

that creates the difficulty and importance of this case, although that is quite true—the contract of the 19th of May 1863 was a fraud upon the partnership contract, because at that date the shares of the different partners were stipulated, and that it is contrary to the good faith of the contract of copartnery that one partner should acquire the shares of the other. The proposition was maintained, and must be maintained, to that full extent. Now, I am inclined to think that upon the general principle there is a great deal of truth in the proposition, and I can quite understand circumstances and cases in which it might receive effect. I think this bargain behind the back of the remaining partner was not a candid or straightforward one. I have little doubt—the impression left on my mind by the evidence is that Cassels did ask Stewart to see whether Reid might not retire in 1863, and I further think that Reid had some intention of that kind; and I do not think it was straightforward conduct on the part of Stewart to make this bargain and say nothing to his partner. What Stewart gained by it was the surplus interest in the concern over the £60,000 that Reid had. It is important to note that Cassels had a very substantial interest in this transaction (but whether that can be made effectual under this action or in any action is another affair). His real interest was this—he was the existing partner, he had managed the concern for a long period of years with a comparatively small share or interest in the business, and he naturally looked forward to the time when Mr Reid, who was the moneyed partner of the concern, should retire, and that, he foresaw, would leave him entitled at all events to an equal share with Mr Stewart, and possibly from the connection that he had made, and the way in which he had worked up this business, he might have had substantially the command of the whole affair; and his complaint is that he has been deprived of the chance of that by an arrangement under which Reid ceased to have any real or substantial interest in the concern and his partner Stewart contrived to absorb in his own person substantially the large proportion of the interest in the company. He says that if he had known in 1864 that Reid had sold his shares in this way he never would have thought of entering into the agreement of the 31st May. As I have already said, I think there is a great deal of force in that; but the question is, what damage has he suffered? He has, no doubt, lost his chance of obtaining the complete command of this copartnery, but that was not within the copartnery contract. He took the chance he had in the ordinary conduct of affairs not provided for by the contract; and in the meantime, from 1864 down to the death of Reid in 1870, he has been trading upon Reid's capital and getting his own share of the profit accruing upon that capital. I do not see my way to go back to 1864. I cannot undo all that has been done, and I do not suppose Mr Cassels would choose to undo it all, because the profits of the trade for that time have been exceedingly valuable, and we could not if we would—and I do not think we would if we could—go back to that period and state the accounts as if Reid had retired in 1864, paying him out the £60,000 and carrying the whole of the remaining profit made by his capital which was not paid out to the credit of the remaining partner. I

do not see my way to that, and therefore the result to which I come on the whole of this matter in this action is, that there are no materials on which we could give effect to any legal interest on the part of Mr Cassels to maintain the conclusions of the action.

I have explained, I think clearly, the general view that I take of the relations of the parties; and I think it unnecessary to go further into the law of partnership on this point. I think there is a good deal of difficulty in some of the points which have been argued, but they do not appear to me to arise in any very practical form under this summons.

Saturday, June 28.

FIRST DIVISION.

[Lord Craighill, Ordinary.]

SMITH v. CAMERON.

Diligence—Future and Contingent Debt—Inhibition—Where Decree given for Damages to be Paid in Instalments.

Inhibition and arrestments used on the dependence of an action of damages were withdrawn on consignation of a sum in bank by the defender. A sum of damages was decreed for, to be paid in equal yearly instalments during the pursuer's tenancy under the lease. There was a break in the lease in the tenant's favour. Held that the consigned money might be uplifted on caution being found for the instalments to come due up to the date of the break, and that the rule that diligence cannot be used for a debt which is either future or contingent did not apply.

The pursuer in this case was the lessee of the Chevalier Hotel, Fort-William, of which the defender was the proprietor. The lease was for ten years from Whitsunday 1876, with a break in favour of the pursuer at the end of five years. In June 1878 the defender set up an opposition hotel in Fort-William. The pursuer consequently raised this action of damages, and used inhibition and arrestments in the dependence, which were withdrawn on the defender consigning the sum of £1000 in the Bank of Scotland to abide the result of the action, and subject to the order of the Court. The Lord Ordinary (CRAIGHILL) found for the pursuer, and assessed the damages at £500, but ordained the defender "to make payment to the pursuer of the said sum of £500 sterling by equal yearly instalments, beginning payment of the first of these instalments as at Martinmas 1878, the second at Martinmas 1879, and so forth, making payment yearly thereafter during the pursuer's tenancy of the Chevalier Hotel under the said lease, but no longer, with interest." His Lordship thereafter pronounced this interlocutor—"Grants warrant to and authorises the Bank of Scotland to pay to the said defender the balance of the money consigned in their hands, conform to deposit-receipt, with interest accrued thereon, and warrant upon the clerk to deliver up the said deposit-receipt for that purpose, and decerns, and that both on a certified copy of this interlocutor."

