

the proceeds of the estate as they fall in year by year; it does not mean that these proceeds must necessarily be identical in each year.

The Court answered the first question in the case in the affirmative.

Counsel for the First Parties—Horne; for the Second Party—Macmillan. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for the Third Parties—Dove Wilson. Agents—Mackenzie & Kermack, W.S.

Friday, October 23.

SECOND DIVISION.

[Sheriff Court,
Glasgow.

STEWART v. BUCHANAN.

Partnership—Constitution—Proof of Partnership—Partner or not—Loan or Partnership—Partnership Act 1890 (53 and 54 Vict. cap. 39), sec. 2, sub-sec. 3 (d).

Terms of lease and agreement upon which held that a person, who had leased premises and provided funds for the purposes of a business upon certain conditions, was a partner in the business, although the agreement in terms provided that he should not be or be held to be a partner.

The Partnership Act 1890 enacts, section 2, sub-sec. 3 (d)—“The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business, or liable as such: Provided that the contract is in writing, and signed by or on behalf of all the parties thereto.”

This was an action brought in the Sheriff Debts Recovery Court at Glasgow by Robert R. Stewart, grocer and wine merchant, 184 High Street, Edinburgh, against the City Stockroom Company, 16 to 20 Springfield Court, Glasgow, and Robert William Saunders of that address, and Charles Buchanan, 65 Montgomerie Street, Kelvin-side, Glasgow, the alleged partners of the company, for payment of an account for goods supplied to the company.

Buchanan alone appeared to defend. His defence was that he was not a partner of the company.

Charles Buchanan was the proprietor of subjects at 16 to 20 Springfield Court, Glasgow, of which he granted a lease in favour of Robert William Saunders, therein described as “about to carry on business in the said subjects under the name or firm of the City Stockrooms Company.”

Under the lease Buchanan agreed to fit up the premises to suit the requirements of

Saunders' business as might be arranged between parties, “and failing agreement as the first party (Buchanan) may determine,” to the extent of a sum not exceeding £1200; and he further agreed in the same terms to furnish the premises to the extent of a sum not exceeding £700. The lease provided as follows—“At the expiry or earlier termination of the lease the whole fittings, fixtures, furniture, and others shall be and remain the property of the first party in the absence of payment of loan.”

The lease was for the period of fifteen and a-half years at a weekly rent, “but only from week to week,” and terminable by Buchanan, in the event of breach of any of the conditions by Saunders, on one month's notice.

Along with the lease an agreement was entered into between Buchanan of the first part and Saunders of the second part, under which in addition to the two sums mentioned above Buchanan agreed “to advance the further sum of £100 as the same may in his opinion be required, and as he may think proper from time to time, in starting and developing and carrying on the business of the second party in said premises, making in all the sum of £2000, which shall be placed to the credit of the first party on loan capital account in connection with the said business, and on which the first party shall receive interest at the rate of 7½ per cent. per annum, payable monthly, any additional sums required for necessary outlays in connection with the said business shall only be advanced by the first party in his discretion and option, and shall be repaid to him, with interest at 7½ per cent. per annum, out of the first sums to be realised from the business as soon as they come in.”

Under the agreement Saunders was entitled to engage assistants with the consent of Buchanan, and he was entitled to charge the business with a salary which might be raised from time to time with the consent of Buchanan as the business progressed. Saunders was taken bound to keep proper books and to devote his whole time to the business. The agreement prescribed the mode in which all sums drawn from the premises let in carrying on the business should be applied, and gave Buchanan the right to appoint a cashier in the event of rent and charges not being paid or the business being carried on at a loss, or the profits being in his opinion disappointing, and to appoint an auditor. It provided for policies of fire insurance to be effected in name of Buchanan *primo loco*, and Saunders in reversion, and after all disbursements from revenue it provided, “the surplus shall be divided equally between the second party in name of profit, and the first party in name of extra interest, and all moneys received from said business shall be held and applied in trust only for the purposes above specified.”

The agreement further provided—“Sixth. The second party shall not be entitled to incur any obligations beyond the necessary requirements of the business, or grant any bills or enter into any risks or speculations in connection with the said business, nor

shall the first party be or be held to be a partner in the said business, or liable for its debts or obligations, nor shall he be liable for any debts or losses, or in any way in connection with the affairs of the second party. . . . *Eighth.* In the event of the said business proving successful after two or three years' trial, it shall be turned by the said parties into a limited liability company, . . . and the first party shall receive $7\frac{1}{2}$ per cent. preference stock for his capital outlays in connection with the said premises, and the ordinary stock shall be divided equally between the said first party and the second party and their respective nominees."

