case, as we have seen, the fee was given partly to persons known and existing at the time of the truster's death, and partly to certain classes called by description. Now the law as regards vesting subject to defeasance, as laid down in the case of *Steel's Trustees*, 16 R. 204, is that where the fee is given to persons known and existing at the time, it must, in order to vesting, be given absolutely without further destination, which is not the case here, because there was a destination-over to their issue, and where the destination is to a class called by description it depends upon whether the persons who constitute the class are ascertained at the date of the truster's death, or whether he or they cannot be known or ascertained till the death of the liferenter, or the occurrence of some other event. If the person or persons are not known, or the individuals who are to constitute the class are not ascertained at that date, the fee will not vest until the occurrence of the event which will determine who are the persons called, or the individuals composing the class are ascertained. That being the law, there could be no vesting of the fee of Mrs Waddell's share until the death of Mrs Gilroy, when only the persons to whom the fee was destined could be ascertained. But if the share of the residue destined to Mrs Waddell and her issue did not vest in the beneficiaries until the death of Mrs Gilroy, it is clear that a right to one-fourth share of it did not vest at any earlier period. I am therefore of opinion that the first question should be answered in the negative, and the second in the affirmative.

The next question is, whether the third parties are entitled to the share in question *per stirpes*, or whether there is intestacy with regard to the said share?

In my opinion the third parties are entitled to it. The direction of the truster is that John Campbell Corbett and Mrs Steel, or failing them their issue, are to share with the issue of his other children. That appears to me to be very clearly an implied destination of the share to the issue of the other children, and that their right to a share is not contingent on there being issue both of John Campbell Corbett and Mrs Steel to share it with them. In fact Mrs Steel has left issue to share it with them.

I therefore think that the third question should be answered in the affirmative, and the fourth in the negative.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court answered the first question in the negative, and the second and third in the affirmative, found the third parties entitled *per stirpes* to the one-fourth of the share of residue destined to Mrs Waddell and her issue, and answered the fourth question in the negative.

Counsel for the First and Third Parties—Guthrie, K.C.—W. C. Smith. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for the Second Parties—Dundas, K.C.—Clyde. Agents—Smith & Watt, W.S.

Friday, June 21.

SECOND DIVISION.

[Lord Low, Ordinary.

J. M. SMITH, LIMITED *v.* COLQUHOUNS' TRUSTEE.

Contract—Offer and Acceptance—Right to Withdraw Offer—Sale of Shares—Offer Made in Terms of Article Giving Right of Pre-emption to Shareholders — Company—Sale.

By article 4 of the articles of association of a company it was provided that if any holder of ordinary B shares wished to sell them he must offer them in writing to the company at the price at which he was willing to sell, and the company should either take the shares at that price or intimate the offer to the other ordinary B shareholders, who might lodge sealed offers with the company specifying the price which they were willing to pay for the shares, and the highest of such offers should be accepted by the seller provided it was equal to or above the sum specified by him. It was also provided that the sealed offers should be opened by the directors within fourteen days after the notice to the other B shareholders.

A trustee in a sequestrated estate became entitled in that capacity to certain ordinary B shares in the company, and by letter dated 31st January 1900 he offered them to the company at a certain price "under article 4 of the articles of association of your company." The trustee's letter was considered at a meeting of directors held on 3rd February, and by circular dated 10th February they made intimation of the trustee's offer to the holders of the ordinary B shares. On 10th February A, one of ordinary B shareholders, sent to the company a letter offering to purchase the shares at the price specified in the trustee's letter. No other offer was made by the B shareholders, and the company intimated A's offer to the trustees on 12th February. Meantime, however, the trustee on 5th February had written to the company withdrawing and cancelling his offer of 31st January.

