article . . . refers to the provisions in the lease as to the time when payment is to be made, as to the power of the tenant to make up for a shortcoming in the output of one year by putting out a certain amount free of royalty in succeeding years, as to the books which are to be kept by the tenant, and the statements which are to be furnished to the landlord, and as to the right of the landlord to appoint a check grieve to take a daily account of produce and sales.

"It is not disputed that the daily output from the colliery for the year 1890-91 (the year in regard to which the present question has arisen) is over 100,000 tons and under 130,000 tons, and that being the case I am of opinion that the royalty under the agreement is one-thirteenth of the price of the total quantity of coal and dross sold."

The pursuer reclaimed, and argued—(1) The natural meaning of "annual output" was nett output. A coalmaster if asked to state his output would not give the gross amount. (2) The "annual output" was really defined by the words which followed, viz., "total quantity of coals and dross put out and removed from the lands. (3) The Lord Ordinary's interpretation was inequitable. It would be a temptation to the coal company to bring as much coal as possible to the surface, but to be reckless as to the amount consumed on the lands. The coalfield might thus be unduly exhausted to the prejudice of the owner. (4) The pursuer's construction of the word "output" was the correct one upon an examination of the terms of the lease, which, so far as not altered, still subsisted.

Argued for the respondents—The Lord Ordinary was right. There was no reason for not giving "output" its natural sense, which was gross output. The fact that the royalty was only to be paid upon the coal put out and removed did not affect the question.

At advising—

LORD PRESIDENT—I agree with the Lord Ordinary in considering that the dispute in this case must be determined by the terms of the 3rd article of the minute of agreement of 1889.

Now, the first question is, what is the ordinary meaning of the words "annual output of coal and dross from the mineral field?" and I suppose there is no doubt that in their ordinary sense they mean all the coal and dross that is brought to the surface within the field. Well, then, is there any necessity arising in the context in this particular passage for attaching to those words a different and secondary sense, or, in other words, is there anything to compel us to the conclusion that saying "the annual output" they meant only some of the annual output? I find no repugnancy in adopting the primary sense of the words. It is quite possible to fix the rate of royalty according to the amount of the annual output, and to make the royalty payable only on a part of the output—to wit, that which has been sold. This is what the clause in question purports to do according to the natural sense of the words, and therefore I hold this to be its legal effect. The argument for the reclaimer, so far as it was confined to the agreement, does not seem to me to come to more than that a part of the annual output would be a fairer criterion than the whole. I am not satisfied that it would; but at all events, by the language which I have been discussing, the parties have settled that question for themselves.

Even assuming that we are entitled to go back to the lease in order to find the meaning of "annual output," I do not think that it supports the reclaimer. On the contrary, it seems to me that where the word "output" is used alone, it means the whole mineral brought to the surface, and when it has a more limited sense, the limitations are expressed.

I am for adhering to the Lord Ordinary's interlocutor.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court refused the reclaiming-note.

Counsel for the Pursuer and Reclaimer—H. Johnston—C. N. Johnston. Agents—Dalgleish & Bell, W.S.

Counsel for the Defenders and Respondents—Dickson—A. S. D. Thomson. Agents—Davidson & Syme, W.S.

Saturday, November 12.

SECOND DIVISION.

SMITH *v.* SMITH.

Process—Petition—Appointment of Judicial Factor—Sequestration of Partnership Estate—Competency of Presenting Petition to Inner House—20 and 21 Vict. cap. 56, sec. 4.

Held that under section 4 of the Distribution of Business (Court of Session) Act 1857, a petition by a joint-tenant for the appointment of a judicial factor on the partnership estate, and praying the Court incidentally to sequestrate the estate and interdict the other joint-tenant from selling any part thereof, must be brought before the Junior Lord Ordinary, and cannot be taken in the first instance before the Inner House.

The Distribution of Business (Court of Session) Act 1857 (20 and 21 Vict. cap. 56), sec. 4, enacts—"All summary petitions and applications to the Lords of Council and Session which are not incident to matters or causes actually depending at the time of presenting the same, shall be brought before the Junior Lord Ordinary officiating in the Outer House, who shall deal therewith and dispose thereof as to him shall seem just; and in particular, all petitions and applications falling under any of the descriptions following shall be so enrolled before and dealt with and disposed of by

the Junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court, viz., . . . 4. Petitions and applications for the appointment of judicial factors."

