British India; and therefore find it unnecessary to answer the other question; and decern: Allow the expenses incurred by both parties to this Special Case to be paid out of estate."

Counsel for the party of the First Part — Kinnear—W. J. Mure. Agents—J. & F. Anderson, W.S.

Counsel for the party of the Second Part—Asher—Hunter. Agent—R. B. Ranken, W.S.

Tuesday, June 12.

FIRST DIVISION.

[Lord Gifford, Ordinary.

PETITION—ALEXANDER GOW.

Judicial Factor—Appointment—Partnership—Dissolution and Winding-up.

Where a contract of copartnery has expired, both partners surviving, the Court will not interfere with the winding-up of the concern by appointing a judicial factor, except in very special circumstances.

Observations (*per* Lords Deas and Shand) on the distinction between such an application in the case of a going business and in the case of a dissolved company.

This was a petition presented by Alexander Gow, one of the partners in the dissolved firm of Schulze, Gow & Company.

The following narrative is taken from the Lord Ordinary's note:—"The petitioner in this case seeks sequestration of the copartnery estate of Schulze, Gow, & Company, and the appointment of a judicial factor thereon, with certain special powers mentioned in the prayer. The petition is resisted by Mr Schulze, who was the only other partner of the now dissolved firm. The copartnery of Schulze, Gow & Company was dissolved by expiry of the agreed-on term so long ago as 31st July 1875, and both parties have been engaged since that date in winding up its affairs. Its whole stock-in-trade and corporeal moveables have been sold and realised; all the debts due by the concern have been paid and discharged, and the only assets still outstanding are certain debts which were due to the company at its dissolution, and which have not yet been recovered. It seems that the business was carried on in two branches—one branch at Dundee under the charge of the petitioner, and the other branch at Galashiels, under the charge of the respondent. The debts due to the Dundee branch still unrecovered are said to amount to £5047, 6s. 3d., and hitherto the petitioner has been doing what he can to recover these. The outstanding debts of the Galashiels branch are said to amount to £7890, 9s. 5d.; and hitherto the respondent, who had managed the Galashiels branch, has been attempting to recover these. The recovery of these two sets of debts is the only thing wanted for the complete realisation of the whole assets. The parties, however, are at issue as to an accounting *inter se*. In particular, the petitioner says that the respondent has failed to account for his intromissions, and to exhibit proper balances and states of affairs of the Galashiels branch. The petitioner also says that he has various claims against the respondent, including apparently claims of damages—that he has entirely lost confidence in the respondent—that he mistrusts his action in the further realisation of the debts—that he has asked in vain a full accounting; and he now seeks sequestration of the estates and the appointment of a judicial factor. The Lord Ordinary, after hearing parties, continued the case for eight days that the petitioner might examine, with what assistance he chose, the Galashiels books, which it appears he had never yet done. On 9th current, however, he intimated that he declined to look at the books or to say what should be done with any of the outstanding debts, or to give any assistance or advice either in recovering the debts of his own branch or those of the Galashiels branch, but that he simply insisted in the prayer of his petition."

Thereafter the Lord Ordinary refused the prayer of the petition.

In his note the Lord Ordinary, after the narrative given above, added:—"The Lord Ordinary after full consideration is of opinion that the petitioner is not entitled *hoc statu* to the sequestration of the debts and the appointment of a judicial factor.

"One of the main grounds—indeed the principal ground—on which the petitioner relied was, that the accounts between the two partners—that is, the count and reckoning *inter socios*—were in a state of confusion; that the books, and especially the Galashiels books, had not been properly kept; and that the respondent had failed to account for his intromissions; and he insisted that the first duty of the factor, if appointed, would be to call the respondent to account, to examine into the respondent's whole intromissions, both during the partnership and since its dissolution, and to ascertain and fix the balance now due by the respondent to the petitioner.

