In the Privy Council.

(No. 4 of 1898)

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN THE MOLSONS BANK (PLAINTIFFS) - - APPELLANTS,

AND

COOPER & SMITH, JAMES COOPER AND JOHN C. SMITH (DEFENDANTS) - - RESPONDENTS.

Case

OF RESPONDENTS.

10 1. This is an appeal from the unanimous judgment of the Supreme Court of Canada, dated the 9th day of December, 1896, which reverses the judgment of the Court of Appeal for Ontario.

The action was first tried by Mr. Justice Rose, without a jury, and he gave a verdict on the 19th April, 1895, for the Appellant Bank for $50,000 and interest. The Queen's Bench Division of the High Court of Justice for Ontario, on the 13th June, 1895, on appeal, reversed this decision and dismissed the bank's action. The Court of Appeal for Ontario, on further appeal by the bank, restored the judgment of Mr. Justice Rose.

As stated above the Supreme Court of Canada unanimously reversed the 20 judgment of the Court of Appeal for Ontario, pronounced on the 4th day of February, 1896. The Supreme Court ordered and declared that certain promissory notes deposited by the present respondents with the Appellant Bank, as collateral security, were so deposited under an agreement, dated the 13th day of June, 1891, as collateral security for advances made by the Appellant Bank to the present respondents on discounts and overdrafts, and that the present respondents are entitled to have all moneys received or to be received by the bank as the proceeds of such notes duly applied and credited to the present respondents in their account with the bank, and did further direct a reference to a proper officer to take an account.

2. The action was by the appellant Bank for $50,000.00, and interest on four promissory notes made by respondents to the Bank, as follows :

	Date.	*Time.*	*Due.*
$25,000.00	4th Aug., 1893	4 months	7th Dec., 1893
10,000.00	7th Aug., 1893	4 months	11th Dec., 1893
5,000.00	11th Aug., 1893	4 months	14th Dec., 1893
10,000.00	14th Aug., 1893	4 months	18th Dec., 1893
$50,000.00	Total.		

These were the latest maturing of ten promissory notes amounting to $145,000.00 made by respondents in favor of the appellant Bank.

The appellants were bankers of respondents, and discounted the ten notes above referred to, and placed the proceeds to the respondents' credit and received as collateral security for the payment of the principal debt a large number of promissory notes made by customers of the bank in favor of the respondents, and which collateral notes or "collections" were deposited with the appellants upon an agreement in writing as follows :

" Toronto, 13th June, 1891.

Rec., p. 8, l. 4. " I am pleased to inform you that our Board has granted you a line of " credit to $150,000.00, to be secured by collections deposited—rate six " per cent.—one-quarter commission on all cheques and collections outside of " the city, as agreed upon with your Mr. Mason.

" Yours truly,

" C. A. PIPON, Manager."

" P. S.—The meaning of the above is not that the advances shall be fully " secured by collections, but as near as you can. C. A. P., Manager."

At the time of depositing the said collateral notes with the Bank a list thereof was entered in a book kept by the Bank, with the following memorandum signed by Cooper & Smith :

Rec., p. 8, l. 14. " The notes enumerated in this book were deposited with the Molsons " Bank as collateral security for advances made to us by the Bank in " discounts and overdrafts."

4. The respondents suspended payment in August, 1893, and the Bank then held uncollected collateral paper to the amount of $104,104.00 as

Rec., p. 7, l. 36. security for the said $145,000.00.

The appellants sued the respondents upon six of the said ten notes, and obtained judgment upon five of them, after crediting upon the first maturing note, $6,920.00, collected on such collaterals. An action is still pending upon one of the ten notes. Rec., p. 7, l. 39.

This present action is upon the last maturing four of said ten notes, and was commenced on the 2nd day of June, 1894. Rec., p. 2, l. 23.

5. Large sums were collected by appellants upon these collections, which came due at different dates, and which at the date of the trial amounted to $82,135.71. Rec., p. 7, l. 41.

10 The appellants' contention was that they are not bound to credit the moneys so collected upon their principal debt. They assert that they can obtain judgment upon the $145,000.00 in full, and hold the cash received " in " suspense."

