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 consignation, 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 consignation 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 consignation 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 intromissions 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 copartnery. It was understood that the said shares should be equal, and that the copartnery could be terminable at will. The pursuer intended this action to be intimation of the termination of the copartnery by him, and he also hereby gives intimation of the termination of the copartnery. . . . 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."

The defender denied any partnership, and averred that the pursuer had no other business than that of a property agent. He admitted that they occupied the same office, and had the same staff of clerks. As regarded the advances alleged by the pursuer, the defender averred that the two had been joint adventurers in several property transactions, and that there was a balance due to him upon these.

The Sheriff-Substitute (ERSKINE MURRAY), after proof, found that there was no partnership, and dismissed the petition.

On appeal the Sheriff (CLARK) recalled the Sheriff-Substitute's interlocutor, and found "that the pursuer and defender are writers in Glasgow, and have carried on business as such in copartnership since the month of August 1876, and down till the institution of the present action, and that the defender is bound to produce a full account of his intromissions as partner and cashier of the said copartnery: Therefore ordains the defender to lodge in process, within fourteen days from this date, a full account of his intromissions as aforesaid, and remits to the Sheriff-Substitute for further procedure." He added this note:—

"*Note.*—In dealing with this case it is important at the outset to ascertain as nearly as may be the positions respectively taken up by the pursuer and defender. The pursuer says that he and the defender entered into a partnership at will as law and property agents in Glasgow in August 1876, and that the defender acted as cashier for the concern. The defender's story is not so clear, and there is some difficulty in ascertaining the exact position which he intends to take up. It seems, however, to amount to this—that though he and the pursuer carried on business in the same office, and employed joint clerks, yet they had no other connection than that of joint adventurers in some property transactions. The question at present to be considered is, which of these stories is the correct one?

"Now, *prima facie*, there is nothing to be said against the pursuer's story. There was no reason why the defender should not enter into partnership with him as contended for. The pursuer is a notary-public and a property agent, and had for a considerable time acted in both capacities, and had apparently established a pretty fair connection. The defender is a procurator of Court, though apparently not a notary. From his father's connection it was probable he would bring into the concern a fair amount of forensic business. He was not possessed of funds, but the pursuer was. There was no incompetency in their becoming partners in their joint law and property business—forming, in point of fact, a firm of writers to carry on all such business, whether conveyancing or forensic, as is usually carried on by writers in Glasgow—the one attending to the property and conveyancing work, the other to the business in Court. There were also, plainly, advantages to be gained by their entering into such a copartnery—both were in a position to contribute something by way of connection, and each possessed qualifications personally and professionally which might be utilised for their mutual advantage. That the parties themselves were impressed with these considerations is proved by the evidence of Adshead, a relative of the defender, with whom he and the pursuer had a meeting in August 1876, when they ordered from him certain furnishings as for the partnership into which they were about to enter. There is no reason to doubt that this meeting took place, and that the account of it given in the proof is substantially accurate. Adshead could have no object in making a statement contrary to the interests of his relative, the defender. His account is clear in itself, and is in all respects concurred in by the pursuer. The next thing that appears is that the pursuer and defender took an office in common, and employed joint clerks. Business of all kinds seems to have been obtained, and this business they conducted in the same office with the same staff of clerks. The work was distributed between them on the principle that each was to attend to that branch with which he was most conversant and had the requisite qualifications for conducting; the pursuer looked after the property and conveyancing department, the defender directed his attention to the law business properly so called. At the same time this did not form an absolute rule; and there is no reason to doubt that in the absence of the one the other supplied his place in so far as his qualifications enabled him to do so. The business books do not appear to have been regularly kept; but so far as they go they indicate the partnership relation, and certainly are by no means incompatible therewith. The day-book and ledger, so far as kept, appear to have been intended for the joint interests. The diary undoubtedly was common to both. As regards the letter-books, the pursuer and defender on coming together did not adopt a common letter-book, but continued to use those they had previously employed. And there was good reason for this, when it is considered that each party took a special charge of a particular department. Yet it is noticeable that the keeping of separate letter-books—one for the particular business of each—was by no means rigidly adhered to. On the contrary, the instances are numerous, and of continual recurrence, in which the letter-book used by the pursuer was employed for the recording of letters written by the defender; and in like manner the letter-book generally appropriated for the defender's work was utilised for the pursuer's purposes. Strictly speaking, it does not appear that a firm name or style was fixed upon and adopted; but this is not a circumstance of very much importance. A firm name or style is by no means essential to the partnership relation; and as in the present case the alleged partnership was only at will, and might be determined at any time, there was perhaps the less reason for adopting a firm name until it should appear whether the connection was to be of a permanent kind. Yet it is noticeable that something very nearly approaching, if not practically equivalent to, a firm name existed. The names of the pursuer and defender appeared on the door of their chambers in close juxtaposition. Instances are numerous in which letters were signed in the joint names. This appears from the letter-books, and it cannot be said that this was due to mistake or inadvertence when it is considered that such letters appear in the defender's letter-book, and even in his handwriting. Again, many transactions were settled in the joint names—a fact which the defender is compelled in evidence to admit. It is also noticeable that