"The Lord Ordinary cannot concur in this view. He thinks that when a judicial factor is appointed to wind up a company estate, his primary duty is to realise outstanding assets, and not to settle past questions of accounting *inter socios*. No doubt his actings in realising may often facilitate accounting *inter socios*, and when there is no dispute he will also distribute among the partners; but where serious disputes arise between the partners as to their shares, or as to their past actings, especially as to claims of damages, a factor is no judge of such matters. He has no power to give any binding deliverance or to take proof of any kind as between partners; and his probable course would be, in the case of serious differences, simply to consign the net funds recovered. and allow the partners to compete for them *inter se* by a multiplepoinding or otherwise. Accordingly, if in any case there are no outstanding assets at all to recover—if, for example, in the present case there had been no outstanding debts, the Lord Ordinary, as at present advised, would never sequestrate and appoint a judicial factor merely because there are unsettled disputes between the partners.

"The only ground therefore upon which, in the Lord Ordinary's opinion, the present application can rest is, that a judicial factor is

necessary in order to ingather the bad and doubtful debts still outstanding.

"But the Lord Ordinary is of opinion that in the present case there is no necessity for the appointment of a judicial factor in order to collect or turn into value as far as possible the bad and doubtful debts still outstanding; on the contrary, he thinks that the appointment of a judicial factor for such a purpose would, in existing circumstances, probably lead to serious loss to both parties.

"As to the outstanding debts due to the Dundee branch of the business, the collection of these debts is now, and has hitherto been, under the charge of the petitioner himself, as was natural, the petitioner alone having managed the Dundee branch. The respondent stated at the bar that he was both willing and anxious that the petitioner should continue to realise these debts—that he committed the whole steps to be taken to the petitioner's own discretion, giving the petitioner *carte blanche* and the respondent's full authority to do whatever the petitioner thinks best, and to take what assistance he thinks right. The respondent also offered his own advice and assistance whenever required. In reference to the Dundee debts, the Lord Ordinary thinks the petitioner can ask no more than this. The petitioner says that these Dundee debts are in danger of being lost; but if so, it must be the petitioner's own fault. He has full power—both his own and the respondent's authority—to do whatever is necessary, or to employ agents to do what is necessary. In short, the petitioner can do, and do now, everything that a judicial factor could do, and he has knowledge and means of judging which a judicial factor could never have.

"This leaves only the Galashiels outstanding debts. As to them, also, the respondent's offers are fair and reasonable. The respondent offers either (1) To continue to do his best to recover these debts, which are all due abroad, and many of them in peculiar positions, and that, so far as the respondent is personally concerned, gratuitously. (2) He offers to concur with the petitioner in any steps the petitioner might suggest as to any or all of these debts. This offer was verbally rejected at the bar by the petitioner, who said he knew nothing whatever about these foreign debts. (3) The respondent offered either to sell or to purchase the outstanding debts by sealed tender. Or (4) To dispose of the whole outstanding debts by public roup, both partners being at liberty to bid.

"The Lord Ordinary thinks that these offers are reasonable, and fully meet all that the petitioner can ask. It is both the manifest interest and the bounden duty of both partners to give their best services for winding-up their own affairs, and, in the present case, it is thus alone that there is any hope of making anything of the Galashiels debts. They are all due abroad, chiefly apparently by tailors in various cities in Italy, Sicily, Hungary, Austria, Russia, Turkey, Egypt, and elsewhere. They would almost certainly be lost if, as the petitioner suggest, a Glasgow or Dundee accountant should be employed to recover them, and it is difficult to say what expense might not be incurred. The petitioner is bound to concur with the respondent in taking the best and most reasonable measures, or, if the partners cannot agree on this, then sell or buy the debts *inter se* by tender or public auction. This is not unreasonable, two years having now elapsed. The petitioner is not entitled, as he has done for two years, to refuse to look at the Galashiels books, which, though kept by the respondent, are really the petitioner's own books, and have always been at his command; and to insist on throwing the whole foreign debts into the hands of an accountant, with almost a certainty of their being lost. The petitioner has never yet made one suggestion as to what ought to be done as to any of the debts in question. Still less is the petitioner entitled to get an accountant who will litigate with the respondent at the expense of the firm—that is partly at the expense of the respondent himself. The partners must vindicate their rights *inter se* at their own risk and expense. In existing circumstances, therefore, and having regard to the respondent's offers, which meet almost ever alternative, the Lord Ordinary refuses the petition."

