CASSELS *v.* STEWART.*

(*Ante*, p. 562.)

OPINION OF LORD JUSTICE-CLERK—In this case we have from the Lord Ordinary a very long and elaborate note expressive of his opinion, and the result at which I have arrived is that he has come to a just conclusion, and indeed to the only possible conclusion upon the demand contained in the summons.

The pursuer brings this action for the purpose of asking the judgment of the Court to the effect that an agreement, dated the 19th of May 1863, which we have heard fully discussed, was made and entered into by the defender for and on behalf of the Glasgow Iron Company and the pursuer and defender as the whole remaining partners thereof, or must be held to have been so made and entered into. And then it has a further conclusion, which I suppose is dependent, although it may not necessarily be dependent, on our affirming the first of these propositions, that the partnership "accounts of the said company, from 31st May 1859 to 31st May 1870 inclusive, should be made up and settled on the footing that the said purchase was made for behoof of the said company and the pursuer and defender equally, and as the whole remanent partners thereof."

Now, the first of these propositions, that the agreement which was made on the 19th of May 1863 was made on the part of the copartnery, and that the copartnery was entitled to the benefit, depends upon the proof, and I think the evidence which has been led proves beyond all question not merely that the agreement was not made on behalf of the company, but that the only thing which, upon the allegation of the pursuer, the defender was instructed or requested to do on behalf of the company never was done, for whatever may be the terms of this agreement, it proves beyond all question that James Reid remained a partner—and in point of fact he did remain a partner—of this company down to the day of his death, and never ceased to be so. And it seems equally clear that Stewart, who was the other partner, never did ask him to cease to be a partner, or that if he did ask him, Reid did not consent to it. What Stewart did was something entirely different, and something which the company never could by possibility have had the benefit of. In the first place, Stewart agreed with Reid, not that he should retire from the company, but that he should remain in the company until he (Stewart) wished him to retire, which he never did; and in the second place, they made a bargain to the effect that in respect of his payment some twenty years afterwards, or within twenty years, of the sum of £60,000 which stood at the credit of his copartner and uncle, Mr Reid, in the books of the firm, he should obtain a conveyance of the whole of Reid's interest in the firm as at that date. Now, as regards the first of these conclusions, I think it came out quite clearly in the debate that there never was a bargain under which Reid was to retire as at 19th May. Now, it appears from the evidence of Cassels that that is what he says Stewart undertook to do. Whether Stewart undertook to do that or not, it was not done. The agreement is of a totally different description, and therefore the case is dependent upon the first of these conclusions, that this was a bargain for behoof of the company, and I am quite clear that there are no materials in the facts of this case on which that could possibly be sustained.

The second ground is more difficult, and it raises some questions in regard to the law of partnership, the importance of which I entirely appreciate. It cannot be disputed upon the decided cases that although there is a *delectus personæ* in the contract of copartnery, any partner may, if he chooses, assign his own share to a third party, as long as that does not interfere with the conduct of the company or the respective rights and interests of the partners *inter se*. There is nothing to prevent that in the law of partnership or the *delectus personæ*. Neither is there anything under this contract of copartnery. All that is provided there about the assignment of shares in the copartnery is this, that the company shall not be bound to take any notice whatever of transactions of that kind. And so long as the company are not called upon to take any notice of them, there is no violation of that provision of the contract. Now, in the present case, what has actually happened is, that Mr Stewart holds an unintimated assignation to the whole of Reid's share. There is a clause unquestionably in the original contract of the 19th of May to the effect that "the right and interest or stock hereby sold (that is, the whole interest which Reid had) may remain in the first party's name, or it may be transferred over to the second party at any time he may require it." That clause was never acted on in the second branch of it—that is to say, Reid's name continued as a partner to the end; and therefore no question arose as to that clause or as to the powers which Stewart might have had if he had chosen to act upon it. But I have a very strong opinion that in the circumstances that actually occurred the construction of that 7th clause, which would lead to the right of Stewart to turn Reid out, cannot be maintained, because on 19th March 1864 Mr Reid entered into a new bargain not only with Mr Cassels, the other partner, but with Mr Stewart himself. It was agreed on the 31st May 1860—the deed was signed on the 19th of March 1864, after the date of the other agreement—that James H. Robertson having sold his shares, there should be a statement of the position of the accounts; and it is said, "When it was arranged to buy J. H. Robertson's shares in the business, it was further agreed by the remaining partners that they should each have an equal interest in the company's business from the date of J. H. Robertson's retiring from the concern;" and therefore from the date of the signing of that minute, viz., the 19th of March 1864, there was substantially a new contract of copartnery, and a contract of copartnery under which Reid had a third share of the interest in the concern. It is not necessary to decide that matter, but I take it that Stewart was as much bound to it as Cassels was, and that that being posterior to the agreement, you cannot read the agreement in any way but conform to the stipulations of the contract which was made in 1864. And therefore Mr Reid did remain not only ostensibly but actually a partner of this company down to the day of his death. But then it is said—and

* The manuscript of this opinion was not received in time for publication with the report of the case.

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 decerned 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."