In an action at the instance of the company and A against the trustee, for declarator that a contract had been concluded for the sale of the shares, and that the defender was bound in implement thereof to deliver the share certificates to A, and for decree ordaining him to do so, *held* (*aff.* judgment of Lord Low, Ordinary) that no contract for the sale of the shares to A had been concluded, in respect that the trustee

was entitled to withdraw his offer made in terms of article 4 at any time before it had been accepted, and had validly and effectually so withdrawn it before it was accepted on 5th February; and also (*per* Lord Trayner) in respect that the trustee's offer as made in terms of article 4, was not an offer to sell to any other shareholder, but only to the company, and could not therefore be effectually accepted by A or by the company on his behalf.

J. M. Smith, Limited, having their registered office at No. 67 Hope Street, Glasgow, and Robert Crawford, merchant, Glasgow, raised an action against John Wilson, C.A., Glasgow, trustee on the sequestrated estates of J. & D. T. Colquhoun, writers, Glasgow, and of James Colquhoun and David Turnbull Colquhoun, both writers in Glasgow, sole partners of the said firm, as such partners and as individuals.

The conclusions of the action were (1) for declarator that by virtue of the terms of an offer, dated 31st January 1900, addressed by the defender to the pursuers J. M. Smith, Limited, and an acceptance of said offer addressed by the said J. M. Smith, Limited, to the defender, dated 12th February 1900, and signed by the pursuer Robert Crawford, a contract was concluded between the said J. M. Smith, Limited, and the defender for the sale, under the terms of article 4 of the articles of association of said company, of 687 ordinary B shares of said company, the said shares being Nos. 3842 to 4468 inclusive, and 4713 to 4772 inclusive, and such as were specified and referred to in a letter dated 4th January 1900, addressed by the defender to the said J. M. Smith, Limited; (2) for declarator that the defender was bound to implement the said contract of sale by executing transfers and delivering the share certificates to the pursuer Robert Crawford, or alternatively to J. M. Smith, Limited, in return for payment of the sum specified in his offer as the price; (3) for decree ordaining the defender on payment of the said price to execute transfers and give delivery of the share certificates to Robert Crawford or to J. M. Smith, Limited, in conformity with the declaratory conclusions; and (4) for interdict against the defender selling the shares or executing transfers thereof, or giving delivery of certificates applicable to the same to any person other than the pursuer Robert Crawford, or alternatively the pursuers J. M. Smith, Limited, or in any manner or way other than was provided by the terms of articles 4 and 5 of the articles of association of J. M. Smith, Limited.

The pursuers averred that the defender as trustee foresaid was the holder of 687 Ordinary B shares of J. M. Smith, Limited. "(Cond. 2) The defender, in realising the estates of said bankrupts (*i.e.* the Colquhouns), desired to sell, *inter alia*, said 687 Ordinary B shares, and in so doing was subject to the requirements of the articles of association regarding the transfer of said shares. Article 4, which secures a right of pre-emption in favour of existing B shareholders, is in the following terms, viz.:—'If any holder of Ordinary B shares wishes to sell his B shares, he shall, before doing so or transferring them to any party, offer them to the company in writing, specifying the price which he is willing to accept for said B shares, and the directors shall either take said shares on behalf of the company at such price, or intimate said offer to the other Ordinary B shareholders, who may lodge sealed offers with the company specifying the sum or price which they are willing to pay for such shares, and which offers shall be opened at a meeting of the directors to be held within fourteen days after the directors shall have given the aforesaid notice to the other shareholders, and the highest offer shall be accepted by the seller provided it is equal to or above the sum specified in his letter, and if the highest offer is below the sum specified in the letter of offer, the holder of Ordinary B shares so desiring to sell shall then be at liberty to sell his Ordinary B shares to any party (subject, however, to the stipulation in article 5), but not at a price below the highest sum offered by any of the other shareholders as aforesaid, and in no case shall Ordinary B shares be sold at a sum below the highest offer without giving the directors or the shareholders so offering the first option of acquiring said shares at the lower sum which the seller has agreed to take, and in every case the highest offerer as aforesaid shall be bound to take the Ordinary B shares at the price so offered by him.' (Cond. 3) In terms of said article 4, the defender addressed to the pursuers J. M. Smith, Limited, a letter of which a transcript is subjoined, viz.—'154, St Vincent Street, Glasgow, 31st January 1900. Messrs J. M. Smith, Limited, 65 Hope Street. *J. and D. T. Colquhoun's Seqn.* Dear Sirs —I hereby offer to the company the following shares—Ordinary B shares, 100 at £10, 1s. each; 100 at £11, 1s. each; 100 at £12, 1s. each; 100 at £12, 11s. each; 100 at £13, 1s. each; 50 at £13, 11s. each; 50 at £14, 1s. each; 50 at £14, 11s. each; 37 at £15, 1s. each. These shares are offered to you under article 4 of the articles of association of your company. . . .' (Cond. 4) Upon receipt of said letter a meeting of the directors of the company was held, and at said meeting on 3rd February 1900 the pursuer Robert Crawford offered to buy all the shares at the prices before mentioned, which offer was accepted 'should no higher offer be made by any other holder of B shares.' Thereupon the pursuers J. M. Smith, Limited, in terms of the procedure enacted by said article 4, made intimation of said offer to the existing Ordinary B shareholders of the company, and invited offers from them. Upon 10th February 1900 Mr Crawford, who was a holder of Ordinary B shares, put his offer in writing by a letter in the following terms, viz.—'84 Miller Street, Glasgow, 10th February 1900. J. M. Smith, Limited. Dear Sirs—Referring to the offer received by you from the trustee on the sequestrated estate of Messrs J. &

