lender the sum of £400 which he borrowed. It would be extravagant to say that it did. So, I think, exactly in the present case.

It is true that, by the lease the tenant was bound as to the machinery "to keep up and maintain the whole in good and sufficient repair and working order, and on the tenant or his foresaids leaving the whole of the machinery so repaired, renewed, or added to, in good working order and sufficient repair, the proprietor agrees to pay the tenant or his foresaids the sum of £400 at the end of the lease." It was maintained that to leave the machinery on the premises at the end of the lease was a condition precedent of the tenant obtaining this £400. In this contention I think a great deal more than its just effect is attributed to the phrase "to leave." I do not think the obligation to leave is different from or anything additional to the obligation to keep up and maintain. If the machinery was kept up and maintained it would be necessarily left in good order at the end of the lease. The obligation on the tenant I consider no greater than it would have been had he simply been taken bound to keep and maintain the machinery during the currency of the lease, which, I think, implies merely an obligation to maintain it in repair whilst it exists. I think the tenant clearly not bound to leave the machinery, in all circumstances, on the ground. He is only bound to keep it in repair whilst it is there. He is not bound to replace it if destroyed by accident. This would be a very serious obligation, of which there is not a vestige in the lease. If the landlord replaced the machinery, the tenant's obligation to maintain it would revive, and he would have no claim for abatement of rent. If the landlord did not replace it, no obligation to maintain lay upon the tenant, because the subject of the obligation was gone. It is not said that the tenant failed in his obligation to keep up and maintain the machinery so long as it existed. When the machinery perished by the fire the obligation fell to the ground from the very nature of the case. But all this did not interfere with the landlord's obligation to repay to the tenant the sum of £400 he had borrowed from him in order to purchase the machinery.

I cannot look upon the tenant's claim for this £400 as involving anything else than a personal debt by the landlord. It was not a debt secured over the machinery; though I do not think that, if it had been, the case would be different; as the destruction of the security would not involve the loss of the debt. Far less was it a claim made dependent by the contract on the continued existence of the machinery in all circumstances. To attach such a condition would have been a serious matter for the tenant, requiring a very special covenant; and I consider none such to have existed. The machinery was wholly the landlord's. The tenant was not *dominus* of any part of it. He had merely a right of use in it during the subsistence of the lease. This might undoubtedly cease, and the lease, if no other subject was comprised in it, might come to a termination through the fire. And this, indeed, it was made substantially to do to a certain extent, by an abatement of rent corresponding to the value of the mills and machinery being allowed to the tenant. But the machinery, considered as property, perished wholly to the landlord. The tenant was not the less entitled to claim from the landlord the personal debt incurred by him in order to secure its original acquisition.

I have hitherto regarded the case apart from all consideration of the insurance effected on the machinery. I have now only to say that I think the legal relation of the parties in no way affected by the insurance. The insurance of the subjects to the extent of £1200 provided for by the lease (of which the landlord chose to allocate £200 to the machinery), was entirely an insurance for the landlord's benefit. Though half the premium was to be paid by the tenant, this was in substance nothing more than so much additional rent, just as the payment of so much of the landlord's taxes might be. The policy was to be taken in the name of the landlord; and he, and he only, was entitled to recover on the policy. The tenant was not entitled to receive a single farthing of the sum paid by the insurance office. I consider the whole arrangement of the insurance to have been nothing else than an arrangement by the landlord for his own security. It was in his power to make the security greater or less at his pleasure. If he had insured the machinery at its full value of £800, he would have recovered from the insurance office enough to satisfy the tenant's claims, and to put £400 into his pocket—in other words, would have placed himself in his originally proposed position, of getting, in money's worth, the sum of £800, *minus* the sum of £400, which he required to expend to gain it. That he did not so arrange the insurance cannot affect the claim of the tenant against him. The landlord only recovered from the insurance company the sum of £200, in consequence of his own limitation of the sum placed on the machinery. I think he is not bound to communicate to the tenant any part of this recovery. But I consider him clearly bound to pay to the tenant, or the tenant's heir, the sum of £400 for which he had become personally obliged; and his liability for which I do not think he has stated any sufficient ground for shaking off.

