"But then the question remains whether Brember incurred liability to Rutherford by holding himself out as a partner, and I am of opinion that he did." [*His Lordship then gave the grounds on which this opinion was based*].

The complainer reclaimed, and argued, *inter alia*—His first plea-in-law should be sustained. The decree was against the firm alone, and he admitted that such a decree was competent—*Forsyth v. Hare & Company*, November 18, 1834, 13 S. 42. There was also no doubt that under such a decree diligence could proceed against any partner of the firm—Partnership Act 1890 (53 and 54 Vict. cap. 39), sec. 4, sub-sec. 2. But the complainer was not a partner of the firm, and although a person holding himself out as a partner might make himself liable to third parties just as if he was a partner, that did not make him a partner of the firm—*Clippens Shale Oil Company* v. *Scott*, May 17, 1876, 3 R. 651, 13 S.L.R. 429. There was therefore no warrant for the execution of diligence against him.

Argued for the respondent—A person holding himself out as a partner so as to incur liability to a third party was liable to the same diligence as if he was a partner. In any event, under the general law of holding out he was personally barred from maintaining that he was not a partner in a question with the innocent third party whom he had deceived—*Findlay* v. *Currie*, December 7, 1850, 13 D. 278; *Goodwin* v. *Industrial and General Trust Company, Limited*, December 6, 1890, 18 R. 193.

LORD YOUNG—I have read this record carefully, and also the judgment of the Lord Ordinary, and have given my best attention to the arguments for and against the suspension. My opinion is that this charge against the present suspender cannot be sustained. It is a charge on a decree in absence, not against the suspender, but against a firm of the name of Brember & Company. Now, the Lord Ordinary holds it to be proved that if there ever was such a company, the suspender was not a partner of it. I agree with the Lord Ordinary in that—indeed I go the length of holding that there was no such company at all. I think it is according to the evidence that the man Flynn made use of the name "Brember & Company" in his business because he did not want his own name to be known. Brember was a relative of Flynn, and assisted him, but he was not a partner in the business. Brember may have so conducted himself as to make himself liable for the debts of Flynn in a question with the respondent, but he is not liable as the firm of Brember & Company or as a partner of that firm. If the action had been brought against himself, it would have been a good ground for decree against him that he had represented himself as trading under that name, or as the true employer of Flynn, even if there was no partnership, and he would have had no ground for objecting to a charge on such a decree. But here the decree is not against himself, but against Brember & Company. I am quite of opinion that in a suspension of a charge against Brember on that decree there is no answer to the plea for the suspender that there is no decree against him at all, and in such a suspension it is impossible for the Court to enter upon the question whether he acted in such a manner as to hold himself out to the respondent as a partner of the firm. It will be competent for the respondent, if so advised, to proceed directly against Brember on that ground.

I think that the Lord Ordinary has fallen into error, and that his interlocutor should be recalled.

LORD TRAYNER—I agree. The question here appears to be a very simple one. The respondent has obtained a decree against Brember & Company. That decree is a good warrant for diligence against Brember & Company, and against any partner of Brember & Company, but it is a warrant for diligence against nobody else. The question therefore is—Is the complainer a partner of Brember & Company? The Lord Ordinary is of opinion, and I agree with him, that it has been proved that he is not a member of the firm. That is conclusive of the whole matter, for if the complainer is not a partner there is no warrant for the charge complained of.

I am therefore of opinion that the first plea for the complainer must be sustained and the charge suspended.

I offer no opinion as to whether the complainer held himself out as a partner and thus made himself liable for the company's debts. That is not the question here. The question is—Does the charge proceed on a sufficient warrant? and I am of opinion that it does not.

The LORD JUSTICE-CLERK concurred.

LORD MONCREIFF was absent.

The Court recalled the interlocutor reclaimed against, sustained the first plea-in-law for the complainer, and suspended the letters and charge *simpliciter*.

Counsel for the Complainer and Reclaimer—Salvesen, K.C.—A. M. Anderson. Agents—J. Knox Crawford & Son, S.S.C.

Counsel for the Respondent—Chree—Ingram. Agents—Purves & Barbour, S.S.C.

Saturday, November 2.

FIRST DIVISION.

FERGUSON, PETITIONER.

Company—Shares Issued as Fully Paid-up — Authority to File Contract or Memorandum—Title of Individual Shareholder to Petition—Companies Act 1898 (61 *and* 62 *Vict. c.* 26), *sec.* 1, *sub-secs.* 1 *and* 4.