6. The respondents' contention was that at all events, now that all the notes of $145,000.00 are due, the appellants must give credit upon the whole debt or hold the moneys collected for the use of the respondents. The appellants must either treat the moneys collected as payment *pro tanto* or pay the same over to the respondents. That is the main point in dispute.

7. There is however another sum of about $4,000 which the appellants 20 received, and which is clearly a payment on account of the notes sued on, quite irrespective of and independently of the other contentions.

The following are the facts relating to this $4,000:

The respondents on the 4th of October, 1893, made an assignment of certain book debts and accounts due to them to one E. R. C. Clarkson as trustee for the creditors of Cooper & Smith. A declaration of the claim of the Molsons Bank was made on the 7th of October, 1893, and filed with Mr. Clarkson, setting forth the total claim of the Molsons Bank, both due and not then due, including the four notes sued on in this action. Rec., p. 8, l. 18. Rec., p. 8, l. 28. Rec., p. 48, l. 29. Rec., p. 50, l. 51.

The Bank received from Mr. Clarkson a dividend on its whole claim of 30 about eight cents on the dollar; $4,000 (equivalent to eight cents on $50,000) of this dividend would be applicable to the notes in question herein. This dividend was paid after the 5th of December, 1894. Whatever the result of this appeal there ought to be no question as to this Court compelling the Bank to credit this $4,000 in this action. Rec., p. 51, l. 15.

8. The Bank in their original statement of claim in this action also sought to get judgment against the respondents as endorsers of the collateral notes.

This claim was abandoned at the trial. Reference is here made to this abandoned claim to explain the meaning of some paragraphs of the statement of defence.

Rec., p. 5, l. 22. Rec., p. 5, l. 26. 9. Issue was joined by the Bank on the defence and counterclaim of the respondents. The parties went to trial before Rose, J., without a jury.

Rec., p. 8, l. 40. He gave a verdict for the appellants for $50,000, and also for interest, and took no notice whatever of defendants' counterclaim, not even granting them an account of the amounts collected on collaterals.

Rec., p. 10, l. 42. Rec., p. 14, l. 25. 10. The respondents appealed to the Queen's Bench Division. The appeal was heard by Falconbridge, J., and Street, J., who were of opinion that the Bank must either give credit on the debt or pay the money back to the debtor, as there was no agreement for allowing the Bank to keep the moneys in suspense or unapplied. As the Bank refused to apply the money upon the first maturing notes then in judgment, the Court held that the Bank must apply the money as payment upon the notes sued on in this action, and dismissed the Bank's action with costs.

Rec., p. 53, *et seq.* 11. The appellant Bank then appealed to the Court of Appeal for Ontario, and the judgment of the Divisional Court was reversed, Maclennan, J.A., dissenting. Mr. Justice Osler rested his decision on the question of estoppel only.

The respondents then appealed to the Supreme Court of Canada. The unanimous judgment of the Court was given by Sir Henry Strong in favor of the present respondents, and held that the written agreement of the 13th June, 1891, was that the moneys received by the Bank from collateral collections were payments *pro tanto* on the principal debt, and directed that an account be taken, and the judgments previously recovered stand as security only for the balance found to be due on the taking of the account.

Rec., p. 97.

Rec., p. 100, l. 23. 12. The Supreme Court also held that as estoppel had not been pleaded the Bank could not take advantage of it, and further, that even if the Bank had by pleading raised the question of estoppel there was in law no estoppel, as the issues in the two issues were not at all identical.

13. If it were not for the question of *res judicata* raised by the appellants when they were in the Divisional Court, the matter in dispute would simply be whether a Bank receiving money upon collateral paper deposited with them for collection, under the circumstances hereinbefore detailed, could refuse to recognize the money as payment *pro tanto* of the principal debt, or in the alternative be compelled to pay the money over to the respondents who deposited the collateral.

14. The facts connected with the alleged estoppel are as follows :

The Bank had in September, 1893, obtained judgments amounting in the aggregate to $83,100.00 upon the first five maturing of their promissory notes, less the sum of $6,900.00 which the Bank in its first action credited as the amount of collections on collaterals. Rec. p. 16, l. 27.

