

LORD HUNTER—I am of the same opinion. I do not think that the alternative complaint can be read fairly on any other footing than as meaning that any charge in excess of 2s. 3d. allowed by clause 3 of the Milk Order was an unreasonable charge. When you refer to clause 12 of the Order I think it indicates that any artificial transaction or any unreasonable charge is to be illegitimate. The intimation given to the complainer was that all excess above the 2s. 3d. per gallon to which he was entitled under clause 3 was an unreasonable charge; but neither of the preceding cases to which we were referred appears to me to afford any ground for holding that the terms of clause 12 are *ultra vires* of the Food Controller, because, as Lord Mackenzie has pointed out, those cases proceeded on the footing that it was *ultra vires* to intimate to a man who was entitled to make some charge that he was guilty of an offence if he made some unreasonable charge when you have not defined what a reasonable charge was.

But surely it is not *ultra vires* to intimate what the prices are that may be charged for the commodities to be sold, and to say that any charge in excess of these defined charges is unreasonable. That is what seems to have been done here; and as no attempt appears to have been made by the suspender to establish that he had rendered any service in respect of which he was entitled to make any charge, I think his reasons for suspension entirely fail.

The Court refused the bill.

Counsel for the Complainer—Sandeman, K.C.—J. H. Christie. Agents—P. Morison & Son, W.S.

Counsel for the Respondent—The Lord Advocate (Clyde, K.C.)—MacRobert, A.-D. Agent—W. J. Dundas, W.S., Crown Agent.

COURT OF SESSION.

Thursday, April 1, 1920.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

BLAKE'S TRUSTEES v. JOLLY.

Process—Petition—Partnership—Judicial Factor—Appropriate Procedure—Questions of Fact and Law—Partnership Act 1890 (53 and 54 Vict. cap. 39), sec. 39.

A firm was dissolved by the death of one of its two partners. Thereafter his representatives brought a petition under section 39 of the Partnership Act 1890 craving the Court to wind up the firm and for that purpose to appoint a judicial factor. The surviving partner lodged answers. The parties were at issue upon the construction of the partnership writs and also upon questions of fact. *Held* that in respect that the parties were at issue upon questions requiring investigation or inquiry,

procedure by way of summary petition was inappropriate, and petition *sisted* to enable the respondent to have those questions determined by raising an action of declarator.

The Partnership Act 1890 (53 and 54 Vict. cap. 39) enacts, section 39—“On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may, on the termination of the partnership, apply to the Court to wind up the business and affairs of the firm.”

Mrs Margaret Wishart or Blake, widow of Joseph Cumming Blake, and three others, the testamentary trustees of Joseph Cumming Blake, and as such his executors-nominate, *petitioners*, brought a petition in which Francis John Jolly, formerly partner with Joseph Cumming Blake, in the firm of James Allan & Company, was called as *respondent*, craving the Court to wind up the business and affairs of James Allan & Company, and for that purpose to appoint a suitable person to be judicial factor upon the estate, property, assets, and business of James Allan & Company.

The relevant clauses in the *minute of agreement*, dated 15th April 1903, between James Allan & Sons and James Allan & Company and Joseph Cumming Blake and the respondent, the individual partners of the latter firm, under and in terms of which that firm was constituted, and of a *supplementary agreement*, dated 19th March 1908, are quoted in the petition.

Answers were lodged for the respondent.

The *petition* and *answers* set forth—
“1. The said deceased Joseph Cumming Blake died on the 4th October 1919 leaving the said trust-disposition and settlement, whereby he appointed the first three petitioners his trustees, and assigned and disposed to them, and to the acceptors and acceptor, survivors and last survivor of them, the whole estate, heritable and moveable, that might at the date of his death belong to him, or of which he might then have the power of disposal. The fourth petitioner . . . was assumed into the trust by deed of assumption dated the 9th October 1919. The trustees were by the said trust-disposition and settlement appointed the trusters' executors. (*Ans.* 1) It is admitted that the said deceased Joseph Cumming Blake died on 4th October 1919. The trust-disposition and settlement and deed of assumption mentioned in the petition are referred to for their terms.
2. At the date of his death the said Joseph Cumming Blake was a partner in the firm of James Allan & Company, cabinetmakers and upholsterers, Union Street, Aberdeen, the only other partner being Francis John Jolly, residing at 49 Gladstone Place, Aber-