In a petition under the Companies Act 1898 for authority to file a contract or memorandum with the Registrar of

Joint-Stock Companies in regard to shares issued as fully paid-up, *held* (1) that the petition was competently presented by a shareholder although he did not hold all the shares which would be affected by the contract or memorandum being filed, and (2) that where the original contract had been filed, but not filed timeously, the proper course was to authorise a memorandum in writing to be filed under section 1, subsection 4, of the Act.

The Companies Act 1867 enacts:—Section 25—"Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares."

The Companies Act 1898 enacts:—Section 1, sub-section 1—"Whenever before or after the commencement of the Act any shares in the capital of any company under the Companies Acts 1862 and 1890 credited as fully or partly paid up, shall have been or may be issued for a consideration other than cash, and at or before the issue of such shares no contract or no sufficient contract is filed with the Registrar of Joint-Stock Companies, in compliance with section 25 of the Companies Act 1867, the company, or any person interested in such shares, or any of them, may apply to the Court for relief, and the Court, if satisfied that the omission to file a contract or sufficient contract was accidental or due to inadvertence, or that for any reason it is just and equitable to grant relief, may make an order for the filing with the Registrar of a sufficient contract in writing, and directing that on such contract being filed within a specified period it shall in relation to such shares operate as if it had been duly filed with the Registrar aforesaid before the issue of such shares." Subsection 4—"Where the Court in any such case is satisfied that the filing of the requisite contract would cause delay or inconvenience or is impracticable, it may in lieu thereof direct the filing of a memorandum in writing in a form approved by the Court, specifying the consideration for which the shares were issued, and may direct that on such memorandum being filed within a specified period it shall in relation to such shares operate as if it were a sufficient contract in writing within the meaning of section 25 of the Companies Act 1867, and had been duly filed with the Registrar aforesaid before the issue of such shares."

In May 1898 a provisional agreement was entered into between Alexander Ferguson, distiller, Glasgow, and H. M. Nairn, as trustee for a proposed company, to be called B. Smyth & Company, Limited, by which Ferguson agreed to sell, and Nairn as trustee foresaid to purchase, the business of B. Smyth & Company, wine merchants, Calcutta. By clause 2 of the provisional agreement it was provided that the price or consideration for said sale should be a certain sum in cash, and the issue to the vendor or his nominees of 3000 of the cumulative preference shares or of the ordinary shares, or of either or both, as fully paid-up, or cash or fully paid-up shares, at the option of the directors." It was further provided by clause 14 that "the company shall cause this agreement with or without modification or some other sufficient contract, to be filed with the Registrar of Joint-Stock Companies before any of said shares are allotted." On 20th June 1898 the provisional agreement was filed with the Registrar of Joint-Stock Companies.

On June 20th 1898 B. Smyth & Company, Limited, was incorporated under the Companies Acts.

On July 2nd 1898 the directors of the Company, in pursuance of the said provisional agreement, passed the following resolution:—"The board, under the option of the provisional agreement, allotted as fully paid-up to the vendor 1000 preference shares of [£10 each] and 2000 ordinary shares of [£10 each] in respect and to account of the purchase price payable to him under the provisional agreement, and authorised the secretary to issue scrip therefor in implement of the agreement."

Of the same date 1000 preference and 2000 ordinary shares were issued to Ferguson.

On September 23rd 1898 a formal agreement between the company, Ferguson, and Nairn, adopting the aforesaid provisional agreement, was filed with the Registrar of Joint Stock Companies.

On February 25, 1901, Ferguson, on the narrative that it was doubtful whether the provisions of section 25 of the Companies Act 1867 had been sufficiently complied with, presented a petition to the Court for authority to file a contract or memorandum in writing with the Registrar of Joint-Stock Companies under the provisions of section 1 of the Companies Act 1898 (quoted *supra*). He stated that he now held only 375 preference and 1100 ordinary shares out of those originally issued to him, the rest having been at his request allotted to various other persons.

The petitioner prayed the Court—"To find that the omission timeously to file a contract with the Registrar of Joint-Stock Companies in respect of the said 1000 preference shares and 2000 ordinary shares numbered as aforesaid was due to inadvertence, or that in the circumstances the relief craved is just and equitable, and to direct the company to file with the Registrar of Joint-Stock Companies the said adoptive agreement of 14th July 1898, or otherwise a memorandum in writing in the form of a draft to be lodged by the petitioner, or in such form as to your Lordships shall seem proper; to direct that on such agreement or memorandum duly stamped specifying the consideration for which the shares were issued being filed within such specified time as to your Lordships shall seem proper, it shall, in relation to such shares, operate as if it were a sufficient contract in writing within the mean-

ing of section 25 of the Companies Act 1867, duly filed with the Registrar before the issue of such shares."