Evidence was led. Buchanan deposed that he supplied the whole capital for the business.

On 3rd March 1903 the Sheriff-Substitute (DAVIDSON) pronounced an interlocutor whereby he found that the defender Buchanan was not a partner of the City Stockrooms Company when the goods, the price of which was sued for, were ordered, and assolized him from the conclusion of the summons, and granted decree in absence against the other defenders.

Note.—"The position of the defender Buchanan is precisely that defined in section 2, sub-section (3) (d), of the Partnership Act 1890. There is evidence, both oral and written, that he was not a partner; and no proof has been adduced that he held himself out to third parties."

The pursuer appealed to the Sheriff.

On June 10, 1903 the Sheriff (W. GUTHRIE) pronounced the following interlocutor:—"Having heard parties' procurators, and considered the cause (there having been no appearance in the cause by or for the other defenders)—Recals the judgment appealed against: Finds that the defender Buchanan is carrying on business with the said Robert W. Saunders under the name and firm of the City Stockrooms Company, and that he is a partner of that firm and company along with the said Robert W. Saunders: Finds that the goods, the price of which is sued for, were sold and delivered by the pursuer to the said company: Therefore decerns as craved."

Note.—"The evidence in this case consists entirely of the lease and the missive agreement in process. I am unable to regard it as showing a simple case of loan under the Partnership Act 1890, sec. 2 (3) (d). The written agreement is intended to simulate a loan transaction, with a very strict security over moveables and a going business in security of the loan. But I think one cannot read the agreement without seeing that it goes further than any previous case, and gives the lender the powers not of a creditor but of the dominant partner of the company. To begin with, the other partner, though he is to get half profits, if there are profits over and above his salary, is merely the hand and instrument of the defender. In other cases, such as *Mollwo, March, & Company v. The Court of Wards*, L.R. 4 P.C. 419; *Ex p. Tennant*, 6 Ch. D. 303; and *Badeley v. Consolidated Bank*, 38 Ch. D. 238, the

powers of a lender to interfere in the business for the security of his loan were of an extremely extensive kind; and I think that these cases carried the principle of allowing lenders to escape the responsibility of partnerships which are mortgaged to them and worked chiefly for their benefit, as far as it is possible in reason to carry it. I think that this case goes further than any of them, for it presents us with a company started in a building belonging to the defender—I believe started at his suggestion and for his benefit—with a man of no means installed under a written agreement as his manager, apparently independent, and alone empowered to sign the name and conduct the business, but bound hand and foot to the defender, who fits up and furnishes the premises with money *ex facie* lent, advances all the money required to start the business, has a voice in the appointment of all servants, has an auditor, and has power to appoint a cashier with co-ordinate powers with the manager, besides various other conditions as to the determination of the business and the distribution of the assets. I can come to no other conclusion on the construction of this minute of agreement than that this defender was the real owner of the business, and that he admitted Saunders to participate only as one pays a servant by giving him a share of profits. If I had any doubt about this I would allow further proof, as may be done under the Act. In construing the clause of the Partnership Act it is well to remember the often quoted words of Sir Montague Smith in giving the judgment of the Privy Council in *Mollwo, March, & Company*—'The judgment in *Coax v. Hickman* had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the determination of cases of this kind is made to depend, not on arbitrary presumptions of law but on the real contracts and relations of the parties. It appears to be now established that although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such participation alone, it may, as a presumption not of law but of fact, be inferred, yet that whether that relation does or does not exist must depend on the real intention and contract of the parties. . . . Again, wherever the agreement between parties creates a relation which is in substance a partnership, no mere words or declaration to the contrary will prevent, as regards third persons, the consequences flowing from the real contract.'"

The defender Buchanan appealed, and argued—The case was one of money lent in such terms as to give the lender a control to prevent its being wasted, but in no such terms as to deprive him of the protection of sec. 2, sub-sec. 3 (d), of the Partnership Act 1890. There was no evidence of the intention of parties except in their contract, which expressly declared that they were not partners. The case was governed by the authorities cited by the Sheriff—

Mollwo, March, & Company v. The Court of Wards (1872), L.R. 4 P.C. 419; *Badeley v. Consolidated Bank* (1888), L.R. 38 Ch. D. 238. The case of *M'Cosh v. Brown & Company's Trustee*, May 5, 1899, 1 F. (H.L.) 86, 36 S.L.R. 619, differed from the present; there the money was not lent to be repaid as the £100 advanced in terms of the agreement was here.

