Thursday, June 9.

FIRST DIVISION.

[Lord Gifford, Ordinary.

ALEXANDER DICKIE *v.* WILLIAM MITCHELL.

Judicial Factor—Joint Tenancy—Lease.

In a case of joint tenancy of a farm, one of the two joint tenants was incapacitated by age from taking any part in the management, and the other had granted a trust deed on the narrative that he was unfit for business on the ground of facility, and that large losses had already occurred and were likely to occur in future from his management. The first mentioned party presented a petition for the appointment of a judicial factor either to carry on or to renounce the lease. *Held* that such an appointment was within the power of the Court.

The parties to this case were joint tenants of a farm belonging to Mr Forbes Irvine of Drum, under irregular missives of lease followed by possession, the lease being for nineteen years from Whitsunday 1871. The management of the farm was entrusted to the respondent William Mitchell, who was the son-in-law of the petitioner, but it turned out most unsatisfactory, and large losses were the result. In November 1873 Mitchell granted a trust deed in favour of certain parties, which deed proceeded on the narrative that he felt himself at times unfit for the charge of the farm, and that serious losses had already resulted from his management. In these circumstances, Dickie was anxious to renounce the lease, but this Mitchell refused to do, and Dickie accordingly presented a petition to the Court praying for the appointment of a judicial factor, with the intention, as was admitted, that the factor should renounce the lease, the landlord being willing to accept the renunciation, and being a consenting party to the prayer of the petition.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 6th May* 1874.—The Lord Ordinary officiating on the Bills having heard parties' procurators, and having resumed consideration of the petition as amended, answers thereto, and whole process—Refuses the prayer of the petition, dismisses the same, and decerns: Finds the respondent entitled to expenses, and remits the account thereof, when lodged, to the Auditor of Court to tax the same and to report.

"*Note.*—The Lord Ordinary is of opinion that the objection to the mode in which the petitioner's title was set forth in the original petition is sufficiently obviated by the Minute of Amendment, No. 64 of process, which he has sustained by the previous interlocutor. It seems plain enough that the petitioner, although he has not signed the formal lease, is still joint-tenant with the respondent in virtue of the missives and possession following thereon. The joint-tenancy, which is the petitioner's true title, is expressly admitted by the respondent in his answers.

"On the merits of the question raised by the petition, the Lord Ordinary is of opinion that no sufficient cause has been shewn warranting the appointment of a judicial factor, or warranting sequestration of the alleged partnership estate belonging to the petitioner and respondent.

"The alleged partnership or joint adventure between the petitioner and respondent consists solely in the joint-lease held by them from Mr Forbes Irvine, whether that lease is constituted by a regular deed of lease, or by the irregular missives and other documents followed by possession, and of the stock, effects, and property connected therewith. The lease is for nineteen years from Whitsunday 1871.

"The Lord Ordinary does not doubt the power of the Court to appoint a judicial factor over a partnership estate when this is shewn to be absolutely necessary, but in general such factor will only be appointed for winding up the partnership, and realizing and distributing the partnership estates. The Lord Ordinary is not aware of any case in which the Court has appointed a judicial factor for the purpose of carrying on a mercantile partnership, either till the term fixed by the contract or even for a more limited time. To meet this difficulty, the petitioner urged that the factor would renounce the lease, and he stated that the landlord, Mr Irvine, had consented to accept such a renunciation, and the petitioner asks authority to renounce accordingly. But the Lord Ordinary is not in a position to say whether the lease is or is not a profitable one to the tenants, or whether a renunciation is or is not expedient, and on what terms; and the reporter, Mr Dove Wilson, suggests that this question should be left to the judicial factor. Possibly, therefore, the factor might have to carry on the lease till its ish, and, in any view, in making the appointment, the Lord Ordinary must take this possibility into account. He cannot order renunciation, because the landlord is not a party to the present process, and would not be bound to accept renunciation excepting on his own terms.

"The case then really comes to this, that because the joint tenants have disputes and differences as to the management of the lease, can either of them insist on the appointment of a judicial factor to carry on the farm or to negotiate a renunciation of the lease? The Lord Ordinary thinks not. Nor does it alter the case that the petitioner alleges that the respondent is insolvent. This is denied, and although there seems to have been a disposition *omnium bonorum*, there has been no formal bankruptcy or mercantile sequestration. But although the bankruptcy or insolvency of a partner or joint adventurer may sometimes be a ground for dissolving the partnership or joint adventure, it will not warrant the appointment of a judicial factor upon the whole partnership estates.

"The Lord Ordinary thinks that the present petitioner has mistaken his remedy. If, as the petitioner avers, he has been compelled to pay the whole rent, and to discharge debts improperly incurred by his co-tenant, his course is to constitute his debt against the co-tenant, and either enforce payment of the debt or take out sequestration, which, subject to the landlord's consent, would carry the bankrupt's interest in the lease; and thus, if the respondent is really in the wrong, his right under the lease would be terminated; at all events, and whatever the petitioner's remedy may be, the Lord Ordinary does not think that he is entitled to demand the appointment of a judicial factor.