Agents for Defender and Reclaimer — Scott Moncrieff & Dalgetty, W.S.

Agents for the Pursuer and Respondent—Tods, Murray & Jamieson, W.S.

Saturday, December 24.

ALEXANDER FERGUSON *v.* KENNETH MACKENZIE (JOHN FERGUSON'S JUDICIAL FACTOR).

Process — Summons — Relevancy — Reparation — Issues — Mora. Circumstances which were found irrelevant to sustain an action of damages, at the instance of a surviving partner, against the judicial factor upon the estate of his deceased co-partner.

Held that mere questions of disputed management and general disagreement were not sufficient to ground an action of damages between partners, especially where there had been manifest *mora* on the part of the pursuer.

This was an action of damages brought by Alexander Ferguson, one of the partners in a sugar refinery in Leith, against the judicial factor upon the estate of his deceased brother, John Ferguson, the other partner in the said firm.

The pursuer's condescendence set forth that he and his brother had carried on business in Greenock up to the year 1852, and that in that year they had, under the firm of J. & A. Ferguson, taken a lease of the Leith Sugar Refinery, which

property they afterwards bought. John Ferguson went to Leith to superintend the business of the firm in March or April 1852, but the pursuer remained in Greenock until the end of October of that year, when he went to reside in Leith, and thereafter took charge of the cash and counting-house department of the business. For some years after 1852, the business of sugar refining carried on by the firm of J. & A. Ferguson in Leith was well conducted, and proved very profitable. During the first period of five years after the commencement of the business ending in 1857, the firm were very successful, and realised large profits, after payment of all charges and expenses. During the whole of the said period the actual process of refining was superintended and conducted by skilled and competent workmen, many of whom had been previously engaged in sugar refining in the employment of the Leith Sugar Refining Company, who had previously occupied the premises. The statements which were relied upon as grounds for an action of damages were as follows:—"From the time when the pursuer went to reside at Leith until the middle of the year 1857, his brother and partner, the late John Ferguson, was very much in Greenock or elsewhere, and he did not during that time take any charge of the sugar house, or of any department of the business, or interfere with the operations of the workmen. But in 1857 John Ferguson began to interfere in an improper and unwarrantable manner with the business of the refinery. He had no knowledge whatever, either theoretical or practical, of the various processes necessary for refining sugar. Yet, notwithstanding his ignorance of such matters, the said John Ferguson, at his own hand, wrongfully dismissed all the skilled and competent workmen who had previously been in the employment of the firm, and employed in their stead common unskilled labourers, who knew nothing whatever about sugar boiling or refining." The consequence of the foresaid reckless and wrongful proceedings on the part of the said John Ferguson was, as alleged, great loss to the firm and to the pursuer as an individual, through loss of custom, waste of raw material and general deterioration of stock and machinery." The pursuer stated that he had frequently "remonstrated with his brother, the said John Ferguson, and objected to his proceedings, but his remonstrances and objections were treated with the utmost contempt." The pursuer also intimated to his said brother that he would hold him responsible for the loss occasioned by these proceedings, but the only reply the pursuer obtained consisted of strong language and threats of personal violence. In addition to the waste and destruction of sugar and molasses as aforesaid, the production of refined sugar became gradually less and less until the end of the year 1860. About that time the refinery came almost to a stand still, John Ferguson having then dismissed all the workmen in the establishment with the exception of one man, who was retained apparently for the purpose of keeping up steam in the works. Matters remained thus until on or about the 21st May 1861, when John Ferguson shut up the doors both of the counting-house and of the sugar house, and secured them with chains and padlocks, in order to prevent the pursuer from getting access to the premises. He also at the same time locked the doors of all the other houses and places within the premises in order to keep out the pursuer. The pursuer was thus wrongfully and illegally debarred from access to the premises of the firm, and he was wrongfully and illegally kept out of these premises until the 18th of December 1863, The said John Ferguson, after shutting him out of the premises as aforesaid, refused to give the pursuer any access thereto. At the time when the pursuer was locked out of the premises, he had in his possession the key of the safe, which contained the cash-book of the firm and the titles of the refinery property. John Ferguson, in consequence presented an application to the Sheriff for warrant, ordaining the pursuer to deliver up to him the key of the safe. The pursuer, however, lodged answers to the application, and also applied to the Court of Session for the appointment of a judicial factor upon the estates of the firm. Negotiations were thereupon commenced between the pursuer and his brother John, with the view of settling the various matters of dispute which had arisen, but these negotiations came to nothing; and, meantime, on the 2nd February 1863, John Ferguson died. It farther appeared from the pursuer's own statements, that from the date of his brother's death in 1863, nothing material had been done towards winding up the concerns of the firm, and very little towards preventing farther deterioration and waste of the firm's property; his statement being that he was during that interval endeavouring to come to an arrangement, first with James Ferguson, his co-executor upon his deceased brother's estate, and afterwards with the present defender, who had been appointed judicial factor upon the estate. The pursuer's concluding statement was: "The loss and damage sustained by the pursuer in consequence of being illegally excluded from the premises, and from the destruction or deterioration of the goods therein, loss of trade, and otherwise, amounts at least to the sum of £43,000. The defender, as judicial factor upon the estate of the said John Ferguson, has been required to make suitable reparation to the pursuer in respect of the premises, but he refuses, or at least delays to do so, whereby the present action has been rendered necessary."