D. T. Colquhoun, of which a copy is annexed, I hereby offer for the whole of the Ordinary B shares therein mentioned the prices attached thereto in the trustee's letter of offer, and to pay the amount of these prices in cash at once against delivery.—Yours truly, R. CRAWFORD.' . . . (Cond. 5) The said pursuer Robert Crawford was the only offerer among existing B shareholders for said 687 shares, and as the price offered by him was equal to the price specified by the defender in his letter of 31st January 1900, the said Robert Crawford became entitled to purchase said shares under the terms of article 4. The defender, however, has refused to execute transfers and to deliver the share certificates applicable to said 687 shares, founding upon a letter addressed by him to the pursuers J. M. Smith, Limited, under date 5th February 1900, in which he writes as follows—'I hereby withdraw and cancel the offer which I made to you on the 31st ult. of the following shares in your company,' and a list is appended of the said 687 shares. . . . The defender is now in a position to execute transfers and deliver certificates to a transferee, and the pursuers J. M. Smith, Limited, are apprehensive that he is about to do so without observing the conditions of articles 4 and 5 of said articles of association. The pursuers believe and aver that the defender has, in point of fact, either arranged or is in course of arranging to transfer said shares in disregard of said conditions to Mr D. M. Stevenson, merchant, Glasgow. Prior to the offer to the company of date 31st January 1900, the defender had in fact advertised privately for offers for said shares, and had by printed conditions of tender provided that such private offerers should be, *inter alia*, subject to the right of pre-emption contained in the 4th article of said articles of association. Thereupon, and prior to said 31st January, Mr Stevenson concluded his transaction of purchase (subject to said conditions) with the defender. The offer of 31st January was then made, and Mr Stevenson induced the defender to withdraw his offer to the company, and is endeavouring to have the transaction with himself carried out in defiance of said articles of association. . . . (Cond. 6) The said letter of 5th February 1900 was written by the defender after the pursuers J. M. Smith, Limited, had resolved at a board meeting to invite offers from their Ordinary B shareholders under the terms of said article 4, and the pursuers declined to admit the defender's right to cancel his offer pending receipt of such offers as might be received from said shareholders." . . .

By letter dated 12th February 1900 and signed by J. M. Smith, Limited, and by Robert Crawford, Messrs Smith, Limited, refused to recognise the defender's right to withdraw his offer, intimated Mr Crawford's offer, and "in conjunction with Mr Robert Crawford" thereby accepted the defender's offer of 31st January, and called upon him to implement it to Mr Crawford. The defender admitted that prior to 31st January 1900 he had entered into a contract of sale of the shares to a third party, but he averred that that contract was made subject, *inter alia*, to article 4 of the company's articles of association. From the minutes produced it appeared that the intimation to the ordinary B shareholders was made by circular dated 10th February 1900.