The pursuer reclaimed, on the ground that the defender was entitled to uplift the balance (£500) of the consigned money only on finding caution for the future instalments of the damages.

Argued for her—The circumstances here were very special, and the pursuer was entitled to have the security she asked for. The arrestments were recalled on the defender consigning the money in bank to abide the result of the action, and the mere fact that the Lord Ordinary had spread the payment of the damages over eight years for the convenience of the defender was surely not to deprive the pursuer of the benefit of the consignment, to which she certainly would have been entitled had decree been given in the usual way.

Argued for the defender—The general rule was that an arrestment would be recalled if the debt was future or contingent, unless the debtor was *vergens ad inopiam*, which was not the case here.

Authorities—*Symington v. Symington*, Dec. 3, 1875, 3 R. 205, 2 Bell's Comm. 69.

At advising—

LORD PRESIDENT—This is certainly a peculiar case. Diligence was used upon the dependence of this action of damages at the instance of Miss Catherine Smith, and the inhibition and arrestments were recalled on an arrangement between the parties that the defender should consign in bank the sum of £1000 subject to the order of the Court, and as a security to the pursuer for any sum she might recover in the action. The Lord Ordinary has pronounced an interlocutor in which he gives £500 damages to the pursuer, but he ordains that payment is to be made by equal yearly instalments, which are to extend over the pursuer's tenancy of the hotel—so that she is entitled under this decree to the payment yearly of a sum of over £60. But there is a break in the lease, for the tenant is entitled at Whitsunday 1881 to put an end to the lease, and in that case there are only three years to run and three instalments payable. Now, therefore, there are here two questions? There is first the question, Whether the pursuer is entitled to the security of this consignment for the whole period of the lease? and secondly, if she is not entitled to that, whether she is entitled to the security for the payments up to the date of the break, which although future are not contingent?

The general rule is that diligence cannot be used for a debt which is either future or contingent, but this rule applies chiefly to cases where the debt arises out of some contract between the parties, and where the law naturally holds that if the party requires a security for payment of his money he will obtain that security at the time when he entered into the contract. That principle appears to me to be the foundation of the rule, but it has hardly a clear application to a case like the present, and it had hardly a clear application to the case of *Symington*, which, however, I do not think is an authority here, as it depended on circumstances which arise out of the peculiar relation of husband and wife. In the present case I have certainly a strong impression that the circumstances of the Lord Ordinary awarding damages and making the sum payable by annual instalments is not of itself a sufficient reason for depriving the pursuer of the benefit of diligence or of the consignment which comes in

place of it, and so far as the instalments will certainly become payable, I think she is entitled to the security. I do not think that this is a violation of the general rule of law that it is not competent to use diligence in security of a future debt. The pursuer will therefore be entitled to have so much of the consigned money left in bank as will meet the instalments down to 1881, or the defender must find caution for their amount.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

Counsel for Pursuer (Reclaimer)—Trayner—J. P. B. Robertson. Agents—Waddell & M'Intosh, W.S.

Counsel for Defender (Respondent)—Dean of Faculty (Fraser)—Strachan. Agents—Mitchell & Baxter, W.S.

Tuesday, July 1.

SECOND DIVISION.

[Sheriff of Lanarkshire.]

MORRISON v. SERVICE.

Partnership—Presumption—Circumstances held to Infer.

Two persons, who were both in the legal profession, had a joint office, though it was not taken in a firm name, one staff of clerks, and one set of books. They did business in many instances in their joint names, and the one made considerable advances to the other, covered only by I O U's. There were also joint transactions in properties bought and sold. Held that the circumstances as proved were sufficient to establish a presumption in favour of partnership.

This was an action at the instance of A. M. Morrison, writer in Glasgow, against James Service junior, also writer there, calling on the latter to produce a full account of his intrusions as a partner and as cashier of the firm of A. M. Morrison and James Service junior, writers in Glasgow, and to pay to the pursuer the sum of £1500 sterling as the balance due by him. The pursuer averred that he and the defender had carried on business in copartnership together under the name of A. M. Morrison and James Service junior, writers in Glasgow. He stated further:—"There were no special terms stipulated as to the shares of the copartners or the endurance of the copartnership. It was understood that the said shares should be equal, and that the copartnership could be terminable at will. The pursuer intended this action to be intimation of the termination of the copartnership by him, and he also hereby gives intimation of the termination of the copartnership. . . . The defender acted as book-keeper and cashier of the firm, and received from the pursuer, for the purposes of the firm's business, about £1000 of the pursuer's own private means. The defender has also got in considerable sums due by third parties to the firm."