

bankruptcy and insolvency, where it is practically settled that anyone who has a claim against an insolvent estate is entitled to keep back money which he owes to the estate, and cannot be compelled to pay in full while he only receives a dividend. But the principle is not limited to bankruptcy cases, and it seems to me that the circumstances of the present case constitute a very clear ground for its application, because Lady Ross while in the management of her son's estates appears to have wholly neglected the duty of keeping strict accounts, which is incumbent upon every administrator of the property of others, and when she is called upon to account she states that the whole of the money has been expended, and that of a very large sum, amounting to nearly £4000 a-year, she is unable to give any particulars. Now, that is a position which no guardian or administrator is entitled to assume, and upon the statement of these accounts, and also the claim of legitim, I cannot doubt that, if it appears to the Court that there is a probability that Lady Ross has already in her hands as much of her son's money as would satisfy this jointure, she would not be entitled to immediate decree. The judgment which I understand your Lordship will pronounce will be one merely suspending the procedure in this case, and if it turns out, contrary to all the probabilities, that the whole of the son's income has been legitimately and properly expended by his mother, and also that there is no legitim due to him, then of course Lady Ross will be entitled to decree for her jointure.

LORD KINNEAR—I agree that it would not be safe to pronounce decree at this stage in the terms of the Lord Ordinary's interlocutor; and therefore I agree with Lord Adam in thinking that we should suspend consideration of the case in the meantime, leaving it to either party to move in the event of any change of circumstances.

The LORD PRESIDENT was absent at the hearing.

The Court superseded *hoc statu* further consideration of the cause.

Counsel for the Pursuer—Ure—Clyde.
Agents—Dundas & Wilson, C.S.

Counsel for the Defender—C. S. Dickson
—Pitman. Agents—J. & F. Anderson,
W.S.

Saturday, March 9.

FIRST DIVISION.

[Lord Low, Ordinary.

THOMSON & COMPANY v. SWANN
AND PATTISON, ELDER, & COM-
PANY.

*Reparation—Fraud—Charge of Fraud
against Copartnership—Relevancy.*

T. & Co. sued one of their travellers and the firm of P. E. & Co., conjunctly and severally, for damages, on the alleged grounds that their traveller, while under contract to them not to sell goods for any other person, had persistently acted, with the knowledge of P. E. & Co., and by pre-concert with them, as a traveller in their interest; that P. E. & Co. were fully aware of his actings in soliciting orders upon their behalf, and of the terms of his contract with the pursuers, and that said actings were wrongful and in breach of that contract.

The Court *dismissed* the action in respect that the sole ground upon which the defenders could be made conjunctly and severally liable was fraud, and that there was no allegation of fraud, which was essentially a personal matter, against any individual member of the firm of P. E. & Co.

William Swann was commercial traveller for Messrs R. H. Thomson & Company, wine merchants, Leith, under an agreement by which, *inter alia*, he bound and obliged himself not to sell any goods for any other person without receiving their consent in writing, and by which six months' notice was required if either party wished to terminate the contract of employment within five years. Before that time had elapsed Swann entered into a contract with Messrs Pattison, Elder, & Company, wine merchants, Leith, to become their traveller in a month, and gave notice to that effect to R. H. Thomson & Company, but upon their refusing to accept that notice as sufficient, agreed to continue in their service for six months. Within that period, however, R. H. Thomson & Company dismissed him, on the ground that in breach of his contract he had ceased to exert himself on their behalf, and was really acting in the interests of Pattison, Elder, & Company. They also brought an action of damages against him and Pattison, Elder, & Company, conjunctly and severally, for £1000. In this action they averred that Pattison, Elder, & Company were fully cognisant of the terms of Swann's contract with them. They also averred (Cond. 5) "that during said period, and while the defender Swann was in pursuers' service as aforesaid, he persistently acted, with the knowledge of Pattison, Elder, & Company and by pre-concert with them, as a traveller in their interest and behalf. In particular, he solicited and obtained orders from various customers of the pursuers for and on behalf of

the defenders Pattison, Elder, & Company; and further, upon receiving general orders for goods from various customers of the pursuers, the defender Swann forwarded said orders to the defenders Pattison, Elder, & Company to execute, although he was aware said orders were meant for pursuers, and were given to him in the belief that he was travelling in the pursuers' interest. It is further averred that the defenders Pattison, Elder, & Company were fully aware of said actings of the defender Swann in soliciting and obtaining orders upon their behalf, and in improperly forwarding to them orders meant for the pursuers, and said defenders were further aware that said actings were wrongful and in breach of pursuers' contract with the said defender Swann, yet they did, in pursuance of said pre-concert and understanding with the defender Swann, execute said orders and receive the benefit, to the great injury of the pursuers. (Cond. 6) Both of said defenders were parties to the wrong committed upon the pursuers."