No answers were lodged.

On 20th March 1901 the Court remitted to the Hon. J. W. Moncreiff, W.S., to inquire and report as to the regularity of the procedure and the facts and circumstances set forth in the petition.

Mr Moncreiff lodged a report, wherein, after narrating the foregoing facts and the procedure in the petition, he made the following statement:—"I have to point out, however, that it is stated on page 5 of the petition that of the said 1000 preference and 2000 ordinary shares originally allotted to the petitioner the petitioner at the date of the petition held only 375 preference shares and 1100 ordinary shares, the remainder of his original holding having been transferred to other shareholders. The petitioner thus asks the Court to grant an order relative to shares which are held by other parties on whom service of the petition has not been made, and who may be in ignorance of the whole proceedings. So far as I am aware, in all petitions at the instance of individual shareholders under the Companies Act of 1898 which have come before the Court of Session, the petitioners have either been the holders of all the shares affected by the omission to file a contract, or they have asked the Court for authority to file a memorandum dealing only with the shares held by themselves, and it appears to me that where, as in the present instance, the petition is at the instance of an individual shareholder who holds only a certain number of the shares affected by the omission timeously to file a contract, the company itself should have been conjoined with the petitioning shareholder, and the petition should have been served on all holders of shares to be affected by the filing of the contract or memorandum under authority of the Court. The agents for the petitioner, however, have referred me to the case of *Whitefriars Financial Company, Limited*, [1899], 1 Ch. 184, in which application for relief was made by six out of 113 interested shareholders. Justice Kekewich held that he must follow the words of subsection 1 of section 1 of the Act, according to which 'any person interested in such shares, or any of them,' may apply for relief, and that application for relief was sufficiently made by the six shareholders, and he accordingly authorised the filing with the Registrar of a memorandum relative to the shares held by the whole 113 shareholders. It is for your Lordships to determine whether the procedure allowed by Justice Kekewich may be adopted in the present case, to the effect that the petitioner may competently apply to the Court for authority to file a contract or memorandum relative to shares which are not held by him. . . . As the adoptive agreement of 14th July 1898 has already been filed with the Registrar, it cannot be refiled, and should your Lordships grant the prayer of the petition it would be necessary in the present case to file a memorandum as allowed by the statute. The agents for the petitioner have lodged in process the draft of the memorandum which they suggest should be filed, and it appears to me to be in order." He also stated that since the date of the petition B Smyth & Company, Limited, had gone into liquidation, and the petition had been served on the liquidator.

After hearing counsel for the petitioner,

LORD PRESIDENT—This question arises under the Companies Act 1898, which is directed to give relief in regard to a matter which has in many cases caused hardship—the omission to file with the Registrar of Joint Stock Companies a contract in terms of section 25 of the Companies Act 1867. That omission frequently occurred through oversight, and the object of the Act of 1898 was to provide a remedy. The principal question here, which has very properly been considered by the reporter, is, whether the holder of a less number of shares than the whole of a particular class, has a title to ask for an order under the Act of 1898. It is plain that any partial registration is not contemplated, and it appears to me that the holding of a certain number of shares gives the holder a good title to have a contract or memorandum registered. As the contract or memorandum is one and indivisible, the registration of it must affect all the shares of the particular class alike, so that the benefit of it will enure to all, and it cannot affect them prejudicially. The words of the Act are in my judgment unambiguous. It is satisfactory to know that this view of the question has already been taken in England.

The only other question is, what document shall be registered? There is here a difficulty in registering the contract because it has been already registered, although not timeously. This seems to let in the alternative procedure sanctioned by the Act, viz., that of registering a memorandum in writing, specifying the consideration for which the shares were issued, and as the memorandum produced appears to be in order I think we should authorise the registration of it.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

> "The Lords having heard counsel for the petitioner, and being satisfied that the omission timeously to file a contract with the Registrar of Joint Stock Companies in respect of 1000 preference shares and 2000 ordinary shares of B. Smyth & Company, Limited, numbered 1 to 1000 and 1 to 2000 respectively, was due to inadvertence, and that in the circumstances it is just and equitable to grant relief in respect of the issue of said shares, and that it is impracticable now to file a contract pursuant to section 1, sub-section (1) of the Companies Act 1898: Approve of the draft-memorandum No. 25 of process specifying

the consideration for which the said shares were issued which is now extended, and forms No. 28 of process, as a proper memorandum to be filed in lieu of such contract: Direct said memorandum No. 28 of process to be filed with the Registrar of Joint Stock Companies within one month from the date hereof, and on such memorandum being filed, appoint that it shall, in relation to the shares therein mentioned, operate as if it were a sufficient contract in writing within the meaning of section 25 of the Companies Act 1867, and had been duly filed with the said Registrar before the issue of said shares; Find the said B. Smyth & Company, Limited, liable to the petitioner in the expenses of this application, of the procedure thereon, and the expenses incurred in connection with the preparation, execution, stamping, and filing of the said memorandum, and decern."