The pursuers pleaded—"(1) A contract for the sale of said shares having been duly concluded by said offer and acceptance, decree should be pronounced in terms of the conclusions of the summons for declarator and decerniture. (2) The defender having transferred, or being about to transfer, said shares and deliver share certificates therefor in breach of the conditions in the company's articles, interdict should be pronounced as concluded for."

The defender pleaded, *inter alia*—"(1) No title to sue. . . . (3) The pursuers' averments being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed."

On 19th January 1901 the Lord Ordinary (Low) pronounced an interlocutor whereby he sustained the first and third pleas-in-law for the defender, and dismissed the action.

Note.—"The question in this case is, whether there was a concluded contract between the defender and the pursuer Crawford for the sale of a number of ordinary B shares in J. M. Smith, Limited.

"By article 4 of the articles of association of that Company it is provided that if any holder of ordinary B shares wishes to sell them he must offer them in writing to the Company at the price at which he is willing to sell, and the Company shall either take the shares at that price or intimate the offer to the other ordinary B shareholders, who may lodge sealed offers with the Company specifying the price which they are willing to pay for the shares, and the highest of such offers shall be accepted by the seller provided that it is equal to or above the sum specified by him. It was also provided that the sealed offers should be opened by the directors within fourteen days after the notice to the other B shareholders.

"The defender, as trustee on the sequestrated estates of Messrs J. & D. T. Colquhoun, became entitled to certain ordinary B shares in the company, which by letter dated 31st January 1900 he offered to the company at a certain price 'under article 4 of the articles of association of your company.'

"The defender's letter was considered at a meeting of directors held on 3rd February 1900, and the minute bears that the pursuer Crawford, who is a director and also a holder of ordinary B shares, offered to buy the defender's shares at the price which he had put upon them, and that the directors agreed to accept Crawford's offer 'should no higher offer be made by any other holder of B shares.'

"The directors then made intimation of the defender's offer to the other holders of B shares, and upon 10th February Crawford addressed to the company a letter offering to purchase the defender's shares at the price named by the latter.

"The defender, however, had meantime,

upon 5th February, written to the company withdrawing and cancelling his offer of 31st January.

"The defender avers that the directors did not intimate his offer to the other B shareholders until after they had received his letter withdrawing his offer. The pursuers, however, although they do not deny, do not admit that averment, and therefore I cannot assume it to be correct.

"In these circumstances the pursuers maintain that the defender is bound to transfer the shares to Crawford at the price named.

"It was not disputed that, in view of the judgment of the House of Lords in *Trevor* v. *Whitworth*, 12 App. Ca. 409, the power which was given to the company by the 4th article to purchase shares was illegal and void, but it was contended for the pursuers that the provision in the article, that shares which the holder desired to sell should be offered to the other holders of similar shares, was perfectly legal, and remained binding upon the members of the company. I do not see any reason why the articles of association of a company should not provide that a shareholder wishing to sell his shares should first offer them to the other shareholders. In the view, however, which I take of the case, it is not necessary to decide that question, but I shall assume that to that extent the 4th article was good and binding upon the defender.

"The question therefore is, Whether the defender was entitled to withdraw his offer, and if so, whether he withdrew it timeously?

"It was said that the terms of the 4th article imply that if a shareholder offers his shares to the other shareholders he shall not withdraw his offer but shall give them an opportunity of accepting it. The argument, as I understood it, was chiefly founded upon the provision that the offers of the other shareholders should be opened within fourteen days of the notice to them, which the pursuers argued implied an obligation on the defender's part not to withdraw the offer in the meantime. It seems to me that that provision was enacted in favour of the shareholder desiring to sell, for the purpose of ensuring that he should not be prejudiced by undue delay. But an offer to sell does not amount to any contract, and I am unable to see why, before a contract had been constituted by acceptance of the offer, the defender should not, if he saw fit, change his mind and withdraw the offer."