The pursuers pleaded—"The defenders or one or other of them having by their wrongful actings as aforesaid caused injury and damage to the pursuers to the amount sued for, decree should be granted as concluded for."

Both defenders pleaded, *inter alia*—"(1) The action is incompetent. (2) The pursuers' averments are irrelevant and insufficient to support the conclusions of the action.

Upon 25th January 1895 the Lord Ordinary (Low) allowed a proof before answer."

"*Opinion.*—The argument which I heard in the Procedure Roll was mainly directed to the two preliminary pleas which are stated for both sets of defenders, namely, that the action is incompetent, and that the pursuers' averments are not relevant.

"If, as the defenders argue, the claim against Swann is for breach of contract, and the claim against Pattison, Elder, & Company, with whom the pursuers had no contract, is for a wrong which they have done to the pursuers, I think that the action is plainly incompetent as laid, because the summons concludes against both sets of defenders for payment of one sum of £1000 conjunctly and severally, and it is settled that two parties cannot be made conjunctly and severally liable for two separate wrongs.

"But the pursuers say that the action is not laid upon breach of contract at all, but upon one wrong which the two sets of defenders joined together to commit, the wrong being that, while Swann was in the service of the pursuers as their commercial traveller, he, acting in concert with Pattison, Elder, & Company, and for their benefit, took for them orders from customers of the pursuers, which it was his duty to obtain for the pursuers, and for the pursuers alone. If a case of that sort was established it would be a case of *quasi delict*, and the defenders as joint delinquents would be each liable *in solidum*. And it would not, in my judgment, affect

that result that Swann was under contract with the pursuers, and might have been sued separately for breach of contract, because, although the position of Swann under his contract with the pursuers would have furnished the occasion and the means of committing the wrong, the wrong would be wholly separate and separable from the contract.

"The question therefore is, have the pursuers made relevant averments of a joint wrong on the part of the defenders. The 5th article of the condescence contains the main averments of the pursuers in regard to the joint wrong which they allege that they have suffered, and the defenders Pattison, Elder, & Company argued that these averments did not necessarily involve more than this, that they knew that Swann was obtaining orders for them while in the employment of the pursuers. That conduct on Swann's part, they argued, might render him liable to an action of damages for breach of contract, but no such action could be brought against them, because they were not parties to the contract, and mere knowledge of and taking benefit by Swann's actings on their part, even assuming that it would found a separate claim of damages against them, would not justify an action against them and Swann concluding for joint and several liability. As I have said, I agree that, if the claim against Swann is for breach of contract, and against Pattison, Elder, & Company for a wrong which they have done to the pursuers, the action falls to be dismissed. But it appears to me that the pursuers' averments when fairly read do not disclose a claim for damages for breach of contract, but for joint delict, and that there is no reasonable ground for doubt as to what the alleged joint delict is. The 5th article of the condescence is not well framed, but in it it is averred that Swann, by 'preconcert' with Pattison, Elder, & Company, obtained orders from various customers of the pursuers for Pattison, Elder, & Company, and that the latter firm executed and received the benefit of these orders. Further, in the 3rd article of the condescence it is averred that Pattison, Elder, & Company were fully cognizant of the terms of Swann's contract with the pursuers, which bound him not to sell any goods for any other person or firm than the pursuers; and in the 6th article it is averred that 'both of the said defenders were parties to the wrong committed upon the pursuers,' whereby they have suffered loss to the amount sued for.

"I think that these are relevant averments upon which to found a claim of joint and several liability against the defenders as joint wrongdoers, and that the case which the pursuers offer to prove, and which the defenders have to meet, is not doubtful, although, as I have said, it might have been, and ought to have been, more precisely and clearly stated." . . .

