

Friday, May 5.

(Before the Lord Chancellor (Halsbury) and
Lords Watson, Shand, and Davey.)

M^cCOSH v. MURRAY.

(Ante November 4, 1898, 36 S.L.R. 29;
and 1 F. 52.)

Partnership—Loan or Partnership—Advances to Carry on Business.

By an agreement entered into by four parties—A, B, C, and D—it was provided that A and B should advance respectively to C and D, in equal proportions, the capital required to start and carry on a business for a period of three years. A's advance to C was expressly a loan, but B's advance to D was expressed to be on behalf of D without any obligation for repayment either by C or D.

C was declared to be the sole partner, in the meantime, of the business, and it was agreed that he should manage the finances, while B was to be manager of the works. Beyond a right of inspecting the books, &c., A and B were to have no concern with the management of the business.

It was provided that the profits, after payment of salaries to C and D, and interest on the sums advanced by A and B, should be accumulated for three years, one-half to the credit of C and one-half to the credit of a "suspense account," and the losses were to be debited in the same way, so that at the end of the three years' trading the balance of profit or loss, as the case might be, would stand to the credit or debit of these two accounts. A and B had the power to require, at any time during the three years, that the balance at the credit of these two accounts should be applied to repayment of the capital advanced by them. One-half, both of the accumulated profits as represented by the suspense account, and of the assets of the firm, was at the absolute disposal of B at the expiry of the contract, and he had similar rights both in the profits and the assets in the event of the business being wound up during the three years.

It was agreed that at the expiry of the three years B should be entitled to call upon D to take C as a partner, B's share in the assets and the accumulations in the suspense account being made over to D.

Held (aff. the judgment of the First Division) that these provisions showed that the business was carried on by and for behoof of B, and that he was liable as a partner.

The case is reported *ante, ut supra*.

The defender appealed from the judgment of the First Division.

At delivering judgment—

LORD CHANCELLOR—The question in this case appears to me to be simply this, what is the true construction of this agreement? The agreement is before us in writing, and it is for us to construe it, and therefore the sole question, as it appears to me, is, whether upon the true construction of this agreement it is an agreement which constitutes a partnership or not.

In dealing with that question, although there has been a long series of cases upon the subject, I do not think that either any statute, or indeed any of the cases, except perhaps that great case in the House of Lords—*Cox v. Hickman* (8 H.L.C. 306)—which decided one question, has ever really departed from the leading principle of what does or does not constitute a partnership. In that case, no doubt, one particular portion of it had reference to the arrangements sometimes made with creditors to allow a business to be carried on for the purpose of paying the debts of the concern, and the question was whether they would not thereby become partners. That subject was debated with considerable authority on both sides. The Court of Common Pleas was equally divided, and when the case came to your Lordships' House, the Judges who were summoned to give their advice to the House upon the subject were also equally divided. But that is a point far removed from anything that we have here to decide. If it were relevant to the question under debate, of course the decision of your Lordships' House is final and conclusive on the subject. But looking at this agreement, I put to myself the language of Lord Cranworth in his judgment given in the case to which I have referred, wherein he has stated what is the correct view of what does and what does not constitute partnership. He says—"The correct mode of stating the proposition is to say that the same thing which entitles him to the one" (a share in the profits) "makes him liable to the other" (the debts), "namely, the fact that the trade has been carried on on his behalf—that is, that he stood in the relation of principal towards the persons acting ostensibly as the traders by whom the liabilities have been incurred, and under whose management the profits have been made." The same thing which entitles him to the profits also makes him liable to losses. That is what was laid down with the assent of all the noble and learned Lords who took part in that judgment as the criterion which is to be applied.

A partnership is a community of adventure, and I cannot forbear from saying that I adhere to what was suggested as perhaps having had a misleading effect on one of the learned Judges in the Court below, that you must look at the reality and substance of the transaction apart from the particular words used. I adhere to what I said in the case of *Adam v. Newbigging* (13 App. Cas. 308) that "If a partnership in fact exists, a community of interest in the adventure being carried on in fact, no concealment of name, no verbal equivalent for the ordinary phrases of profit or loss, no indirect expe-

dient for enforcing control over the adventure will prevent the substance and reality of the transaction being adjudged to be a partnership." I adhere to those words, and I think they are very applicable to the question we are now dealing with, because I admit that on the face of this instrument there are not the ordinary words used, "profit and loss," and one has to look through the whole of the arrangement in order to see whether there was a real community of adventure, an actual partnership constituted by this written agreement. If there was, of course the consequences must follow.