The memorandum in writing filed was in the following terms:—"Pursuant to an order of their Lordships of the First Division of the Court of Session, dated the 2nd day of November 1901, in a petition at the instance of Alexander Ferguson, distiller, 108 West Regent Street, Glasgow, for filing of contract or memorandum with reference to fully paid-up shares in B. Smyth & Company, Limited. The aftermentioned 1000 preference shares and 2000 ordinary shares of £10 each, all fully paid, were issued to the petitioner the said Alexander Ferguson in satisfaction of £30,000 sterling, being part of the consideration of £40,000 sterling agreed to be paid by B. Smyth & Company Limited, having its registered offices at 108 West Regent Street, Glasgow, to the said petitioner for the purchase of the business carried on under the title of B. Smyth & Company, wine merchants, Government contractors, army agents, tea estate agents, &c., at Calcutta and Bombay, together with the goodwill and assets thereof. The said issue of fully-paid shares was made in pursuance of (*First*) a provisional agreement in writing dated 25th May 1898, and made between the said petitioner of the one part and Herbert Methven Nairn, 108 West Regent Street, Glasgow, as trustee of and on behalf of the proposed company to be called B. Smyth & Company, Limited, of the other part; (*Second*) a resolution of the Board of Directors of said B. Smyth & Company, Limited, dated July 1898, adopting and carrying into effect said provisional agreement of 25th May 1898; and (*Third*) an adoptive agreement in writing dated 14th July 1898, and made between the said B. Smyth & Company, Limited, of the first part, the said petitioner of the second part, and the said Herbert Methven Nairn as trustee foresaid of the third part, which adoptive agreement expressly adopted said provisional agreement with certain modifications which did not affect the shares issued to the petitioner. The said agreement dated 25th May 1898 was filed with the Registrar of Joint Stock Companies before the issue of the said shares, but the adoptive agreement of 2nd July 1898 was not so filed. The said 1000 preference shares and 2000 ordinary shares are now held by the following persons as follows."

[*Here followed a schedule of the holders of the shares.*]

Counsel for the Petitioner — Lorimer — Laing. Agents—Laing & Harley, W.S.

Tuesday, November 5.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

ANDERSON *v.* DICK.

Compromise — Compromise of Action — Locus pœnitentiæ — Informal Writings —Settlement Confirmed by Letters Passing between Agents.

The defenders in an action with regard to heritage having been assoilzied in the Outer House, the pursuer reclaimed. Before the reclaiming-note was heard letters passed between the parties' agents confirming a verbal arrangement for the settlement of the action. Thereafter the parties differed as to the meaning of the arrangement embodied in these letters. One of the defenders presented a note praying the Court to refuse the reclaiming-note in respect that the action had been settled. The pursuer in answer maintained that the settlement was not binding in respect that no joint minute had been adjusted and no authority had been interponed, and that the letters which had passed being neither holograph nor tested could not constitute a binding agreement as to heritage.

Held that the settlement was binding upon the parties, and reclaiming-note *refused.*

In January 1894 William Hill, writer, Glasgow, by missives concluded a contract on behalf of James Anderson, 164 Buchanan Street, Glasgow, with Messrs M'Grigor, Donald, & Company, writers, Glasgow, as agents for the trustees of a certain Mrs Thomson, whereby the trustees agreed to feu to Anderson three lots of building ground.

Before the feu-contract was executed William Hill, it was alleged, without the knowledge of his client Anderson, suggested to William Riddell Dick, merchant, Glasgow, that he might buy one of the lots which had been purchased for Anderson, and Dick assented. Hill then instructed M'Grigor, Donald, & Company that the feu-contract for lot three was to be with Dick, and the feu-contracts for lots one and two with Anderson, and the feu-contracts were completed in accordance with these instructions.

The superiority created by the feu-contract between Anderson and M'Grigor, Donald, & Company's clients was disponed by these clients to Dick in 1897.