[His Lordship then dealt with a contention for the pursuers that Robert Crawford's intimation at the meeting of the directors of J. M. Smith, Limited, on 3rd February 1900, that he was willing to buy the shares at the price mentioned, and the directors' acceptance of that offer should no higher offer be made by a holder of B shares, was an acceptance of the defender's offer. This contention was given up as untenable by the pursuers' counsel in the Inner House.]

"The pursuers further founded upon the defender's admission that he has sold the shares to a third party, and contended that although the defender might be entitled to withdraw his offer because he had made up his mind to retain the shares, he was not entitled to do so for the purpose of selling them to some one outside the company, because under the articles of association he could only sell the shares to an outsider if no existing shareholder was willing to purchase them.

"It seems to me that the purpose for which the defender withdrew his offer is immaterial so far as the present action is concerned. The fact that he did explicitly withdraw it seems to me to be sufficient for the determination of the question whether or not a contract for the sale of the shares was concluded with Crawford. That is the only question which is raised in this case, and it in no degree affects, or is affected by, the question of the validity of any sale which the defender may have made to a third party."

The pursuers reclaimed, and argued—They did not dispute the law laid down by the Lord Ordinary. But that law applied to a voluntary offer. Here they were dealing not with a simple offer but with an offer made under a contract, namely, article 4 of the articles of association. The offer must be held to include the conditions of that contract. The defender had taken up the position of a vendor of shares and had offered them as he was bound to do to the company. He was not entitled to withdraw that offer as long as he remained desirous of selling these shares, and a reasonable time must be allowed to elapse in order that his offer might be communicated to the shareholders who constituted the company, in terms of article 4. The defender's offer to the company was made on 31st January, and the offer was accepted by the company under article 4 on 12th February, so that the transaction had been carried through with due dispatch. In these circumstances the contract had been completed, and the pursuers were entitled to decree in terms of the conclusions of the summons. In any event they were entitled to interdict in order to have their rights protected. The defender did not deny that he wished to sell the shares to an outsider, and under article 4 he was not entitled to sell to an outsider without first offering the shares to the company.

Argued for the defender—He had withdrawn the offer he had made before it was accepted. The offer therefore fell. There was nothing in article 4 which compelled a shareholder offering his shares to keep his offer open for a certain time. No such condition was expressed or implied in article 4, and indeed such a condition was foreign to the terms of that article. The article did not specify any time within which the directors were to intimate the offer to the shareholders. They could do so at any time they pleased. But until the offer had been accepted the shareholder making it was entitled to withdraw it. Interdict was unnecessary as it was not disputed that before a sale could be

carried through the conditions in article 4 must be fulfilled.

LORD JUSTICE-CLERK—I have no serious doubt as to this case. It appears from the pursuers' averments that the defender, who is the trustee on a sequestrated estate, entered into a conditional contract with a gentleman of the name of Stevenson for the sale of certain shares belonging to the sequestrated estate, and having made this contract, he, on 31st January 1900, did what he was bound to do under the articles of association of the company whose shares were the subject of the sale, he offered these shares for sale to the company before attempting to carry into effect his conditional sale of them to Stevenson, and the question is, whether having made that offer to the company, as I have said, on 31st January 1900, he was entitled to withdraw it on 5th February before he had received any acceptance of it. That, I think, is really the whole question in this action. Now, I can see no reason why he should not so withdraw his offer if he pleased. It was argued that if the company did not wish to buy the shares itself, each of the B shareholders was entitled to fourteen days within which to put in sealed offers to purchase the shares, and that the defender was bound to accept the highest of these offers provided it was not less than the sum at which he had offered the shares, and it seemed to be suggested that because fourteen days are mentioned the defender was precluded from withdrawing his offer even before the fourteen days had begun to run. I cannot assent to that. I think that the provision as to fourteen days is a provision in favour of the selling shareholder, who might be prejudiced if the matter could be hung up indefinitely, and not in favour of the other B shareholders with the view of giving them a fixed period within which to make up their minds as to buying the shares. There is no doubt that the purpose of article 4 of the Company's articles of association was to give the company, and failing the company the other shareholders, a reasonable opportunity of purchasing shares which a shareholder wished to sell, but that the shareholder is entitled to change his mind as to selling and to withdraw his offer at any time before acceptance I cannot doubt. I therefore think that the conclusions for declarator and implement are ill-founded. I also think that the conclusion for interdict cannot be sustained. If the defender attempts to carry into effect a sale of the shares to Mr Stevenson, or to anyone else, without complying with the requirements of articles 4 and 5 of the articles of association, the company have the remedy in their own hands by refusing to register the transfer. The defender is just as much bound by these articles as ever he was. His offer having been withdrawn by himself, matters are brought back into exactly the same position as they were before he made the offer.

