of the trust estate that the executors should continue to be partners of the said company after the said William Neilson's death, or should enter into litigation with the company on that question, but that it is rather for the benefit of the trust estate that the estate should receive from the company the sum to which the estate is entitled on the footing of William Neilson having ceased to be a partner of the company at his death and of his executors having right to be paid out his interest, all in terms of article 10th of said contract of copartnery, while the other trustees, the said Hugh Neilson and James Neilson, are by the terms of the said trust-disposition and settlement precluded from voting or taking part in the question on which the said other two trustees differ: Find (8) that in these circumstances the pursuer Mrs Neilson, with concurrence of certain of the beneficiaries under the said trust-disposition and settlement, is not entitled to maintain the action at her instance, and dismiss the said action and decern: Further, in the action at the instance of the pursuer Hugh Neilson junior, Find that having regard to the provisions of the said contract of copartnery, and to the fact that the defenders in that action, the remaining partners of the company, desired to continue the business thereof, notwithstanding the notice by him to them of 4th May 1883, and the service of the summons at his instance, the said Hugh Neilson is not entitled to decree in terms of the conclusions of the summons at his instance, to the effect of having the business and the copartnery wound up, and its whole assets realised and divided as concluded for: Further, in respect it is not disputed that the copartnery carried on after 31st May 1882 was a partnership-at-will terminable by notice by any of the partners, dismiss the first conclusion of the said action; assoilzie the defenders from the conclusions thereof; reserving to the said Hugh Neilson his right either under the said notice of 4th May 1883, or any notice he may thereafter give, to have the company dissolved to the effect of his being paid out his interest therein, in terms of the provisions of the said contract of copartnery, and decern: And as regards expenses in the action at the instance of Mrs Neilson, as between the pursuer Mrs Neilson and the Mossend Iron Company, Find no expenses due to or by either party prior to the interlocutor of 7th March last beyond such expenses as have already been found due, but find the Mossend Iron Company entitled to expenses since the date of that interlocutor: Further, find the defender James Thomson entitled to expenses: And in the action at the instance of Hugh Neilson junior, find him liable in expenses to the defenders therein; and remit to the Auditor to tax the accounts of expenses respectively found due herein, and to report."

Counsel for Mrs William Neilson — Pearson — Guthrie. Agents—J. & J. Ross, W.S.

Counsel for the Mossend Iron Company (Reclaimers) — Mackintosh — Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Hugh Neilson junior—Trayner Graham Murray. Agents—H. B. & F. J. Dewar, W.S.

Counsel for William Neilson's Trustees—J. P. B. Robertson—Low. Agents—Morton, Neilson, & Smart, W.S.

Friday, December 19.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

COMMISSIONERS OF SUPPLY OF FIFESHIRE *v.* MAGISTRATES OF DUNFERMLINE AND OTHERS.

Burgh — Rating — Assessment — Lunatics (Scotland) Act 1857 (20 *and* 21 *Vict. c.* 71)—*Militia (Scotland) Act* 1854 (17 *and* 18 *Vict. c.* 106)—*Contagious Diseases Animals Act* 1878 (41 *and* 42 *Vict. c.* 74)—*Prisons Act* 1877 (40 *and* 41 *Vict. c.* 53).

A district, 1000 acres in extent and consisting of villages and farms, lay within the royalty of a burgh, as extended by a local Act, but was beyond the Parliamentary boundary as defined by the Reform Act 1832. *Held* that the commissioners of supply for the county in which the burgh was situated were not entitled to impose assessments on the lands and heritages within this district for the purposes of the Lunatics (Scotland) Act 1857, the Militia (Scotland) Act 1854, or the Contagious Diseases (Animals) Act 1878.

Counsel for Pursuers—J. P. B. Robertson—Gillespie. Agent—William Black, S.S.C.

Counsel for Defenders — Trayner — Shaw. Agents—Morton, Neilson, & Smart, W.S.

Friday, December 19.

SECOND DIVISION.

[Sheriff of Stirlingshire.

BEESLEY & COMPANY *v.* M'EWEN.

Sale—Delivery—Risk—Res perit domino.

B. in Birmingham sold to M. in Stirling a wire-straightening and cutting machine, to be delivered on railway truck at Birmingham. On arrival of the machine at Stirling, M. objected to it as disconform to contract. By arrangement between the parties it was returned to B. to be examined and to have any alterations made upon it which he might find necessary to make it conform to contract, he paying the carriage if it should be found defective. After certain alterations had been made upon it, the machine was again delivered by B. at the railway station at Birmingham. It arrived at Stirling in a broken condition, and M. refused to take delivery of it and intimated his refusal to B. In an action by B. for the price of the