have been included within the bounds of large farms, and it is said that these occupiers ought not on that account to be deprived of the benefits of the Act. If it is true that there is such a class of occupier, nothing we have now decided will, in my opinion, affect the question between such persons and their landlord. It may be that an occupier of such a kind is a tenant of the proprietor notwithstanding the fact that his holding lies within the bounds of a farm, and notwithstanding even the fact that he pays rent to someone else than the landlord; but if he is a tenant, he must hold of the proprietor; and the ground of our judgment, I conceive, is that the complainer by his own statement negatived the idea that he held under the proprietrix at all, because he says that he was "a yearly sub-tenant, under the said James Thomas Shaw, of a holding at Tornain on the said farm of Barr," and the evidence does not in any way displace that averment, but on the contrary confirms that he held under no agreement with the proprietor.

I agree, therefore, that the pursuer has not satisfied this condition, and I also agree that he has not satisfied the condition as to residence.

LORD M'LAREN—I desire to express my concurrence in the additional observations made by Lord Kinnear. There may be such a class of occupiers as has been described holding another position from that with which we have here to deal, and I should not like to say anything to prejudice their case.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Complainer—Jameson—G. W. Burnet. Agent—D. M'Lachlan, S.S.C.

Counsel for the Respondent—Guthrie—Macfarlane. Agents—John C. Brodie & Sons, W.S.

Friday, March 20.

FIRST DIVISION.

[Lord Low, Ordinary.

ALLAN AND ANOTHER *v.* GRONMEYER.

Copartnery—Dissolution of Copartnery—Realisation of Partnership Property—Judicial Factor.

A deed of copartnery provided that on the termination of the contract the stock, property, and debts of the company should be realised by one of the partners named, and the proceeds divided among the partners according to their respective interests.

Three years after the termination of the copartnery it was shown by an accountant's report that during that period the liabilities of the firm had been increased, the stock-in-trade to a large extent renewed, and the business carried on by the partner named as a going concern.

On the application of the remaining partners, the Court *appointed* a judicial factor to wind up the copartnery estates.

This was an application for the appointment of a judicial factor on the estates of the now dissolved firm of Scott & Allan, wine and spirit merchants in Leith.

In May 1881 a contract of copartnery was entered into between Thomas Cranstoun Allan, Albert James Allan, and Richard Gronmeyer to carry on the business of the above-named firm. The capital of the firm, consisting of upwards of £22,000, was contributed entirely by the Messrs Allan.

The fourteenth article of the contract provided that on the termination of the copartnery the books were to be balanced, and the value of the stock-in-trade, property, and outstanding debts ascertained, and that the whole might be taken over by any of the partners at a valuation, and if this was not done, the stock, property, and debts were to be realised by Gronmeyer with all convenient speed, and the proceeds divided among the partners according to their respective interests therein.

It was agreed that the copartnery should be dissolved early in 1888, and that the stock should be realised by Gronmeyer. The proof of this fact is set out in the Lord Ordinary's interlocutor.

In October 1890 the Messrs Allan presented this petition, and averred that they were not satisfied with the method of winding-up the business adopted by Gronmeyer; that instead of winding it up he was carrying it on as a going concern; that he had since 1887 increased the liabilities of the company, and almost entirely renewed the stock-in-trade; and that, looking to the large amount of their capital still in Gronmeyer's hands, it was of great importance that the partnership property should be realised with all convenient speed.

Gronmeyer lodged answers in which he denied that the partnership had been dissolved. He averred that he was managing the business with a view to the judicious realisation of the large stock of wines and spirits held by the firm; further, that the appointment of a judicial factor, especially an accountant, would inevitably lead to a sacrifice of the stock, and cause loss to the petitioners.

By minute the respondent undertook that on 15th December 1890 the books of the firm would be submitted to Messrs R. & E. Scott, C.A., for audit, and that the realisation of the stock would be completed not later than Whitsunday 1892.

The substance of Messrs Scott's report, so far as bearing upon the present question, was in these terms—"The accountants were under the impression . . . . that the business was only to be continued for the purpose of gradually winding it up, but they find that instead of this having been done, the business has been carried on as

a going concern, and that the whole of the stock of spirits and wines in bond, valued at £11,624, 2s. 2d. (with the exception of about £1000), has been purchased subsequent to" February 1887.

On 5th March 1891 the Lord Ordinary (Low) appointed Mr Ebenezer Erskine Scott, C.A., Edinburgh, to be judicial factor on the partnership estate.