On the whole matter I think that the Lord Ordinary is right, and I move your Lordships to affirm the judgment.

LORD YOUNG—I am of the same opinion, and I think it almost superfluous to add anything to what your Lordship has said, but the case appears to me so clear that just to avoid any suspicion on my own part that I may have misapprehended its nature I think it right to state in a few words how it strikes me.

I quite understand a contract between a company and its shareholders—of which we have here a specimen—by which the shareholders are not at liberty to sell their shares without first making an offer of these shares to the company, or, if the company does not itself wish to take the shares, without giving the company an opportunity of communicating the right to take up the shares to the individual shareholders, so that any of the shareholders may if they please take the shares in terms of the offer, or on such other conditions as may be specified. A provision of this sort seems to me a perfectly intelligible and practicable provision. In the case now before us the shares belonged to a firm of the name of Colquhoun & Company, I think, which had been sequestrated, and the trustee in the sequestration had to consider in the interests of the creditors as to the disposal of these shares. Now, having regard to the requirements of article 4 of the company's articles of association, the trustee in the sequestration on 31st January 1900 made intimation of his intention to sell the shares in the company which belonged to the bankrupts. This letter of intimation bore that the trustee offered to the company the shares specified, and stated that the offer was made under article 4 of the articles of association of the company. That article provides as follows:—[*His Lordship quoted article* 4]. Now, it is not said — on the contrary the reverse is now admitted — that the directors desired to take up the shares on behalf of the company, and after the lapse of a year and a-half the truth is that the company itself is not willing to acquire the shares on its own account. But on the 10th February 1900 the directors proceeded to follow the alternative course provided in article 4 of the company's articles of association, by sending a circular letter to the B shareholders intimating that the trustee in the Colquhouns' sequestration had resolved to sell the shares specified under the conditions set forth in article 4 of the company's articles of association at the prices mentioned, and requesting the shareholder if he desired to offer for these shares to forward a sealed offer to the secretary of the company by twelve o'clock on Monday 12th February. On the same day, that is to say on the 10th February, a Mr Robert Crawford sends a written offer to purchase the shares at the prices specified by the trustee in his letter of 31st January. Then the directors of the company, according to their minute of meeting, on 12th February proceeded to open the replies from the B shareholders to the circular of the 10th February. The minute bore that Mr Crawford's letter, to which I have referred, was the only reply received, and then, after

quoting Mr Crawford's letter, the minute stated that "Mr Crawford's offer being equal to the sum specified in Mr Wilson's" (that is, the trustee's) "letter of 31st ultimo as the price at which he offered his shares, the meeting instructed the secretary to intimate to Mr Wilson that his offer was accepted, and that Mr Crawford was the purchaser at the same price as that at which Mr Wilson had offered the shares to the company."

