COLLINS AND ANOTHER, . APPELLANTS.
YOUNG, . . . . . RESPONDENT (*a*).

1853.
14*th March.*

The Court will not appoint a receiver or judicial factor merely on the ground that a partnership is dissolved by the death of one of the partners.

Before the Court will interfere, there must be evidence of some breach or neglect of duty by the surviving partners who are authorised by law to wind up the concern.

On such points there is no difference between the law of Scotland and that of England.

*Lord Chancellor's opinion.*

THE *Solicitor-General* (*Bethell*) and Mr. *Rolt*, for the Appellants. The *Lord Advocate* (*Moncreiff*) and Mr. *W. M. James*, for the Respondent.

The LORD CHANCELLOR (*b*):

My Lords, in this case certain contractors had agreed to do certain railway works, and one of them died before the works were completed.

In January, 1852, his representative applied to the Court of Session by petition for the appointment of a judicial factor, or receiver, to wind up the concern for both parties. The Court granted the appointment: and it is against the interlocutor so appointing a receiver that the present appeal is brought to this House.

My Lords, what is the law of Scotland with regard to the surviving partners in a mercantile contract? I take it to be exactly the same as the law of England, and this indeed appears from the very learned judgment of Lord *Cockburn* (*c*), who says, "When a partner dies, a right to wind up the partnership concerns is by law vested in the surviving partners. This is the principle on which all such estates are managed. This is a right unquestionably which, like all other things, is liable to be abused, and the Court may be called upon to interfere with the surviving and legal winder-up. But then a case of abuse must be at least stated against

(*a*) Reported 24th Feb., 1852; Second Series, vol. xiv. p. 540.
(*b*) Lord Cranworth.
(*c*) Second Series, vol. xiv. p. 543.

COLLINS AND ANOTHER v. YOUNG.

*Lord Chancellor's opinion.*

him, why the winding-up should be taken out of his hands." This view of the law is, I conceive, perfectly correct (*a*).

Now, the contracts having been completed, and there remaining nothing to do but to get in what is due from the Railway Company, why are the two surviving partners not to exercise their right of winding-up the concern? Two grounds have been alleged for calling on the Court to interfere—the one is, that whatever may be the ordinary right, in this case it is specially limited by the terms of the contract. It is said, that by the terms of the contract it was stipulated that Collins should receive the money that was coming from the Railway Company; it was so stipulated by what is called a mandate, that is, an authority given to him by the two other partners—by Young, and by the other surviving partner. Young having died, the mandate came to an end it is said. But what then? Suppose it is so; undoubtedly the result is, that Collins can no longer continue to receive by virtue of that mandate. What follows? Simply, that the parties are remitted to their original rights, which they would have had if there had been no such mandate. I state this with the more confidence, because no such point as that to which I have referred was ever made below, and in truth there is no mention in the petition of the mandate at all; it is only because it accidentally found its way in the answer to the petition, that the parties now seize upon it as a *tabula in naufragio* that may float them through, when every thing else has failed.

Then the other point is one which is to be found in what Lord *Cockburn* says, that "this is a right

(*a*) In *Hardie* v. *Glover*, 18 Ves. 281, Lord Eldon said, "I have frequently disavowed that a receiver is to be appointed merely on the ground of a dissolution of partnership. There must be some breach of duty."

*Lord Chancellor's opinion.*

unquestionably which, like all other things, is liable to be abused, and the Court may be called upon to interfere with the surviving and legal winder-up." The Respondents argue there are such circumstances here; for that there has been an unwarrantable delay in getting in this money. Even if there were nothing suggested but delay, still if that delay were unconscionable or unreasonable, it might, and I think it would, be a very proper ground for interference; but unless it is very clearly made out, one would be very loth to believe that in point of fact there can have been any unnecessary delay in a case where the moneys to be got in belonged, as to two-thirds, to the parties who were endeavouring to get them in, and who have had every interest to act with the greatest possible diligence. They might, however, have neglected their duty, and if they had neglected their duty, the Court might have been justified in acting on the delay so established. But what are the facts of the present case? It is said in the petition, unsupported by any evidence, that they have been guilty of delay. The delay is totally denied by the answer. The answer says, we did every thing we possibly could. The Railway Company disputed the accuracy of our demand, and we were compelled to submit to an arbitration. We have been guilty of no delay that we could avoid; on the contrary, everything has been done to push the matter forward with all the rapidity in our power.

Therefore, my Lords, with the greatest deference to the majority of the learned Judges who have appointed this receiver, it seems to me they have acted upon an assumption of the untruth of the facts stated in the answer, there being nothing to rely on but the answer. If the statement in the answer were untrue, some steps should have been taken. This was not the proper remedy. Here the only question was, whether a case

COLLINS AND ANOTHER *v.* YOUNG.

*Lord Chancellor's opinion.*

was made on the petition and answer to justify the appointment of a receiver. You have assertion on the one side and denial on the other. How can you say then that delay is established?

It appears to me that this is a case in which the petition ought to have been refused. I shall, therefore, feel it my duty to move your Lordships that this interlocutor be reversed.

*Lord Brougham's opinion.*

Lord BROUGHAM: My Lords, I entirely agree.

The *Solicitor-General:* There has been a subsequent interlocutor by which the Respondent has been ordered to restore matters in the event of the interlocutor being reversed.

The LORD CHANCELLOR: The House decides what ought to have been decided below, namely that the petition should have been refused with costs.

ROBERTSON & SIMSON.—RICHARDSON, LOCH, & M'LAURIN.