Argued for the respondent—In order to take advantage of the provisions of the Partnership Act relied on the appellant was bound to show that he was merely a lender of money; this he had failed to do; the business was his, and Saunders was in the position of his salaried manager rather than that of his partner. Half the *corpus* of the business was to go to Buchanan in the event of its proving successful; these considerations were conclusive—*M'Cosh v. Brown & Company's Trustee, cit. sup.*

At advising—

LORD YOUNG—This is an action brought to recover a sum of money for goods furnished to the City Stockrooms Company. It is brought against the company and against two individuals—Saunders and Buchanan—as the only known partners of the company. The only defence lodged is that on behalf of the defender Buchanan, his defence being that he had no concern with the company except as a lender of money to it, and that he is not liable for the company's debts. The Sheriff has found, and I agree with him, that Buchanan is a partner. It was in fact his business, and Saunders was either his partner or else his employee. The business was set up by Buchanan for his own profit. The premises in which the business was carried on belonged to him and were furnished at his expense, and he supplied all the capital. Saunders had no property in the business and was only employed on certain terms to manage it. It is immaterial whether his position was that of partner or of employee, or whether Buchanan was a partner in or sole proprietor of the business. In support of this contention Buchanan refers to the contract of agreement and the lease between Saunders and himself. In my judgment the sole purpose of these documents was to enable Buchanan to carry on the business without incurring liability for the company's debts. I agree with the Sheriff that this device should not be allowed to succeed, and I think that the Sheriff's judgment is right and should be affirmed.

LORD TRAYNER—The pursuer sold and delivered certain goods to the City Stockrooms Company and he now sues the company and Robert William Saunders and Charles Buchanan, the alleged partners of the company, for the price of the goods so delivered. The company and Saunders do not appear to defend the action but Buchanan does, and his defence is that he is not a partner of the company and therefore not liable for its debts. I agree with the Sheriff in thinking that the evidence upon which this disputed question of fact falls to be decided is to be found in the

lease and the minute of agreement executed by Saunders and Buchanan. The parole testimony is of no importance. I consider chiefly the minute of agreement (although I think both it and the lease only parts of and evidence of one transaction), and I do so because Buchanan, founding on the terms of that agreement, maintains that he is in the position described in sec. 2 (3) (d) of the Partnership Act of 1890 as a lender of money to the company and Saunders and nothing else, and that such loan, although it entitles him to a share of the company's profits, does not make him a partner. I think it quite clear that the defender Buchanan does not stand in the position described in the statute, and that he can take no benefit or protection from its provisions. The statute only applies to persons who have "advanced money by way of loan to a person engaged or about to engage in any business." Now, Buchanan never advanced money by way of loan to the company or Saunders. What he maintains is that he has advanced to them £1900, and subsequently an additional £100. But the agreement shows that this was not advanced as a loan, but was paid out by Buchanan in implement of his obligation. The premises in which the company carries on its business are the property of Buchanan, and the amount advanced by him was advanced to provide fittings for the premises to make them suitable for the business to be carried on there. The whole of such fittings are the property of Buchanan, and are part of the subjects he has let. The agreement and lease both show the return to be made to Buchanan for the premises and fittings, but neither of them confer any right of property in the fittings on the company or Saunders, and neither of them provide for the repayment of the £2000 which they would certainly have done had the money been a loan. There is provision for the payment of any further advance which Buchanan in his discretion may make, not by the company or Saunders, but "out of the first sums to be realised from the business as soon as they come in." The £2000, on the other hand, is to be put to Buchanan's credit "on loan capital account in connection with said business." Leaving out of view for the moment that the £2000 is to be put to "capital account," the case appears to me, as I have said, to be this—that Buchanan in order to get a tenant for his premises undertook to fit up the premises suitably for the tenants' business at a cost of £2000. In doing this he was making no advance of money by loan, but simply fulfilling an obligation which as landlord of the premises he had undertaken. If, then, the defender Buchanan does not bring himself within the terms of the Partnership Act, what is his position?