On that subject I think it is very material to observe that the question propounded in all the cases really is, whose is the business? The first thing we have to inquire about here, whose was the business; to whom did it in fact belong apart from the mode in which the business was constituted, and the indirect phraseology from which you are to determine whose the business was? Two people are minded to start their respective relations in business, and they each advance a certain sum of money. Besides doing that, in order to enable them to start in the business they make various provisions, one of which, and the only one relevant to this transaction, is that in the course of the business the one who advances half of the capital for the new business states his intention of giving what is the result of this common adventure to the relation whom he is minded to benefit, but in order to take care that that shall not of itself constitute a transfer of the right of property, he expressly stipulates in the same instrument that that person or that person's representatives shall have no right whatever to insist upon that being the ultimate destination of the result of this trading adventure. It would be very difficult to say in face of that stipulation that that person has actually obtained a right or interest in the property which is to be the result of this common adventure.

When I look therefore to see what is the real nature of the transaction clouded by the somewhat elaborate machinery which this written instrument suggests, I find that Mr M'Cosh—with whom your Lordships are dealing as the appellant—retains every right that a person can have who is a proprietor in this concern. If there was a profit, it would not belong to either of the persons who were actually carrying on the trade. If there was a surplus, as I have said already—I care not for the particular phrases used—"suspense account" is the phrase; it means a certain amount of money put aside—who is entitled to that? When I look at the instrument and see who will ultimately become entitled to it as a matter of law, apart from the gratuitous present which he may in future make if he pleases to the relation in whom he is interested, I find that Mr M'Cosh is the only person who can insist upon those profits, that suspense account being so divided that he will have half. Further, as was pointed out by my noble and learned friend Lord Davey yesterday, the interest which he would be

entitled to upon his £1500 is to be diminished if there are such claims upon the common adventure as will entitle the persons having those claims to be paid in priority to any interest that the lender may get. If we put those propositions together we find this result, that of this trading adventure started with this capital supplied in moieties by those two persons, Mr M'Cosh has the right to the profits in the way I have described; he is liable to the losses in the way I have described, diminishing *pro tanto* the amount of interest he has received; and at the end of the period which the trading adventure is supposed to cover he is entitled to do what he pleases with the business which has thus been created. Really, when I find in the written agreement that these persons have so constituted this trading adventure between them, and that the right in the trading adventure to be carried on for three years is, under those circumstances, obviously the property in moieties of the persons who established it—that they are liable for losses and they are entitled to the profits—it is really almost reducing the matter to an absurdity to ask what other element is wanting in the construction of this written agreement to make up what we call a community of interest—a partnership which is established for trading purposes.

Therefore I am wholly unable to concur in the judgment of the Lord Ordinary. With all submission to that learned Judge, I think he has argued in a vicious circle. He says this business does not belong to Mr M'Cosh, for Mr M'Cosh had no rights in it, and Mr M'Cosh was not entitled to the profits. If you start with those propositions, I quite agree that the consequence follows, but that is the very question to be determined, and it is not a question of evidence—it is not a question of presumption—it is not a question of where the burden of proof lies—this is a written instrument which it is for the Court to construe, and if, looking at the real substance and nature of the written instrument, it does establish the community of interest I have described, and which I assume to be established by that written instrument, we have nothing to do with presumptions or evidence, or anything of that sort. The question is, what is the true construction of the written instrument before us, and if we come to the conclusion that it does make a partnership within the definitions which have been always accepted as making a partnership, then we have nothing to do with presumptions—we have to say such and such is the construction of the instrument.

For these reasons it appears to me beyond all doubt to be a case in which we should affirm the judgment of the Inner House, and accordingly this appeal should be dismissed with costs.

LORD WATSON—The position occupied by Mr M'Cosh, the appellant in this case, is, when it is considered even not very attentively, a very peculiar one. He claims to

be a secured creditor of this firm, and to have an interest in the firm as a creditor merely; he says that he has no rights as partner—he had no interest in the stock, although the extent of the interest which he had stipulated for in the firm is not in the least degree proportional to the amount of the debt which he says is charged. However, I venture to take a very short view of this case, and it appears to me that a very short view is quite sufficient to dispose of the merits laid before us on behalf of the appellant by his counsel.

