1892

29366

In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

ALEXANDER STEWART,

(Respondent in the Supreme Court of Canada, in the Court of Queen's Bench, and Plaintiff),

APPELLANT;

AND

JOHN MacLEAN,

(Appellant in the Supreme Court of Canada, in the Court of Queen's Bench, and Defendant),

RESPONDENT;

AND

JAMES HARDISTY SMITH,

MIS-EN-CAUSE.

APPELLANT'S CASE.

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APPELLANT'S CASE.

1. The Respondent, MacLean, prior to the 1st January, 1887, carried on business as a wholesale dry goods merchant in Montreal, in copartnership with John Heath, under the firm name of John MacLean & Co. On the 10th July, 1886, John MacLean's capital account in the books of the firm composed of Heath and himself showed a balance to his credit of $42,177.66. During the year 1886 James Hardisty Smith appears to have loaned to or deposited with the then firm of John MacLean & Co. the sum of $30,000.00, and the Appellant, Mr. Stewart, appears to have loaned to or deposited with the same firm the sum of $25,000. During the year 1886 it was arranged that Heath should retire from the firm, and that Smith and Stewart should enter into partnership with MacLean. The new firm of John MacLean & Co. after an existence of four years and a half suspended payment, and later made an abandonment of its property for the benefit of its creditors. MacLean subsequently bought the firm estate—the sum realized from the sale was paid to the creditors, who granted discharges to all the partners. At the time of the abandonment, the capital accounts of the partners, in the firm books, showed that while large sums were due to Smith and Appellant, MacLean's account was overdrawn to the amount of $29,079.31, the present suit is to recover Stewart's interest in that overdraft and is substantially an action for partition and account. Respondent's contention shortly stated is that in the purchase of the estate he acquired his own overdraft, and that in any event he can offset against plaintiff's claim the amount of the claims of creditors in whose rights he pleads he is subrogated.

Record, p. 13, l. 1. p. 82, l. 27. p. 13, l. 13. p. 13, l. 19. p. 57, l. 14. p. 65, l. 1. p. 63, l. 27. p. 83, l. 39 Civil Code 1898.

2. The articles of partnership between MacLean, Stewart & Smith are dated 31st December, 1886, and the partnership was for a term of five years,

p. 52, l. 28

commencing on 1st January, 1887. At that time it appears that the parties did not know the precise sum MacLean's interest would amount to, for the following provision was made in regard to capital;

Record, p. 52, l. 40. "The capital of the said business to be by the said partners put in and contributed to be as follows:

"The said John MacLean shall contribute the amount standing at his credit in the books of the late firm of John MacLean & Company to wit: all his title and interest in the assets of said firm at that date.

"The said Alexander Stewart and James Hardisty Smith will each contribute the respective amounts standing at their credit on deposit in the books of the late firm of John MacLean & Company at the thirty-first day of December instant, which sums are to be by them deposited to the credit of the firm on said last mentioned day."

3. The Articles further provided that:

p. 53, l. 4 "On capital so put in or standing at the credit of the several parties before mentioned, interest shall be allowed and credited at the rate of seven per centum per annum, and at every succeeding annual balance, interest shall be allowed on the amounts shown at the credit of the partners on the thirty-first day of December next preceding."

It is provided that:

p. 53, l. 20. "The said interest so to be paid on said capital sums shall be a charge on the business of the said copartnership, and the net profits of such business after deduction of bad debts, depreciation of stock of said interest so to be paid on said capital sums, and of all charges and expenses incurred in carrying on such business, shall be divided between them the said partners in the following proportions, viz:—

To the said John MacLean one-half, and to the said Alexander Stewart and James Hardisty Smith each one-quarter, and the losses and liabilities (if any) shall be borne by them in the like proportions."

4. The Articles further provided that:—

p. 53, l 9. "There shall be kept for the said copartnership business, proper books of account after the manner of merchants which shall be balanced yearly on the thirty-first day of December of each year, and shall at all times be open to the examination and inspection of the said copartners respectively. When said books are so balanced, a balance sheet shall be prepared and signed by the said partners, and shall not be open afterwards to objection of any kind by them or either of them, or by their respective executors, heirs or assigns, and shall be binding on and conclusive against them and their respective executors, heirs and legal representatives to all intents and purposes whatsoever."

p. 53, l. 29. 5. It was expressly agreed that in the event of dissolution of the firm by the death or the retirement of a partner from the firm, the share of each partner in the profits shall be the amount shown by the balance sheet of the p. 53, l. 37. 31st December preceding such death or retirement "and the amount of the share of such partner deceased or retiring shall be accounted for and paid over by the other partners, less all moneys actually received by such partner since the date of such balance sheet, it being understood that the balance so established by the said last balance sheet shall be the sole basis of such final settlement."

6. Provision is also made for repaying at stated periods to the heirs of a partner dying before the expiration of five years "the capital then at his credit." Record, p. 53, l. 43.

7. The partners were "entitled to withdraw from the said copartnership business annually, as follows: The said John MacLean the sum of six thousand dollars, and the said Alexander Stewart and James Hardisty Smith, each the sum of three thousand dollars." p. 54, l. 5.

8. MacLean's interest in the firm composed of himself and Heath, when ascertained turned out to be much less than it was on the preceding 10th of July. His capital as shown by his capital account on that date amounted to $42,177.66. It was reduced to $4,480.91 on 31st December following, (1886,) Defendant's Exhibit A3. At the commencement of the copartnership on 1st January, 1887, the several capital accounts stood as follows: p. 82, l. 27; p. 82, l. 36. p. 82, l. 21.

To the Credit of MacLean	$ 4480.91
To the Credit of Stewart	25292.47
To the Credit of Smith	30350.96
	$60124.34

p. 56, l. 36.

9. Each partner's Capital Account was kept separately in the books of the firm. It was credited with interest and his share of the profits when there were profits, and debited with his drawings and his share of losses when there were losses. This method of keeping the accounts was in accordance with the practice in the old firm of John MacLean & Co., and it was followed and approved by the partners in the new firm.

10. Before the expiration of the term of the partnership, viz., on the 22nd day of July, 1891, the partners in the firm of John MacLean & Co. made an abandonment of the copartnership property for the benefit of creditors under the law relating to the abandonment of property in the Province of Quebec. The instrument by which the abandonment was effected makes no reference to the personal or individual estate of each partner as distinguished from the copartnership property of the three. A curator was named by the Court to the copartnership property. The estate showed a nominal surplus but there can be no doubt it was insolvent. The curator caused the stock to be taken and valued. The book debts were also valued. Liberal discounts were made from the stock list prices and book accounts—and after this scaling down process the statement Plaintiff's Exhibit C at enquete, was presented to the creditors with the assent and concurrence of all the partners: p. 57, l. 1. p. 86, l. 25. p. 42, l. 7. p. 48, l. 29 to p. 49, l. 8

Record, p. 62.

STATEMENT.

JOHN MACLEAN & CO.

MONTREAL.

June 30, 1891.

	These figures are in pencil.	These figures are part in pencil, part in ink.
Assets.		
Stock	120,068.75	120,068.75
Book Debts	49,532.43	49,536.94
Bills receivable	1,065.46	1,865.46
Plant	1,600.00	1,600.00
Bank of Scotland	2,618.26	2,618.26
Cash on hand and Bank	4,516.08	4,616.08
	$180,300.98	$180,305.49
Liabilities.		
Bills Payable G. B.		97,198.29
Bills Payable Mer. Bk.		16.000.00
Bills Payable D. A. S.		25,596.52
Open accounts	23,627.62	23,632.13
Rent and taxes		1,445.44
Salaries		1,063.53
Surplus		15,369.58
		$180.305.49
Merchants Bank indirect		115,989.00
Business and water taxes		321.50"

p. 82, l. 16. 11. The Curator with the assistance of the partners prepared a statement of the capital account of each partner, taken from the books of the firm, showing the state of MacLean's capital account from the 30th June, 1884, to 31st p. 83, l. 9. December, 1886, and from that date to 30th June, 1891; and those of Stewart p. 84, l. 9 and Smith from 1st January, 1887 to 30th June, 1891. These accounts were p. 85, l. 9. submitted to the creditors and their representatives by the Curator with the p. 43, ll. 6-42 concurrence of all the partners. The account was fyled by MacLean as Exhibit A3.

From these accounts it would appear that on 30th June, 1891. and at the date of the abandonment MacLean's capital account was overdrawn $29,079.31, Stewart's capital was reduced to $17,185.72, and Smith's to $27,379.54.

p, 67, l. 33. 12. In this state of affairs MacLean made an offer "to the creditors of the said firm of John MacLean & Co., Insolvents" in the following terms:

In the matter of

JOHN MACLEAN & CO.,

Insolvents.

To the Creditors of said Firm:

I hereby renew and confirm the offer of composition upon the liabilities of said firm already made by me as follows:

To pay all privileged and secured claims and expenses in insolvency in full in cash and a composition upon the ordinary liabilities at the rate of Fifty cents

in the dollar to Canadian and American creditors, and ten shillings in the pound to European creditors, payable by my Promissory Notes dated 1st September, 1891, in three instalments as follows: (1) Notes at four months after said date for fifteen cents in the dollar or three shillings in the Pound. (2) Notes at eight months after said date for fifteen cents in the dollar or three shillings in the Pound, and (3) Notes at twelve months from said date for twenty cents in the dollar or four shillings in the pound, the said last mentioned notes (at twelve months) to be secured by the endorsement of Mr. A. F. Gault—the whole on condition that the Assets and Estate generally of the said John MacLean & Co. be transferred to me individually and that a discharge be granted by the creditors to myself, Mr. Alexander Stewart and Mr. James Smith, the former members of said firm of John MacLean & Co.

Montreal, 3rd October, 1891.

(Signed), JOHN MACLEAN.

Having taken communication of the foregoing offer, I hereby agree to endorse Mr. MacLean's Promissory Notes at Twenty cents in the dollar or four shillings in the pound for the third instalment of the composition.

(Signed), A. F. GAULT,
by Atty. R. L. GAULT." Record,

This offer was accepted by the creditors. A petition was presented on behalf of the curator for leave to convey on the terms of this letter and acceptance, the "assets and estate generally of the said firm to the said John MacLean." An order was made in the terms of this petition and on the 6th November, 1891, the formal deed of transfer was executed before Mr. Marler, Notary Public. p. 69, l. 39. p. 63, l. 44. p. 67, l. 19. p. 65, l. 20.

13. The deed of transfer describes Mr. Riddell, the Curator making the transfer, "as *the curator to the property abandoned by the commercial firm of John MacLean & Co.*, heretofore carrying on business at the City of Montreal as wholesale dry goods merchants, composed of John MacLean, Alexander Stewart and James Hardisty Smith, all of Montreal aforesaid, Wholesale Dry Goods Merchants, as the members thereof, as such Curator duly appointed on the advice of their creditors by Mr. Justice Delormier, one of the Judges of the Superior Court for Lower Canada in the District of Montreal, on the eleventh of August last." p. 65, l. 23.

Then the deed proceeds to state "that John MacLean & Co. became insolvent and the said Mr. Riddell was appointed *Curator to their Estate as above mentioned*." p. 65, l. 33.

Next the deed declares that MacLean "offered a composition to the creditors of his said firm" * * * * "the whole on condition that the assets and estate generally of the said John MacLean & Co. be transferred to him the said John MacLean individually, and that a discharge be granted by the creditors to himself, Mr. Alexander Stewart and Mr. James Smith, the former members of the said firm." p. 65, l. 35. p. 65, l. 47.