"*Opinion.*—The petitioners aver that the copartnery between them and the respondent came to an end on 11th February 1887, when the business fell to be wound up. The respondent, on the other hand, avers that the copartnership still continues.

"Whatever may be the precise date at which the partnership was dissolved it is clear that it was at all events dissolved early in 1888. The respondent's agents, in their letter to the petitioners' agents of 20th March 1888, say—'Our client is willing to accept the interpretation your clients desire to put upon the contract, and to hold that the copartnership should be terminated at once.' They then proceed to make suggestions as to the realisation of the stock. Again, in their letter of 5th May 1888, the respondent's agents say—'With a view to the expeditious winding-up of the business, he' (the respondent) 'has put the whole of the travellers and other employees on a month's engagement, and he is on Monday to give one of the travellers warning to leave in a month. He is also not buying in any stock unless it is absolutely necessary in order to keep the business up as a going concern. For instance, if his traveller goes in and asks for an order for a cask of whisky, the customer might want a case of Loopuyt's gin or a case of Renault's brandy. Unless the firm were able to supply these different orders then they would lose a lot of their best customers. Mr Gronmeyer, however, is only buying these articles in small quantities with a view to keep the business together to get the other stock sold.' Further, in the same letter it is said that the respondent proposes to do business as a spirit-broker on his own account, 'but he will devote so much time and attention to the business of Scott & Allan as is necessary for the speedy realisation of the present stock.'

"From these letters it seems to be plain that the parties were agreed in 1888 that the partnership should be dissolved, and that the stock should be realised by the respondent, who should only make such additions to the existing stock as might be absolutely necessary to enable him to dispose thereof to advantage.

"The present petition was brought in October 1890, on the ground that the respondent was not realising the stock, and would not give the petitioners any information on the subject. The respondent in answer denied that the partnership had been dissolved, and stated that he had been managing the business with the view of an advantageous realisation of the stock, which in the state of the market required a very careful, judicious, and gradual treatment.

"Messrs R. & E. Scott, C. A., Edinburgh, had previously reported upon the books of the firm, and as both parties had confidence in them, it was agreed that the books of the firm should be submitted to Messrs Scott, and that consideration of the petition should be superseded until their report was ready. That report has now been lodged.

"Messrs Scott's previous report embraced the period from 11th February 1886 to 11th February 1887. At that date the balance due to Mr T. C. Allan was £12,137, 16s. 1d., to Mr A. J. Allan £12,472, 8s. 6d., and to the respondent £44, 14s. 3d. At that date the value of the stock amounted to £17,470, 12s. 3d.

"Messrs Scott's second report embraces the period from 11th February 1887 to 31st October 1890. It shows that the amount due at the latter date to Mr T. C. Allan was £11,282, 8s. 3d., to Mr A. J. Allan £11,723, 19s. 8d., and by the respondent £2118, 0s. 2d. The value of the stock is stated at £17,986, 0s. 7d.

"Further, during the last-mentioned period the report states that a loss has been incurred in the conduct of the business of £2330, 6s. 8d.

"Further, the liabilities of the firm have materially increased. At 11th February 1887 these were as follows:—

Bills payable . . .	£ 75	2	7
Ordinary ledger balances, being sums due by the firm	2003	15	1
In all	£2078	17	8

"At 31st October 1890 the liabilities were:—

Bills payable . .	£ 721	3	5
Balance due to Royal Bank	422	12	3
Ordinary ledger balances, being sums due by the firm	6989	1	3
In all	£8132	16	11

being an increase of liability of upwards of £6000. It is also noticeable that the amount due by customers was £9323, 13s. 10d. in February 1887, and £11,816, 9s. 7d. in October 1890. As already mentioned, the value of the stock is £17,986, 0s. 7d. as at 31st October 1890, being greater than the value of the stock in 1887 before the winding-up commenced. The Messrs Scott state in their report that 'the business has been carried as a going concern, and the whole of the stock of spirits and wine in bond, valued at £11,624, 2s. 2d., with the exception of about £1000, has been purchased subsequent' to 11th February 1887.

"I had an interview with Mr E. Scott, who prepared the report, in order to make sure that I fully apprehended its import, and he informs me that the sum of £17,470, 12s. 3d. entered under the general heading of 'Stock, etc.' in the report of 1887 represents the same items as the sum of £17,986, 0s. 7d. in the last report, the only difference being that in the latter case the items are given in detail. He also informed me that the loss of £2330, 6s. 8d. mainly represents the excess of expenditure over receipts during the period embraced in the report.

