Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Stewart v. *MacLean* (Smith mis-en-cause), *from the Supreme Court of Canada; delivered* 28*th July* 1896.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Davey.*]

This appeal arises out of an action by one of three partners against another partner for recovery of a sum of money under the following circumstances. By Articles of Partnership dated 30th December 1886 MacLean (the present Respondent) Stewart (the present Appellant) and Smith (who was called as *mis-en-cause*) entered into a partnership for five years. The three partners agreed to contribute to the capital certain amounts which were ascertained at the following sums:—

MacLean	-	- $4,480 91
Stewart	-	- $25,292 47
Smith	-	- $30,350 96

The profits and losses were divisible in the following proportions viz. MacLean one half and Stewart and Smith each one quarter.

On 22nd July 1891 the partners made an "abandonment" of all their property to their creditors. Their moveable property was described as consisting of their stock in trade in store in the City of Montreal book debts and

92505. 100.—8/96. [44]

bills receivable. The list of creditors did not contain any of the separate creditors of the partners. At the date of the abandonment the capital accounts of the partners were as follows viz.—MacLean had a debtor balance against him of $29,079. 31 or (in other words) had overdrawn to that amount, Stewart had a credit balance of $17,185. 72 and Smith a credit balance of $27,379. 54.

MacLean made an arrangement for purchasing the assets for a sum which would be sufficient for payment of the privileged debts and expenses in insolvency in full and of 50 c. in the dollar to the other creditors. The creditors agreed to accept this composition in satisfaction of their claims and to discharge all the partners—and the proposal was approved by the proper authorities. Accordingly by a deed of the 6th of November 1891 the Curator in consideration of the agreed payments by MacLean transferred to him all the assets and estate of the late firm as it existed at the time the Curator was appointed.

There was no mention made throughout the proceedings of any separate estate of the partners or of their separate debts. The right of action by the partners for an account and partition after payment or satisfaction of all the debts was not a right of action of the firm and did not pass by the assignment to the Respondent.

In the month of April 1892 this action was commenced by the present Appellant against the Respondent to recover from him the sum of $11,213. 20 being the proportion of Respondent's overdraft due to him if the same were brought in and divided between the Appellant and Smith in proportion to the sums standing to their credit respectively at the date of the abandonment. Smith was called as *mis-en-cause* but apparently took no part in the litigation.

The action was heard before Mr. Justice Jette, who gave judgment for the Appellant for $10,261. 08. This sum was arrived at in a somewhat different mode than that suggested in the Appellant's declaration. In the Court of Queen's Bench the Chief Justice Lacoste pointed out that the action was irregular in form and that it ought to have been an action for account and partition between all the partners, but considered that justice might be done between the partners in the action as framed. The learned Chief Justice also pointed out what he considered to be the proper form of account and relief to which the Appellant was entitled but as the result would be a sum in excess of the judgment the Court dismissed MacLean's appeal.

The judgment of the Queen's Bench was reversed by a majority of the Supreme Court.

Their Lordships have no hesitation in saying that they agree with the judgment of the Court of Queen's Bench and the minority of the Judges in the Supreme Court.

The form of the action was no doubt wrong but Smith had an opportunity of intervening had he desired to do so and the Respondent's Counsel could not point out to their Lordships any injustice that would be done to any party by giving relief in the action as framed.

On the merits the case appears to their Lordships one of extreme simplicity. The partnership has been dissolved, all the debts have been discharged or satisfied and there remains nothing to be done but to adjust the rights of the partners *inter se* having regard to the Articles of Partnership and their respective contributions and drawings. The fact of one of the partners having been the purchaser of the assets for the sum required for satisfaction of the debts does not seem to affect the question any more than if the purchaser had been a stranger. MacLean has not only

drawn out his capital, but has also drawn out $29,079. 31 in addition. He must at least pay back the amount of his overdraft, to be divided between his partners on whom the whole loss has been allowed to fall. It is unnecessary for the purpose of the present appeal to go further.

The exact form of the account (if any account had been necessary) may be a matter of nicety but it is unnecessary to consider that as the learned Counsel for the Respondent did not suggest that an alteration in the form would result in any benefit to his client.

Their Lordships therefore will humbly advise Her Majesty that the order appealed from be reversed and the judgment of the Court of Queen's Bench be restored. The Respondent must pay the costs in the Supreme Court and of this appeal.