Next the deed declares "that the said Mr. Riddell as such Curator"—acknowledges that MacLean has complied with the terms of his offer—and "the said curator authorized as aforesaid hereby assigns, transfers and makes over unto the said John MacLean thereof accepting all the assets and estate p. 66, l. 45, to p. 67, l. 5

generally of the said late firm of John MacLean & Co. as they existed at the time the said curator was appointed, including the stock in trade, furniture, and office fixtures, books of account, book debts and bills receivable, cash on hand and in the bank, a list or schedule of the book debts and bills receivable as on the thirtieth day of June last, being hereunto annexed marked "C," and signed for identification by the parties in the presence of the said Notary."

The deed of transfer next declares that:

Record, p. 67, ll. 6-13 "The proceeds of the sales of stock and the collection of the debts to take the place of the assets so collected and realized and being as Mr. Riddell now declares included in the cash handed over by him to Mr. MacLean of all of which assets the said Mr. MacLean acknowledges himself now in possession, and in consideration thereof and of the said John MacLean having been in possession of all the stock and assets hereby transferred ever since the insolvency grant to the said curator a full and final discharge from all further accounting in the premise."

p. 65, l. 36. The offer of MacLean is made a part of the deed of transfer, and appended to the offer and forming part of the deed is the following letter addressed to the "Curator Estate John MacLean & Co.":

p69, ll. 23-38 "To A. F. RIDDELL,

Curator

Estate JOHN MACLEAN & CO.

Montreal.

DEAR SIR:

In consideration of the Creditors of the Firm John MacLean & Co. waiving security on the first and second Instalments of the composition settlement effected by me, I hereby agree to hold the assets of the said Estate to be transferred to me intact for the benefit of the said creditors, and I hereby undertake to place no lien upon the Assets to be transferred to me, this undertaking to remain in force until the said first and second payments of the said Composition are satisfied:—

Yours truly

Signed. JOHN MACLEAN."

14. From MacLean's offer, its acceptance, the petition to the Court, the order to transfer, the terms of the transfer and the acceptance, it is clear that MacLean was bargaining for, and purchased the co-partnership assets only, that Riddell acted as Curator to the copartnership estate,—only—and that the transfer is in terms limited to partnership property and assets—of which MacLean declares he was "in possession ever since the insolvency." He was not in possession of the personal rights or personal property of his partners since the insolvency—and he knew well that he was not acquiring these any more than he was acquiring their personal debts. He was acquiring the stock, book debts and other assets mentioned in the statement, Exhibit C, and he swears that this overdraft was not included in any one of these items of assets.

p. 67, l. 11.

p. 62, l. 1.

p. 23, ll. 1-21.

p. 70, l. 12. Appended to the deed of transfer is a detailed statement of the "open accounts

p. 81, l. 1. receivable" due to John MacLean & Co., and a "list of bills receivable on hand"—due to John MacLean & Co. The statement and list attached to the deed of transfer, specify in detail what accounts, book debts and bills receivable

were transferred to MacLean, and among these there is no mention or reference to the overdraft of $29.079.31, which neither in the statement submitted to creditors nor in any other way was treated as an asset.

Record, Declaration p. 4, l. 4.

15. Some time after MacLean had purchased the assets of John MacLean & Co., Stewart took suit against MacLean for the amount due him as a copartner. Stewart rested his demand upon the settled and undisputed accounts, but offered to go into the accounts if the already settled accounts were not acceptable to MacLean. The Appellant in his declaration substantially sets up the foregoing facts. He invokes the articles of copartnership, fyled the settled and undisputed accounts taken from the books of the firm and proceeds upon the view that once MacLean had exhausted his capital, all subsequent drawing by him, practically was an inroad upon the capital of Stewart and Smith, which should be made good to them according to their respective interests in capital. A calculation upon this basis would give Stewart a claim against MacLean for $11,213.20 for which sum he brought suit—"*praying acte of his willingness to enter into the taking of or rendering of any further account, if deemed necessary by the Court.*" Mr. Smith was made a party to the action in order that he might be apprised of the proceedings. He fyled an appearance by his attorneys—but took no part in the litigation either in the Superior Court or in the Appeals, and he is not taking any part in the present appeal to the Judicial Committee of the Privy Council.

p. 1, l. 8. p. 2, l. 9. p. 54, l. 20 p. 56, l. 1. p. 60, l. 38. p. 4, l. 1. p. 4, l. 5.

16. The Respondent, MacLean, appeared by his attorneys. He made no objection to the form of the action. He did not avail himself of Plaintiff's tender and offer to go into the accounts. He recognized that the action fairly raised the question of responsibility to his late copartners—and he met that issue on the merits. He apparently acquiesced in Plaintiff's view that no advantage could be gained by either party from going into a discussion about accounts that all acknowledged had been correctly kept, that the curator had verified and that the partners themselves had submitted to their creditors. The accounts were settled, undisputed and accepted by all the parties and the only question for settlement was a pure question of law. Neither in the Superior Court nor in the Quebec Court of Appeals nor in the Supreme Court of Canada was any question raised as to the form of the action which fully brought up the question at issue.

p. 43, ll. 6-42.

Record, Pleas.

17. By his first plea Respondent denies the correctness of the Plaintiff's statement of the capital contributed by each partner, and also denies the correctness of the Plaintiff's statement of the amount of Stewart's and Smith's reduced capital and of MacLean's overdraft—at the date of the abandonment—but all controversy upon these points has disappeared since the making of the proof, Plaintiff's averments being sustained.

p. 4, l. 29. p. 4, l. 34. p. 15, ll. 11-16, & p. 18, l. 25. p. 20, i. 7 to p. 22, l. 23.

The plea next admits that "*a judicial abandonment was made by the firm of John MacLean & Co. on the 22nd day of July,* 1891,"—but avers that the overdraft if an indebtedness at all "was an asset" of the "copartnership." By the ninth paragraph of his first plea he reiterates that the overdraft, if it existed (which he declares he does not admit but denies) "was a liability to and an asset of the firm of which he was a member." By the tenth paragraph of his first plea he again avers that if there was an overdraft, "which he does

p. 4, l. 39. p. 4, l. 33. p. 5, l. 3. p. 5, l. 7.

not admit, but, on the contrary expressly denies, the same was a liability to and an asset of the said firm, of which he was a member." Next he pleads (twelfth
Record, p. 5, l. 12. paragraph) that any offer of composition (which would be more correctly termed his offer to purchase) "*was made to the creditors of the firm* (which is quite correct) entitled as such to rank upon the assets thereof and expressly stipulated for the transfer of all assets to himself personally, and specially stipulated for a discharge for his copartners, including the Plaintiff as well as himself." There is no pretence here that Mr. Stewart's personal estate or rights of action were abandoned, vested in the Curator, and were subsequently transfered to MacLean. The second plea repeats the allegations in the first plea—that if there be any "indebtedness" on the part of MacLean, which is
p. 5, l. 39. not admitted, "such indebtedness is a liability on the part of the Defendant to the said firm of John MacLean & Co., and is an asset thereof." Then
p. 5, l. 44. the Defendant pleads that he paid "to the creditors of the firm of John MacLean & Co." "large sums of money," "a proportion of which far exceeding the amount claimed in the present action was and is chargeable against the Plain-
p. 6, l. 1. tiff." He further pleads that "it was expressly stipulated as one of the conditions of the payment of the said debts that a full and complete discharge should be granted to the members of the said firm of John MacLean & Co., and to the present Plaintiff, which discharge and acquittal has been granted." He pleads that when he so paid the obligations of the firm of John MacLean & Co.
p. 6, l. 8. he "was subrogated in all the rights of the creditors of the said firm, whose claims were so discharged against the remaining members thereof." He avers that in consequence of the payments so made to the creditors and the alleged
p. 6, l. 11. subrogation the Plaintiff is indebted to him in a sum exceeding that claimed in the action, and that in consequence Plaintiff's claim is compensated by Defendant's counter claim. There is no pretence here that Mr. Stewart's personal estate and rights of action were abandoned, vested in the curator, and were subsequently conveyed to MacLean.

The third plea re-asserts the allegations of the two preceding pleas, that
p. 6, l. 32. if there be an overdraft, "such liability is a liability on the part of the Defendant to the firm of John MacLean & Co., and is an asset thereof."

Next the Defendant repeats the allegation in his second plea that he "paid
p. 6, l. 35. large sums of money to the creditors of the firm, a proportion of which far exceeding the amount claimed in the present action was and is chargeable against the Plaintiff." He further pleads that when he paid and discharged
p. 6, l. 46. the obligations of the firm of John MacLean & Co., "the Plaintiff's share of which far exceeded the amount claimed in the present action, the Defendant was subrogated in all the rights of the creditors of the said firm" whose claims were so discharged against the remaining members thereof. Defendant here prac-
p. 6, l. 36. tically avers: 1st. That he has the right to charge Plaintiff for a proportion of
p. 6, l. 47. the amount that he paid for the estate, and 2nd. That he acquired from the creditors their rights against Stewart, or at all events, the right to recover from Stewart his "share" of the obligations of the firm, and *that* notwithstand-
p. 7, l. 4. ing the discharge. Next, Defendant pleads that the only moneys drawn by him were drawn in accordance with the articles of partnership, and that he
p. 7, l. 10 never exceeded the amount he was entitled to withdraw from the firm. Next are

charges against the Plaintiff's method of keeping the books, but no attempt was made to sustain these charges. They were practically abandoned and never referred to in any of the proceedings in the Canadian Courts. The accuracy of the keeping of the books and of the accounts has been conceded. It is next pleaded that the capital contributed by Stewart and Smith became part of the assets of the firm, and that Defendant under the Articles had the right to draw upon these assets and did so, with the knowledge and consent of his copartners. The plea concludes with the allegation that "the other items (that is the items other than drawings) of the said capital account (MacLean's) are for the profits and losses made and incurred in the regular course of the said firm's business, and any liability or balance due by the Defendant in respect of the same, was a liability to and asset of the said firm of John MacLean & Co. and of the creditors thereof, and the said Defendant might have been called upon by the said firm and by the creditors thereof to make good and to repay the same into the estate for the common benefit of the creditors." The plea concludes for compensation. It is practically the same as the second plea, with the additional averment that Defendant had the right to draw the sums he did under the Articles. If he had, the creditors had no right of action against him for these drawings. The fourth plea avers that Defendant never overdrew his account in the firm, and that whatever he withdrew was in accordance with the articles of copartnership. Next is an allegation that Plaintiff's drawings should have been charged to "current account" and not against his capital. This was not insisted upon in the Canadian Courts, and then there is the allegation:

Record, p. 7, l. 10.
p. 15, l. 11.
p. 7, l. 24.
p 7, ll. 38 44
p. 7, l. 46.
p. 8, l. 14.
p. 8, l. 26.

"That if any liability appears on the said statement of the Defendant's capital account, the same was and is a liability to and an asset of the said firm of John MacLean & Co., and not of the individual members thereof." Next there is the important allegation in this plea: "That at the time of the composition made by the said Defendant with the creditors of the said firm of John MacLean & Co., *the Curator to the said estate as representing the said creditors, the said creditors themselves, and the inspectors, well knew of such indebtedness,* if any there was, on the part of the said Defendant to the estate of John MacLean & Co.

p.8,ll. 29-31
p.8, ll 32-40

That if any such indebtedness existed at the time of the abandonment of the said estate of John MacLean & Co., the same was an asset of the said estate and of the creditors thereof and was abandoned by the said firm of John MacLean & Co., along with its other assets."