deen. (Ans. 2) Admitted that at the date of his death the said Joseph Cumming Blake was a partner in the firm mentioned in the petition, the only other partner being the respondent. 3. The said partnership was dissolved by the death of the said Joseph Cumming Blake, conform to section 33 of the Partnership Act 1890, and by section 39 thereof the property of the partnership falls to be applied in payment of the debts and liabilities of the firm, and the surplus assets after such payment fall to be applied in payment of what may be due by the partnership respectively to the said Francis John Jolly, and to the estate of the late Joseph Cumming Blake, or in other words, their respective shares in the value of the partnership upon a winding up. (Ans. 3) Sections 33 and 39 of the partnership Act 1890 are referred to for their terms. Reference is also made to answers 5 to 8. 4. The said Francis John Jolly is desirous of taking over the business, property, and assets of the said firm, and carrying on the business for his own behoof; but while meantime continuing to possess all the assets and to carry on the business, he refuses or delays to apply the assets in meeting the liabilities of the firm for which the said Joseph Cumming Blake and his estate were and are liable, and in paying out the share to which the petitioners as the legal representatives of Mr Blake within the meaning of the said Act are justly entitled. (Ans. 4) It is admitted that the respondent continues to carry on the business. The allegation that he refuses or delays to apply the assets in meeting the liabilities of the said firm and in paying out the share to which the legal representatives of Mr Blake are entitled is denied. 5. The circumstances in which this dispute, which can only be terminated by the due winding up of the firm, has arisen are as follow—The business in Aberdeen which since the year 1903 has been carried on and known under the firm name of James Allan & Company, was carried on for many years prior to that time under the firm name of James Allan & Sons by two gentlemen, Mr David Allan and Mr Alexander Allan of West Cults, Aberdeenshire. In the year 1903, being unable to continue in business owing to increasing age, they determined to sell and make over the business on certain terms to the said Joseph Cumming Blake and Francis John Jolly, at that time two of their employees, and the said Joseph Cumming Blake and Francis John Jolly agreed to accept of it and to continue the business in partnership under the firm name of James Allan & Company. The new partners not being possessed of sufficient capital to finance the business and to pay the price thereof in cash to the said David Allan and Alexander Allan, it was agreed that the price of £11,050, 8s. 8d., less £50, 8s. 8d. paid in cash, should be and remain a debt secured by twenty bonds in common form, repayable in half-yearly instalments, and that the whole balance remaining due should be paid off on the 1st day of February 1910. The terms of the transaction were contained in a minute of agreement, dated 15th day of April 1903. The agreement for partnership was con-

tained in article fourth of said minute and was as follows—'Messrs Jolly and Blake agree to become partners for carrying on business from and after thirty-first January Nineteen hundred and three, as cabinet-makers and upholsterers in Aberdeen, under the said firm name of James Allan & Company, and so to continue in partnership till the whole of their debt to Messrs David and Alexander Allan has been paid, and not while any portion of that debt remains unpaid to assume any other partner into their firm unless with the written consent of Messrs David and Alexander Allan.' No arrangement was made as to paying out a retiring partner, but as regards a partner deceasing within the currency of the period above defined it was provided by article seventh—'If either Mr Jolly or Mr Blake shall die while any part of their debt to Messrs David and Alexander Allan remains unpaid, his representatives shall not withdraw from the business of James Allan & Company any part of his capital therein, but may receive, upon the completion of each subsequent yearly balance, such reasonable interest thereon, or such share of the profit as Messrs Jolly and Blake may themselves agree upon.' (Ans. 5) The petitioners' averments concerning Mr David Allan and Mr Alexander Allan are admitted to be true. It is also admitted that Mr Blake and the respondent agreed to continue business in partnership under the name of James Allan & Company, and that they had not sufficient capital to finance the business and to pay the price thereof. Reference is made to the minute of agreement for its terms. 6. The business of the partnership was carried on upon the terms aforesaid for five years, but in 1908, it having appeared to them that the aforesaid clause seventh, dealing with the death of a partner before the debt was paid off, failed to provide for the ascertainment of the interest of the estate of the decessor upon which the said interest should be payable, the partners entered into a supplementary agreement. Said agreement, which is appended to the principal agreement, and is dated 19th March 1908, provides, *inter alia*—'Having now in view the possibility that one or both of them may die before the whole of that debt' (the debt to Messrs Allan) 'has been repaid, they have arranged between themselves and hereby agree as follows—If either of them shall die while any part of the said debt remains unpaid, the value of his interest in the funds of the partnership shall be ascertained, not by re-valuations and a fresh balance-sheet at the date of death, but (1) by reckoning the sum at the deceased partner's credit in the latest complete balance-sheet; (2) adding to it any sums paid in by him since the date of that balance with interest thereon at the rate of five per cent. per annum; (3) deducting any sums drawn out by him during the same period, on which sums interest need not be reckoned if the drawings of the two partners continue to be, as they have hitherto been, exactly equal in amount; (4) adding the deceased partner's estimated share of profit from the date of the last balance to the date of his death, reckoned