"It thus appears that the respondent has not been winding-up the business and realising the stock as in 1888 he undertook to do. On the contrary, he has been carry-

ing on the business as a going business, and carrying it on at a loss, and the stock, instead of being reduced, has actually been increased.

"The respondent had, as far as I can see, no legitimate interest in failing to realise stock as speedily as possible when the partnership was dissolved. He had no capital in the business, only a trifling sum being due to him, and there seems to be no doubt that the assets of the firm were greatly more than sufficient to meet the liabilities. Notwithstanding this he has, while leading his partners to believe that he was winding-up the business, been carrying it on as a going concern, with the result that the capital of his partners has been reduced, a yearly loss has been incurred, the liabilities of the firm have been largely increased, and also the amount of outstanding debts due to the firm, he himself has become a debtor to the firm, and the stock on hand is larger than ever.

"In these circumstances I am of opinion that the petitioners are entitled to have the winding-up of the business taken out of the respondent's hands. Whatever his motives may have been, he has broken faith with the petitioners, and I think that they have reasonable grounds for fearing that their interests may be imperilled if he is allowed to continue in the management. I shall therefore appoint a judicial factor.

"It is probably right to add, that apart from the fact that the respondent has carried on the business instead of winding it up, notwithstanding the dissolution of the partnership and the express wish of his partners, I do not see any reason to suppose that he has acted dishonestly. The books are accurately and properly kept, and, so far as they are concerned, there appears to have been no disposition on the respondent's part to conceal or misrepresent the true state of matters. But he seems to have been determined to carry on the business instead of winding it up. To do so was contrary to his duty, inconsistent with the undertaking which he had given in his agents' letters to which I have referred, and has been to the prejudice of the petitioners, and as they have really the sole interest in the realisation of the stock, I think that they are entitled to demand that it should be entrusted to some one else."

Gronmeyer reclaimed, and argued—That he was entitled to a proof to show that his method of winding-up the business was the only one calculated to prevent a loss. That it was most inexpedient to throw suddenly on the market a large quantity of wines and spirits, and that in the opinion of other parties in the trade the time within which he proposed to wind up this business was reasonable. If a judicial factor was to be appointed, it ought to be a person experienced in the business, and not a chartered accountant.

Argued for the respondents (the Messrs Allan)—The business was not being wound up as provided for in the contract of copartnery, but was being treated as a going concern. The respondents had the preponderating interest in the business, and they were entitled to prescribe the manner in which it was to be wound up. They were satisfied that the factor appointed by the Lord Ordinary on their nomination would protect their interests, and the case was one in which the Court should confirm the Lord Ordinary's appointment.

At advising—

LORD ADAM — It is obvious that the petitioners have an overwhelming interest to make the present application, as they have upwards of £22,000 at stake, whereas the respondent has no capital at all. The petitioners are therefore entitled to take every precaution to protect their property —[*His Lordship here narrated the facts of the case stated above*].

It is clear from what I have just stated that Gronmeyer's duty was to wind up this business and to realise the stock. It now appears from the accountant's report that although nearly three years have elapsed since the termination of the copartnery this business is as far from being wound up as ever it was.

Gronmeyer was undoubtedly appointed to wind up the business, but so far from doing so, he has been carrying it on during these three years, on his own admission, as a going concern, both increasing the firm's liabilities and purchasing fresh stock.

It is no answer to the present application to say that the business has been successfully carried on. The Messrs Allan were entitled to say whether the business was to be wound up or not, especially where it is made clear that Gronmeyer was carrying it on entirely at the Messrs Allan's risk and expense. I therefore agree with the Lord Ordinary in thinking that the petitioners are entitled to have a judicial factor appointed on this estate.

LORD M'LAREN—There can be no doubt that at the expiry of the term of copartnery the Messrs Allan were entitled to demand that this business should be wound up, and that accounts between them and Mr Gronmeyer should be adjusted and settled.

It was provided by the contract that this was to be done by Gronmeyer, the clause to that effect having been inserted specially for the protection of the Messrs Allan; and they are entitled now to have this arrangement carried out for the protection of their interests.

Now, the state of facts with which we have to deal, and as they are set out in the accountant's report, are these—that at the end of two years from the expiry of the contract of copartnery the assets of the firm are unrealised, its liabilities are materially increased, and the stock-in-trade has to a very large extent been renewed. In these circumstances I think it is quite clear that Mr Gronmeyer has not done his duty to his copartners.