This allegation makes it clear that the Curator was acting as the Curator to the estate of the firm (not as the Curator to Stewart's personal estate) that the creditors he represented were the creditors of the firm, and Defendant's contention is that if any indebtedness existed in respect of the overdraft the firm has abandoned it—as an asset of the said estate to the creditors thereof—"along with its other assets." There is no pretence that either Stewart or Smith had abandoned their personal estate or rights of action and that these had either not been restored or had been transferred to MacLean. The contrary is distinctly alleged, namely that if there was an indebtedness it was an asset of the firm estate, and went with the other firm assets into the hands of the Curator to the firm.

p. 8, l. 40.

Record, p. 8, l. 41. Next, Defendant expressly pleads that the offer he made "to the Curator and to the creditors for the assets and the estate of the said firm was accepted," p. 8, l. 46. and the said estate, assets and effects, including any liability to said firm and to the estate thereof was duly transferred to him,—" by deed passed before p. 9, l. 1. Marler, Notary Public, on 6th November. 1891," a copy of which deed he fyles and invokes.

And he finally pleads:

p. 9, ll. 4-9 "That when the Defendant purchased the estate, and when the same was transferred to him, he became the owner and possessor and was put in possession of any and every claim which the said firm might have had against him, and any debt or liability on his part towards the said firm or towards the partners thereof, and towards the Plaintiff as alleged in his declaration herein became and was and is extinguished by confusion."

Answers to Pleas. 18. The Plaintiff (Appellant) in his answers denies that the overdraft was p. 9, l. 30. an asset of the firm. In his answer to the second plea, Plaintiff says:

p. 10, l. 7. "Defendant's said overdraft is not an asset of the late firm of John MacLean & Co., and is not a liability of Defendant thereto."

The Plaintiff also answers that the sums of money paid by the Defendant p. 10, l. 12. to the creditors was the price of "the assets and estate generally of the said firm," and that these were consideration for the payments of said sums of money p10,ll. 15-23 and "furthermore, Plaintiff says that if any sum was paid by Defendant to the curator of the estate of John MacLean & Company or to the creditors of the said firm it was upon the condition that the assets of the said firm should be transferred to the said Defendant "individually," and such assets were so transferred to the said Defendant, and said Defendant, on such transfer received value and consideration for any payments then made by him, or to be made, and cannot now pretend to claim a second advantage for such payments by setting them off against the sum he individually owes to Plaintiff."

p10 ll. 24 26 Then Plaintiff prays acte of the Defendant's admission in his plea "that a full and complete discharge was granted by the creditors under said settlement to the members of the firm of John MacLean & Co. and to the present p10,ll. 27-29 Plaintiff," and alleges that "thereby the said creditors relinquished all rights and claims against the said Plaintiff, and Defendant cannot now claim anything from Plaintiff under said alleged subrogation or otherwise."

p. 10, l. 46. Plaintiff in his answer to the third plea reasserts "that the overdraft was not an asset of the firm and is not a liability of Defendant thereto." He further asserts that Defendant was not entitled to withdraw moneys from the co-
p. 11, l. 5. partnership business, "other than stipulated in the articles of partnership."
p. 11, l. 8. The Plaintiff further answers that by the articles of copartnership "each partner was entitled to interest on his capital," and the net proceeds of the business after deduction of bad debts, depreciation of stock and of said interest on capital and of all charges and expenses incurred in carrying on the business were to be divided between the partners in proportion as specified in the said articles of copartnership. Further, Plaintiff answers that the "drawings" of the part-
p11,ll. 15-19 ners "were not and were never treated as expenses incurred in carrying on the business, but were properly treated as charges against the individual capital of each partner," * * * "and the Defendant was not entitled to withdraw

any sum whatever from the said copartnership business when his capital had become exhausted." Record.

Then the answer avers that the fact that Defendant did so withdraw does p. 11, l. 20.
not deprive Plaintiff of his recourse, denies that the books were incorrectly or improperly kept, and specially referring to a "private ledger" alleged by Defendant to be withheld, Plaintiff answers:

"The same was delivered up with the other books of account to the p. 11, l. 34.
Curator who took charge of the partnership estate."

The Plaintiff in his answer to the fourth plea specially says:

"It is untrue and is specially denied that the Defendant by his purchase p12,ll.16-22
of the partnership estate of John MacLean & Co., became the owner and possessor, and was put in possession of any and every claim which the Defendant's partners might have against him.

"The Defendant did not purchase from the Curator of the estate of John MacLean & Co., or from the creditors thereof his indebtedness and liability towards his copartners, Plaintiff and Smith."

19. These pleadings in effect amount to this: Plaintiff says to Defendant, "I claim my common law right to adjust accounts with my late partners. I am ready to go into the taking of accounts with you, if you are not satisfied that the accounts already settled are correct. But here is the state of accounts according to our own books. These are the accounts as submitted to our creditors. There is a large overdraft against you and independently of the claims of creditors, we, the partners, should have a settling up among ourselves, and now the more particularly as the claims of creditors no longer exist."

Plaintiff recounts the story of the firm's creation, career and downfall—invokes the balance standing to the debit and credit of the partners' accounts—and claims to be indemnified in respect of the overdraft.

By Article 20 of the Code of Civil Procedure of the Province of Quebec it C.C.P.L.C. Art. 20.
is enacted:

"In any judicial proceeding it is sufficient that the facts and conclusions be distinctly and fairly stated, without any particular form being necessary, and such statements are interpreted according to the meaning of words in ordinary language."

20. The Defendant understood the situation perfectly. He does not deny the Plaintiff's right to sue. He does not pretend that Plaintiff lost his right to sue—or that when the firm assigned the partnership estate, the Plaintiff's personal estate went with it—or that the personal estate vested in the curator of the partnership estate, or that it was transferred to MacLean by the conveyance or that it still remains in the curator. In effect he denies that Plaintiff's claim ever had any connection with Stewart's personal estate, for he uniformly in all his pleas, says: "If there is any overdraft it is an asset of the copartnership, and my liability is not to the Plaintiff but to the firm. I have purchased the firm assets and this asset among them." Whether he relies on the plea of confusion or compensation, the sheet anchor of the defence is that this overdraft is an asset of the firm—that the firm assets were abandoned, and that he acquired them. He never pleads that the personal estate of Stewart was abandoned and that all Stewart's estate and rights of action vested in the

curator, and that he has either acquired these or that they have never been restored to Stewart. All these things are creations of a later date.

Proceeding in Superior Court, Judge Jetté's Judgment. Record, p. 88, l. 1.

21. The case was tried in the Superior Court by the Honourable Mr. Justice Jetté, and the facts as to the partners accounts were found as alleged by Plaintiff.

Judge Jetté also found that though the Capital of the firm was made up of

MacLean's Contribution		$ 4 480.91
Stewart's	do	25,292.47
Smith's	do	30,350.96
Aggregating the sum of		$60,124.34

nevertheless each of the partners contributed his capital for enjoyment p. 88, l. 29. *(jouissance)* and not for property *(propriété)* because each partner had stipu- p. 53, l. 4. lated for interest on his capital and had the right to withdraw it in the event of retirement or anticipated dissolution. The judgment finds that "the p. 88, l. 34. partnership so formed" made an abandonment of its property to its creditors, p. 88, l. 38. that "the partnership" was insolvent, and had lost all its capital—that the p. 88, l. 41. creditors consented to transfer "the assets of the said copartnership to Mac- p 89,ll.24-32 Lean," for the consideration already mentioned. Upon the plea of compensation the Superior Court judgment is that the sum paid by MacLean was for the assets of the partnership estate, that it is not established that any sum was exacted in consideration of granting the discharge, but, on the contrary, it was proved that the sum paid by him was the real value of the copartnership estate. The judgment rejected the p. 88, l. 34. plea of compensation. Upon the plea of confusion the judgment of the Superior Court is that under the deed of copartnership the partners had the right to draw the sums they did from the partnership, that it is established that these sums were entered in the books of the firm to the debit of capital; that these entries were so made to the Defendant's knowledge, and that in other respects they were perfectly justified by the deed of partnership; the judgment p. 89, l. 42 also is that even if these withdrawals had been entered to the debit of "current to p. 90, l. 3 account"—"they would not constitute in the hands of the creditors a special and distinct right against MacLean giving rise to a retrocession extinctive of the personal and reciprocal rights of the partners between themselves flowing from the stipulation of the deed of partnership on the subject of the apportionment of losses; that these entries were only intended to establish the state of the situation of MacLean towards his copartners, and it is from this point of view that they can be justly appreciated: that, in consequence, the creditors have not transferred to MacLean a right which did not concern them and in consequence no confusion could be produced."

The judgment then holds that as "the abandonment has absorbed the total capital and there is between partners a total loss, * * * * "and as the capital was created originally by sums advanced by the partners (sommes p. 90,ll.5-14 versées à titre d'avance par les associés) and in unequal proportions, it is now proper to equalize the contributions in order to distribute fairly (*équilibrer*) the loss between them."

The total capital, $60,124.34, being lost, the judgment holds that that loss p. 90, l. 7. must be borne in the proportion specified in the articles, namely, by MacLean

one-half, $30,062.17, by Stewart one-quarter, $15,031.08½, and by Smith one-quarter, $15,031.08½. Deducting MacLean's capital from the loss he should bear there remained the sum of $25,581.26 which he was still bound to make good. Deducting Stewart's share of the loss he was bound to bear $15,031.08½ from the amount he had lost (his capital) $25,292.47 there remained the sum of $10,261.38½, which loss he had borne in excess of his proportion. By like calculation Smith had borne in excess of his proportion of loss $15,319.87½. The two items for excess of loss borne by Smith and Stewart added together amounted to $25,581.26,—the amount of loss that MacLean was bound to make good to his partners. The judgment holds that the action is substantially one to establish the apportionment of the loss in accordance with the articles of partnership, and that Stewart's demand is well founded to the extent of $10,281.08½.

Record, p 90,ll 25 32

The Judgment of the Court of Queen's Bench, Appeal Side, Opinion of Chief Justice Lacoste

22. From this judgment an appeal was taken by MacLean to the Quebec Court of Queen's Bench, Appeal Side, and the judgment of that Court, composed of five judges, was unanimous—the Appellate Court finding that "there is no error in the judgment appealed from."

The Chief Justice, Sir Alexander Lacoste, alone gave reasons for the judgment of the Court of Appeal. For convenience a translation of this judgment was inserted in the present Appellant's factum in the Supreme Court. After stating the facts and the issues, he explains the reasoning by which the Honourable Mr. Justice Jetté arrived at the conclusion that MacLean should be condemned to pay $10,261.38½ to Stewart. But the summary lacks the force of the consecutive reasoning of Mr. Justice Jetté's complete opinion.

p. 91, l. 34.
p. 110, l. 45

Next the Chief Justice considers what he terms the important question as to the right of action—a question not raised in the pleadings, and he puts the question in this form: "Has the cession taken away from the copartners the recourses which they might exercise against each other in regulating the affairs of the partnership which existed between them?" And he states the proposition of the present Respondent to be that "the abandonment of property transferred to the Curator not only the property and rights of actions of the firm of John MacLean & Co., but also the personal property of the members of the copartnership from which it would result that Stewart would have lost all his recourses against his copartners." An examination of the pleadings just reviewed will show that this is not the Respondent's proposition. The Chief Justice thinks that the proposition is right in principle. "That the judicial abandonment of a firm includes not only the property of the partnership but also those of the partners and that this transmission is effected by the sole operation of law." The only law referred to by the Chief Justice from which this consequence flows, is the article 772 of the Code of Civil Procedure of Lower Canada, and the decision rendered by the Superior Court sitting in Review (not the Court of Appeal) in the case of Reid vs. Bisset, 15 Quebec Law Reports, 108, in which the question incidentally arose. The learned Chief Justice states that this is a consequence of the personal as well as partnership obligations which every partner contracts towards the creditors of the partnership. The present Appellant contests the proposition and will submit his reason for contending that there is nothing in the law relating to the abandon-

p. 93, l. 34.
p 93,ll.36-40
p 93,ll.41-44
p. 93, l. 45.

ment of property which operates the abandonment of anything more than the abandonment of the property of the debtor making the abandonment, and will further submit that Bisset & Reid had been wrongly decided and should not be followed. The obligation of a partner to firm creditors is one thing; the effect of the abandonment is another. The learned judge who delivered the reasoned judgment in Bisset & Reid assumed that certain principles prevailed that it would be convenient to apply, but which principles no matter how excellent could not be applicable unless deducible from the statute, and further assumed and stated that the provisions of the law in relation to the abandonment of property were the same as the provisions of the Insolvent Acts formerly in force, whereas in this respect they widely differ. No critical examination of the law relating to abandonment or of the case of Bisset & Reid was made by the Chief Justice, as appears from the judgment.