deeds prepared in the common office frequently bear the joint names, and accounts appear to have been rendered in a similar manner. Advertisements in regard to property were habitually inserted in the public prints in the joint names. The defender, indeed, attempts to get over this by saying that it was done without his sanction; but it is very difficult to accept any such explanation when it is considered that the defender was well aware of the practice, and yet seems to have taken no effectual means to check it. It is very difficult in such circumstances to avoid the conclusion that it was done with his sanction. That there was a right to share profits is to a certain extent clearly proved. Even the defender is compelled to admit this, though with some reluctance; and the admission is all the more significant that it does not quadrate with but contradicts his statements on record. It seems also clearly proved that, in some cases at least, he had a joint interest with the pursuer in certain properties, which, though held in the name of one of them, were held for the common interest. The significance of this is further enhanced by the fact that the defender has declined to answer questions, the purpose of which was to probe this matter to the bottom, and for his declinature to answer which no good or intelligible reason is given. One of the strongest tests of the partnership relation is the existence of mutual agency, by which any one of the alleged partners has the power of binding his fellows or the concern with third parties. This is indeed aptly expressed in the civil law by the brocard '*contractus societatis non secus ac contractus mandati.*' Now, it seems that if there is any one fact more clearly proved than another in the present case it is this, that in a question with the world the pursuer and defender would have been effectually held liable as copartners. There can be no reason to doubt that orders given or obligations undertaken by either of them within the sphere of a writer's business would have effectually bound the other. *Quasi*-partnership therefore undoubtedly existed; but *quasi*-partnership has always been held to form a very strong presumption for the existence of actual partnership. (See Lindley on Partnership, 3d edition, vol. i. p. 93, and *Peacock* v. *Peacock*, 2 Campbell's Reports, p. 45.) There is one other consideration that strongly weighs with me in support of the existence of the partnership relation. It is plain from the I O U's produced in process by the pursuer that he has made very large advances during his connection with the defender—whatever that may have been. The defender indeed says that he holds similar documents from the pursuer; but beyond his *ipse dixit* he has produced no evidence of this, and has not put in process a single document of the kind. We are therefore compelled to assume that the pursuer's statement is correct, and that for some reason or other he had advanced very considerable sums to the defender. The defender would have us believe that these were loans to himself as an individual; but such a view appears to be almost incredible. It it clearly proved on the evidence that the defender was possessed of no means whatever when he formed his connection with the pursuer, and that he was not in a position to give any security for such advances as the pursuer might make. Nothing therefore is more unlikely than that the pursuer should have made the large advances he did for no visible reason, and simply on the personal security of the defender. But if the theory of partnership be adopted, the reason of the advances becomes at once apparent. They were contributions towards a common business, out of which each was to receive an equal share of profits, and in which the defender was to act as cashier for the concern.