We have been asked to allow the respondent a proof of his averments in his answers to this petition, and if any charges of a personal character had been made against Mr Gronmeyer he would have been entitled

to appear and defend himself, but all that the petitioners say is that his mode of winding-up this business is not a good one, and is prejudicial to their interests. That, it appears to me, is a question of accounting, and in cases where the Court consider a remit to an accountant to be necessary, it is not to be assumed that the consent of parties is required in order to make the report binding upon them. The object of the report is merely to bring the matters of fact in the case before the Court in a convenient form.

We have in the Messrs Scott's report quite sufficient to show us how matters here really stand. The Lord Ordinary has given effect to this report by appointing a judicial factor upon this estate, and I am of opinion that we ought to adhere to that interlocutor.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Petitioners—C. S. Dickson—Sym. Agents—Torry & Sym, W.S.

Counsel for the Respondents—W. C. Smith. Agents—Boyd, Jameson, & Kelly, W.S.

Friday, March 20.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

DUNCAN AND OTHERS (HEWIT'S TRUSTEES) *v.* LAWSON.

Succession—Bequest to Charity—Mortmain Act (9 Geo. II. cap. 36)—Heir-at-Law—Election.

A truster whose estate included freehold and leasehold property in England, empowered his trustees to sell his whole estate, and directed them to dispose of the residue thereof by paying legacies, including certain to his heir-at-law, and to divide the balance among various charitable institutions. The heir-at-law accepted payment of some of the legacies bequeathed to him.

It was established by an opinion of the Court in England that in virtue of the Mortmain Act the bequests to charitable institutions, in so far as they were payable out of the English freehold and leasehold estates, were null and void; that in the event of the trustees exercising the powers of sale of these estates conferred upon them by the truster, the bequests would still be null and void in so far as payable out of the proceeds; that the Court would hold these bequests to be void whether the heir-at-law made claim to the freehold estate or not; and that even in the event of his waiving his right, the estates would not fall to be distributed in terms of the settlement, but would be treated as undisposed of.

The trustees sought declarator that the heir-at-law having accepted the bequests in his favour, was under implied obligation to renounce all claims against the estate.

Held that as the heir could not surrender the English real estate to the uses of the will, he was not bound to elect between his rights as heir and his rights under the will.

David Gavin Hewit, leather dresser, Edinburgh and London, died on 1st August 1887, survived by his wife, and by one child, who died on 23rd August of the same year, aged a few weeks, before the period of vesting named in the after-mentioned deed. Mr Hewit and his child were survived by Mrs Lawson, the only sister of Mr Hewit. Mrs Lawson died intestate on 19th November 1887, survived by William Lawson, her eldest son and heir-at-law. Mr Hewit left (besides other testamentary writings which need not be more particularly referred to) a trust-disposition and settlement dated 21st May 1887.

At the date of his death the truster was resident in England, but it was admitted that he died a domiciled Scotsman. In his trust-deed he desired that his affairs should be "administered and wound up as far as practicable in accordance with the law and practice of Scotland."

The trust-estate consisted of moveable and heritable property. The heritable estate was situated partly in Scotland and partly in England. The heritable estate situated in England consisted of freehold and of leasehold property. To his trustees, of whom William Lawson was one, the testator disponed his whole means and estate, heritable and moveable, real and personal, of what kind or nature soever or wheresoever situated, and to enable his trustees to carry out the purposes of his settlement he conferred on them "all requisite powers, and particularly (but without prejudice to said generality, and without prejudice to the powers hereinbefore contained with reference to my businesses in Edinburgh and London) I empower them to retain the property and securities in which my means and estate may be invested at the time of my death, and also whenever they think fit, to sell, realise, and convert into money the whole estate or any part thereof (whether as left at my death or at any time invested), and that either by public roup or private bargain, and to execute and deliver all deeds and writings necessary for divesting themselves of the premises, binding the trust-estate in absolute warrandice."

Mr Hewit directed his trustees to pay several legacies, and, *inter alia*, one to Mrs Lawson of £3000, one of £3000 to William Lawson, and one to each of his trustees, who should accept, of £105. Mrs Lawson, prior to her death received payment of the legacy of £3000 bequeathed to her. William Lawson received payment of both of said legacies of £3000 and £105 bequeathed to him on 11th November 1887.