The first question, which really is a very interesting one, appears to me to be this: During the three years of the agreement, which is of course the critical period—the three years lasted until article 4 was acted upon by Mr M'Cosh—during the whole of that period to whom did the £1250 which this deed says—and in one sense the statement is true, though in all senses I am quite satisfied it is not true—was advanced to Adam Jardine belong? That point being fixed, the next point is to consider for whose behoof it remained in the firm, and for whose behoof was it traded on during the whole of that period as one of the assets of the partnership—as an asset amounting to one-half of the stock of the firm. Now, there are three persons to whom it may be suggested that that asset in reality belonged. First of all, Donald Brown junior, who is the ostensible partner of the firm by whom its assets are possessed, and who in terms of this agreement was entitled and bound to conduct the commercial part of the adventure. Donald Brown got no real right to that money whatever—he got no title to it—he got possession of it in order that he might pay for the assets of the partnership and take them over, but he got no interest. His position differed from that of Mr Adam Jardine in this essential particular, that whilst he was invested with his share of the stock of the trading firm, Mr Adam Jardine had no right in that stock until he got that right by the consent of M'Cosh at the end of three years. That is the position of Mr Donald Brown. What is the position of Mr Adam Jardine? He had no right as a partner. Article 4 makes that perfectly clear, and shows that, until he was admitted by Mr M'Cosh, he had no interest whatever either in the partnership or its assets. Adam Jardine had no right to the stock unless and until he was admitted as a partner. Then we come to Mr M'Cosh. Mr M'Cosh I do not say had a title to these funds; he could only touch them if he had a right to do so through Donald Brown, whom he had chosen to make his manager of the concern, but M'Cosh had a right—and that right seems to have resided with no-one else—at the end of the three years to appropriate the whole of the capital that he had advanced, or any part of it that remained, or anything that represented it. He had also a right to have the profits that had accrued upon it set apart in a suspense account during the continuance of those three years, and at the end of that period the right to it did not pass to Adam Jardine unless with his consent and goodwill.

In these circumstances I cannot have the slightest doubt that Mr M'Cosh was from the very outset of this adventure the leading partner in it, and that he so remained in the state in which the adventure was at the time when this action was raised. It appears to have been unsuccessful, and the concern appears to have been sequestrated, but that was before any change was made in the rights of the parties, or before they were in the least different from what they would have been at the end of the triennial period.

LORD SHAND—In this case I have come without difficulty to the same conclusion as your Lordships. One can scarcely read the deed without seeing that Mr M'Cosh, the appellant, interposed in the business with a kindly object. His intention undoubtedly was not ultimately to gain an advantage for himself, but that he should by transferring his interest in the business after a time secure a benefit for a relation. It seems also to be pretty clear that he did not expect or anticipate that the deed, which is very involved in its provisions, would in point of law result in his being held to be a partner in the firm. But nevertheless I am of opinion that unhappily the deed has been so drawn as by its terms to make him a partner in the concern, and that from the date when the deed was signed.

It is unnecessary in this case to give any real weight to the consideration of the effect of the provision in the Partnership Act that a share of profits will *prima facie* infer a partnership, because, as has been pointed out by your Lordships, and as is clear upon the face of the proceedings, we have not to consider a single provision giving an interest in the concern in the shape of a return of profits, but there are other considerations and provisions which have to be taken into account.

The issue in the case I think is this—was the business Mr M'Cosh's business to the extent of one-half from the time he signed that deed? Upon that matter I agree with your Lordships in thinking that the effect of its provisions, which apply to the three years during which Mr M'Cosh's hands were tied up by his having devolved the management upon others, and to the expiry of that time, was that he had a right, not only to the repayment of the money that he had put into the business, but also a right to one-half of the profits and surplus profits. I am unable to regard that arrangement as being in the nature of a loan only; I adopt the view which my noble and learned friend Lord Watson has just expressed, that dealing with each of the other three persons to this contract, it is demonstrable that at all events two of them were not partners, but were in the position of managers only, having a separate interest, with the result that the two others were the partners carrying on the business. It is clear that the half of those profits or surplus profits went to Mr M'Cosh, and that could only be in his character not as having lent money, but as being really a partner for whose interest, to the extent of one-

half, the business was being carried on. It is true, I think, that Mr M'Cosh did not mean to put the money into his own pocket, but he was to possess it; he was to have the control of it, and he was by means of it to put his young relation into the business. That would have been practically making a new business with new partners. Mr M'Cosh would have been exercising his rights, not as a lender of money, but as a partner in taking the money, the result of the trading, to himself in the first instance, and then putting his nephew into the business by transferring the money so taken to him. Till then Mr M'Cosh was, to the extent of one-half, the person carrying on the business though under conditions of restraint as to management, and so he was one of the partners.

