29367

In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

ALEXANDER STEWART - - - - - - - - *Appellant*

AND

JOHN McLEAN - - - - - - - - - - *Respondent*

AND

JAMES HARDISTY SMITH - - - - - - - *Mis-en-cause.*

RESPONDENT'S CASE.

1. This is an appeal from a judgment of the Supreme Court of Canada, rendered June 26th, 1895, which dismissed the action taken by appellant against respondent, and reversed the judgments of the Court of Queen's Bench for the Province of Quebec (Appeal Side) and of the Superior Court for the same Province, rendered on September 29th, 1894, and May 13th, 1893, respectively, which had maintained said action to the extent of $10,261.08. RECORD.

2. The action was brought to recover what appellant claimed to be his share of certain monies alleged by him to have been overdrawn by respondent from the late firm of John McLean & Co., of which firm appellant, respondent, and the mis-en-cause were partners. The following are the material circumstances. pp. 1-4.

3. The partnership was formed on December 31st, 1886, and was to continue for five years, the partnership articles being to the following effect. p. 52, l. 28.

p. 52, l. 43, to p. 53, l. 3

4. The respondent was to contribute as capital whatever might be due to him on December 31st, 1886, from a former firm of John McLean & Co., the other partners contributing the deposits which each had in said firm on the same day.

pp. 82–85.

Respondent's contribution was established at $4,480.91; appellant's at $25,292.47; Smith's at $30,350.96.

5. The books of the firm were to be balanced on the 31st day of December in each year, and a balance sheet prepared and signed by all the partners. In the first of said balance sheets each partner was to be credited with interest at 7 per cent. on the amount of his capital, while in each subsequent one interest was to be allowed him on the amount standing to his credit in the books on the 31st of December previous.

The interest thus payable on the capital was to be a charge on the business of the firm, "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 "sum, and of all charges and expenses incurred in carrying on such business" were to be divided in the following proportions, viz.: one half to respondent and one quarter each to the other partners, "and the losses and liabilities (if any)" were to be "borne by them in like proportion."

p. 53, ll. 4–28.

6. On dissolution of the firm by death or retirement of a partner, the share of the deceased or retiring partner, was to be the amount standing to his credit in the balance sheet next preceding his death or retirement (less any monies since received by him) and he was not to share in any subsequent profits or losses. If the death took place before the end of the five years the amount due was to be paid by the firm to the representatives of the deceased in three years by six semi-annual payments, each bearing interest at 7 per cent.

p. 53, ll. 29–46.

7. The partners were to be "entitled to withdraw from the said co-partnership business annually as follows": Respondent $6000, and the other partners $3000 each.

p. 54, ll. 5–9.

8. Each partner had a capital account in the books of the firm, in which account, on the 31st of December in each year, there was entered a debit or credit balance as the case might be. These balances were arrived at by crediting the partner (1), with the capital contributed by him; (2), with 7 per cent. interest thereon for the first year; (3), in each subsequent year with interest at the same rate on the credit balance entered in his favor on the 31st of December previous; and (4), with his proportion of profits earned during the year, viz., one-half to respondent and one-quarter to each of the others; and by debiting him (1), with whatever he drew out during the year; (2), with his share of the year's losses (distributed in the same proportion as the profits); and (3), with interest on the debit balance, if any appearing against him, on the previous 31st December.

pp. 83–85.

9. The partnership was dissolved on July 22nd, 1891, before the end of the agreed period by a judicial abandonment of property made by the partners on the demand of their creditors under the provisions of articles 763 et seq. of the Code of Civil Procedure of Lower Canada. Although their statement showed a surplus of about $15,000, the firm admittedly was completely insolvent. pp. 56, 57. p. 47, ll. 11–15.

10. The result of the accounts of the three partners kept as above stated was that at the dissolution there was $29,079.31 to respondent's debit, and $17,185.72 and $27,379.54 to the credit of appellant and Smith arrived at respectively, as follows :— p. 82, l. 4.

RESPONDENT'S ACCOUNT.

Dr.		
To drawings from 1887-1891	$23,215.11	
„ ½ losses, 1888-1891	18,472.44	
„ interest, 1889-1891	1,639.68	$43,327.23
Cr.		
By original capital	$4,480.91	
„ ½ of profits, 1887	8,861.13	
„ interest	905.88	$14,247.92
		$29,079.31

APPELLANT'S ACCOUNT.

Dr.		
To drawings, 1887-1891	$11,397.84	
„ ¼ losses, 1888-1891	9,236.24	$20,634.08
Cr.		
By original capital	$25,292.47	
„ ¼ profits, 1887	4,430.56	
„ interest	8,096.77	$37,819.80
		$17,185.72

SMITH'S ACCOUNT.