Pattison, Elder, & Company reclaimed, and argued—The action was incompetent and irrelevant. It sought to make the defenders liable jointly and severally, but

the case against Swann depended entirely upon his contract with the pursuers, to which these defenders were no parties. Even if Swann had not merely acted in breach of his contract but had committed a wrong, that wrong was entirely different in character from the wrong, if any, committed by them. If the action was rested on a fraudulent scheme, then the pursuers had failed to allege fraud on the part of any individual member of the firm.

Argued for Swann—Even if the pursuers had a good ground of action against him, for the reasons stated by the other defenders the action against them was incompetent, and being an attempt to establish joint and several liability, fell to be dismissed *in toto*.

Argued for the pursuers—Swann had not merely acted in breach of his contract; he had done a serious wrong to the pursuers. While pretending to be their servant, and their servant alone, he had advanced the interests of others with their knowledge and connivance. Although fraud was not mentioned in terms, it was a fraudulent scheme which was set forth. If the case were sent to a jury, as the pursuers would prefer, although not opposed to a proof, it would be competent upon their averment to put “fraudulently” into the issue.

At advising—

LORD PRESIDENT—This summons concludes against the defenders Pattison, Elder, & Company and Mr Swann, conjunctly and severally, and under it the pursuers ask nothing from either defender for which the other is not liable. We are therefore put in search of some ground of liability for the same sum common to both defenders. No other ground of liability is within the action.

The only case at all of this nature indicated on record was ultimately represented by the pursuer's senior counsel as a case of fraud with the word “fraud” left out, and this omission, we were told, was immaterial if the substance of the thing was there. It was said that the ground of action really is, that it was arranged between the two defenders that Swann, while continuing ostensibly to act exclusively as the pursuers' traveller (which was his contract duty) should take advantage of that position to divert business from his master to Pattison, Elder, & Company by soliciting orders for them.

Now, it seems to me that a case of this kind is a case of fraud or nothing. If A, the servant of B, conspires with C, that he shall continue to act ostensibly as B's servant and receive his wages, but shall, instead of promoting B's interests, betray them by diverting his business to C, then it is surely clear that A and C are guilty of fraud against B, and are jointly and severally liable in damages to him on the ground of their common fraud.

The pursuers' case, however, seems to me to fall short of what I have stated in one vital point. Fraud is a personal matter,

and can only be committed by an individual. It is true that others than individuals may become liable for the frauds of individuals, but that does not affect the essentially personal nature of the act giving rise to the liability. Now, this record does not allege the acts complained of against any individual at all. Accordingly, it is not by a mere euphemism that this case differs from and falls short of a case of fraud. Had the pursuer said that such a conspiracy had been entered into by someone named, one of the partners of Pattison, Elder, & Company, I could quite understand the firm being concluded against, as being liable for a fraud committed by a partner in the region of his mandate. But on this record the basis of such a case is wanting.

I am for recalling the Lord Ordinary's interlocutor, and dismissing the action as against both defenders.

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

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for the Pursuers—C. S. Dickson—M'Clure. Agents—Davidson & Syme, W.S.

Counsel for the Defenders, Pattison, Elder, & Company—Jameson—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Defender, Swann—Cook. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Saturday, March 9.

FIRST DIVISION.

[Court of Exchequer.

CORKE (SURVEYOR OF TAXES) v. FRY.

Revenue — Income-Tax — Abatement — Income — Annual Value of Manse — Income-Tax Act 1842 (5 and 6 Vict. c. 35), sec. 167, Schedule E — Customs and Inland Revenue Act 1876 (39 and 40 Vict. c. 16), sec. 8.

Section 8 of the Customs and Inland Revenue Act of 1876 provides that an abatement shall be given to any person who shall be assessed to any of the duties of income-tax, and who shall prove that his total income from all sources is less than £400.

Held that the annual value of the manse occupied by a minister of the Established Church forms part of his income in the sense of the above section—*M'Dougall v. Sutherland*, March 20, 1894, 21 R. 753 distinguished.

At a meeting of the Income-Tax Commissioners, held at Ayr upon the 4th December 1894, the Rev. Samuel Campbell Fry, minister of the parish of Girvan, claimed repayment of £3, 10s. for year ended 5th