In the meantime, however, on 5th February, Mr Wilson the trustee had written to the company withdrawing his offer to sell the shares belonging to the bankrupts, and this action has been brought in consequence of that withdrawal of his offer by the trustee on 5th February. The trustee's letter of 5th February is a withdrawal of the offer to sell the shares, and it is expressed in terms as distinct and unequivocal as it is possible to use. The purpose of the action is in substance to have it declared that this distinct and unequivocal withdrawal of his offer by the trustee is invalid and ineffectual. The real pursuer of the action is Mr Crawford, the shareholder who had offered to purchase the shares, as the company, who also appear as pursuers, have really no interest in the matter since the directors had resolved not to purchase the shares on behalf of the company, and the company appear as pursuers merely on the ground that their instance was necessary in justice to Crawford, in order to enforce the contract by which it is said the defender is under obligation to transfer the shares to him. Now Crawford was under no obligation whatever to the defender or to anyone else in regard to these shares prior to his letter of 10th February, and that being so I am unable to see on what principle it could be held that the defender was under any obligation to Crawford in regard to these shares when on 5th February he sent his letter withdrawing his offer to sell the shares. Besides, the persons to accept the offer were not the directors of the company; what article 4 says is that the offer "shall be accepted by the seller," that is in the present case the defender, the trustee for the Colquhouns, and he could not accept consistently with his letter of withdrawal of 5th February. It is said that the trustee after making his offer of 31st January was not entitled to withdraw that offer on 5th February. I know of no authority or principle in law or in reason for that proposition. Mr Campbell argued that the trustee had a duty to make that offer. I asked whether there was any authority for that but none was cited to us, and I know of none. I assume that the trustee made the offer in the exercise of his duty as trustee, in the interests of the bankrupt estate which he represents, but I know of no principle or duty which forbids him to withdraw that offer before it has been accepted if he finds that he can get a better price for the shares. He will I assume have to realise the shares in the exercise of his duty as trustee, and in realising he will have to keep in view the provisions of clause 4 of the articles of association under which the bankrupts held the shares, but there is nothing in the case now before us which requires us to deal with that matter.

On the whole matter I agree with the Lord Ordinary, and think that his interlocutor should be affirmed.

LORD TRAYNER — I am of the same opinion. The pursuer concludes for decree affirming (1) that there was a contract of sale; (2) for decree ordaining the defender to implement that contract; and (3) for interdict against the defender selling or transferring the shares which were the subject of the alleged contract otherwise than in accordance with that contract, or otherwise than as provided for in the articles of association of the pursuers' company. The conclusion for interdict obviously depends on the pursuer's success with regard to the other conclusions. If there has been no contract made such as the pursuers allege, no interdict can proceed which would deprive the pursuer of his right to deal with his shares in any way he pleases, consistently always with any conditions which may be validly imposed upon him by the articles of association. Against any infringement of the articles of association these articles afford the pursuers ample protection and render any interdict on that account quite unnecessary. If the defender attempts to transfer his shares otherwise than as provided for in the articles of association the pursuers may refuse to register his transfer.

If, however, the contract alleged was made, then the defender may be interdicted from doing anything which puts specific performance thereof out of his power. Accordingly, the main question in the case is—Was there a contract?

The alleged contract is said to have been constituted by offer and acceptance. I cannot assent to the view that any contract was here constituted by offer and acceptance. Article 4 of the articles of association on which the question depends is not very happily expressed. It begins by saying that "if any holder of ordinary B shares wishes to sell his B shares he shall before doing so, or transferring them to any party, offer them to the company in writing, specifying the price which he is willing to accept for said B shares, and the directors shall either take said shares on behalf of the company at such price," &c. Now, I think that so far the use of the word "offer" is right enough. The idea is that the company if it pleased should accept the shareholder's offer to sell the shares by sending him a letter of acceptance and thereby completing the contract, assuming that the company could legally purchase its own shares. But the company did not accept, and never intended to accept, the shares which the defender offered to sell. There is no contract therefore between the company and the defender as to the sale of these shares.