"The respondent's case is all the stronger if, as seems to be the fact, the petitioner became joint-tenant merely as a mode of providing a lease and a

means of livelihood for his son-in-law, and as a form of becoming cautioner for his son-in-law's rent. If this be so, his remedy lies in an action of relief against his son-in-law, the claim of relief being enforced in the usual way. The Lord Ordinary does not base his judgment on the evidence taken before Mr Dove Wilson, because he has some doubts as to the competency thereof. He thinks that the statements in the amended petition and answers, and the documents in process, are sufficient for the disposal of the case."

The petitioner reclaimed.

Argued for him—That though this was not an ordinary case, it was one within the power of the Court, who were entitled to look at the facts of the case and see whether the appointment of a judicial factor would be for the advantage of the estate. Admittedly the Court had power to make such an appointment for the purpose of winding up a trust-estate or partnership; that the joint tenancy was a kind of partnership, and that there was no difference in principle between an appointment for winding up an estate and one for carrying it on.

Authorities—Bell's Comm., ii, 524, 535; Clark on Partnership, p. 584; *Bell* v. *Williamson*, March 11, 1857, 19 D. 704; *James Ferguson and Others*, Pet., Feb. 3, 1865, Sess. Pap.; *William Mitchell*, Pet., June 26, 1873, Sess. Pap.

Argued for the respondent—This was not the case of a sequestration or of the appointment of a *curator bonis*. There was no authority for holding that the Court had power to appoint a judicial factor to carry on a lease.

Authorities—*Philip*, Nov. 22, 1827, 6 S. 103; *Gilray* v. *Robertson*, May 21, 1827, 10 Macph. 715.

At advising—

Lord President—This is rather a peculiar case, but it has been very satisfactorily argued, and the result of the argument on my mind is, that I think the prayer of the petition ought to be granted, and a judicial factor appointed with the usual powers, for I am not at present for giving him special powers. Whether such powers must hereafter be applied for will be a question for the judicial factor in the first place, and if hereafter he makes such an application to us, we will consider it upon its own merits. I do not think that any of the cases which have been referred to in the course of the discussion are quite in point. This is not properly a case of partnership—the parties are merely joint tenants under a lease—but still those cases are not without bearing on the present, and they furnish us with two or three general principles which are of importance here. When all the partners in a concern are dead, there is no doubt of the power of the Court to appoint a judicial factor, and no doubt also, that they will exercise it. The case of *Dickson* is authoritative on that point. If, on the other hand, there be a survivor who is not labouring under any incapacity for business, the Court will refuse to make any such appointment, but will devolve on him the duty of winding up the estate. In one of the cases referred to, I mean the case of *Young*, where one of three partners had died, the Court did make such an appointment, but that decision was reversed on appeal by the House of Lords, who adopted the view expressed by Lord Cockburn in the minority; so we may say that the rule stands thus,—that in the one case, where all the partners are dead, the Court will appoint a judicial factor; in the other case, where there is one or more survivors, they will not. There remains, however, a third case.—Where there is a survivor, but one who is incapable of carrying on the business or of winding it up, either from a failure in duty or from natural incapacity. Such cases must always be determined mainly by their special circumstances, but I have no doubt of the power of the Court to make such an appointment. The present case, though not exactly one of partnership, nearly resembles it. The father and son were partners in the popular sense of that term; or, to put it more correctly, they were joint adventurers—which comes very near to partnership. It is perfectly clear that the old man is quite incapacitated, and the question therefore arises whether the respondent is a person who ought to be left sole manager of the farm. It was, no doubt, at first contemplated that he should be so, but if it turns out that he is unfit to be manager, and that a continuance of his acting in that capacity will be ruin to both himself and his father-in-law, is it still to be maintained that he must be allowed to go on? It would be very much to be regretted if that were so. The case is a very strong one for interference. The lease under which these parties hold began at Whitsunday 1871, and great losses have already arisen under it, and it has still sixteen years to run. That being the condition of the lease, let us see what is the capacity of the respondent. We have a portrait of himself drawn by his own hand, and in the most graphic terms. He says—"In consequence of injuries and a severe physical shock which I sometime ago received through an explosion of gunpowder, and from other circumstances concurring therewith, I am at times unfit for the conduct and management thereof, and have entailed on myself and on said joint tenant serious losses through the facility with which I have been induced to sign accommodation bills for worthless parties, and to conclude rash bargains from which serious losses have resulted in the management of the said farm and otherwise: Considering further that I, the said William Mitchell, being fully satisfied of the great disadvantage and ruinous consequences which have followed and might yet follow in consequence of the facts and circumstances before narrated, have agreed to convey over the whole heritable and moveable estate belonging to me to the trustees afternamed, in order that the said farm and other business hitherto conducted by me may be managed and conducted by them." Can any one say that a person so described by his own hand is fit to be left in the sole management of a farm? It seems to me impossible to think so. There are only two alternatives that I can see; either we must make the appointment prayed for, or we must allow the respondent to go on with the management of the farm. The remedy sought seems to me to be an appropriate one. The Lord Ordinary says the petitioner has mistaken his remedy. He says—"If, as the petitioner avers, he has been compelled to pay the whole rent, and to discharge debts improperly incurred by his co-tenant, his course is to constitute his debt against the co-tenant, and either enforce payment of the debt or take out sequestration, which, subject to the landlord's consent, would carry the bankrupt's interest in the lease; and thus, if the respondent is really in the wrong, his rights under the lease would be terminated; at all events, and whatever

the petitioner's remedy may be, the Lord Ordinary does not think that he is entitled to demand the appointment of a judicial factor." I cannot see the force of that; the remedy suggested seems to me to be a very insufficent one. I think the circumstances amount practically to a case of necessity, and that being so, I am for granting the prayer of the petition and appointing a judicial factor, with the usual powers.