on an average of the profits of the partnership for the three years ended at the date of the latest balance.' (Ans. 6) The supplementary agreement is referred to for its terms. 7. The said debt to the Messrs Allan was totally paid off at the term of Martinmas 1908, as at and from which date the said articles, and particularly the article of the supplementary agreement last quoted, were spent and ceased to be operative. (Ans. 7) It is denied that the debt to Messrs Allan was paid at Martinmas 1908 and that the articles, including the article of the supplementary agreement quoted in the petition, were spent and ceased to be operative. 8. The partnership, however, continued till the death of Mr Blake on 4th October 1919 as aforesaid. The said Mr Francis John Jolly has been called upon, as a condition of being permitted to carry on the business continuously, to pay out the interest of the late Mr Blake on fair and equitable terms by a valuation of the debts, liabilities, and assets of the firm as at the said 4th October 1919, but he declines absolutely to do so. He maintains that he is entitled to reinstate the business and pay out the interest of Mr Blake on the basis of existing account and balance-sheet values. Such values in no way correspond to true values. Some of the values are believed to be stated at less than cost, and it is believed that subjects are omitted from the list of assets. The proposed division would produce a most unfair and inequitable result in the favour of Mr Jolly. The latter refuses to act as the agent of the partnership and to manage the business for the purpose of winding up the same and dividing the assets as accords of law, but insists on carrying it on as a going business and acknowledging a debt to the petitioners on the basis described. This attitude the petitioners submit is wrongous and unfair, and the present application for winding up the business is therefore necessary. (Ans. 8) So far as not coinciding with the statements in these answers, the petitioners' averments are denied. The petitioners are called upon to specify what values are stated in the firm's accounts or balance-sheets at less than cost and what subjects are omitted from the list of assets. Explained that from the commencement of their partnership Mr Blake kept the books and compiled the accounts and balance-sheets while the respondent had sole charge of the trading of the firm. In order to finance the business and pay the price thereof the respondent and Mr Blake incurred heavy debt. The amount of their debt in which Messrs Allan were the original creditors was at first entered in the firm's books under the heading of 'D. & A. Allan No. 1 Account,' and commenced with the item 'By stock and book debts, £11,059, 8s. 8d.,' this representing the purchase price under the minute of agreement. At Martinmas 1908 this account had been reduced by repayments made from time to time to £5750. At or about Martinmas 1908 Mr Alexander Allan (who survived his brother Mr David Allan) disposed gratuitously to the respondent and Mr Blake as partners of their said firm the heritable property in

Union Street, Aberdeen, in which they carried on business. On the suggestion of the late Alexander Ledingham, solicitor, who was law agent for the Messrs Allan, and who also acted for Messrs Jolly and Blake in the transfer of the business, a sum of money was borrowed on the security of these subjects precisely sufficient to repay the balance on said account. The money so borrowed was entered in the books of the firm as 'Edmonds & Ledingham—Borrowed money, £'; and in Messrs Allan's account the item to square the account reads 'To paid per Edmonds & Ledingham, £5750.' In order to repay the said balance, Mr Blake and the respondent incurred obligations for repayment to other creditors. Gradual repayments towards the extinction of the said indebtedness were made during Mr Blake's lifetime, but to the extent of at least £4600 these obligations were at the date of Mr Blake's death and still are undischarged. By the said agreement, dated 15th April 1903 (which was prepared primarily for the protection of Messrs David and Alexander Allan, by their law agents), provisions had been made for the Messrs Allan as individuals, or either of them, assigning to third parties the bonds granted in connection therewith. Reference is made to the obligations for repayment and to the tenth and eleventh articles contained in the said agreement. When the said supplementary agreement was executed on 19th March 1908 Messrs David and Alexander Allan remained the creditors in the said debt to the extent of £5750. Mr Blake and the respondent entered into the said supplementary agreement for the sole purpose of regulating the rights of the survivor of them and his liabilities to the representatives of the predeceaser in the event of one of them dying before their debt had been extinguished, whether Messrs Allan remained as their creditors or not. When the respondent and Mr Blake made repayments as aforesaid to Mr Alexander Allan and the representatives of Mr David Allan, the indebtedness with reference to which the supplementary agreement was executed was, so far as the partners were concerned, not extinguished, but was merely transferred to other creditors. Mr Blake and the respondent always recognised this fact, and their agreement to that effect was a material condition of the continuance of the partnership. About six months before his death Mr Blake expressed to the respondent the intention of making a testamentary settlement, and stated to the respondent (who expressly agreed with Mr Blake) that the said supplementary agreement remained operative. The partnership subsisted at Mr Blake's death, and the said supplementary agreement regulates the rights and interests of his representatives in the assets of the partnership. The statement by the petitioners to the effect that the said supplementary agreement ceased at Martinmas 1908 to be operative is contrary to the provisions of the supplementary agreement and the actings and state of knowledge as well as the expressed intentions and oral agreement of the partners. The respondent has never refused to act in

