JOHN MACLEAN (DEFENDANT).....APPELLANT; 1895

AND *Feb. 25, 26.
*June 26.

ALEXANDER STEWART (PLAINTIFF).. RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Partnership—Judicial abandonment—Dissolution—Composition—Subrogation—Confusion of rights—Compensation—Arts. 772 and 778 C. C. P.

A partner in a commercial firm which made a judicial abandonment was indebted to the firm at the time of the abandonment in a large amount overdrawn upon his personal account. Subsequently he made and carried out a composition with the creditors of the firm, and with the approval of the court the curator transferred to him, by an assignment in authentic form, "all the assets and estate generally of the said late firm," * * * "as they existed at the time the said curator was appointed." At the same time the creditors discharged both him and his partners from all liability in respect of the partnership.

Held, affirming the decision of the court below, that the effect of the judicial abandonment was to transfer to the curator not only the partnership estate, but also the separate estate of each partner as well as the partners' individual rights as between themselves.

Held, reversing the decision of the court below, the Chief Justice and Taschereau J. dissenting, that the assignment of the estate by the curator and the discharge by the creditors, taken together, had the effect of releasing all the partners from the firm debts, but vested all the rights which had been transferred by the abandonment in the transferee personally and could not revive the individual rights of the partners as between themselves, and that, in consequence, any debt owing by the transferee to the partnership at the time of the abandonment became extinguished by confusion.

APPEAL from a decision of the Court of Queen's Bench, for Lower Canada (1), affirming a judgment of the Superior Court (2), which condemned the defend-

PRESENT:—Sir Henry Strong C.J., and Fournier, Taschereau, Sedgewick and King JJ.

(1) Q. R. 3 Q. B. 434. (2) Q. R. 4 S. C. 36.

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ant to pay to the plaintiff $10,261.08, part of the sum contributed by the plaintiff towards the capital of a commercial partnership formerly existing between them and one J. H. Smith which had terminated upon their making a judicial abandonment for the benefit of the firm's creditors.

The following statement of the case is taken from judgment of Mr. Justice Sedgewick.

On the 31st December, 1886, John MacLean, the defendant and appellant, Alexander Stewart, the plaintiff, and James Hardisty Smith, *mis en cause*, entered into partnership, MacLean's contribution to the capital being $4,480.91, Stewart's $25,292.47, Smith's $30,350.96. Before the expiration of the term of five years, viz., on the 22nd July, 1891, the partnership was dissolved by a judicial abandonment which the partners made at the demand of their creditors. At the time of the abandonment, according to the partnership books, there stood to the credit of Stewart's capital $17,185.82, to the credit of Smith's capital $27,379.54, and to the debit of MacLean's $29,079.31.

Although the statement prepared at the time of the abandonment showed a surplus of assets over liabilities of about $15,000, it is nevertheless admitted that the partnership was wholly insolvent, the plaintiff himself testifying that the assets of the estate were not more than enough to pay fifty cents on the dollar. Afterwards an arrangement was come to by which MacLean, with the knowledge and assent of his partners, undertook to pay, and did eventually pay, a composition of fifty cents on the dollar to ordinary creditors, and the full claims of all privileged creditors, in consideration of which the assets of the firm were transferred to him personally, the creditors at the same time discharging both him, and his partners as well, from all liability in respect of the partnership. This

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action is brought by Stewart against MacLean to recover from him his proportion of the amount appearing in the firm books at the time of the abandonment as having been drawn from the firm assets.

The action was tried in the Superior Court, and judgment was entered in favour of the plaintiff for $10,261.08½, with interest.

Upon appeal to the Court of Queen's Bench this judgment was sustained.

Beïque Q.C. and *Greenshields* Q.C. for the appellant. Respondent's right of action was extinguished as a necessary consequence of the discharge granted to appellant.