"On reviewing the whole evidence, therefore, I have come to be of opinion that the facts of this case can only receive an intelligible explanation on the theory of a partnership such as that contended for by the pursuer. There is a common place of business, and there are joint clerks. Books are kept in common to a considerable extent. The practice of doing business in the joint names is established by letters, settlements, deeds, advertisements. There is the right to share profits, plainly exercised in certain important instances, and there is nothing to indicate that a contrary rule applied in the general run of the business. There is *quasi*-partnership clearly established as regards the public. There are advances made by one of the parties that seem to be entirely inexplicable except on the theory of partnership.

"Turning now to the explanation which the defender gives of the facts and circumstances brought ought out in evidence, they seem to be altogether insufficient. He mainly relies upon the theory that what would indicate partnership is to be attributed to the existence of certain joint adventures; and what this will not explain, he endeavours to get over as mistakes and inadvertences. I do not think there is much in the theory of joint adventures. If parties were nowise connected, except in one or two instances of special transactions, the theory of joint adventure might afford a reasonable explanation. But when it becomes necessary to invoke this theory at almost every turn, and when in order to explain the facts it is necessary to assume a series of joint adventures forming a large part of the business, it becomes much more probable that actual partnership existed, seeing that this view gives an intelligible and much more probable explanation of all that has occurred. As regards the use of the joint names, and the insertion of letters written in the joint names in books, the publication of advertisements in their joint names, and similar transactions, it seems to me vain to contend that all this is to be explained by mistakes or inadvertences. The practice was far too common to have escaped the knowledge of the defender; and certainly if he did not intend the pursuer to understand that partnership existed, he was inexcusable in permitting such a practice to go on for so long a period unchecked. It must also be considered, that on the defender's theory it is very difficult to understand what end or advantage the pursuer could have expected to gain from his connection with the defender. If the defender had been a man of means, it is quite possible that the pursuer might have been willing to enter with him into a series of joint adventures as regarded property; but seeing that the defender had nothing to advance, and that all the advances, at least at the outset, were to come from the pursuer himself, it is very difficult to understand what purpose the latter purposed to serve by joining himself with the defender otherwise than as a partner. On the other hand, if a regular

partnership was entered into, the pursuer had a very considerable deal to gain, and the arrangement is not only intelligible, but highly probable. The defender had a certain connection, and had certain qualifications—to wit, those of a law agent—that could be profitably utilised for the common interest; but of course this necessarily meant that in the proper law business, just as in other transactions, the pursuer was to have the same interest as the defender.

"There are some circumstances on which the defender laid great stress as militating against the theory of a partnership, and to these it is desirable to advert in conclusion.

"It is said that the office was not taken in the social name, but only in the names of both parties as co-tenants. I see nothing, however, in this to militate against the theory of a partnership. No doubt in practice premises are often taken in the names of firms; but the other custom is also common, and it is perhaps in strict law the more correct of the two. A partnership is only a *quasi*-person, and it seems more correct to take leasehold property just as proper feudal subjects, not in the social name, but in the name or names of one or more of the partners, who shall hold as trustees for the joint concern.

"It is said that in the schedules for the attorney licences taken by each of the alleged partners the column in which their names should be entered as partners is left blank, and from this it is argued that they could not have been in partnership or in contemplation of partnership when such schedules were filled up. I do not think there is anything in this argument. On reference to the statute it will be found that the Legislature has not required a practitioner on obtaining an attorney licence to state whether he is a partner or not. The column intended for such a statement in the schedule seems to be a mere form, destitute alike of legislative direction and statutory force. It would be a matter of very great inconvenience if persons in partnership as writers could only obtain the attorney licence on condition of their disclosing the partnership relation in the schedules of application. It would, in so far as the business of an attorney is concerned, render latent partnerships impossible; and besides, in the case of partnerships at will, it would be a very dangerous thing to state the partnership, because in that case the parties might be held bound as partners for the whole period over which the attorney licence extended. As matter of fact, it is well known that this column in the schedule is by no means usually filled up by such as are in partnership.