Record, p. 93, l. 46. The learned Chief Justice says that it was in recognition of this principle that the Court of Rennes in France in 1808 (Sirey 1808–2–354) (Sirey 1809–2–47) denied to a partner a recourse against his copartners after the partnership was placed in bankruptcy. That case turned upon the special provision of the law of France of that date applicable to it, and it differs essentially from this on the facts, for the partners there assigned for a consideration, namely, their discharge, *not only the partnership assets but their personal estate by formal act of cession*, and the latter passed by that act and not by operation of law, and further it does not appear that there was any provision in that case as there is in the articles of copartnership in this, for each partner as between partners retaining the ownership of and receiving interest upon his capital.

p. 94, l. 5. The Chief Justice, however, holds that the discharge given by the creditors to the partners left them free to exercise their rights against each other.

p 94, ll.6-10. He also finds that there was no transfer to MacLean of the personal rights of Stewart, that the deed of transfer from the curator to MacLean established the contrary, that it was not his intention to acquire the personal rights and assets of his copartners any more than to assume their debts.

The Chief Justice on the authority of Depouilly & Gouin reported in

p. 94, l. 16. Dalloz (1869-1-467) holds that the partners having received back their personal rights may demand from each other the regulation of the copartnership accounts. Coming to the merits of the action the Chief Justice in effect held

p. 94, l. 29. that the amount of MacLean's overdraft is not an asset of the late firm, that the firm creditors could not call upon him to pay that sum to them, that he had a right to draw a certain sum annually from the business and that he had not

p. 94, l. 32. exceeded this amount, that at the end of the partnership each partner owed an account to his copartners of what he received from the partnership in order that an equitable division should be made according to law and the articles of

p. 94, l. 26. partnership, and this was the character of Mr. Stewart's action. The plea of confusion was therefore unfounded.

p. 94, l. 38. The Chief Justice also held that the plea of compensation was equally un-

p. 94, l. 41. founded. There was no subrogation in the rights of the creditors. MacLean

p. 94, l. 41. got value for what he paid, namely the partnership assets, and he could not in any event exercise a recourse against his copartners and codebtors without

p. 94, l. 44. accounting for the partnership estate. But besides this he had stipulated that

they should be free from the claims of the creditors. In these circumstances there could be no compensation. Record, p. 94, l. 45.

Upon the plea that MacLean was not accountable for the sum claimed because the articles authorized him to withdraw, the Chief Justice held that a partner must account after the dissolution of the partnership for what he drew legitimately in virtue of the articles, and that he owes this account, not to the partnership but to his copartners to reach an equitable division of the profits and losses. p. 95, ll. 2-5.

The Chief Justice held that what a copartner might obtain from his co-partner was an account and partition of the partnership property, that in this account and partition each made a return to the mass of what he had received, the debts are deducted and the balance divided in conformity with the law and the articles. The demand for accounting in respect of the overdraft of one partner and with reference to the credit balance of the other two was irregular. But no objection was taken to the form of the action. The object of the action was to obtain a partition of what remained of the partnership, and as the Plaintiff in his conclusions offered to render any account which should be judged necessary, an offer which the Defendant did not think proper to avail himself of, he was disposed to render justice between the parties as the Superior Court had done on the action as brought. The Chief Justice then lays down this important principle: p. 95, l. 12. p. 95, l. 17. p 95, ll. 18-22

"The abandonment of property having swallowed up the assets of the partnership, there is nothing to count upon to form the mass but the returns of the partners drawings. But, on the other hand, the partners having been freed from the partnership debts, the mass must return to them (the partners) in its entirety. This (mass so formed) is first applied to repay the capital which comes back to each partner." p 95, ll. 23-26

In the Chief Justice's opinion, the partners had stipulated that the capital should be repaid to the partners before the partition. The stipulation to pay interest to each partner on his capital during the partnership was in effect a stipulation that the capital of each partner should be withdrawn before the partition, and he refers to a case in Sirey (1865-1-2) to sustain this view. He agreed with the judgment of Mr. Justice Jetté in saying that the capital being lost the partners must contribute to the loss in the proportion agreed upon, but before applying this rule account must be taken of the sums received from the partnership by each partner. p. 95, l. 34. p 95, ll. 31-33 p. 95, l. 40.

Applying the rules above laid down the Chief Justice said each partner should return what he received from the partnership, out of this each partner should be repaid his capital, *pro tanto*, and the deficiency being loss, should be divided in the proportion of one half to MacLean and one quarter to each of the other partners. The result gives a sum in excess of the amount of the judgment. p. 95, l. 44.

Proceedings in the Supreme Court of Canada.

23. From this judgment the Defendant appealed to the Supreme Court of Canada. In the Supreme Court the present Respondent made no pretence that the action was not properly brought. His factum shows he met the case on the merits. He reasserts his original pleas of confusion and compensation. He states his position succinctly thus: Record, p. 101, l. 1.

Record,
p. 101, l. 44. "Appellant pleads confusion and compensation and denies any liability towards Respondent.

p. 101, l. 45. "He contends that whatever amount he may have drawn from the firm and for which he may be accountable, is a debt due to the firm and consequently an asset of the latter which it had transferred to its creditors, who in their turn, transferred it to Appellant, who has thus become his own creditor, thereby extinguishing the debt by confusion.

p. 102, l. 4. "Appellant (now Respondent) further pleads the settlement and the payment by him of sums exceeding $100,000, to the creditors of the firm; that Respondent's (now Appellant's) liability was far in excess of any amount claimed by his action; and that the Appellant in settling with the creditors was subrogated in their rights and entitled to compensate such rights as against any indebtedness."

From this it is clear that MacLean does not pretend to have purchased anything more than "the assets of the firm" and though he argues later that the abandonment of the firm property involves the abandonment of the personal property of each partner a proposition that Stewart denies,—it does not appear how the personal estate and property of Stewart could be conveyed to MacLean as "an asset of the firm."

The then Appellant, MacLean, next proceeds to state his view of what the then Respondent's contention is as follows:

p101,ll29-33 "The Respondent, contending that the abandonment of property and the composition effected by the Appellant have not destroyed the rights and obligations of the partners between themselves, and that Appellant owes him an account of part of his capital of which only the enjoyment had been given the partnership, took the present action to enforce such alleged right."

p. 104, l. 44 MacLean in his factum in the Supreme Court admits the correctness of the amount of the overdraft of $29,079.31, and thus summarizes his argument upon the plea of confusion.

p104,ll43-47 "It therefore follows that Appellant, in drawing as he did from the business, the said sum of $29,079.31, when he had no right to do so, became thereby primarily liable to the firm for the amount of such drawings, and that on his purchasing the assets of the firm and taking a transfer thereof, the said indebtedness became extinguished by confusion."

If he had the right to withdraw, this argument would fail. The item of $29,079.31 is arrived at by crediting interest and profit and debiting interest charged and losses, as well as by withdrawal of actual money. There is nothing to relieve him from accounting at the dissolution.

In his factum in the Supreme Court, the present Respondent makes this admission:

p.105,ll.5-9. "It is not of course denied that after a firm has made an abandonment of its property and the creditors have been paid in full, the partners resume the exercise of their personal rights, and are entitled to an account from one another and to a final settlement of the partnership affairs according to the articles of copartnership."

Why should this proposition not apply in a case where the creditors accept the sum realized from the sale of the abandoned property in full satisfaction of

all their demands. The admission virtually concedes the Appellant's right of action. MacLean states in his factum in the Supreme Court that Stewart bases his claim upon the discharge. This is not so. Independently of the claims of creditors, Stewart contends that the partners are accountable to each other. The abandonment of the firm property did not destroy this right. That the discharge supervened may have facilitated its exercise.

Record, p110,l37 41

24. The Respondent, Stewart, in his factum in the Supreme Court, "for convenience adopts the statement made by Sir Alexander Lacoste, Chief Justice of the Court of Appeals, giving a translation of the judgment in its entirety, but noting at the close the exception which he takes to the comments upon the form of the action and the right of action."

At the close of the Chief Justice's remarks, the then Respondent, after referring to the form of the action, discusses the effect of the abandonment, and carefully distinguishes between the rights of creditors as against the partnership, and the rights of partners *inter se.*

p. 116, l. 28.

He states his position thus :

"*The abandonment is not a mode of either extinguishing obligations or releasing from debts except to the extent that they are paid or remitted.* The claims of the creditors thus would still subsist for the unsatisfied portion of the debts due them had they not released the partners therefor. The claims of the creditors against the partners is one thing and the claims of the partners *inter se* is another and totally distinct thing, *which exists separately and independently of the creditors claims. Now the creditors have released the partners from these claims, but have they, or could they,* release the partners *from the claims they may have inter se.*' They have not and could not, and these claims subsisted after the discharge *and were not extinguished by anything that was done.* While their assets were in the hands of their creditors, these claims of the partners *inter se* no doubt *could not be exercised to the prejudice of the creditors,* but once the partners were discharged *the claims of the partners inter se were untrammelled.*

p. 116, l. 42-p.117, l. 12.

MacLean did not offer to purchase or buy from the creditors the claims of his partners against him. His offer was for the assets of the firm of John MacLean & Coy.—the assets of the copartnership."

The Supreme Court Judgment. Record, p 128,ll.1-11

25. The Judges of the Supreme Court were divided in opinion. Three were for allowing the appeal, two for the reasons stated by one of them, the other without giving reasons. Two—the Chief Justice Sir Henry Strong and Mr. Justice Taschereau—were for dismissing the appeal for the reasons assigned by Chief Justice Lacoste. Mr. Justice Sedgewick alone gave reasons for the judgment of the Supreme Court.

Mr. Justice Sedgewick in his statement of the case says that "an arrangement was come to" by which "the assets of the firm" were transferred to MacLean personally "with the knowledge and assent of his partners." Stewart and Smith, must have known of the sale but there is nothing to show that they assented to it. They are not parties to the transfer; their assent was not asked for. MacLean "individually" made the "arrangement" with the curator to the firm and the firm creditors—altogether apart from Smith or Stewart.

p.128, l. 14

Mr. Justice Sedgewick allowed the appeal on three grounds, but before stating these admitted that "had the firm been dissolved in the ordinary way,

p. 128. ll. 17-23.

there having been no judicial abandonment, and had the action been brought for the winding up of the partnership and the distribution of the assets upon the basis of the partnership articles amongst the different partners the Defendant Stewart (sic.) (obviously intended for MacLean) would rightly have been called upon to pay the amount of the judgment recovered in the present action."