An abandonment by a commercial firm includes, by operation of law, not only the partnership property but also the private property of the partners, and the curator is vested with all the property abandoned, whether disclosed or not disclosed in the inventory. *Reid* v. *Bisset* (1); *Re Macfarlane* (2); *Lewis* v. *Jeffrey* (3); *Ontario Bank* v. *Foster* (4); Bedarride, Faillites (5); C.P.C. arts. 772 & 778; Pardessus, Droit Commercial (6).

Binney v. *Mutrie* (7), is not a case in point. First because there was neither abandonment, or composition, or discharge, and second, because under the English law, unless otherwise provided, only the use of capital is contributed (Lindley on partnership 5 ed. pp. 402, 403); whereas under the French law the capital contributed becomes the property of the firm, and on liquidation is treated like any other asset (8).

Macmaster Q.C. for the respondent. The abandonment and the composition effected by the appellant

(1) 15 Q.L.R. 108.
(2) 12 L.C. Jur. 239.
(3) 18 L.C. Jur. 132.
(4) 6 Legal News, 398.
(5) Vol. 2, nos. 743-4.
(6). No. 1086.
(7) 12 App. Cas. 160
(8) 26 Laurent no. 267 *et seq.*; Pont Société no. 365.

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did not extinguish the rights and obligations of the partners between themselves

The members of a partnership who obtain a discharge by abandoning partnership assets to creditors may reciprocally exercise their personal recourse in the settlement of partnership accounts between themselves (1).

There is no subrogation.

A partner can claim an account and partition from his co-partners. Arts. 1898, 712-727 C.C. In this account and partition each returns to the mass what he has received, the debts are deducted and the balance divided between the partners. Returns are due only from co-heir to co-heir not to legatees nor creditors of succession. Art. 723 C.C. The abandonment absorbed the assets and left nothing available to form the mass, but the drawings of the partners. The partners having been discharged from the partnership debts, the mass must return to them in its entirety; it is then applied towards the payment of the capital which is due to each partner (2).

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 subsist for the unsatisfied portion of the debts until they release the partners. The claims of the creditors against the partners and the claims of the partners *inter se* are totally distinct and separate. Now the creditors could not release the partners from the claims they might have *inter se.* While their assets were in the hands of their creditors these claims of the partners *inter se* could not be exercised to their prejudice, but once discharged the claims of the partners *inter se* were untramelled.

The conveyance to MacLean was simply a conveyance

(1) Cour de Cassation, Dalloz, 69, 1, 67.

(2) S.V. 65, 1, 12.

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of the assets of the co-partnership, and did not include the assets and liabilities of his co-partners. It did not pass the individual estate and rights of each partner and rights cannot be taken away by implication. As regards the creditors the overdraft could not be looked upon as an asset. It added nothing to the rights of the creditors. The overdraft is nothing more or less than a result of the "keeping of the reckoning" between the partners.

As to the plea of compensation there is no foundation whatever for it. Appellant simply bought the bankrupt estate from the creditors, at the rate of fifty cents on the dollar on the amount due to firm creditors. He received money's worth in goods and credits and cash on hand for the amount he paid in the form of composition, and he cannot make the payment avail in the double capacity of satisfying his obligations to his late partners and purchasing the bankrupt stock. Lindley on Part. (1); arts. 1839, 1103, 1854, 1863, 1865, C.C. See also *Binney* v. *Mutrie* (2); *Neudecker* v. *Kohlberg* (3); *West* v. *Skip* (4); *Gunnell* v. *Bird* (5).

THE CHIEF JUSTICE.—I can see no error in the judgment appealed against; therefore, adopting the reasons assigned by Chief Justice Lacoste in delivering the judgment of the Court of Queen's Bench, I am of opinion that this appeal must be dismissed.

FOURNIER J.—I concur in the judgment prepared by Mr. Justice Sedgewick in this case.

TASCHEREAU J.—I dissent for the reasons stated by Chief Justice Lacoste. This appeal should be dismissed.

SEDGEWICK J.—His Lordship stated the facts of the case as above set out and proceeded as follows:—

(1) Pp. 584, 591.
(2) 12 App. Cas. 165.
(3) 3 Daly, 407.
(4) 1 Ves. Sr. 239.
(5) 10 Wall 304.