LORD DEAS.—We are dealing here with what I consider a very valuable part of the jurisdiction of the Supreme Court. The Lord Ordinary states the law quite correctly in one part of his note. He says he "does not doubt the power of the Court to appoint a judicial factor over a parnership estate when this is shown to be absolutely necessary;" but he goes on, with reference to this case, "that the factor might have to carry on the lease to its ish," and he "is not aware of any case in which the Court has appointed a judicial factor for the purpose of carrying on a mercantile partnership either till the term fixed by the contract or even for a more limited time." So that, although in the outset he says he does not doubt the power of the Court, he here goes on to say that it is not competent for the Court to interfere for the management of a partnership estate. I am of opinion that it is not incompetent for the Court to interfere. I think the very principle on which the jurisdiction of the Court is founded makes it as competent in the one case as in the other, though it may require very cautious exercise. The case of *Dickson* was very fully considered in this Court. In that case it was very difficult to say if there was any subsisting contract at all, but there were representatives of a great number of partners all liable for the debts and entitled to the profits of the concern, and what influenced the Court very much was the immense loss which would have resulted from stopping and winding up the concern. The important power which was given to the factor in that case was the power of management, so much so that we granted *interim* execution pending appeal. When the case came before the House of Lords they felt considerable hesitation, but the result was that they satisfied themselves that the jurisdiction existed. I am therefore of opinion that the question is not one of competency, but a question whether the circumstances are such as to justify us in making the appointment. I agree with your Lordship that the case is a very strong one. There might have been a practical difficulty as to who should be appointed, but the landlord comes forward and consents not only to the appointment but to the particular individual suggested.

The other Judges concurred.

The Court prenounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for Alexander Dickie against Lord Gifford's interlocutor of 6th May 1874, Recal the said interlocutor, sequestrate the estate of the joint-adventure subsisting between the petitioner and the respondent; appoint John Crombie, accountant in Aberdeen, to be judicial factor thereon, with the usual powers, he finding caution before extract in common form, and decern; find the petitioner entitled to expenses since the date of the lodging of the answers to the petition, and remit to the Auditor to tax the account of the said expenses and report."

Counsel for the Petitioners — Watson and M'Laren. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Respondents — Dean of Faculty (Clark) Q.C., and Trayner. Agent—J. B. Sutherland, S.S.C.

Thursday, June 11.

FIRST DIVISION.

SYMINGTON *v.* SYMINGTON.

Expenses—Husband and Wife—Arrestment and Inhibition on the Dependence of an Action.

In an action of separation and aliment at the instance of a wife against her husband, the Court gave decree in favour of the pursuer. *Held* (*diss.* Lord Deas) that she was not entitled to charge against the defender the expense of arrestments and inhibition used on the dependence of the action, as not being part of the expense of process, although the use of diligence was in the circumstances reasonable and necessary.

Expenses—Fees to Counsel—Third Counsel.

Circumstances in which the Court allowed against the unsuccessful party the expense of a third counsel, taken in in the Inner House, and of the senior of two counsel employed both in the Outer House and the Inner House.

This was an action of separation and aliment, at the instance of Mrs Symington against her husband, on the ground of the alleged adultery of the defender. The Court, on 19th March 1874, gave decree for the pursuer, and the case now came up upon the auditor's report of the pursuer's account of expenses.

The following findings of the auditor were objected to:—

(1) The pursuer had used arrestment and inhibition against the estate of the defender on the dependence of the action, and the auditor disallowed the expense thereby incurred; (2) The pursuer had employed two counsel in the Outer House, and when the case came before the Inner House had, in addition, taken in a third counsel (Sol.-Gen. Millar). The auditor struck off the fees charged for the latter counsel.

It was stated for the pursuer that the defender, immediately upon the Inner House giving judgment against him, had left the country, and that but for the diligence used by her on the dependence of the action, the pursuer would not have derived any benefit from the decree which she had obtained. It was further stated that before the Solicitor-General was taken into the case by the pursuer, the Lord Advocate had been taken in by the defender, although he had already two counsel in the case.

Argued for the pursuer—The expense of arrestment and inhibition should be allowed, 1st, because, as the sequel showed, it was a reasonable and proper precaution, and necessary to render the decree, when obtained, effective; 2d, Because it was really part of the expense of process, being a step taken during the continuance of the process; and 3d, Because it was an action