The Sheriff gives it as his opinion that Buchanan is the sole partner; that the business is his business, and that Saunders only occupies the position of Buchanan's salaried servant, the salary being to some extent provided by a share in the profits. I am far from dissenting from this view, but I think it goes beyond what we are

called on to decide. It is enough for the decision of the case in the pursuer's favour if we hold that Buchanan was interested in this business as a partner, and of this I have no doubt. The reasons given by the Sheriff, based upon the terms of the agreement, for holding that Buchanan is the sole partner, are sufficient to support the view that Buchanan is at least a partner, and that, as I have said, I am prepared to affirm. If any question arises between Saunders and Buchanan as to their relative rights and liabilities under the agreement, it may be that Saunders may be able to show that as between them he is not a partner or liable as such. But meantime it is enough to hold that Buchanan is a partner, and on that ground to give the pursuers decree.

The LORD JUSTICE-CLERK read the following opinion of LORD MONCREIFF, who was absent at advising—I am also of opinion that the judgment of the Sheriff should be affirmed for the reasons which he states very tersely in his note. I do not think that anyone can read the documents which formed the contract between the defenders without seeing that the true trader with the largest interest in the concern was Buchanan and not Saunders. In other words, that truly construed the documents disclose a contract of partnership between Buchanan and Saunders.

Is there any reason in law why this, the manifest truth of the contract, should not receive effect? I can find none. It must now be taken on the one hand to be the law that the receipt by a person of a share of the profits of a business does not of itself make him a partner; neither does it of itself make a person a partner that having advanced money in loan he stipulates for a certain amount of control over the business in order to secure the debt. But both these things—receipt of a share of the profits, and control of the business—are, whether taken separately or together, important elements in deciding whether there is partnership or not.

On the other hand it is equally certain that a person who is truly a partner will not escape responsibility however emphatically he may declare in the contract that he is not a partner and is not to be considered a partner.

In each case the whole circumstances must be considered. I do not think it necessary to repeat what has already been pointed out by the Sheriff and by your Lordships as to these circumstances in the present case which indicate partnership beyond this, that unlike the English cases referred to by the Sheriff this is not a case of a loan made by Buchanan to an existing and independent trader. It is not really a case of loan at all. Buchanan created the business out of his own funds and Saunders was merely Buchanan's creature—I do not use the word in an offensive sense—who was ostensibly to carry on the business as his own and accept liability, but really to act as manager practically during Buchanan's pleasure and be remunerated by

receiving a proportion of the profits and a salary.

It is not easy to argue from one case to another on this question. The cases of *Mollwo* and *Badeley* at first sight go far to support the appellant's contention. The latter case goes further than I should be prepared to follow in at least one respect. But they were both cases in which the Court on consideration of the circumstances were satisfied that there was a genuine loan and a genuine security, and that the true purpose of the transaction was to secure the loan, not to make the lender a partner. Our judgment will not trench on the principles of law upon which these cases proceeded.

The LORD JUSTICE-CLERK concurred.

The Court dismissed the appeal and affirmed the interlocutor appealed against; remitted to the Sheriff to of new decern against the defenders as craved; and found the defender Buchanan liable in expenses in this Court.

Counsel for the Pursuer and Respondent—Campbell, K.C.—Hunter. Agent—Alfred A. Murray, W.S.

Counsel for the Defender and Appellant—Salvesen, K.C.—Younger. Agent—Campbell Faily, S.S.C.

Thursday, October 29.

SECOND DIVISION.

HUTCHINSON'S TRUSTEES v. YOUNG & OTHERS.

Succession—Trust—Direction to Purchase Government or Savings Bank Annuities—Annuities to be Alimentary—Continuing Trust not Provided for—Right of Annuitant to Demand Payment of Capital.

A testatrix directed her trustees "to provide and apply the sums after mentioned in the purchase of Government or Savings Bank annuities for the persons after mentioned" (then followed the names of the beneficiaries and the respective sums bequeathed to each), "and the said annuities shall be strictly alimentary, and shall be payable to the said annuitants on their own receipt." The testatrix further provided and declared, *inter alia*, that the annuities bequeathed by her should "not be assignable or affectable by creditors." She made no provision for a continuing trust.

The Government Annuities Act 1853 (16 and 17 Vict. cap. 45), which regulates the purchase of Government or Savings Bank annuities, enacts, sec. 25—"The right, title, interest, and benefit in and to any annuity . . . purchased under the provisions of this Act shall not be assignable by the original proprietor thereof so as to enable the assignee to receive the same during the