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In my view the appeal must be allowed and that upon three grounds which I shall, as briefly as I can, point out.

I am willing to admit, and it may be taken for granted for my purpose, that had the firm been dissolved in the ordinary way, there having been no judicial abandonment, and had the action been brought for the winding up of the partnership and the distribution of its assets upon the basis of the partnership articles, amongst the different partners, the defendant Stewart would rightly have been called to pay the amount of the judgment recovered in the present action. But in my view the case here presented is a different one calling for the application of different principles. There is no question here 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. It may be that theoretically the property still remains in the firm or in its several members, but all right of action in respect of it passes over exclusively to the curator, their right of action for the time being ceasing. The claim now in suit, if a valid one, was a right of action which the plaintiff had against MacLean at the time of the dissolution, and passed by virtue of the abandonment and subsequent proceedings to the curator. In my view that right of action so transferred and vested in the curator has never yet been re-transferred to the plaintiff. It went from him by operation of law. It has never been restored either by operation of law or by any act of any person qualified or authorized to make such restoration. In the present case the abandoned property was in effect purchased

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by the defendant MacLean, but assume that no such transaction had taken place and that the insolvent estate had been wound up under the Code by the curator, and distributed by him as therein directed, in that case it could not, I think, be contended that Stewart could proceed by action and recover for his own benefit the amount now in controversy. If MacLean out of his private or separate estate was able to pay that money, the curator and not Stewart would have been entitled to it for distribution among the joint creditors of the firm after the separate creditors of Stewart had first been paid in full. By what act or under what law did this money, which otherwise would have belonged to the creditors, become the property of Stewart? Although, it is true, the creditors have discharged Stewart, the consideration for that discharge was not the transfer to him individually or to the firm of his or of the firm's property and right of action. So as far as he was concerned he 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. I am unable to see how the purchase by MacLean on his own account, and (we must assume) with his own money, from the curator of the abandoned property could vest in Stewart any right of action. 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, 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 late associates. MacLean, therefore, had as much right to purchase the firm assets as any stranger, and was in no sense acting in the getting back of the estate as an agent or for the benefit of Stewart, and its transfer to

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him, viewed as a transfer simply, could not in any way that I can perceive enure to Stewart's benefit. Indeed, if Stewart's right of action had passed over to the curator it makes no difference whether the curator himself realized the assets and made distribution of their proceeds or whether he sold them; so long as there was no transfer from the curator to the three partners or to himself he had no right of action.

The learned Chief Justice of the Queen's Bench, while admitting to the fullest extent that the abandonment transferred to the curator, not only the firm's rights but the rights of Stewart as well, argues that because there was a composition and discharge, that is to say, because the creditors discharged the members of the partnership in consideration of which MacLean, one of the partners, pledged himself to pay the composition, "the partners regained the exercise of their personal rights which the abandonment had taken from them."

With all respect I must differ from this view. There was no composition and discharge in the ordinary sense in the present case so far as Stewart was concerned. There would have been had each member been discharged; had they each undertaken to pay the composition, and had there been a transfer to the three of the abandoned estate. But here, Stewart got his discharge, nothing more. If it gave him the right to recover any private debts of his own, to recover the very claim in question, it would, it seems to me, have given him the right in common with his two late associates to recover the debt due the firm, a position which is manifestly without foundation. I repeat, the discharge of a debtor under the Code of Civil Procedure operates as a discharge only and does not bring with it, as incidental thereto or otherwise, any right of action which he may have had before abandonment. I

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am therefore of opinion for this reason that the action should have been dismissed.

There is, however, another ground upon which I think the plaintiff must fail. As already stated, the effect of abandonment by operation of law was to transfer to the curator all the property and rights of the firm as a firm, and of each individual member of it. The transfer from the curator to MacLean was intended to give to MacLean every asset which under the abandonment had become vested in the curator, and in my view the transfer of the 6th November, 1891, from the curator to MacLean, gives full effect to that intention. The order of the Superior Court of the 13th October, 1891, authorized the curator "to transfer the assets and estate generally of the said firm to the said John MacLean," and the instrument of transfer purports to transfer and make over unto the said John MacLean "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."

