[13th *August* 1832.]

ANTHONY DIXON and JOSEPH DIXON, Appellants. — *Lushington* — *H. Robertson.*

No. 17.

WILLIAM DIXON and others, Respondents. — *Lord Advocate* (*Jeffrey*) — *Knight.*

Sequestration — Factor — Society. — The partners of a company having died, one intestate, and the last survivor having left a settlement, appointing trustees and executors, and the trustees and executors having accepted: Held (affirming the judgment of the Court of Session), that the representatives of the intestate partner were entitled to have the property sequestrated, and a judicial factor appointed.

Inner House.
1st DIVISION.

THE Dumbarton Glasswork Company was carried on, during many years, by a succession of partners. After various changes, the partners remained three in number, holding equal shares, viz. John Dixon, his brother Jacob Dixon, and Alexander Houston. In 1821, Houston retired from the concern, leaving the two brothers sole partners. By the contract of partnership, in case of the death or of the bankruptcy of a partner, his interest in the company ceased, and the creditors of the bankrupt partner, or the representatives of the deceasing partner, were to receive their shares as stated in the balance immediately preceding the death or insolvency. Another regulation in the contract was, that the business should be carried on under the contract, although the stipulated duration should have expired, unless the contrary should be fixed by entries in the company's sederunt-book.

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When Houston retired, the contract had not expired, and it was alleged that he was paid out according to the balance-sheet immediately preceding, after certain allowances were made to keep up the value of the company's property. No new written contract was executed by the brothers, but they proceeded on the footing of the old contract. Before the next period for balancing arrived, John Dixon died, and Jacob Dixon, as surviving partner, became sole proprietor of the business.

Jacob Dixon assumed his own son, Jacob Dixon junior, and John, son of John Dixon deceased, as partners. The concern consisted of forty-one shares. Jacob Dixon senior kept twenty-one. He allotted to John Dixon ten shares, and to Jacob Dixon junior ten shares; stating the latter as debtor for the amount, 24,000*l.*, in an account current. John Dixon junior was stated as having paid up his ten shares of 24,000*l.*, and as creditor in an account current for a balance amounting together to 38,188*l.* The whole of this last sum remained under the command of Jacob Dixon senior.

It was alleged that a contract, to endure for seven years from the 30th June 1821, the date of the balance preceding John Dixon senior's death, to be held in force after that time, unless expressly altered, and providing that the representatives of a deceased partner should be paid out according to the balance-sheet preceding the death, was shortly afterwards entered into, and engrossed in the sederunt-book of the company. John Dixon junior died in October 1828, and William Dixon and others were decerned and confirmed his executors. By the balance-sheet of June 1828, the company were due to him nearly 36,000*l.*

For this sum the executors raised an action in the

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Court of Session against Jacob Dixon senior and junior, the surviving partners, and who continued to carry on the business under the same firm. In a few months afterwards, Jacob Dixon junior died, survived by four children, Jane, Elizabeth, Joseph, and Anthony, all of them either minors or pupils. Having executed no deed of settlement and possessing no heritage, these four succeeded to him equally. The day after Jacob Dixon junior's death Jacob Dixon senior died, leaving two sons and three daughters, namely, Anthony, Joseph, Elizabeth, Louisa, and Catharine, all of age. Jacob Dixon senior had executed settlements, by which and a subsequent codicil he conveyed his whole property, heritable and moveable, to trustees, for payment of his debts and certain provisions to his sons and daughters. In regard to the residue, the deed bears: "Lastly, I appoint my "said trustees to convey, deliver, and make over to "Jacob Dixon, my eldest lawful son, the residue of my "said means and estate, after satisfying the provisions "and others above mentioned, and that so soon after "my death as my said trustees may have recovered and "laid aside sums sufficient for satisfying the provisions, "annuities, and others provided by this deed, and the "relative or supplementary deed before mentioned, "care being always taken that my said eldest lawful "son shall not receive less, out of my means and estate, "than the sum of 6,000*l*. sterling, or the value "thereof."

Anthony and Joseph Dixon accepted of the trust, and entered on the management. They commenced carrying on the works, and, as executors, they gave up an inventory of the personal means and estate of their father; but the inventory was defective.

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It was alleged, that, on William Dixon and the other executors of John Dixon junior requesting information as to the state of the funds, the trustees gave no satisfactory account or explanation. The executors therefore, used inhibition and arrestment. Thereafter the trustees stopped the works, and the crown issued a writ of extent for duties. In this situation of affairs the executors became apprehensive for their interests. They found themselves liable for the debts remaining due by the old company of John and Jacob Dixon senior, to the amount of 31,000*l.*, John Dixon junior being the heir-at-law and general disponee of his father; and although they had, by their depending action in Court, claimed payment from Jacob Dixon senior and junior of nearly 36,000*l.*, and the assets of the company were said to amount to 126,000*l.*, there was reason to believe that to be a great over-valuation; in fact the estate seemed placed in much jeopardy, and no effectual and safe administration existed.