He pleaded, "The pursuer having suffered loss, injury, and damage, as alleged by him, in and through the wrongful acts of the deceased John Ferguson, the defender, as representing the said deceased, is bound to indemnify the pursuer for such loss."

The defender stated as preliminary pleas—"(1) The statements in the summons are not relevant or sufficient in law to support the conclusions of the summons. (2) The action is, in the circumstances above set forth, barred by *mora*, taciturnity, and acquiescence. (3) Even assuming that the late John Ferguson's conduct had been in any respect illegal, the pursuer having acquiesced therein, and not having adopted and insisted in any of the remedies which were open to him, to prevent loss and damage, is barred from insisting in the present action."

The Lord Ordinary (JERVISWOODE) having heard parties in the procedure roll, approved of the following issues, which were proposed by the pursuer, and appointed them to be the issues for the trial of the cause, namely—

"It being admitted that the pursuer and the said deceased John Ferguson carried on business as sugar-refiners at the Leith Sugar-Refinery, Leith, as partners, under the firm of J. and A. Ferguson,—

"Whether the said deceased John Ferguson, during the years 1857, 1858, 1859, 1860, and

1861, or during part thereof, wrongfully interfered with the management of the said sugar-refinery, to the loss, injury, and damage of the pursuer?

"Whether, in or about the month of May 1861, the said deceased John Ferguson wrongfully shut up the said sugar-refinery, and wrongfully excluded the pursuer therefrom, to the loss, injury, and damage of the pursuer?

"Whether, in or about the month of May 1861, the said deceased John Ferguson wrongfully shut up in said sugar-refinery a quantity of sugars and goods belonging to the said firm, which thereby became deteriorated in value, to the loss, injury, and damage of the pursuer?"

Against the interlocutor approving these issues the defender reclaimed.

MILLAR, Q.C., and MARSHALL, for him.

SOLICITOR-GENERAL and WATSON for the pursuer and respondent.