Record, p. 128, l. 23. The learned judge finds that the case here presented is a different one, "calling for the application of different principles." Appellant's rights must therefore have been taken away by the judicial abandonment.

p. 128, l. 24. Then the learned judge proceeds to state that: "There is no question as to the legal consequences which follow upon the judicial abandonment by the members of a partnership of the firm assets for the benefit of its creditors. Such an abandonment transfers to the curator not only the estate and rights of action of the partnership but also the estate and rights of action of each member of that partnership." The pretension of the present Appellant is and always was the very reverse; and his reasons for that view will be stated later. The learned judge thinks that Plaintiff's right of action passed by virtue of the abandonment and the subsequent proceedings to the curator—

p. 128, l. 35. "and had never yet been retransferred to the Plaintiff." "It went from him

p. 128, l. 36. by operation of law," says the learned judge, and "has never been restored either by operation of law or by any act of any person qualified or authorized to make such restoration." Then the learned judge states that "the abandoned

p. 128, l. 39. property was in effect purchased by Defendant MacLean"—which is quite true. But there still remains the question: "What property?" He thinks the

p. 129, l. 4. abandonment destroys the action to account. Stewart was "discharged"—"but the property and rights which, by the abandonment went to the curator, still remained outstanding in the Curator, who alone might sue in respect of them."

p. 129, l. 8. The learned judge cannot see how MacLean's purchase "could vest in Stewart

p. 129, ll. 9-12 any right of action," and proceeds to state that: "One effect of the abandonment was to dissolve the firm. From that moment the partners became strangers. Their existing liabilities and obligations toward each other doubtless remained unimpaired," (a proposition to which Appellant readily assents,) "but each individual had thereafter a right to do business on his own account and for his own benefit without reference to any of his associates." Underlying the whole reasoning is the assumption that the individual property and personal rights of Stewart were abandoned and vested in the curator—that Stewart was simply

p. 129, l. 29. discharged, that "the discharge of a debtor under the Code of Civil Procedure operates as a discharge only and does not bring with it any right of action

p. 129, l. 41. which he may have had before the abandonment." For this reason Judge Sedgewick was of opinion that the action should be dismissed.

Judge Sedgewick's second ground for allowing the appeal is that: "Inas-

p. 130, l. 18. much as the claim now sued on was a right of action which Stewart had at the time of the abandonment, it was a right of action which became vested in MacLean by virtue of the transfer," not because it was an "asset of the estate of John MacLean & Co.," as stated in the pleadings, but because the expression

p. 130, l. 14. "all the assets and estate generally of the said late firm of John MacLean & Co. as they existed at the time the said curator was appointed," included in the

p. 130, l. 16. learned judge's view "the separate estates of the individual partners as well, as the joint estate of the partnership itself." This, too, involves the assump-

tion, that the assets and personal property of each partner were abandoned, vested in the curator and were transferred to MacLean. This is not pleaded and is not the issue. And besides the terms of MacLean's offer to purchase and of the deed of conveyance make it clear that the personal estate and rights of Stewart were not the subject of bargain and sale.

The third ground upon which the appeal was allowed is that MacLean is practically in the position of a stranger who purchased the "firm assets" with his own money that he is subrogated in the creditors' and the curator's rights—just as a stranger would be, "having liquidated all the partnership debts with his own moneys, the debts which were due from the firm to the creditors became due to him personally," and he holds that "*MacLean becomes in effect a creditor of the firm not for the amount of the composition paid by him but for the full amount of the indebtedness that that composition represented.*" No account is here taken of the discharge in the face of which there could be no subrogation, or of the fact that the creditors accepted the proceeds realized from the sale of the estate in satisfaction of the original debt, which was thus extinguished. Finally, the learned judge thinks that MacLean has the right to set off against Stewart's claim the difference between the sum paid in composition and the total amount of the debt discharged. Judge Fournier concurred in these reasons. Mr. Justice King was of opinion that the appeal should be allowed but gives no reason and does not state that he concurs in Judge Sedgewick's reasons.

Record, p. 130, l. 30. p. 130, l. 36. p. 130, l. 40. p. 128, l. 9. p. 131, l. 29.

26. There can be no doubt of the correctness of the accounts fyled, and that they truly represent the condition of the respective capital accounts of the partners. Before the abandonment the partners did not treat MacLean's overdraft as an asset of the firm, and in the statements made to their creditors it was not included as an asset. MacLean says it was not an asset.

p. 43, l. 4. p 23,ll.18-21

The proceedings before and subsequent to the abandonment and the act of abandonment itself, show that the partnership property alone was abandoned, and that there was no abandonment of the personal estate and rights of the partners individually. The abandonment was made on the demand of the Merchants Bank, a creditor of John MacLean & Co. The copartners as such abandoned all their property and specify what it is and where it is, viz., "stock in trade consisting of silks, velvets, ribbons, ladies hats and general millinery goods, office and warehouse furniture and fixtures, all contained in store being on St. Helen Street, in the City of Montreal, book accounts and bills receivable."

p. 57, l. 1. p. 57, l. 1. p57,ll.15-18

This all indicates firm property—and firm property only—and it has never been contended in any of the written or oral pleadings that this instrument abandoned in terms anything but firm assets. The pleas state that the judicial abandonment was made "by the firm;" that the indebtedness in respect of the overdraft was an asset of the firm; that as such it was vested in the Curator to the firm; and was transferred by such Curator to MacLean. In none of the pleadings defining the issue is it pleaded that by the abandonment of the firm assets,

p. 4, l. 39.

the individual property and rights of the partners vested in the Curator—nor is it contended in any of them that Plaintiff's right of action as an individual became vested in the Curator and was transferred by him to MacLean.

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27. There was no curator named to the personal estates of the three partners. As the personal estates had not been assigned, no curator was necessary.

Record. p. 65, l. 25. The curator was appointed by the creditors of the firm, and to the firm estate.

When Mr. MacLean wished to repurchase the property and rights abandoned he addressed his offer to "the creditors of said firm"—and offered to pay fifty cents in the dollar, not upon all debts individual as well as copartnership—but upon "the liabilities of said firm." His offer was for "the assets and estate generally" of the firm. He, at the same time addressed a letter to "A. F. Riddell, Curator Estate John MacLean & Co.," undertaking to place no lien upon the assets. The Inspectors who passed upon and recommended the acceptance of this offer were "the Inspectors to the Estate of John MacLean & Co." They instructed the Curator to the estate to apply for an order of Court authorizing him to transfer the firm estate to MacLean individually. The order authorized the Curator to transfer to MacLean "the assets and estate generally of the said firm." The deed of transfer shows clearly what was transferred and by whom. Mr. Riddell, acting in his quality as vendor, is correctly described as *"curator to the property abandoned by the commercial firm of John MacLean & Co."* To make the matter clearer the deed declares that "John MacLean & Co. became insolvent and the said Mr. Riddell was appointed curator to their estate." The transfer is specified to be of the "assets and estate generally of the said late firm of John MacLean & Co." Then the general character of these assets are described which shows that they are simply the partnership assets originally abandoned—saving only portions of the stock sold since the abandonment, and certain debts collected—"the proceeds" of which "sale of stock" and "collection of debts" Mr. Riddell declared were "included in the cash handed over by him to Mr. MacLean, of all which assets the said Mr. MacLean acknowledges himself now in possession and in consideration thereof and of the said John MacLean having been in possession of all the stock and assets hereby transferred ever since the insolvency grant to the said Curator a full and final discharge from all further accounting in the premises."

p. 68, l. 42. p. 68, l. 43. p. 69, l. 9. p. 69, l. 24. p. 68, l. 37. p. 69, l. 40. p. 65, l. 2. p. 67, l. 47. p. 65, l. 23. p. 65, l. 35. p. 66, l. 46. p. 67, l. 6.

MacLean was not in possession of the personal rights and assets of Stewart or Smith since the insolvency. Neither was the curator. They were not in contemplation in this sale and transfer. The curator had only firm assets to sell, and MacLean knew perfectly well, as the deed shows, that he was only buying firm assets. Even if the personal estate and rights of Stewart vested in the curator, they certainly were never transferred to MacLean. *Neither Stewart nor Smith were parties to the deed of transfer.*

p. 67, l. 25.

28. Mr. Justice Sedgewick says that if it were contemplated that MacLean should remain liable towards his copartners "there should have been a clear indication of it in the deed itself." It is not clear that any declaration made in a deed between the curator and MacLean would bind Stewart and Smith

who were not parties. But accepting the general principle enunciated by the learned judge, it may, with force, be answered that if it were contemplated that MacLean was purchasing the separate estates and rights of his copartners, "there should have been a clear indication of it in the deed itself." The distinct limitation of the purchase to copartnership assets and the absence of all reference to the personal estates and rights of his copartners, make it abundantly clear that Mr. MacLean did not contemplate the acquisition of his partners' estates and rights—much less their debts. Record, p.130, l. 27.

29. The first two grounds of the judgment of Mr. Justice Sedgewick assume that the abandonment of the copartnership estate, involves the abandonment of the individual rights and estate of each partner—"by operation of law." As before the abandonment, without doubt, there were the separate estates as well as the copartnership property and as the partners only abandoned one—and no one is assumed to strip himself of his rights and property—the law must be explicit that operates the abandonment of the property of a private individual when the instrument clearly refers to copartnership property. p. 129, l. 44.

Further, the first two grounds of the judgment involve the assumption that the abandonment and the subsequent proceedings vested the property and rights of action of each partner in the Curator.

30. The original provisions of the Code of Procedure in relation to abandonment of property, had reference solely to "any debtor arrested under a writ of capias *ad respondendum*." These provisions were amended and the law so amended was made also applicable to "every trader who has ceased his payments." The law is not an insolvent law; the provincial legislature which passed it has no power to legislate upon Bankruptcy or Insolvency. The abandonment of property has not for its object the extinguishing of any rights the debtor has. It is simply a means by which the debtor's property is placed in the hands of an administrator who takes possession of it, realizes it and distributes the proceeds of it, in the form of dividends, among the creditors according to their rights, and the creditors claims are discharged to the extent of the amounts so paid. If the creditors, as a matter of grace, choose to discharge the whole debt, when but half of it is paid, that is their matter. There is nothing in the law relating to the "abandonment of property"—that makes the debtor or trader *abandon any of his rights.* The provisions of the Code of Procedure are under the heading of "Abandonment of property." The debtor or trader as the case may be "may make a judicial abandonment of his property for the benefit of his creditors." The abandonment is effected by fyling a statement in the office of the Prothonotary of the District where the trader has his place of business—and the statement must be accompanied with a declaration that he "consents to abandon all his property to his creditors." C.C.P.L.C. Articles, 763-780. Amended by R.S.Q. Articles 5952 5965 and further amended Statutes of Quebec, 1889. 52 Vict. Chap. 51. C.C.P., 772 (a) and 779. C.C.P. Art. 763 and 763. (a). C.C.P. Art. 764, Sec. 4, C.C.P. Art. 764, Sec. 3.

The Prothonotary appoints "a provisional guardian," who personally or by deputy "takes immediate possession of all the property liable to seizure and the books of account of the debtor." Then the Court or Judge, upon the demand of a party interested, must appoint upon the advice of the creditors of the debtor, a curator to the property of such debtor. Inspectors or advisers are appointed in the same manner. The abandonment stays execution against the debtor's property. Art. 768. Art. 768, Sec. 3. Art. 768, Sec. 4. Art. 769.

Record, C.C.P. Art. 771. "The curator takes possession of all the property mentioned in the statement and administers it until it is sold, in the manner hereinafter mentioned."