Jacob Dixon senior and junior had in their defences alleged that the executors of John Dixon junior were merely representatives of a deceased partner of a dissolved company, entitled to a share of the funds at a final settlement, after payment of all debts. If this view were to be held correct, the executors maintained that it was clear that they had a formal title to call for the appointment of a manager to wind up the concern. But besides, and independent of the daily practice of the Court to take under its protection the affairs of minors, the executors held that it had never been doubted that where from circumstances an estate, by the death, absence, or incapacity of the owner, had fallen into

hazard of confusion or dilapidation, the Court never hesitated to appoint a manager, factor, or curator bonis; and the case which here occurred was one which required and called for an interposition of the power of the Court to prevent loss and ruin. The executors therefore prayed the Court to appoint a manager, with power to wind up the affairs of the Dumbarton Glass-work Company, and other companies composing the same partnership; or a curator bonis, or judicial factor, to protect the funds and estate of these companies for behoof of the minors and the petitioners, and all others having interest.

Anthony and Joseph Dixon, the trustees of the deceased Jacob Dixon senior, answered, that although it had been originally a provision in the contract of copartnership, that surviving partners should settle with the heirs of deceasing partners, according to the balance preceding the death, yet long prior to 1821, when the company consisted of three partners, Houston, John Dixon, and Jacob Dixon, it had been fixed, that, in case of the death of any of the partners, the concern should be wound up. The company continued for many years on this new footing, and the stipulation was frequently renewed. In 1821 Houston retired from the concern, and his interest was ascertained, by the special agreement of parties, and not on the principle in the original contract of paying out by the preceding balance.

When John Dixon died, the time had arrived when, according to the existing agreement, the concern was to be wound up. John Dixon junior represented his father universally in his heritable and movable estates. To him, therefore, belonged the free proceeds of his

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father's one half of the company estate; but he had no right to be paid out what was described as his father's interest in the concern, but merely to have the concern wound up, and then to take his share of the free proceeds, according as the affairs of the company turned out.

The alleged new contract of copartnery, said to have been entered in the company's books, never had been agreed on or executed; but even by that contract an allowance for bad and doubtful debts and other burdens is to be made, in ascertaining the value of each partner's share. But instead of the true value of his share in the concern, John Dixon junior's executors demanded the precise sum at his credit in the books, without reference to what division the assets of the company could bear. This attempt was of course resisted, when suddenly Jacob Dixon senior and junior died. Anthony and Joseph Dixon, the sons of Jacob Dixon senior, and his accepting trustees, found themselves placed in a situation of great difficulty, and they felt it their imperative duty, as representing the most deeply interested party, the principal and last surviving partner, to enter into possession of the company property, for the purpose of protecting it from loss, or rather destruction. This was a step, not of choice, but of necessity.

They proceeded with the utmost activity in the management, and by the interposition of their own individual responsibility paid part of the obligations of the company. But being harassed by the petitioners, impeded by diligence, by inhibition and arrestment, followed by a writ of extent on the part of the Crown, they were incapacitated from winding up the concern, as they otherwise could, without delay or loss. The

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proposal for the appointment of a manager would have still more disastrous results. Besides the expence of management by a factor, the valuable trade of the company would be lost, and the works either abandoned or sold for a trifle. But, independent of the inexpediency of the measure proposed, the Court, in a just exercise of its authority, had no right or power to interfere.

In these circumstances they opposed the application, first, because the executors, being by their own showing merely creditors of the company, have no title to apply for the appointment of a judicial factor or manager. The whole estate and rights of Jacob Dixon senior are now vested, by his trust deed, in Anthony and Joseph Dixon, who are entitled to administer his personal estate. Such being the situation of matters, the executors have no title to subvert the administration fixed by law, and by the will of the defunct, and place the administration in the hands of a factor or manager. The creditors may take such steps as the law allows for recovering payment of their debts, but they can do nothing more.

But, 2dly, There is no legal ground for their demand. The whole estate was vested in the person of Jacob Dixon senior at the time of his death, and the whole has been carried by his deed of settlement to his trustees, liable of course to Jacob Dixon's debts and liabilities; and these, when ascertained, the trustees are desirous and willing to pay and satisfy. Holding, therefore, the executors to be creditors, that character merely gives them a right to call the trustees to account. It gives none to insist that they shall be deprived of the office. No doubt, when an estate is in danger of destruction or dilapidation, from the death, absence, or incapacity

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of the owner, without any person legally entitled to take charge of it, the Court have power to protect it by appointing a manager or factor. But the Court never takes the management from those to whom the law has entrusted it, and commit it to a factor or curator of their own appointment. An opposite course would lead to endless confusion and expence.

The Court sequestrated the funds and estate of the Dumbarton Glasswork Company, and the other companies composing the same partnership, as specified in the petition, and nominated and appointed a judicial factor on the sequestrated funds and estate, with power to take the same under his charge, and to manage and wind up the whole affairs of the said companies, and with the other usual power; the said judicial factor, before extract, finding sufficient caution in terms of the acts of sederunt.*

22d Dec. 1831. 20th Jan. 1832.

Anthony and Joseph Dixon appealed.