the management of the affairs of the partnership or to pay the petitioners any sum to which they are entitled. The petitioners, however, wrongously and unjustly seek realisation by public roup of the whole assets of the partnership or valuation on the basis of prices obtainable on immediate sale of each of the assets separately. No good reason exists for the present application. It is inexpedient. Appointment of a judicial factor would lead to unnecessary expense and would not have the effect of finally ascertaining the rights and liabilities of the parties, which can readily and appropriately be determined by means of an ordinary action wherein the terms and conditions of the partnership can be fully explicated. In the foregoing circumstances the respondent submits that the prayer of the petition should be refused for the following among other reasons—(1) The application is incompetent; (2) the application is inappropriate and inexpedient; (3) the petitioners' averments are irrelevant and insufficient to support the prayer; (4) the petitioners' material averments are unfounded in fact."

The petition was presented in the Inner House, and after a discussion on the competency the First Division remitted the petition and answers to the Junior Lord Ordinary to proceed.

On 6th March 1920 the Lord Ordinary (BLACKBURN) dismissed the petition.

Opinion—"I do not think that this is a case for the appointment of a judicial factor. There are questions between the surviving partner and the representatives of the deceased partner as to the meaning of the contract of copartnery, and as to the effect of a supplementary minute of agreement. I do not think that a petition in the Bill Chamber for the appointment of a judicial factor is the appropriate process for the decision of these questions. I think they ought to be disposed of in an action of declarator in the ordinary way, and when it has been ascertained which of the parties is right as to the construction to be put upon these two deeds then the surviving partner will know what his position is and whether it is his duty to wind up the business or to carry it on. If it should be found that his duty is to wind up the business, and if he thereafter declines to do so, it will then be open to the petitioners to move for the appointment of a judicial factor.

"In the meantime I think that the present petition is premature and that the petitioners should have proceeded by way of an action of declarator. I shall accordingly dismiss the petition and find the respondent entitled to his expenses against the petitioners."

The petitioners reclaimed, and argued—Procedure by petition was competent and habile to determine the questions arising in the present case. Here the firm was already dissolved by the death of a partner, and the present petition was not one in which the Court was asked to decree a dissolution under section 35 of the Partnership Act 1890 (53 and 54 Vict. cap. 39). Cases upon section 35 had therefore no application. The petition

was presented under section 39; under that section it was only necessary to aver that the firm was dissolved and that the remaining partner was not winding up. The petitioners made those averments, and therefore *prima facie* at least the petition was competent. Upon dissolution each partner had a right to insist that the company property should be realised—Clark on Partnership, p. 666. It was usual for the Court to allow a surviving partner who was winding up to continue to do so, but in the present case the surviving partner was not winding up but was refusing to do so. In *Allan v. Gronmeyer*, 1891, 18 R. 784, 28 S.L.R. 525, there were no allegations of misconduct against the surviving partner, but the Court appointed a factor. *Wallace v. Whitelaw*, 1900, 2 F. 675, 37 S.L.R. 483, and *Macnabs v. Macnab*, 1912 S.C. 421, 49 S.L.R. 339, were petitions under section 35, but in any event in the present case the parties were not at issue on matters requiring investigation by means of a proof. The question in the present case was one of law turning upon the construction of the minute of agreement and supplementary agreement. The firm was to be wound up when Messrs Allan's debt was paid, and the only question was, on a fair construction of the deeds had that term in the sense of those deeds arrived. Upon the merits of that question the petitioners were entitled to succeed. In any event the petition should not be dismissed but should be kept in Court, for if the Court took the view that the questions raised could only be conveniently settled by ordinary action it was for the respondent to take action. If he failed to do so, and the petition were dismissed, the petitioners had no compulsitor to force his hand. On that view the petitioners should be sisted for a limited period to see if the respondent would raise an action.