Art. 772, (as amended.) The curator has also the right to receive, collect and recover any other property belonging to the debtor, and which the latter has failed to include in his statement. The "other property" here referred to is clearly restricted to such property as the debtor should have mentioned—but failed to mention in the statement. The debtor in this case is the firm. The partners only abandoned the partnership property—and they abandoned it all. They did not exclude any partnership property from their statement. "The abandonment of his property deprives the debtor of *the enjoyment of* his *property* and gives his creditors the right to have it sold for the payment of their respective claims."

C.C.P. Art. 778 (a).

31. The ownership is in the debtor: but he is deprived of the "enjoyment" of the property: it passes into the possession of the Curator who administers it: the creditors have the right to have it sold and "the moneys realized by the creditors from the property of the debtor, must be distributed among the creditors by means of dividend sheets," and the dividends operate as a discharge *pro tanto*. These provisions relate to the property belonging to the debtor. The debtor does not dispossess himself of his rights of action—by abandoning his property. There is no doubt the Curator has a right to get possession of and to administer the property of the debtor; but of himself he cannot exercise any right of action of the debtor. The right of action is not abandoned; it is provided that the Curator may exercise it, but only "with the permission of the Court or Judge upon the advice of the creditors or inspectors." This must refer to some right of action in respect of the property abandoned. The right of action of Appellant formed no part of the abandoned property, or of the rights of the mass of the creditors. These had the right to be paid in full, and the personal estates of the partners were liable to contribution—after private creditors were satisfied—for copartnership debts. The partners were jointly and severally liable to the creditors. Stewart's right of action against MacLean, even though formally ceded, could add nothing to the rights the creditors had already.

Art. 772 (a)

Art. 779.

C.C.P. Art. 771.

C.C.P. Art. 772, Sec. 2.

32. But even if the right of Stewart to call MacLean to account was a right that the curator could exercise, during the administration, upon the advice of creditors and with the permission of the Court, his not doing so left that right where it was in Stewart. That right remained untouched when the creditors consented to accept fifty cents in the dollar in satisfaction of their claims, and in discharge of their debtors. Where did the moneys come from that satisfied the creditors? Mr. Justice Sedgewick speaks of these as MacLean's moneys. It was in the language of C.C.P. 772(a) "the money realized by the curator from the property of the debtor"—that is of the partnership. If MacLean bought the partnership stock and assets he got moneys worth for his money. The stock and assets were the property of the firm and the interest of Stewart and Smith was far greater than MacLean's in the stock and assets. His interest as between partners was really a *minus* quantity. Had the estate been sold to a stranger for sufficient to pay the

Record, p. 129, 1-7.

C.C.P. 772. (a).

creditors in full, his account with his partners would still show an overdraft of $29,000. It is a displacement of the actual controversy to say that MacLean's money went to discharge the firm's debts. MacLean's money went to purchase the stock and assets of the partnership. For his money he got an equivalent with which he was satisfied. It is proved that the stock and assets of the firm were worth the price that MacLean paid for them. What had been his money took the place of the partnership assets and was distributed by the Curator in dividends—not as MacLean's money—but as the money realized from the sale of the abandoned partnership property. The creditors were content to abate their full claims and accept ten shillings in the pound, and they, not MacLean, granted the discharge to all the partners. Instead of a discharge for half they granted a complete discharge and MacLean was personally interested in stipulating for this, for without it he could not carry on business. The rights of action of the debtor, and the debtor's property are not vested in the Curator. He may, in certain circumstances, exercise the debtor's right of action, but it is the debtor's right, not his.

Record, p. 68, l. 4.

p. 46, l. 39-p. 47, l. 6.

p. 68, l. 6.

C.C.P. Art. 772.

33. It was otherwise under the provisions of the Canadian Insolvent Acts of 1864, 1869 and 1875. Under the Insolvent Act of 1864, the estate of the Insolvent was absolutely conveyed to and vested in the Assignee :—

The greater scope and effect of the provisions of the Insolvent Acts of 1864, 1869 and 1875 now repealed.

Insolvency Act, 1864, Sec. 2, sub-section 7 provides that :

"The assignment shall be held to convey and vest in the assignee, the books of account of the Insolvent, all vouchers, accounts, letters and other papers and documents relating to his business, all moneys and negotiable paper, stocks, bonds, and other securities, as well as all the real estate of the Insolvent, and all his interest therein, whether in fee or otherwise, *and also all his personal estate and moveable and immoveable property*, assets and effects, which he has or may become entitled to at any time before his discharge is effected under this Act, excepting only such as are exempt from seizure and sale under execution, by virtue of the several statutes in such case made and provided."

This sub-section is re-enacted in the 10th section of the Canadian Insolvent Act of 1869.

Insolvent Act, 1869. Sec. 29.

By the 29th section of the Insolvency Act, 1869, it is enacted that :

"Upon the appointment of the assignee, the guardian shall immediately deliver the estate and effects in his custody to such assignee ; and by the effect of his appointment, *the whole of the estate and effects of the Insolvent, whether real or personal, moveable or immoveable,* as existing at the date of the issue of the writ, and which may accrue to him by any title whatsoever, up to the time of his discharge under this Act, and whether seized or not seized under the writ of attachment, shall vest in the said assignee in the same manner, to the same extent and with the same exceptions, as if he had been duly appointed assignee to such insolvent under a voluntary assignment of his estate and effects executed by the Insolvent to an interim assignee, and such estate and effects had been duly transferred to him as hereinbefore provided."

The 116th section of the Insolvent Act of 1869, provides that :

Insolvent Act, 1869, Sec. 116.

"The operation of sections ten and twenty-nine of this Act, shall extend *to all the assets of the Insolvent, of every kind and description,* although they are

actually under seizure under any ordinary Writ of Attachment, or under any Writ of Execution, so long as they are not actually sold by the Sheriff or Sheriff's officer under such writ."

Insolvent Act, 1869, Secs. 10, 29, and 116.

These sections put it beyond question not only that the Insolvent's estate and property are conveyed to and vested in the assignee, but his "personal estate" as distinguished from his interests as a Trader to which the Insolvent Act is made specially applicable is conveyed and vested in the assignee.

Insolvent Act, 1869, Sec. 29.

But the assignee was also vested with the absolute and exclusive right to exercise in his own name, all the rights of action that formerly belonged to the Insolvent but are the Insolvent's no longer in consequence of the conveyance. Section 42 of the Act of 1869 provides that :

Insolvent Act, 1869, Sec. 42.

"The Assignee, in his own name, as such, shall have the exclusive right to sue for the recovery of all debts due to or claimed by the Insolvent, of every kind and nature whatsoever."

34. It was under the provisions of the Insolvent Act of 1864 that the late Mr. Justice Torrance in 1868 held in the Superior Court, that an assignment made by a copartnership vests in the assignee the separate estates of the partners, as well as the copartnership estate, (*re* Macfarlane, 12 Lower Canada Jurist 239). And the same Judge repeated the same opinion in 1878 during the operation of the Insolvent Act of 1869, in Lewis vs. Jeffrey, 18 Lower Canada Jurist, 132.

Insolvent Act, 1875,

The Insolvent Act of 1875 is not only equally emphatic with regard to the extent of the conveyance of the estate, but it practically denudes the insolvent of all rights of action in regard to his property and estate.

Sec. 38.

Section 38 provides that:

"The assignee shall exercise all the rights and powers of the Insolvent in reference to his property and estate," etc.

Sec. 39.

Section 39 of the Insolvent Act of 1875 provides that:

"The assignee, in his own name as such, shall have the exclusive right to sue for the recovery of all debts due to or claimed by the insolvent of every kind and nature whatsoever," etc.

Statutes of Canada, 1880, 43 Vict. Chap. 1.

There was no Insolvent Act in force in Canada in 1891 and there is none now. The latest Insolvent Act was repealed on 1st April, 1880, Statutes of Canada, 1880.

35. The Chief Justice of the Court of Appeals thought that the abandonment of the partnership property carried with it the personal rights and actions of each partner. He cites, in support of this view 772 C. C. P. and Reid vs. Bisset, 15 Quebec Law Reports, 108, a judgment of the Superior Court sitting in Review at Quebec in 1889, which follows Lewis & Jeffrey and in re Macfarlane.

Record, p. 93, l. 44.

Bedarride, Faillites, Vol. 2, 744.

The learned judge who gave the judgment in the case of Bisset and Reid refers to some comments of Bedarride as to the liability of partners, and to the recognition of those well known principles by the French Code de Commerce, and thinks it best that the lot of all the members of a partnership should be common, that is that they should come under the operation of the Insolvency Laws both as partners and individuals and he points out the advantages to be ; firstly, to the creditors who have thus more

guarantee of getting paid, and next to the partners themselves, who find in the division of the property of all, the means of liberating themselves on a larger scale. *(Sur une échelle plus vaste.)* The learned Judge proceeds to state that notwithstanding all this, the Law of 1838 in France adopted the reverse of this rule *(une règle contraire)*, and refers to Judge Torrance's judgment in Lewis vs. Jeffrey, and in *re* Macfarlane, above mentioned. Commenting upon the decision in these cases, Mr. Justice Casault says: "The principles upon which these opinions are founded are the same for the abandonment of property by a partnership under the Articles of the Code of Procedure as under the Insolvent Acts. They flow from the same rules of law of which they are in one or the other case, the consequence, and where they find their origin and their force. The laws relating to Insolvency above referred to, contain nothing on this subject more than the Code of Procedure does in reference to the abandonment of property." Proceeding upon these principles and assuming that the provisions of the Code of Procedure were co-extensive with the provisions of the Insolvent Laws, he was of opinion that the abandonment of the firm estate involved the abandonment of the personal estate of each partner.

18. L.C.J. 132.
12, L.C.J. 239.
15, Q.L.R. 114.
C.C.P. Art. 763-780.

36. The extent of the abandonment must be gathered from the statute and from the terms of the abandonment itself, and not from principles unsanctioned by legislation. The argument for economy or even convenience of administration cannot be invoked to the prejudice of personal rights—if lacking legal foundation. It is submitted that 772 C. C. P. and Reid & Bisset when properly considered, do not support the proposition that the partners abandoned their individual property and rights by operation of law when they abandoned the firm property. In the case from Sirey (1808–2–354) referred to by the Chief Justice the copartners abandoned not merely the partnership estate but their separate estates, excepting only clothing and certain marital rights, and there does not appear to have been in that case a provision in the articles that there should be interest on capital, and that the capital should be returned on dissolution of the firm.

15, Q.L.R. 108.
Sirey, 1808-2-354.

37. The rights that the partners had against each other were not in this case abandoned to the creditors. They would not have added one iota to the creditors' rights. But even if they were constructively abandoned to the creditors, or more correctly placed at their disposal, in case they chose to exercise them, they never did exercise them, and when the creditors discharged the debt and consequently had no longer any claim against the Appellant, the exercise of the right in question by the Appellant himself was untrammelled. It was his right, whether exercised by the creditors or by himself, and this right never left him and consequently did not need restoration, even if the exercise of it could have been temporally regarded as at the creditors disposal. Even if the right of action vested absolutely in the curator as representing the creditors, it returned to the Appellant by operation of law—as surely as would any surplus remaining in the estate after the payment of the debts in full. Had the assets of this estate been sufficient to pay creditors twenty shillings in the pound and there was a surplus of £1000 in the hands of the Curator, that sum would be returned to the partners. It would be their property. The Curator has been

simply administering their estate. And with more force their separate and personal rights would remain unimpaired notwithstanding the abandonment—where a means was found of satisfying creditors' claims without invoking the exercise of the debtor's rights. The case of Depouilly & Gouin is the leading case in France on this point. The case went to the Cour de Cassation. There was an error in citation of the judgment in this case in the present Appellant's factum in the Supreme Court—the judgment of the Cour de Cassation having been omitted through inadvertence. The case is so important and similar to the present case that for convenience the reasoned judgments, which are brief, are here inserted.