The petitioner reclaimed, and argued—"When parties differ between themselves we are familiar with the appointment of a judicial factor"—*per* Lord Deas in *Miller* v. *Walker*, Dec. 10, 1875, 3 Rettie 242. The result of the cases of *Dickie* v. *Mitchell*, June 12, 1874, 1 Rettie 1030, and *Russel* v. *Russel*, Nov. 14, 1874, 2 Rettie 93, is—(1) that where a copartnery is dissolved by the death, or what is equivalent, the marriage of a female partner, the Court will leave it to the remaining partners to carry on the business; (2) if all the partners are dead, the Court will appoint a factor to wind-up the concern; (3) if a surviving partner is unfitted by fault or incapacity for carrying on the business, the Court will appoint a factor. There was such fault here as to justify such an appointment. The practice in the Outer House had been to appoint factors in similar circumstances. In the case of *Steel* v. *Hamilton*, in 1871, Lord Mackenzie made such an appointment on the application of one partner against another—[By the Court — The other partner there acquiesced]. In the case of *Hillson*, in 1872, a similar appointment was made—[By the Court—One partner there was in jail, the other bankrupt]. There was no security here to the petitioner that the respondent would do his utmost to ingather these debts, for his object really was to secure the company debtors as customers for himself in his new business.—*Dixon* v. *Dixon*, Dec. 22, 1831, 10 Shaw 178, 6 W. and S. 229; *Young* v. *Collins*, Feb. 24, 1852, 14 D. 540, 1 Macq. 385.

The respondent lodged a minute offering the outstanding debts due at the Galashiels branch should be exposed to sale by auction, leaving it open to both parties to bid.

At advising—

Lord President—I am quite satisfied with the way in which the Lord Ordinary has dealt with this case. I think he has very properly refused the prayer of the petition, and that on very reasonable grounds. Such an application is without doubt quite competent, and may be entertained by the Court if there are circumstances sufficient to justify such a measure. It is necessary therefore to see how these partners are situated. Their partnership expired, according to their contract of copartnery, on 31st July 1875; their business had been carried on at

Dundee and Galashiels, the Dundee branch being under the charge of the petitioner, while the respondent had charge of the Galashiels business. When the expiry of the contract arrived, the natural and obvious mode of winding up the business was that the petitioner should collect the outstanding debts of the Dundee business, and the respondent should wind up the business at Galashiels. It is said that the debts of the Dundee business are not yet all collected; that shows either that the petitioner has not been able to get them paid, or that he has been remiss in his duty of recovering them; it is not surprising, therefore, to hear that the same is true of the Galashiels business. We have no means of knowing the extent of the debts outstanding; the statement made by the petitioner in his petition is that they amount to £5000; the statement he has now made at the bar puts them at £12,000. If the petitioner made the original statement without an examination of the books, which is the way he accounts for this discrepancy, he committed a very grave error indeed; but, however that may be, we are left without any accurate information as to the state of the fact.

The state of matters then is this:—The petitioner says that the respondent has failed to account to him in time past, and is not fit to be trusted with the collection of the debts still due. Now, it is a mistake to suppose that because parties are in dispute as to bygones between them the Court will listen to the petition of one of them to appoint a judicial factor upon the estate, who will in fact be an arbiter between the parties, instead of leaving the parties to take the ordinary remedy of an action of count and reckoning. As to the outstanding debts, it is impossible to entertain this application after the offers made by the respondent. He has lodged a minute in which he offers that the whole outstanding debts due to the Galashiels branch should be exposed by auction, leave being reserved to both parties to bid for them. The Lord Ordinary also informs us that the respondent's counsel offered at the bar—"(1) To continue to do his best to recover these debts, which are all due abroad, and many of them in peculiar positions, and that, so far as the respondent is personally concerned, gratuitously. (2) He offers to concur with the petitioner in any steps the petitioner might suggest as to any or all of these debts." These offers would give the petitioner full redress against any of the charges which he brings against the respondent. This is a case in which, in accordance with the principles laid down in the case of *Dickie* v. *Mitchell*, the Court will not interfere, both parties being still alive.