Article 4 then proceeds, after the passage which I have quoted, to make provision for the event of the company not purchas-

ing the shares offered for sale, and it is dealing with this alternative case that the mode of expression to which I have alluded is found. The article directs that if the company do not wish to purchase the shares the company is to "intimate said offer to the other ordinary B shareholders." But these shareholders are not entitled to treat the offer as an offer to sell made by the shareholder to them; on the contrary, what the article directs is that such shareholders as please are themselves to make offers to the shareholder who wishes to sell, and he is to accept the highest of these offers on certain conditions specified. In short, if the company do not purchase the shares the position of offerer and acceptor is reversed. Now, I do not omit to notice that the defenders' letter of 31st January is in the form of an offer to sell the shares, but it bears to be an offer made under article 4 of the company's articles of association, and the only "offer" which a shareholder wishing to sell can make under that article is an offer to the company; he makes no offer to the other shareholders, and his offer, if not accepted by the company is, as an offer to sell, at an end. But it may be followed by offers to buy by such shareholders as may desire to purchase, and this will make a contract if followed by an acceptance by the selling shareholder. There was no reply to the defenders' letter of 31st January until 12th February when the directors of the company, according to their minute of that date, intimated to the defender that "his offer was accepted." But accepted by whom? Not by the company to whom alone the offer was made, but by one of the shareholders Mr Crawford, to whom the defender had made no offer. Now, if there was no offer to Mr Crawford there could be no acceptance by him or by the company on his behalf, and if there was no offer and consequently no acceptance there could be no contract constituted by offer and acceptance. That being so, no decree can be given in terms of the first conclusion of the summons nor can we order (in terms of the second conclusion) implement of a contract which had never been made.

I think that this is sufficient for the disposal of the action, but I agree with what has been said as to the defender's right to withdraw his offer, as he did on 5th February before there was any acceptance, or professed acceptance of his offer. I can find nothing in article 4 to exclude him from exercising the ordinary right of a seller to withdraw an offer to sell before acceptance. I can find nothing to suggest that an offer made under article 4 is to be regarded as a "firm" offer binding the offerer not to withdraw his offer for fourteen days, and as the defender had withdrawn his offer before the 12th February, I think it was competently withdrawn whatever view may be taken of the so-called acceptance on that date.

I agree with the Lord Ordinary that we can take no account of the alleged sale by the defender of his shares to Mr Stevenson. If Mr Stevenson has any rights in regard to these shares, he will be entitled to enforce these rights if necessary in competent proceedings for the purpose, but we cannot enter into that question in this action, to which Mr Stevenson is not a party.

LORD MONCRIEFF—I also think that the Lord Ordinary is right. The contention of the pursuers was that under article 4 of the company's articles of association a shareholder who has intimated to the company his intention to sell his shares was not entitled to withdraw that intimation although he has abandoned his intention of selling his shares, and although there has been no acceptance of an offer to sell in terms of the article. I am unable to spell any such condition out of article 4. There is no doubt that at common law a person who has made an offer to sell is entitled to withdraw the offer at any time before acceptance, unless he has bound himself to leave the offer open for a specified time. I cannot find anything in article 4 to introduce a condition altering the common law on this point. Now, the defender withdrew his offer to sell his shares on 5th February before he received intimation of any acceptance of his offer, and I have no doubt that he was entitled so to withdraw his offer. It would have been a different question if any of the B shareholders had sent in an offer for the defender's shares before the defender had withdrawn his offer. In that case he might have been held bound. But as I have said the defender withdrew his offer before anything was done in the way of accepting it. As regards the conclusion for interdict, I do not think that the pursuers have set forth a relevant case, for they expressly aver that the alleged sale to Stevenson was subject to the right of pre-emption contained in article 4 of the articles of association.

The Court adhered.

Counsel for the Pursuers and Reclaimers — W. Campbell, K.C. — Cullen. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Defender and Respondent—Clyde. Agents—Webster, Will, & Co., S.S.C.

Thursday, June 27.

FIRST DIVISION.

[Sheriff of Fife.

M'ARTHUR *v.* M'QUEEN.

Process—Proof—Filiation and Aliment—Calling Defender as Pursuer's First Witness.

Observations (*per* the Lord President, Lord Adam, and Lord M'Laren) on the practice of calling the defender as the first witness for the pursuer in actions of filiation and aliment.

Margaret M'Arthur, residing at Crossgates, Fife, brought an action of filiation and aliment in the Sheriff Court of Fife at