Dalloz, 1869-1-467.

Depouilly & Gouin.

38. Lorsque les membres d'une société commerciale ont obtenu leur libération en abandonment aux créanciers de la société l'actif social, celui qui a contribué pour une plus forte part à la formation de cet actif peut recourir contre ses associés, à raison de cette différence, conformément d'ailleurs aux stipulations de l'acte de société sûr les mises sociales. (c. nap. 1845) (1).

Les sieurs Depouilly, Gouin et Broyart avaient formé une société en nom collectif dont le capital, fixé à 105.000 fr. devait être fourni pour un tiers par chacun des associés. Cette société n'ayant pas prospéré, il est intervenu, le 15 Mars, 1862, entre les associés et leurs créanciers, un arrangement aux termes duquel l'actif social devait être liquidé au profit des créanciers, sous la surveillance de commissaires désignés par eux. Moyennant cet abandon, les créanciers libéraient entièrement les trois associés. Cette convention ayant été éxécuté, le sieur Gouin a réclamé des sieurs Depouilly et Broyard le complément le leurs mises sociales, s'élevant pour l'un à 6,906 fr. 60 c., et pour l'autre à 2, 300 fr.

Sur cette instance, le tribunal de commerce de la Seine a rendu le jugement suivant, le 26 Sept., 1866 :

Sur la demande en complément de mise sociale :—En ce qui concerne les deux défendeurs :—Attendu qu'ils ne dénient pas le chiffre de la réclamation, que Gouin justifie, d'ailleurs, être exact :—Mais que, pour se refuser au paiement, Depouilly et Broyard excipent de ce que la société ayant existé entre eux et le demandeur, a été dissoute le 5 avr. 1862, après abandon fait par les trois associés à leurs créanciers de tout l'actif social sans en rien excepter, si ce n'est leur mobilier personnel, et sous la condition que même en cas d'insuffisance de cet actif pour satisfaire le montant intégral des créances, ils seraient completement libérés envers leurs créanciers, quel que fut le résultat de la liquidation ; qu'ils soutiennent que si, à l'époque de cet abandon, Gouin avait des droits contre eux, en raison des versements inégaux qu'ils auraient pu faire, ces droits faisaient partie de son actif compris dans la masse sociale, dont, pour sa part, il s'était, comme eux, déssaisi au profit des créanciers de la société ; que Depouilly et Broyard allèguent qu'une action à ce sujet ne pourrait, en tout cas, être exercée contre eux qu'au nom et au profit des créanciers ; que la liquidation ayant eu lieu et les créanciers leur ayant donné quittance entière et définitive, Gouin a perdu tout recours contre eux ; mais attendu que, si l'abandon fait par la société à ses créanciers l'a libérée vis-a-vis de ceux-ci, cet abandon n'a rien changé aux situations respectives des associés entre eux, et n'a pas détruit le droit que chacun pouvait avoir d'obliger les autres à parfaire leur mise sociale

pour rétablir l'égalité dont le principe avait été posé dans le pacte social ; attendu qu'il résulte des documents fournis au tribunal que les sommes réclamées sont bien dues par Depouilly et Broyard pour complément de leur mise ; mais qu'attribuer à Gouin l'intégralité de ces sommes serait le mettre à son tour dans une situation plus favorable que celle des défendeurs ; qu'en raison de ce qui vient d'être dit, il y a lieu d'équilibrer seulement la perte entre tous ; attendu que Gouin ayant versé dans la société 35,000 fr,, Broyard 23,700 fr., Depouilly 23,033 fr. 40c., le total de ces versements représente 95,733 fr. 40c. ; que le capital étant entièment pèrdu, la perte égale pour chacun serait de 31,911 fr. 13 c. ;—Que Broyard ayant versé une somme supérieure, Gouin est sans droit pour lui rien réclamer ;—Que Depouilly n'ayant versé que 28,033 fr. 40c., Gouin pour diminuer sa propre perte, est en droit de lui réclamer, 3,088 fr. 87 c., à concurrence desquels il y a lieu d'accueillir ce chef de la demande à son égard ;—Condamne Depouilly à payer à Gouin la somme de 3,088 fr. 87 c., etc.

Appel par Depouilly, mais, par arrêt du 30 mai, 1868, la cour de Paris a confirmé le jugement, avec adoption de tous ses motifs.

Pourvoi du sieur Depouilly pour violation, par fausse application, des art. 1845, 1214 c. nap., en ce que l'arrêt attaqué a condamné le demandeur en cassation à payer au sieur Gouin une somme de 3,088 fr. 87 c., comme complément de sa mise sociale, alors que cette créance s'était trouvée comprise dans l'abandon fait aux créanciers de l'actif social et qu'elle avait été éteinte par la remise consentie par ceux-ci au profit des associés moyennant cet abandon.

ARRÊT.

La Cour :—Attendu que la cour impériale de Paris a reconnu, par l'arrêt attaqué, que l'acte d'abandon fait par la société à ses créanciers n'a pas détruit le droit que chacun des associés avait d'obliger les autres à parfaire leur part sociale, a l'effet de rétablir l'égalité dont le principe avait été posé dans le pacte social ;—Attendu que c'est encore sur le même acte d'abandon, et sur les faits de la cause dont elle avait l'appréciation souveraine, que la cour impériale s'est fondée pour déterminer les limites dans lesquelles il y avait lieu d'accueillir la demande formée par Gouin contre son associé ;—Qu'en admettant, dans ces circonstances, la demande de Gouin, tout en en réduisant le chiffre l'arrêt attaqué n'a donc violé ni l'art 1845 ni l'art, 1214 c. nap., lesquels étaient sans application dans la cause ;—Par ces motifs, rejette le pourvoi.

39. It will be seen that the principles underlying the judgment in Depouilly & Gouin is that the abandonment made by the partners of the partnership estate, did not affect the rights of the partners between themselves, and in no respect changed their situation towards each other, or as it is well expressed in one of the considerants of the judgment :

" But seeing that though the abandonment made by the partnership to its creditors has released it as regards these, this abandonment has made no change in the respective situations of the partners towards each other, and has not destroyed the right which each might exercise (*pouvait avoir*) to oblige the others to make up their contributions to the partnership, in order to re-establish equality, the principle of which has been laid down in the articles."

The *arret* of the Cour de Cassation is express that "the abandonment made by the partnership to its creditors has not destroyed the right which each of the partners had to oblige the others to equalize the contributions to the partnership" in order to equalize the loss ("*Equilibrer la perte entre tous*") as the judgment of the Tribunal de Commerce de la Seine puts it.

Record, p. 128, l. 36.

40. The abandonment here was *de facto* of firm property only. That is conceded. It is only by operation of law, it is said, that the personal rights of Appellant were transferred. What law? While the proposition is denied, Appellant submits that the law which operates the transfer of a debtor's rights to satisfy creditors, should be equally effective to restore them when the creditors are satisfied.

Second Ground of the Judgment of the Supreme Court. p. 130, l. 14.

41. The second ground of the judgment of the Supreme Court is that the transfer from the curator to MacLean of "all the assets and estate generally as they existed at the time the said curator was appointed," included the separate estate of the individual partners as well as the joint estate of the partnership itself. But this statement of what was transferred omits the qualifying clauses of the deed of transfer which shows that the transfer was made by the curator appointed to the partnership property, and that the property transferred is exclusively firm property and not the personal property of each partner. As Chief Justice Lacoste remarked, it is clear MacLean did not intend to acquire the personal assets of his copartners and equally so that he did not intend to be burdened with their personal debts. But this plea, even if sustainable, is not pleaded. What is pleaded is the reverse, namely, that the overdraft is an asset of the firm, acquired by MacLean under the transfer to him, and that any former liability of his in that respect is extinguished by his becoming his own creditor, and the debt in consequence has disappeared by confusion. It is nowhere stated in the pleadings defining the issue that MacLean acquired the personal estate of the copartners under the transfer made.

p. 66, l. 1.

p. 94, l. 14.

p. 9, l. 4.

p. 9, l. 5-9.

Third Ground of Judgment of the Supreme Court. p. 130, l. 40.

42. The third ground upon which the judgment is based is that by reason of the sum he paid to the Curator for the stock and assets "*MacLean became in effect a creditor of the firm, not for the amount of the composition paid by him, but for the full amount of the indebtedness which that composition represented.*" But this could not be, for he was not subrogated in the rights of the creditors. On the contrary the creditors discharged the debtors, accepting in full satisfaction fifty cents in the dollar for each dollar claimed by them, being the amount realized from the sale of the abandoned property on the respective amount of their claims. Suppose a stranger bought the estate for fifty cents in the dollar on the amount of the firm debts, and even took a formal subrogation of the creditors' rights against the three partners—the proceeds of the sale to the stranger would have to be placed to the credit of the partners in diminution of the original claims, and the stranger's rights would only be in respect of the balance due on account of the creditors' claims. How then could "MacLean in effect become a creditor of the firm, not for the amount of the composition paid by him, but for the full amount of the claims that that composi-

tion represented?" MacLean did not buy the claims of the creditors against himself and his copartners. He in effect bought the stock and firm assets for a sum representing fifty cents in the dollar of the firm debts—the creditors discharging all further claims against him and his partners. There was no subrogation and he cannot set up against his partners a subrogation in a right he never acquired and that had been extinguished.

43. There remains the question of the effect of the clauses in the copartnership deed authorizing each partner to withdraw a certain sum annually which was charged to the Capital account of each partner—and shown in the annual balance sheet of the firm as having been so charged, and the clause that each partner was to be allowed interest on his capital, and that in the event of a partner dying or retiring before the expiration of the partnership term his interest should be the amount standing to his credit in the balance sheet of the 31st December preceding, less his drawings since then. This shows that though drawings were authorized up to a certain limit which was not exceeded, the partners by the deed of partnership and by the practice acquiesced in by them were accountable as between the copartners for such drawings. The sums withdrawn were not salary. The provision in the articles shows clearly that the partners intended at the dissolution of the partnership to adjust accounts and that the capital contributed should be kept in a separate account and accounted for before the division of gains or losses. There is nothing in the law relating to abandonment of property that destroys these obligations. And a settled state of accounts will not be disturbed. This brings this case exactly in line with the case of Binney & Mutrie, Law Reports 12 App. Cas. 165, cited by Appellant in all the Courts below.

Record, p. 54, l. 5.

p. 53, l. 20.

p. 53, l. 30.

L. R. 12 App. Cas. 165.

44. The French case of Lélégard contre Gilbert, decided by the Cour de Cassation in 1865 (Sirey 1865–1–12), is a distinct authority that a provision in the articles that interest shall be credited on the capital of each partner, and expenses of the business paid before the division of gains, shows that the parties intended to take back the capital contributed by them to the partnership before dividing the partnership assets at the dissolution of the partnership.

Under the French law the withdrawings or advances *prélevements* authorized by the articles are not considered as definitely acquired, but as advances made to each partner, subject to account. Glady contre Martini, Bourdeaux, 1865, (Sirey 1866-2-182.)