Dr.		
To drawings, 1887–1891	$8,808.81	
„ ¼ losses, 1888–1891	9,236.21	$18,045.02
Cr.		
By original capital	$30,350.96	
„ ¼ profits, 1887	4,430.56	
Interest	10,643.04	$45,424.56
		$27,379.54

pp. 83–85.

p. 47, l. 36. p. 37, l. 16. p. 37, ll. 6–16. pp. 63–69. p. 66, l. 46.

11. After the firm had made an offer to pay its creditors a composition of 40 cents on the dollar, receiving back the assets, which offer was refused, respondent, to the knowledge of his partners, offered on his own account a composition of 50 cents on the dollar (about $85,200) to unsecured creditors, and payment in full of the privileged claims $2,230.47, on condition that the assets and estate generally of the said John McLean & Co. should be transferred to him personally, and that he and his partners should have a discharge. This offer was accepted and a transfer made by the curator under the authority of the Court on November 6th, 1891. The deed of composition and transfer described the property transferred to respondents as "all the assets and estate generally of the said late firm of John McLean & Co. as they existed at the time the said curator was appointed."

pp. 67, 68. p. 69, l. 31.

12. The composition of 50 cents was payable in three instalments, viz.: by four month notes for 15 cents on the dollar; by eight month notes for 15 cents; and by twelve month notes for 20 cents. The twelve month notes were to be secured by the endorsement of a surety; while as to the other instalments in consideration of the creditors waiving security therefor respondent bound himself "to keep the assets transferred to him intact for the benefit of the "holders of said notes, and not to place any lien, or privilege upon such "assets, or suffer any to exist thereon, until the said first and second payments "of the said composition are satisfied."

p. 3, ll. 40–43.

13. Appellant, on April 29th, 1892, *i.e.*, before the second instalment on the composition had become due, took the present action against appellant for $11,213.20, claiming in substance that the sum of $29,079.31 charged to respondent as above-mentioned, was a portion of the capital of appellant and Smith which respondent had withdrawn from said firm, and constituted a personal indebtedness of respondent to his co-partners; that though the firm of John McLean & Co. had made an abandonment of its property, the said alleged overdraft was not an asset of the firm, but simply a depletion of the capital fo appellant and Smith, and a private asset of theirs; and that respondent was bound to pay appellant the proportion which appellant's capital on the 22nd of July, 1891 ($17,185.82) bore to the total capital of appellant and Smith on said day, $17,185.82 + $27,378.54 = ($44,564.36), viz.:

$$\frac{\$17,185.82}{\$44,564.36} \times \$29,079.31 \text{ or } \$11,213.20.$$

pp. 4–9.

14. Respondent, besides general denials, pleaded several pleas which include the following propositions:—

pp. 8, 9.

(1.) That whatever sums the Respondent might have drawn, and for which he might have been accountable, constituted a liability to the firm, and consequently an asset of the latter, which it had by the abandonment transferred to its creditors, who in their turn transferred it to the respondent, the debt being thereby extinguished by confusion.

(2.) That respondent had paid the creditors of the firm over $100,000, the proportion of which chargeable against appellant far exceeded the amount claimed by his action; that respondent when he so paid the creditors of the firm, as one of the conditions of such payments, stipulated for and procured that a complete discharge should be granted to the appellant; and that the respondent in settling with the creditors was subrogated in their rights, and entitled to compensate and set off such rights against any liability to appellant. p. 5, l. 30. p. 6.

(3.) That the alleged overdraft was in respect of sums which respondent was under the articles of partnership entitled to draw without being bound to return such sums to the firm. p. 7, l. 4.

15. The Superior Court gave appellant judgment for $10,261.08½ but not for the reasons assigned by appellant. The Court held that respondent was not accountable for the sum of $29,079.31 above mentioned, but that the partnership capital of $60,124.34 having been completely absorbed by the abandonment became a dead loss, which, according to the provisions of the partnership articles concerning the distribution of losses and liabilities, must be borne one half by respondent and one fourth each by the other partners, making:

Capital lost		$60,124.34
Respondent's share of this loss...	$30,062.17	
Appellant's share of this loss ...	$15,031.08½	
Smith's share of this loss ...	$15,031.08½	
		$60,124.34
Appellant having furnished ...	$25,292.57	
After deducting his share in the loss	$15,031,08½	
Had a balance in his favour of		$10,261.38½
Smith having furnished... ...	$30,350.96	
After deducting his share of the loss	$15,031.08½	
Had a balance in his favor of		$15,319.87½
Respondent's share of the loss being	$30,062.17	
And the capital furnished by him	$4,480.91	
Had a balance against him of		$25,581.26
Making amount due appellant ...	$10,261.08½	
And „ „ Smith ...	$15,319.87½	
		$25,581.26

pp. 88-90.