"It was further argued that as the alleged partners did not keep a common bank-book, but conducted their banking transactions separately, this afforded a strong inference against the existence of a partnership. It must be noticed, however, that the keeping of a bank account in the firm's name is by no means a necessity to a partnership, and that in a great many cases the partnership funds stand in the name of one of the partners. If it be true that in the present case the defender was to act as cashier for the firm, there was a good reason why the company funds should stand, not in the common name, but in his own.

"From the evidence of the witness Mrs Blues, who is a sister of the defender's, it would seem that the pursuer had on one occasion denied that there was any partnership between them. There is not, however, so much in this as at first sight might appear. That Mrs Blues had a meeting and some conversation with the pursuer is undoubtedly true. Whether she correctly understood and now remembers the import of that conversation is a very different question. Nothing would be more likely than that she should have misunderstood the import of a conversation relating to legal subjects; and the weight of her evidence goes for very little when it is seen that in the conjunct probation the pursuer distinctly denies that he ever made such a statement to her, and gives an explanation of the conversation which seems much the more probable one. In any view, there may be set against the evidence of Mrs Blues the very clear statement of another relative of the defender's, viz., Adshead, to which I had occasion to advert at the outset of the note.

"Lastly, the defender founds strongly on the evidence of the joint-clerks, viz., M'Master and M'Allister, as tending to show that in their estimation there was no partnership. It must be noticed, however, that a very large part of their evidence is totally incompetent, on the well-known principle that a witness cannot be asked whether he believed or understood that a partnership existed, but can only be asked as to facts and circumstances coming under his observation, from which not he, but the Court, is to draw the legal inference. (See *Chatto & Co.* v. *Pyper*, 1827, 4 Murray, 354.) It must further be noticed that neither of the witnesses in question can make any clear or definite statement upon the subject. They do not say that they heard a partnership either admitted or denied by either of the alleged partners, nor can they say that when engaged the relationship between their employers was in any way explained. When the evidence of these witnesses is perused, apart from their understandings or imaginings, it seems to me that the facts and circumstances to which they speak, so far from militating against the existence of a co-partnery, are not only fully reconcileable with that relation, but go very far to support its existence."

On the defender's failure to lodge an account, decree was given against him for £1500. The defender then appealed to the Court of Session.

At advising—

LORD JUSTICE-CLERK—It would be very desirable if when two persons were thus acting in concert there had been some more distinct arrangement or agreement to show the existence or the absence of a partnership. I cannot help thinking that in the present instance there was some ulterior object in view, and that this caused an intentional indefiniteness. But we are bound to take the facts and actings as they stand, and although there are very many circumstances which seem to indicate no partnership, yet, on the other hand, when it is remembered on whose shoulders the *onus* of proof falls, I think the pursuer has established what is sufficient, in my opinion, to raise the presumption of partnership.

Looking at what occurred, we find that Mr Service and Mr Morrison were in business matters taking common action; they had a common office; their very clerks were in common; again, their books were at least to a large extent kept in common. All these, and other facts which

have transpired, induce the belief that a partnership existed. For my own part, the fact of the pursuer and defender having common clerks is of great weight; but when going a step further we find Morrison truly contributing funds to the common stock, that clears away much, if not all, of the difficulty in the case.

No doubt there was not, so far as can be seen, any arrangement as to the division of profits; but your Lordships will have observed that a reason may be found for this in the fact that the partnership did not endure long enough, nor was there money enough made to permit of such a division.

I have, on the whole matter, come to be of opinion that these two persons cannot have carried on their business on such a footing, and yet deny either to one another or to the outside public the existence of a partnership.