It would be unreasonable to suppose that there was an intention, either on the part of the court authorizing the transfer or on the part of the parties themselves, that while what might be termed the partnership assets were to be affected the individual assets of the partners were still to remain outstanding in the curator, and it is doing no violence to the language of the instrument to hold that the expression, "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 the separate estate of the individual partners, as well as the joint estate of the partnership itself. That, I think, is the proper construction to give the instrument. It would follow, therefore, that inasmuch as the claim now sued on was a right of action which Stewart had at the time of the

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abandonment, it was a right of action which became vested in MacLean by virtue of the transfer. It may be, and the learned Chief Justice throws out a suggestion to that effect, that the rights of the partners *inter se* were not clearly and distinctly in contemplation when the final arrangements were being made. It is clear, however, to my mind that MacLean, in offering to pay a composition to his creditors, never contemplated that he would be obliged to pay in full any indebtedness from himself to his co-partners. If such had been the intention there should have been a clear indication of it in the instrument itself.

There is a further ground which, in my view, necessitates the allowance of this appeal. As I have already stated MacLean, as the purchaser of the firm assets as between himself and Stewart, must be deemed to be a stranger. Supposing a real stranger, one who had never had any relations whatever with the firm, had purchased the estate and paid off, whether by a composition or in full, the claims of every creditor, he would thereupon as a result become possessed of all the rights of such creditors, as well as of the curator himself. In other words he would become subrogated to their rights. In my view MacLean occupies exactly the same position. Having liquidated all the partnership debts with his own moneys the debts which before were due from the firm to the creditors became due to him personally. So far as Stewart is concerned it makes no difference whether MacLean paid fifty or one hundred cents on the dollar. 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 which that composition represented. The evidence does not, I think, show the exact amount of money which as a matter of fact MacLean did pay. It does show, however, that the firm's direct and indi-

direct liabilities on June 30, 1891, were $281,246.41, of which the direct liabilities amounted to $164,935.91. Assuming this statement to be correct, and that he paid off this latter sum (which he in some way must have done), he would be deemed a creditor of the firm for that sum, and not, as I have already stated, for the amount he paid in liquidation of it. Now when this action was brought MacLean had either paid, or was under an obligation to pay, that indebtedness. And when Stewart, in this action, said in effect to him:

> You, MacLean, at the time of the dissolution of the firm had not only withdrawn from it your original capital, but $29,079.31 as well, pay me my proportion of that overdraft

MacLean had a right to reply, as he has in effect replied:

> It is true that I had overdrawn to the extent you mention at the time of the dissolution, but since that date I have refunded it five times over. I have paid out of my own pocket (it does not concern you how) $164,935.91 to the creditors of the firm, and if there is to be litigation between us it is from you and not from me that payment is to come.

Stewart may reply, and does reply:

> Yes, but for that payment you got in consideration the assets of the firm. "Assets," you admit in reply, "representing in value only fifty per cent of the liabilities. I have more right to hold you responsible for your proportion of the difference between the value of these assets and the amount of the debts I have paid than you have to call upon me for a dollar.

This supposed conversation, I think, correctly represents the legal position of the parties, and it shows at least that the state of the accounts, as they appeared from the partnership books, affords no indication as to the rights of the parties as they existed when MacLean got his transfer and paid off the partnership debts. It further gives strong force to the argument of appellant's counsel that the action was wrongly brought and that the procedure prescribed by article 1898 of the Code should have been followed.

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On the whole, I am of opinion that the appeal must be allowed and the action dismissed, the appellant to have costs in all the courts.

KING J.—I am of opinion that this appeal should be allowed with costs, and the action dismissed with costs in the Superior Court.

Appeal allowed with costs and action in Superior Court dismissed with costs to appellant in all courts.

Solicitors for the appellant: *Atwater & Mackie.*

Solicitors for the respondent: *Macmaster & Maclennan.*