Lord Deas—I have no doubt this petition is competent, but that is not to say that it is to be granted. The whole matter in dispute is the mode of collecting the outstanding debts. It is always a question of circumstances in such cases whether we are to interfere, or whether our interference would not greatly increase the expense of collecting these debts, for the debts can often be collected far better without the appointment of a factor; the present is a case of the kind. I do not say that the time may not possibly come when there may be a sequestration of the partnership estate, and an appointment of a judicial factor, but that is an appointment we do not make unless there be a pressing necessity for it and distinct expediency. I do not find that there is at present any such necessity here. It has been said that it would be a stronger thing to appoint a factor when a partnership concern is going on than to make such an appointment after it is dissolved. The counsel for the petitioner has even represented it as a matter of right after the dissolution of the partnership. I do not see that at all. There may be stronger reasons for such an appointment while the business is going on. In *Dickson's* case it was difficult to say whether some of the parties were entitled to carry on the business; it was *de facto* being carried on, and it was necessary that it should be carried on. We saw that £6000 of Government duty had been paid, and that £6000 more was shortly due; that showed the magnitude of the concern; and it was evident to the Court that, unless they interfered to prevent the tremendous loss that might have been incurred by a winding-up of the concern, ruin was impending. Accordingly, they appointed a factor to carry on the concern—that shows it may be more necessary to make an appointment while the business in question is going on. It is all a question of circumstances, and I find no circumstances here to justify the appointment of a factor.

Lord Mure—I am of the same opinion. I have no doubt of the competency of an application of this sort; on the other hand, the Court seldom interferes in matters of the kind, for it is a very expensive way of proceeding to appoint a factor to realise such an estate, and therefore a very special case must be laid before us. Looking to the proposals made by the respondent to get some arrangement made, I think this is not a case for our interference.

Lord Shand—There was much force in the argument submitted to us by the petitioner, that there is a difference between the cases of a going concern and of a company dissolved, in which there is nothing more to be done than to settle the rights of parties. That argument is certainly sound to this extent, that the Court will more readily interfere with a dissolved company than with a going concern; the consideration on which that rests is this, that if the Court undertook the management of going concerns it would be taking judicial management of partnership concerns, and such undertaking will only be justified by the greatest necessity.

In a dissolved partnership, on the other hand, if a case is stated where there is a good ground of distrust with regard to the credit or the fidelity of a partner, and property is said to be in danger of being lost if no steps are taken,—if, I say, this case could have been brought up to that, I should have been for granting the application. As far as regards the accounting for past intromissions, the appointment of a judicial factor is not the proper method. The only reasonable ground for the application is the existence of these outstanding debts, which may be taken at £1000. They are in a very peculiar position; they are comparatively of small amount, and exist all over Europe; the appointment of a factor to collect these would be a very expensive business. On that ground, while I am of opinion that in many

cases of dissolved partnerships a party may have a right to have a factor appointed, I do not think this is such a case.

The Court adhered.

Counsel for Petitioner — Fraser — Campbell. Agent—William Archibald, S.S.C.

Counsel for Respondent — Balfour — Lang. Agent—James Moncreiff, W.S.

Wednesday, June 13.

FIRST DIVISION.

[Sheriff of Lanarkshire.

HORNE *v.* MORRISON.

Proof—Trust—Act 1696, *c.* 25—*Writ or Oath—Mandate.*

Where it was averred that instructions had been given to an agent to purchase in the joint names and for the joint behoof of himself and his principal, and that he had wrongously taken the title in his own name, and had not communicated any share of the profits to the principal, *held* that that was not an averment of trust, and that the proof was not therefore restricted to the writ or oath of the agent.

Process — Appeal for Jury Trial — Preliminary Plea.

It is competent for a party who has appealed a cause to the Court of Session for jury trial to insist in and argue a plea to the effect that proof must be limited to writ or oath.