At advising—

LORD DEAS—It is quite plain that this case consists of two branches, the one applying to the period from 1852 till the stoppage of the business in May 1861; and the other to the period from May 1861 onwards. We have certain allegations made by the pursuer as to the position of parties prior to May 1861, while the business was being prosecuted, and all that the pursuer can say against his brother is, that during part of that time he interfered in the management of the concern, of which he was a partner, and that, having no knowledge theoretical or practical of the business, he yet dismissed competent, and employed incompetent workmen, and generally by his unskilfulness caused great loss to the concern. Consequently, in the very face of the first issue, the incompetency of the action so far as we have gone manifestly appears. Nobody ever saw such an issue as that sent to trial. If an action was to be countenanced upon such grounds, without any allegation of fraudulent intent, or other competent averment, the result would be most disastrous to the business relations of the country. There would be nothing to prevent any partner bringing such an action, and his copartner bringing a counter action, upon any the most trivial grounds of misunderstanding between them.

The only plausible case made out by the pursuer, is as to what happened in and after 1861, when it is said that his brother closed the working of the business, locked him out of the premises, and refused him admittance ever after, while he himself, the pursuer, carried off the key of the safe containing all the firm's books, title-deeds, &c. Thus they let matters stand for more than a year. The first who comes into Court is John Ferguson, demanding to have access to the safe; and then the pursuer does (what he might have, and should have done long before) apply for the appointment of a judicial factor on the firm's estate. Those proceedings are in dependence at this very time, and, so far as I can see, the parties are at issue still, and the pursuer has never exerted himself to get the firm's affairs wound up, or even taken the proper measures for coming to a settlement with his brother or his executor or the judicial factor on his estate. There is no statement therefore on record which can, after this lapse of time, and while the proper proceedings are still in dependence, be made the foundation of an action such as this, or the ground of issues such as the Lord Ordinary has approved. I am therefore for dismissing the action entirely as irrelevantly laid.

LORD ARDMILLAN concurred.

LORD KINLOCH—I am of opinion that the averments here made are irrelevant to support such an action. There is nothing involved but differences of opinion betwixt partners, a little too strongly and energetically expressed. Even assuming the best possible case for the pursuer—suming, for instance, that he was in the right in all the questions in dispute between him and his brother, and was justified in all he did—still I think that an action of damages is out of the question. The law provides other and appropriate remedies for cases of this kind. Judicial management may, for instance, be sought. Any want of access to company premises or papers may be overcome by application to the Judge Ordinary. Were we to sanction the present action, we should be opening a door to an indefinite number of similar suits, as such questions must be of constant occurrence.

LORD PRESIDENT—I quite agree with your Lordships, and have no doubt that, where partners quarrel there are legal remedies open to them. Fortunately these are summary ones, and easily taken advantage of by any person who desires to do so. They either end in a winding-up of the concern, or in the appointment of a proper manager. This course of proceeding was apparently at one time in the mind of the pursuer in the present case, though, having commenced upon it, he did not follow it up and carry it out. Instead, he lets things stand for years. Now, under the circumstances, the idea of a partner bottling up an action of damages for years in this way, and then bringing it against the executor of his co-partner, is one of most doubtful competency, whatever his averments are; and, upon the present record, it cannot be listened to for a moment.

The Court accordingly recalled the Lord Ordinary's interlocutor, and dismissed the action.

Agents for the Pursuer—Dalmahoy & Cowan, W.S.

Agents for the Defenders—Adam & Sang, S.S.C.

Saturday, December 24.

SECOND DIVISION.

MACFARLANE *v.* ROBB.

Bankrupt — Preference — Act 1696, *cap.* 5—*Prior Debt.* A. & Co. under a charter-party agrees to pay a certain sum as an instalment of the freight to B. & Co., when the vessel should leave the port of lading. Shortly before this sum was due, they granted to B. & Co. their acceptance for £1000, inclosed in a letter to the following effect, viz.—"As you have requested that some security should be given you for fulfillment of the charter per "Asia," we now tender you our acceptance of this date in your favour for £1000 at fourteen days' date, which, when retired by us, shall be imputed *pro tanto* in payment of chartered freight by said vessel." The bill was retired, and thereafter, and within sixty days of the date of said letter, A. & Co. were sequestrated. *Held*, in an action by the trustee