As to the form of the action, to which no objection was made in any of the Lower Courts, it is respectfully submitted that this is a mere question of procedure with which an Appellate Court and especially the Court of last resort should not be called upon to deal. The action as brought raises all the points in controversy between the parties. The accounts were settled between the partners—all the partners had acquiesced in them. It would have been a useless formality to sue for an account when all the partners had the accounts already, and fully acquiesced in them, and the sole question was one of responsibility in respect of them. The Appellant offered to retake the accounts. The Respondent was satisfied with them as they were but said, in effect, taking them as they are, I owe you nothing. Plaintiff says to Defendant, there is a sum due from you to me. The Defendant answers, "there is not for the reasons

Record. p. 4, l. 1.

pleaded by me." The whole of the facts came out under the issues, and the substantial question is: Is the Appellant entitled to recover the sum of money awarded to him by the Superior Court and the Court of Appeals?

45. The Chief Justice of the Court of Appeals found that in the circumstances the rules of the Civil Code in relation to the *actio pro socio* and the rules relating to the partition of successions can be applied here.

Civil Code Lower Canada. Art. 1898.

Article 1898 of the Civil Code (partnership) is as follows :—

"Upon the dissolution of the partnership, each partner or his legal representative may demand of his copartners an account and partition of the property of the partnership; such partition to be made according to the rules relating to the partition of successions, insofar as they can be made to apply. Nevertheless, in commercial partnerships these rules are to be applied only when they are consistent with the laws and usages specially applicable in commercial matters."

The Articles of the Civil Code regulating partition and returns in successions are Nos. 689 to 734 inclusive. The first of these Articles provides for the coheir making a demand for the partition of the succession.

Art. 694 provides that :—

C. C. 694. "The action of partition and the contestations which arise in it are submitted to the Court of the place where the succession devolves, if it devolve in Lower Canada; if not, to the Conrt of the place where the property is situate, or of the domicile of the Defendant. It is before this tribunal that licitations and the proceedings connected with them are to be effected."

Article 700 provides that:

C. C. 700. "Each coheir returns into the mass, according to the rules hereinafter laid down, the gifts made to him and the sums in which he is indebted."

Article 701 provides that:

C. C. 701. "If the return be not made in kind, the coheirs entitled to it pretake an equal portion from the mass of the succession. These pretakings are made as much as possible in objects of the same nature and quality as those which are not returned in kind."

Article 702 provides that:

C. C. 702. "After these pretakings, the parties are to proceed to the formation, out of what remains in the mass, of as many shares as there are partitioning heirs or roots."

Article 712 provides that:

C. C. 712. "Every heir, even the beneficiary heir, coming to a succession, must return to the general mass all that he has received from the deceased by gift *inter vivos*, directly or indirectly; he cannot retain the gifts and legacies bequeathed by the deceased unless such gifts and legacies have been given him expressly by preference and beyond his share, or with an exemption from return."

Article 719 provides that:

C. C. 719. "Whatever has been paid out for the establishment of one of the coheirs, or for the payment of his debts must be returned."

Article 723 is important:

C. C. 723. "Returns are due only from coheir to coheir, they are not due to the legatees nor to the creditors of the succession."

Article 724 provides that:

"Returns are effected either in kind or by taking less." C. C. 724.

Under 723: "the returns are due only from coheir to coheir," and "they are not due to the creditors of the succession." Therefore, independently of the claims of creditors against the succession—or the copartnership—there is the accounting and return between the coheirs or partners. C. C. 723.

46. From the accounts the drawings of the partners are as follows:— Record. p. 62, l. 46.

MacLean's Capital withdrawn	$ 4,480.91
MacLean's overdraft in excess of Capital	29,079.31
	$33,560.22
Stewart's drawings	8,106.75
Smith's drawings	2,971.42
Total,	$44,638.39

According to the judgment of Chief Justice Lacoste, these sums should be restored by the partners. But there still is a deficiency of $15,485.95 in order to make up the Capital, and this latter sum is the loss on Capital and must be borne according to the Articles of Copartnership in the proportion of one half by MacLean and one quarter by Stewart and one quarter by Smith. These contributions to the loss will restore the Capital $60,124.34. p. 56, l. 47. p. 56, l. 40.

From the Capital so restored, Stewart would withdraw his Capital, $25,292.47, less what he had withdrawn—and less his share of the loss thus:— p. 56, l. 38.

Stewart's Capital		$25,292.47
His drawings	$8,106.75	
Share of loss, ¼ of $15,485.95	3,871.49	11,978.24
Amount due to him		$13,314.23
Smith's Capital		$30,350.96
His drawings	$ 2,971.42	
Share of loss, ¼ of $15,485.95	3,871.49	6,842.91
Amount due to him		$23,508.05
MacLean's Capital		$ 4,480.91
His drawings	$33,560.22	
Share of loss, ½ of $15,485.95	7,742.97	41,303.19
Amount due by him		$36,822.28
Amount due Smith	$23,508.05	
Amount due Stewart	13,314.23	$36,822.28

p. 56, l. 39.

p. 56, l. 37.

This calculation shows that Stewart is entitled to $13,314.23, which is in excess of the sum demanded in his declaration ($11,213.20) and of the amount of the judgment rendered in his favor ($10,261.08½).

47. The abandonment of the partnership estate does not involve the abandonment of the separate estates of the partners, for no inconvenience in administration results from the partners retaining their separate estates. They personally still remain debtors, firstly, to their personal creditors, and afterwards to the firm creditors, and there is nothing to prevent the curator of the partnership estate proceeding by action against them personally for any deficiency in the proceeds of the firm assets to meet the claims of partnership creditors. In such case the curator might recover from any one of the partners sufficient to make up the deficiency, which would of course leave to such partner his recourse against the other partners for an adjustment of accounts. In case the claim of a personal creditor should come in competition with those of the curator representing the partnership estate, the duty would devolve upon an officer of the Court of making what is called "a report of distribution" of the proceeds of the personal estates of the partners, in which report, in the case supposed, the personal creditors of the partner would be collocated for the amount of their personal claims in preference to the claims of the partnership creditors.

C.C.P. Art. 601 as amended by R.S.Q. Art. 5926 and Art. 724. Civil Code, Art. 1899.

48. At the argument of the case in the Supreme Court, the Counsel for the now Respondent filed an additional printed statement of what, in their view, constituted "the pretensions of both parties," and submitted a proposition to "test" these pretensions.

Record, p. 131. l. 36.

The case supposed, however, discards two important considerations in the actual case: firstly, whether the Plaintiff had not the right of action to compel the Defendant to account, irrespective of the discharge, and secondly, if he had not, whether the discharge granted by the creditors on receipt of the proceeds of the firm assets, did not leave the Plaintiff free to exercise all his rights.

The answers to the questions in the case supposed may be interesting from an academic point of view, but they do not test "the pretensions of the parties in this case." The case supposed excludes the dominant factors in the actual case; and demonstrates the difficulties attending the assumption that, a debtor abandoning his property to his creditors—who accept the proceeds of the sale of it in full satisfaction of all their claims—has deprived himself, from the moment of its abandonment—and even after all claims of creditors are settled,—of all his personal rights against his own debtors.

Civil Code, 1898, C.C.P. Art. 20. C.C.P. Articles 763-780 as amended by R.S.Q. Articles 5952-5965 and as further amended by Statutes of Quebec, 1889, 52 Vict. Chap. 51.

The Appellant respectfully submits that the judgment of the Supreme Court of Canada should be reversed and the original judgments restored and confirmed, for the following amongst other

REASONS:

1. Because the Appellant's right—under the Civil Code to an account and partition—or to demand whatever sum may be due to him under settled and adjusted accounts, is a right that is personal to him as a partner, and exists independently of the rights of creditors, and is not destroyed by the abandonment of property under the Code of Civil Procedure—and the amendments thereto.

2. Because the law relating to the abandonment of property does not divest the debtor of the ownership of the property abandoned, though it temporarily deprives him of the "enjoyment" of it—but simply affords a means for realizing it and applying the proceeds as the debtor's property, in payment and discharge of debts owing by the debtor; but does not deprive the debtor of any of his rights, though the Curator may, with the Judge's permission, and the consent of the creditors, exercise such of the debtor's rights as may be necessary in the administration and realization of the property abandoned.
3. Because the abandonment of property under the provisions of the Code of Civil Procedure does not vest the property and rights of action of the debtor in the Curator, as an assignment would have vested these in the Assignee under the Insolvency Acts formerly in force in Canada; and the abandonment of the copartnership estate does not, by operation of law, vest the separate estates of the partners in the guardian or Curator as an assignment would have vested these in the Assignee under the said Insolvency Acts.
4. Because the abandonment made in this case was *de facto* by the firm and of the firm property, and not of the separate estates of the partners; no curator was ever named to the personal estates; no abandonment of the separate estates was made, but the curator named was to the copartnership estate; and the sale and conveyance were—by the curator of the copartnership property—of the copartnership property only, and not of the property of the partners individually; and no conveyance of the separate estates of the partners was ever made to Respondent.
5. Because the overdraft in question is in no sense an asset of the firm of John MacLean & Co., was never so treated by the partners or their creditors, and formed no part of the abandoned property; but is in fact the balance standing at the debit of Respondent's Capital account in the keeping of the reckoning between partners, a result arrived at in accordance with the Articles of Partnership and the established course of keeping accounts between the partners; and the Respondent's liability therefor, and his obligation to account is to his copartners and not to his creditors.
6. Because it is not pleaded that the Respondent acquired the separate estates or rights of his copartners—but on the contrary the plea is that the overdraft is an asset of the copartnership and as such was conveyed by the Curator of the partnership to Respondent with the other assets of the firm.

7. Because even if the abandonment of the firm property entailed the abandonment of the separate estates, by what is called "the operation of law," the latter were not conveyed to Respondent, and such abandonment did not deprive the Appellant of the ownership of his property or divest him of his rights of action, and when the creditors accepted the sum realized from the sale of the copartnership assets, in full satisfaction of all their claims, the partners were free to exercise their rights and dispose of the residue of their property as they pleased.

8. Because the Respondent is not entitled to plead the sum by him paid for the partnership assets, or the amount of the firm's indebtedness to the creditors in compensation of Appellant's claim, for the Respondent received money's worth for his money when he individually purchased and received the firm assets from the Curator, and the money so paid by the Respondent ceased to be his money and became the money realized from the sale of the firm assets to him, which took the place of these assets in the hands of the curator, and availed as such to satisfy the creditors in full. The creditors did not subrogate Respondent in their rights for a balance against the partners, but on the contrary discharged the three partners. The fact that Respondent was the purchaser and not a stranger makes no difference and does not affect his obligations towards his partners. Had a stranger bought the assets on the same terms, he would have had the assets for his money but not the right to further pursue the discharged debtors; the creditors would have had the proceeds of the sale amounting to fifty cents in the dollar on their claims—but in full satisfaction of all claims; and the three partners would have had their discharges and would have been free to discuss and settle accounts between themselves.

9. Because by the Articles of Partnership and the course of dealings of the partners with each other, and the method of keeping the partners' accounts, which was acquiesced in by all the partners—each partner was accountable to his copartners for the advances made to him during the partnership—and the capital of each was repayable on the dissolution of the firm, before the division of profits and losses.

10. Because the settlement and discharge obtained from the creditors in no way disposed of the rights and obligations of the partners themselves.

11. Because the curator to the firm property may exercise the recourse of the firm creditors, by direct action against the partners who have not abandoned their separate estates.

DONALD MACMASTER.

In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

ALEXANDER STEWART,

(Respondent in the Supreme Court of Canada, in the Court of Queen's Bench, and Plaintiff),

APPELLANT;

AND

JOHN MACLEAN,

(Appellant in the Supreme Court of Canada, in the Court of Queen's Bench, and Defendant),

RESPONDENT.

AND

JAMES HARDISTY SMITH,

MIS EN CAUSE.

APPELLANT'S CASE.

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