Archibald Smith, joint-tenant of the farm of Branxton and Unthank, Largo, presented a petition to the Second Division of the Court of Session, in which he averred that for the last two years David Smith, the other joint-tenant in the farm, had become intemperate, and neglected the management and cultivation of the farm, and had become so violent, and threatened the petitioner to such an extent, that the petitioner, in fear that his life was in danger, had to leave the farm and take up his residence elsewhere. The petitioner further averred that he was thus precluded from having any voice in the management of the farm, which was being carried on by David Smith in a reckless and improvident manner, and that David Smith kept no accounts, had failed to pay the last half-year's rent, and was about to sell the stock on the farm and apply the proceeds to his own purposes.

The petitioner therefore prayed their Lordships to appoint Thomas Graham judicial factor *ad interim*, pending the intimation and service of the petition; "and thereafter, on resuming consideration hereof, with or without answers, to sequestrate the said partnership estate, and to appoint the said Thomas Graham, or such person as your Lordships may think proper, to be judicial factor on the said estate, with the usual powers, he always finding caution before extract, and to decern *ad interim:* Further, and alternatively to the crave for appointment of a judicial factor *ad interim*, to interdict, prohibit, and discharge (until the prayer of this petition is granted or refused) the said David Smith from interfering with the management of the said farm, and from selling or disposing of the crop, stock, implements of husbandry, and others thereon, and the young horses and cattle in the grass park at Bruntshiels aforesaid; and to grant interim interdict."

David Smith lodged answers, in which, *inter alia*, he objected to the competency of the petition, on the ground that it should have been brought before the Junior Lord Ordinary under section 4 of the Distribution of Business Act 1857.

Argued for the respondent—A petition for the appointment of a judicial factor, and not incident to a depending action, was only competent before the Junior Lord Ordinary, unless (1) the petition asked for something the Lord Ordinary could not deal with, or (2) the appointment of judicial factor was incidental to something the Lord Ordinary could not deal with. Where the petitioner asked for the removal of trustees, it was only competent in the Inner House—*Mitchell, Petitioner*, July 20, 1864, 2 Macph. 1378—but where it did not ask for such, it was only competent before the Lord Ordinary—*Rhind* v. *Steven*, July 20, 1875, 2 R. 1002.

Argued for the petitioner—The better practice was to present applications both for sequestration and the appointment of a judicial factor to the Inner House—Mackay's Practice of the Court of Session, ii. 357; *Rintoul, Petitioner*, December 20, 1862, 1 Macph. 214; *Spiers* v. *Spiers*, November 6, 1877, 5 R. 75, opinion of Lord President (Inglis), 77. Besides, there was here a prayer for interdict, which could be granted by the Inner House in the exercise of their *nobile officium*. The Lord Ordinary's duties were purely statutory, and he could not grant the prayer for interdict — *Webster* v. *Miller's Trustees*, February 26, 1887, 14 R. 501. The petition was therefore presented to the tribunal which could deal with all its parts.

At advising—

LORD JUSTICE-CLERK—This petition is on the face of it one for the appointment of a judicial factor. Everything else prayed for is only incidental to that appointment. Thus there is a prayer for interdict for the protection of the estate till the judicial factor is appointed. And as to the prayer for sequestration, the purpose of the petition for appointment of a judicial factor is to sequestrate the estate and put it into his hands if the Court think proper to appoint him.

There is no doubt that a petition for the appointment of a judicial factor is one of those cases which fall under section 4 of the Act of 1857, and are competent before the Lord Ordinary only. There are some cases where the appointment of a judicial factor was incidental to other matters, and where it has been held that the Inner House may take up the petition. Thus in the case of *Rintoul* it appears that the parties to the case were engaged in a litigation, and the only purpose for which the appointment of a judicial factor was sought was to prevent the rents from being squandered. But it is plain that only exceptional cases are excluded from the rule that petitions for the appointment of a judicial factor must go before the Junior Lord Ordinary in the first instance, and there are no circumstances in this case to take it out of the ordinary application of the statute.

LORD YOUNG—I am of the same opinion. This is an application for the appointment of a judicial factor. Except in the case of an existing trust, and a judicial factor being appointed as trustee, no appointment of a judicial factor can take place without sequestration. Appointing a judicial factor simply means depositing the estate with some person to manage it under the authority of the Court. As to the application for interdict, that application is made for the purpose of preventing the person at present in possession from alienating the estate before the judicial factor has been appointed. My opinion therefore is—and I have arrived at it without difficulty—that this application for the appointment of a judicial factor, along with the two incidental applications I have mentioned, is competent before the Lord Ordinary, and

is not competent before us in the first instance.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER was absent.