LORD ORMIDALE concurred.

LORD GIFFORD—I have come to the same conclusion.

It seems as if these two gentlemen had set themselves to make everything in connection with this partnership, and all the arrangements under which they carried on business together, as indefinite and ambiguous as possible, so as to make it almost impossible to tell what the agreement between them really was. When parties leave things in such an ambiguous position, neither can complain if the courts of law give effect to the preponderance of evidence although nothing is very clearly proved.

These gentlemen had for a long time been on very intimate terms, Morrison having been an apprentice of Service's father. Admittedly they had many joint transactions and many joint adventures together, and ultimately their relations in business were undoubtedly very close; and the question is, whether there was a partnership between them? The indications of this partnership are, I think, sufficient to establish it. They had a common office. This of itself is perhaps not very unusual, as they had separate rooms; but certainly when we find that they had clerks in common the case appears stronger, and still further when their whole business books are seen to have been in common.

I cannot understand that people with separate affairs and separate businesses should keep common books. The fact that the whole actings of the two parties—the whole work done by each— the whole cash received and disbursed—are recorded in common books by themselves or by their common clerks is hardly capable of being explained in any other way than that of an existing partnership. These gentlemen kept a common diary, which served as the day-books of the firm, and it speaks volumes when we find these two gentlemen each entering each piece of work in the same diary. And so with their other books.

It would require very strong evidence to overcome such facts as these.

Then it appears that Morrison had money—was, in short, the moneyed partner—and he made advances to a very considerable extent; and although it would be quite intelligible that he should make advances for a common partnership, still it is not likely that he would advance so much to Service himself. No doubt he took I O Us for the sums, but he had no security; and the vouchers were, I think, merely to enable the partners to adjust accounts *inter se*. It seems impossible that the parties would have acted in the manner disclosed if there had been no partnership between them.

On the whole, it would be unsafe to hold that these parties were not partners in the common business which they carried on.

This interlocutor was pronounced:—

"The Lords in respect the trustees on the sequestrated estate of the pursuer and defender have failed to sist themselves as parties to this action after the intimation of the dependence of the same, and having heard counsel in the appeal, Find that the pursuer has proved facts and circumstances sufficient to establish a partnership between him and the defender, and that from the month of August 1876 down to the date of raising the action: Therefore dismiss the appeal; affirm the judgment of the Sheriff; find the defender liable in the expenses of the appeal, and remit to the Auditor to tax the same and to report; and remit the cause to the Sheriff-Substitute to repone the defender against the decree of 8th August 1878 upon payment by him of £10, 10s. to account of the foresaid expenses, and decerns."

Counsel for Pursuer (Respondent)—Mair—Black. Agent—William Officer, S.S.C.

Counsel for Defender (Appellant)—Rhind—Baxter. Agent—George Begg, S.S.C.

Wednesday, July 2.

FIRST DIVISION.

[Sheriff of Argyleshire.

MURRAY *v.* CAMPBELL.

Lease—Shootings—Wooden Building—Where Landlord agreed to take "any Dwelling-house or Offices" off Tenant's Hand.

In the lease of an arable and grazing farm, which also included the shootings, it was stipulated that "should the tenant build any dwelling-house or offices for his accommodation, the same shall be taken up from him at the expiry of his tenure at their then value, not exceeding £200." The tenant built a cottage containing a kitchen and a bedroom, and erected against the gable of the cottage a wooden structure which contained no fireplace, and was used for the accommodation of summer visitors and for sporting purposes. *Held* that the landlord was liable under the above stipulation in payment of the value of the wooden erection.

By lease dated April 1857 Duncan M'Iver Campbell of Asknish let to Captain John H. Murray, R.N., the farm of Carricks, Argyleshire, for a term of nineteen years from Whitsunday 1857. The farm was both arable and pasture, and it was also "contracted that the said John Haliburton Murray is during the term of this lease to have the exclusive right to preserve the game, and the