Argued for the respondent—The petition should be dismissed. The crave for a judicial factor required to be founded on specific allegations of misconduct—*Collins v. Young*, 1853, 1 Macq. 385. There were no such averments in the present petition. Further, the petition involved an investigation into facts at which the parties were in issue. The date when the firm could be wound up depended upon the conditions of the partnership. That turned upon the writs and also upon facts and circumstances. The phrase "the debt of Messrs Allan" was ambiguous; it might mean the debt in which Messrs Allan were creditors, and only so long as they were creditors, or it might mean the debt in which Messrs Allan were creditors, and after they had ceased to be creditors the same indebtedness though others had come to replace Messrs Allan. The respondent wished a proof of his averments as to the continuance of that debt. The petitioners sought to disturb the *status quo*, and it was for them to raise any action. If they did so, and were successful, the respondent was perfectly willing to wind up, and consequently an application for a judicial factor was unnecessary. It was also inexpedient, as such applications as the

present were advertised and the appointment of a factor would harm the business. In any event the petition should not be kept in Court indefinitely, but only until the respondent raised an ordinary action if it was held that it was for him to do so.

At advising—

LORD PRESIDENT—I agree with the view expressed by the Lord Ordinary in his opinion, though not precisely with the course which his Lordship has taken as indicated in his interlocutor. He says—“There are questions between the surviving partner and the representatives of the deceased partner as to the meaning of the contract of copartnership and as to the effect of a supplementary agreement”; and he further says that he does not think that a petition in the Bill Chamber for the appointment of a judicial factor is the appropriate process for the decision of these questions. When we turn to the petition and answers we find that there are not only questions of law raised upon the construction of the contract of copartnership and the supplementary agreement, but there are also questions of fact. I am not prepared at present to say that the averments in the answers although somewhat vague and general are irrelevant, and I decline to believe that they cannot be improved, at all events in the matter of form, when they are set out, as I hope they will be at a very early date, in articulate articles of condescendence.

No one can say, looking at these papers, that parties are not “at variance with respect to matters requiring investigation or inquiry.” That is the language used by this Division of the Court in the case of *Wallace v. Whitelaw*, 1900, 2 F. 675, 37 S.L.R. 483, and it was adopted with approval by the other Division in *Macnabs v. Macnab*, 1912 S.C. 421, 49 S.L.R. 339. I think there are such matters in this case and I think that the proper process in which to expiscate these questions both of fact and law is an action of declarator.

We are not asked to-day, and could not be asked, there being no averments of misconduct or breach of duty on the part of the respondent, to appoint a judicial factor. It may be—I hope it will be—unnecessary at any stage to take that step, because the attitude which the respondent has taken up before us at all events is that if he is wrong in the construction of the supplementary agreement as construed by the actings of the parties, then in that case he will wind

up the concern and obtemper the law. If he takes up that attitude, counsel for the petitioners very frankly said that that would be best for the interests of all parties and that the partner was the proper person to wind up this business and not a judicial factor imported from the outside.

I rather think that it is the duty of the respondent to raise action here, because the petitioners were well entitled to rely upon the provisions of section 39 of the statute and to insist—it being common ground that this firm is dissolved—upon a winding-up, and if the respondent has a good answer to that demand it is his duty to make that answer and to vindicate his position by taking action in order to show that the provisions of the statute do not apply, but that on the contrary the rights and liabilities of the parties depend entirely on the conventional contract.

Accordingly I think the proper course to follow here will be to recal the interlocutor of the Lord Ordinary and to sist the process until the first sederunt day in the Summer Session to enable the respondent to raise an action of declarator to vindicate the position which he takes up in his answers here.

LORD MACKENZIE—I agree.

LORD SKERRINGTON—I disagree with the Lord Ordinary if he considered that the fact of a question of law being raised by the respondent made it improper for him to decide that question in a petition and made necessary an action of declarator. On the other hand, if he took the view that there was here a mixed question of law and fact which would involve an inquiry, I do not dissent from the way in which he exercised his judicial discretion. As, however, the burden of proof lay upon the respondent the petition ought to have been sisted and not refused.

LORD CULLEN—I also agree.

The Court recalled the interlocutor of the Lord Ordinary and sisted the petition until the first sederunt day of the Summer Session to enable the respondent to raise an action of declarator if so advised.

Counsel for the Petitioners—MacRobert, K.C.—A. M. Mackay. Agents—Alexander Morison & Co., W.S.

Counsel for the Respondent—Chree, K.C.—Scott. Agents—Morton, Smart, Macdonald, & Prosser, W.S.