The Court remitted the petition to the Junior Lord Ordinary, and found the respondent entitled to expenses.

Counsel for the Petitioner—Cook. Agents—Pringle, Dallas, & Company, W.S.

Counsel for the Respondent — Cullen. Agent—T. Temple Muir, S.S.C.

Saturday, November 12.

FIRST DIVISION.

SCOTTISH MANITOBA AND NORTH-WEST REAL ESTATE COMPANY, LIMITED, PETITIONERS.

Company — Reduction of Capital — Ambiguity in Resolution to Reduce Capital— Ordinary Shares of Different Value.

A company with a total capital of £100,000, of which £81,410 had been subscribed, desired to reduce the subscribed capital, and to leave the unsubscribed capital untouched. They accordingly passed a special resolution "that the capital of the company be reduced from £81,410, divided into shares of £10 each, . . . to £61,057, 10s., divided into shares of £7, 10s. each, which they asked the Court to confirm."

The petition was *refused*, on the ground that the resolution was ambiguous in giving the capital as £81,410, while it failed to make it clear that that figure referred only to the subscribed capital, and to show what resolution, if any, had been come to with regard to the capital not subscribed.

Opinion expressed, that looking to the English authorities, the result of having ordinary shares of different values would not be an objection to the reduction of capital proposed.

In July 1892 the Scottish Manitoba and North-West Real Estate Company, Limited, presented a petition to the First Division of the Court of Session, under the Companies Act 1867, for the confirmation of a special resolution reducing the capital of the company.

The Court remitted the matter to Mr Charles Logan, W.S., who reported, *inter alia*, as follows—"The capital of the company is declared by the memorandum of association to be £100,000, divided into 10,000 shares of £10 each. 8141 shares have been issued, on 8081 of which there have been paid the sum of £6, 10s. per share, and on 50 of which there have been paid £5, 10s. per share—the remaining 10 shares (on which there have in all been paid the sum of £28, 15s. 4d.) having been forfeited. . . .

"At extraordinary general meetings held at Edinburgh on 1st and 22nd June 1892, the following special resolution was passed and confirmed, viz.—'That the [subscribed] capital of the company be reduced from £81,410, divided into 8141 shares of £10 each, on which £6, 10s. per share has been called, to £61,057, 10s., divided into 8141 shares of £7, 10s. each, with £4 per share called, and that such reduction be effected by cancelling paid-up capital which has been lost, or is unrepresented by available assets, to the extent of £2, 10s. per share in respect of each of the 8141 shares which have been issued.' . . .

"While I am prepared to report that the proceedings prior to and since the presentation of the petition have been regular, and that the reasons for the proposed reduction of capital appear to me satisfactory, I think it right to call your Lordships' attention to the terms of the special resolution sought to be confirmed. The resolution does not deal with the total registered capital of the company (£100,000), but only with the portion thereof (£81,410) which has been subscribed for and issued, and it refers to the latter amount as if it were the whole capital of the company. It appears to me doubtful whether the resolution is in proper form. If it were confirmed by your Lordships, and the form of minute in the petition registered [viz., 'The capital of the company is £61,057, 10s., divided into 8141 shares of £7, 10s. each, upon which the sum of £4 per share has been or shall be deemed to have been paid up'], the company would appear to be restricted to a total capital of £61,057, 10s., divided into 8141 shares of £7, 10s. each, and thereafter to have no power to issue the present unsubscribed capital of £18,590, divided into 1859 shares of £10 each, that portion of the present capital being entirely ignored in the resolution and minute. On the attention of the petitioners being called to this point, they contend that this unsubscribed capital would still form part of the company's capital, and have proposed to me that the minute to be registered should be in the following terms—'The capital of the company is £79,647, 10s., divided into (1) 8141 shares of £7, 10s. each, upon 8131 of which the sum of £4 per share has been or shall be deemed to have been paid up (the remaining ten shares having been forfeited are now unissued); and (2) 1859 shares of £10 each, unissued.'

"As the resolution, however, does not deal with the unsubscribed capital, it appears to me very doubtful whether such a minute as is now suggested could properly follow upon the confirmation of the resolution, and I am also doubtful whether it would be competent for the company to have two sets of ordinary shares of different value without special provision to that effect in the articles of association."

Argued for the company—1. As to the reporter's first difficulty, it was quite plain