16. The Court of Queen's Bench confirmed this judgment, but for different reasons. It held that respondent was not indebted to the firm on account of what he had drawn out, as the partnership articles entitled him to draw $6000 a year, and he had not exceeded this allowance. But the Court was of opinion—

(1.) That on the dissolution of the partnership each partner, whether indebted to it or not, was accountable to his co-partners for whatever he might have received from the firm, in order that out of the mass so formed each partner might draw whatever he might be entitled to take out before the final division of the assets.

p. 95, ll. 1–5.

(2.) That the partners had contributed only the enjoyment of the capital put in by them, and had in effect stipulated the right to partake this capital in full when the partnership was wound up.

p. 95, ll. 29–39.

(3.) That therefore each partner would have to return what he had received, in order that out of this fund, so far as it would go, the several partners might be repaid the capital contributed by them, and that the deficiency must be borne half by appellant and a quarter each by the other partners.

p. 95, ll. 44–48.

(4.) That as the result of this operation respondent would owe appellant more than the amount of the judgment, which, as there was no cross appeal, must be confirmed.

p. 96, ll. 1 and 2.

(5.) That while appellant was divested of the claim in question, by reason of the abandonment, which included by operation of the law the private assets of the partners, as well as those of the firm, he regained it as a consequence of his discharge.

p. 95, ll. 23–26.

The Chief Justice, who delivered the judgment of the Court, thought that the action was bad in form and ought in consequence to have been dismissed, but that as it was in the nature of a demand of partition, and appellant had offered an account, which offer respondent had not taken advantage of, he was disposed to adjudicate on the action as brought.

p. 95, l. 22.

17. The Supreme Court reversed these judgments, and dismissed appellant's action for the following reasons:—

(1.) An abandonment of property made by a partnership firm includes not only the partnership assets, but also the private property and rights of action of the individual partners. The abandonment, therefore, took from appellant the claim in question, and it has never been restored to him. The transfer to respondent put appellant, except as regards his discharge, in no better position than if the curator had sold the assets in the ordinary way to other persons. The assets comprised in the curator's deed of transfer were transferred to respondent alone, who had as much right to buy them as any

p. 127, et seq.

stranger, and did not in buying them act in any way on behalf of appellant; while the discharge of appellant was a discharge and nothing more, and did not affect his legal position except in relieving him from paying debts he would otherwise have had to pay to the discharging creditors.

(2.) The transfer from the curator to respondent gave the latter every asset, which under the abandonment had been vested in the curator; and there was no intention that respondent, after paying a composition to the creditors, should remain indebted to his co-partners.

(3.) Respondent having paid off the creditors was subrogated in all their rights, and became a creditor of the firm not for the amount of the composition but for the original amount of the firm's indebtedness. Appellant's share of this indebtedness exceeding the claim in question, the latter was in any case extinguished by compensation. p. 127 et seq.

Respondent humbly submits that the judgment of the Supreme Court of Canada was right, and that said judgment ought to be confirmed and the appeal dismissed for the following among other

REASONS.

1. Because respondent's indebtedness, if any, was a liability to, and therefore an asset of, the firm of John McLean & Co., and as such was transferred to respondent by the deed of composition and transfer, and thereby extinguished by confusion.

2. Because by law the property of a debtor is the common pledge of his creditors, and the abandonment of property included by operation of law not only the partnership assets of the firm of John McLean & Co., but also the separate property and rights of action of the individual partners, and therefore divested appellant of the claim in question, even if it be regarded as his separate property.

3. Because appellants' discharge did not do more than relieve him from the obligation to pay the discharging creditors debts he would otherwise have been obliged to pay, and did not re-invest him with any assets or rights of action whether separate or partnership.

4. Because the creation in favour of appellant of the right of action asserted by him herein would have greatly impaired or rendered nugatory the claim of said creditors against

respondent under said composition deed, as well as the safeguards and securities stipulated in said deed in favour of said creditors, and it was not in the contemplation of the parties that the creditors should be placed in that inferior position, and appellant, availing himself as he does of the discharge, is not entitled to maintain a claim which would produce that result.

5. Because, assuming the claim to be separate, then if the discharging creditors comprised the separate creditors of the partners, as well as the creditors of the firm, their discharge necessarily relieved respondent from the claim sued for; while if the separate creditors of the partners were not parties to said discharge, their rights were not affected thereby, and the claim in question is still vested in the curator.

6. Because the judgment of the majority of the judges of the Supreme Court and the reasons given for that judgment are right.

EDWARD BLAKE.

MONTAGUE MUIR MACKENZIE.

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