Appellants.—(1.) The whole stock and estate of the company became the absolute and entire property of the surviving partner, subject to a claim, at the instance of the representatives of deceased partners, for the value of such partner's share, and for relief of the obligations contracted by the company. Therefore, on the death of Jacob Dixon junior, Jacob Dixon senior became proprietor of the trade, stock, and estate of the company, and the respondents became creditors of Jacob Dixon senior and junior. On the death of Jacob Dixon senior, the appellants, as his trustees and executors, assumed, as they were entitled to do, possession of the

* 10 Shaw and Dun., 178 and 209.

whole estate, with power to sell and dispose of the estate uplift, rents and debts, as the deceased, if alive, could himself have done, subject no doubt to the claims of creditors, whether the representatives of deceased partners or third parties. Who else was entitled by law to take and hold possession of and administer the estate of Jacob Dixon senior? Is it not clear that executors nominated by the defunct himself are preferable over all others to the possession and administration of the defunct's estate? — Ersk. Inst. 3, tit. 9, sect. 32.

(2.) The Court had no power to sequestrate or to appoint a judicial factor on the estate, for the purpose of managing and winding up the affairs of the company. Here there are parties legally in the management, and it is only where property is left unprotected, and without a legal custodier, that the Court interferes. The interposition of the Court depends on and can be justified only by the necessity of the case.—Bryce, 25th January 1828, (S. & D. p. 425); Buchanan, 3d August 1782, (Mor. 14,350).

(3.) Even if the Court were entitled to sequestrate in cases where there is not a necessity, but merely a supposed expediency, there is no expediency to call for their interposition in the present instance; but, on the contrary, sequestration will be detrimental, indeed ruinous, to the parties concerned. The appellants are peculiarly well qualified to wind up the affairs. The trade is very complicated, and requiring great local knowledge. The appellants have a deep interest to create the largest surplus. They have the best means of judging how the estate can be realized to the greatest advantage, both by disposing of the property at fitting times, and by adopting prudent means for recovering

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the debts due to the company; and all this they can do at the least possible expence. But the sequestration of an estate is never profitable; nay, a learned judge of the last century described it as a licence to mismanage. If a factor or receiver be appointed, he will deem it his duty to realize the estate by the most expeditious means. He must proceed against debtors of the company without delay or indulgence. The result will inevitably be, that this advantageous trade will be annihilated, and the assets of the company reduced by a half. The appellants have made every tender to settle by amicable arrangement; but nothing will satisfy the respondents but the confusion and loss the necessary consequence of a factory.

Respondents.—(1.) The Court is merely called upon to protect, in the meantime, by the appointment of a judicial manager, the interests of all parties. All the partners have died, and the company has thus become dissolved. Where there is an existing partnership there is confidence between the partners; if one survives, the confidence remains, and he is entitled to recover. But among representatives there is no confidence; and the Court will appoint a neutral person to wind up the concern, especially where interests of such magnitude, as in the present case, are involved and exposed to risk. It is not enough that the trustees hold the usual powers bestowed on trustees. There is no survivorship at law in personal property belonging to a partnership. Jacob Dixon senior did not and could not delegate to the trustees powers to wind up the partnership, or to carry on the trade, in which the representatives of other partners were interested; nor are the appellants quali-

fied for such an undertaking. It makes no difference that the respondents should claim in the character of creditors the protection which they now seek. It cannot injure their title that, besides being the representatives of one of three deceased partners, they are also large creditors of the two other deceased partners. (2.) The power of the Court to appoint a manager never has been doubted. (3.) The present is a case in which the Court ought to exert that power.—2 Bell, 643; 1 Montagu, 165; Philips, 2 Bro. 272; Godfrey, cited in Pearce v. Chamberlain, 2 Vesey, 33.

LORD CHANCELLOR: — My Lords, before deciding this case, I should wish to have time to consider some of the matters of law and fact which have been argued, and more particularly with a view to the power of the Court in appointments of this kind, and the way in which the factor or receiver can be dealt with; for there seems to be a difficulty in obtaining any very precise light on the subject of the power of the Court, either in appointing a judicial factor, or in calling upon that judicial factor to account after he is appointed. I shall not give any opinion one way or the other; but I should wish to have an opportunity of considering the practice, and the authorities on the point, before I state to your Lordships how the case strikes me.

Consideration postponed.

LORD CHANCELLOR: — In this case I stated to your Lordships, that I required some little time to look into the practice as well as the facts of the case, because the question did not appear to me to be very

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satisfactorily settled by the decisions, with respect to the power of the Court of Session to appoint a judicial factor, which is in the nature of a receiver, and as to the mode in which these powers were exercised; I have now satisfied myself that their Lordships have come, upon the whole, to a right decision in this case. And in advising your Lordships to affirm the interlocutor, I should wish it to be understood that it is with reference to the particular circumstances of this case, and without laying down any general rule as to the power of making this appointment, or the mode in which it is to be executed. In the circumstances of this case, I hold their Lordships were well advised in exercising that power, of appointing a judicial factor; but I do not advise your Lordships to give any costs upon the appeal.

The House of Lords ordered and adjudged, "That the "interlocutors complained of be, and the same are hereby "affirmed."

Moncrieff and Webster — Spottiswoode and Robertson, — Solicitors.