This was an action in the Sheriff Court of Glasgow, brought by David Horne, builder, against Archibald Maclean Morrison, writer, concluding for payment of £850, being one-half of the profits of the sale of certain subjects in Glasgow. The pursuer's averments were as follows:—"(Cond. 1) In or about the end of March or beginning of April 1876 the defender and pursuer agreed to be joint-adventurers in the purchase of ground at Firpark, Dennistoun, Glasgow. (Cond. 2) The interest of the parties in said joint-adventure was to be equal. (Cond. 3) The defender was to act as the law agent of and for the joint-adventurers. (Cond. 4) By way of carrying out the joint-adventure, said ground was, in or about the beginning of April 1876, purchased from William Wilson, builder, and John Herbertson, joiner, both in Glasgow, at the price of £1190. (Cond. 5) The said purchase was made, and the missive with the said Wilson and Herbertson entered into, by the defender as agent and for behoof of the joint-adventure, or as one of the joint-adventurers in his own name. The defender had no authority or instructions from the pursuer to enter into the missive in his own name. On the contrary, the arrangement between the parties and the pursuer's instructions were, and the defender's duty was, to take the missive in the joint names of himself and the pursuer. (Cond. 6) Shortly after said purchase the defender, acting as aforesaid, sold said ground at a profit of £1700 or thereby. . . . (Cond. 9) The defender has never made payment of the pursuer's half as joint-adventurer foresaid of said profit." Article 5 of the condescendence had been amended.

The pursuer pleaded—"(1) The pursuer and defender having been joint-adventurers in said purchase and sale, and equally interested therein, as such the defender is bound to pay the pursuer the sum sued for, being one-half of the profit made, less one-half of charges or expenses in carrying out the same. (2) The defender having acted as the law agent and for behoof of the joint-adventurers, and as such having taken the missive in his own name, is bound to communicate the benefit thereof to his co-adventurer. (3) Or otherwise, being one of the joint-adventurers and having made the purchase, as such he was and is bound to communicate the benefit arising therefrom to his co-adventurer."

The defender pleaded, *inter alia*—"(1) The pursuer's averments, at all events so far as material, can be established only by the defender's writ or oath." The defender subsequently added the following plea—"(4) The action is not relevant, in so far as it is averred that the missive of sale was taken in the defender's name contrary to instructions without an allegation that this was done fraudulently."

The Sheriff-Substitute allowed a proof, and the defender appealed to the First Division for jury trial.

It was objected to the defender's proposal to argue the questions raised by his first plea that that question could not be raised under an appeal for jury trial.

Lord President—It is perfectly certain that when a party comes here for jury trial he is entitled to take objection to there being a trial at all.

The defender then argued that under the Act 1696, c. 25, there could be no further proof of such averments as the pursuer's than the defender's writ or oath—*Alison* v. *Forbes*, July 21, 1771, M. 12,760; *Duggan* v. *Wight*, March 2, 1797, M. 12,761; *Mackay* v. *Ambrose*, June 4, 1829, 7 Shaw 699; *Marshall* v. *Lyell*, February 18, 1859, 21 D. 514; *Tennant* v. *Fyfe*, February 13, 1874, 11 Scot. Law Rep. 418. This was no question of partnership or mandate to be proved by witnesses, but a pure question of trust.

The pursuer argued—In order to bring the case under the Act 1696, c. 25, the agent must have been instructed to take the title in his own name, and here we aver the opposite — *The General Assembly of the General Baptist Churches* v. *Taylor*, June 17, 1841, 3 D. 1030; *Forrester* v. *Robson's Trustees*, June 5, 1875, 2 R. 755; Dickson on Evidence, 576; *Boswell* v. *Selkrig*, March 9, 1811, Hume's Decisions 350. An averment of fraud is not necessary. There was not necessarily fraud in so taking the title. The fraud is in defending this action.

At advising—

Lord President—The plea which stood originally on this record was this—"The pursuer's averments, at all events so far as material, can be established only by the defender's writ or oath." The plea was founded on the Statute 1696, and I think the Sheriff was right in re-