I am therefore of opinion with your Lordships that this appeal should be dismissed with costs.

LORD DAVEY—The first observation that occurs to one on reading the agreement is that the £1250 provided by Mr M'Cosh was not a loan to the firm or to any member of the firm, but it was in truth money put into the adventure which was proposed to be started as part of the capital of the concern. I omit from consideration what appears upon the face of the first clause of the deed, that Mr M'Cosh's money was contributed on behalf of Mr Adam Jardine, because I do not think it affects the consideration of what Mr M'Cosh's position was as regards the other parties to the transaction. The question therefore is, for whose benefit was this adventure or business carried on? That must be ascertained from a consideration of the terms of the agreement. Without reading the agreement or any part of it I will state the conclusion I have come to as to the construction of that agreement. The adventure was to be carried on for three years, and in the meantime there was to be no division of profits, but after paying off a debt which was payable by instalments of £500 a-year, one-half of the balance of profits was to be carried to the account of Mr Donald Brown the younger and one-half to what is called a suspense account, and the losses were to be debited in the same way, so that at the end of the three years' trading the balance of profit or loss as the case might be would stand to the credit or the debit of those two accounts; one-half of the balance of profit or loss would be credited or debited as the case might be to the suspense account. There was a power in the meanwhile to apply the money which otherwise would have stood to Donald Brown's account and the suspense account, in payment-off of the capital contributed by Brown the elder and Mr M'Cosh. But that does not seem very material. At the end of the three years Mr M'Cosh may require the adventure to be wound up and an account to be taken, and the surplus, if any, to be ascertained. He will therefore, at the end of that time, and as the result of the joint trading, receive one-half of the balance of profits, if any, or he will have to bear a reduction of what

is due to him on account of the capital contributed by him in respect of the balance of loss. Therefore as the result of the adventure he will receive one-half of the balance of profits if the adventure results in profits, or if it results in loss he will bear one-half the loss.

Now, it appears to me to make no difference that instead of having the business wound up Mr M'Cosh has the option, if he thinks fit to exercise it, but not otherwise, of putting in Mr Adam Jardine as a partner with Mr Donald Brown, and allowing the business to be carried on, and transferring all his interest in the business to Mr Adam Jardine.

On what I have said I can entertain no manner of doubt that the agreement was to carry on a certain business for three years, and at the end of the three years to divide the profit or loss between Mr Donald Brown and Mr M'Cosh, and I know of no *indicia* of a partnership which would not include a transaction or an agreement of that character.

I have not adverted to the provisions which are made in the sixth clause for the cases of the death of Mr Donald Brown or Mr Adam Jardine during the continuance of the term of the adventure, but when I look at that clause those provisions appear to me to strengthen the view I have arrived at from the consideration of the other clauses of the agreement, because in case of the death of Mr Donald Brown, Mr M'Cosh has the right to buy out Mr Donald Brown's interest altogether, and he will then acquire the whole business—instead of being owner of half the business he will become the owner of the whole business. On the other hand, in the case of Mr Adam Jardine's death Mr Brown the elder has a right to buy him out, and he will then have to pay him not only the amount due to him in respect of the capital he has contributed but also the amount standing to the credit of the suspense account. Now, as I ventured to observe in the course of the argument, there is no single case in which Mr Donald Brown, who, Mr Buckley says, is the sole proprietor of this business, can get the suspense account. On the other hand, in every single case that can be put, the balance of that suspense account, if a balance be standing to the credit, will go to Mr M'Cosh or to his nominee Mr Adam Jardine. And on the other hand the balance to the debit of it will be at the charge, in every event that occurs to me, either of Mr M'Cosh or Mr Adam Jardine.

On these grounds I entirely agree that this does constitute a joint adventure or partnership between Mr M'Cosh and Mr Donald Brown, and I concur with the motion which your Lordships have proposed.

Appeal *dismissed* with costs.

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