Executions issued, and the Sheriff realized a sum of money which, under the Creditors' Relief Act, R.S.O. Chap. 65, was distributable between all execution creditors of Cooper & Smith.

In the beginning of November, 1893, application was made in Chambers by the respondents to compel the appellant Bank to apply in reduction of its then existing judgments the sum of about $47,000.00 then on hand from co lections. The Master in Chambers refused the application, which refusal was upheld by Mr. Justice MacMahon. The respondents then appealed to the Divisional Court of Queen's Bench, who directed an issue to be tried upon the following questions.

" Whether before or since the recovery of the judgments above mentioned " the said Bank have received any payments which ought to be applied in " satisfaction in whole or in part of such judgments, or any of them ; and, if " so, when such payments, if any, ought to be applied, and to what extent." Rec., p. 17, l. 3, p. 18, l. 7.

This issue, to which some creditors were made parties, was tried by Mr. Justice Rose on 13th April, 1894, and he reserved judgment ; and on 20th April, 1894, he found that the appellants had not received any payment which they were, under the circumstances, bound to apply as contended. Subsequently, on the 23rd May, 1894, an order was made declaring to the same effect. Rec., p. 47, l. 1. Rec., p. 48, l. 38

The object of the said Chamber application, which resulted in the directing of the said issue, and adding some creditors as parties, was to compel the Bank to rank for a dividend upon a smaller sum than their judgments in the division of the money realized by the sheriff under the Creditors' Relief Act.

The Bank resisted the application on the ground that the collaterals were in respect of their whole debt of $145,000.00, and not held in respect of that part only of their debt reduced to judgment.

See affidavit used by Bank upon Chamber application, and made by W. H. Draper, Bank Manager, denying that any sum specifically applicable to the payment " of these judgments had been received ; and that the collateral " notes were taken as collateral security for th e whole of the defendants' Rec., p. 52. Rec., p. 52, l. 20.

" account; that the amount received in respect of collaterals the bank is " holding as collateral to the whole indebtedness, some of which had not
Rec., p. 52, l. 33. " matured, and the amount not yet matured being between $50,000.00 and
Rec., p. 52, l. 41. " $60,000.00, and that the bank have not received any amounts on collateral " paper which should be applied specifically in reduction of the judgments " obtained, as set out in the affidavit of J. C. Smith." See also argument of bank's counsel at the time of the first issue: " I shall make this point briefly " that the course of dealing shows such a state of facts as will enable me to " contend that this debt has been treated as a whole debt which has become " welded together as one debt."

Rec., p. 40, l. 36. His Lordship: " What do you mean by this debt?"

Mr. Shepley: " I mean the whole debt, something over $165,000.00, " $145,000.00 is represented by discounts of the firm's own paper discounted " directly.....upon a portion of that debt which has matured up to a " certain date, the 11th November, we have recovered judgment; upon " another portion we have not recovered judgment. I want to have the " benefit, to which I am entitled in law, of making the contention that this " collateral security is collateral to the whole debt and not simply the part of " it upon which we have recovered judgment."

Rec., p. 40, l. 47. His Lordship: " I should have thought that beyond question," etc.

Rec., p. 41, l. 7. Mr. Shepley: " I understood from the judgment of the Divisional Court " that it was only on account of the doubt whether that was so they directed " the trial of the issue."

The real issue directed is to be found not in a few expressions which may be extracted by the appellants from the opinions of a judge in directing the issue, but in the actual issue directed and which has been by these respondents quoted above.

Rec., p. 51, l. 18. The respondents humbly submit that the judgment of the Supreme Court of Canada is right and ought to be affirmed, except as to costs which, including all costs of the courts below, instead of being set off against the appellants' debt ought to be paid by appellants to respondents, for the following among other

REASONS:

(a)—As to payment *pro tanto.*

1 The notes made by respondents' customers having been put in the bank for collection under the written agreement above set out, any moneys received by the bank must be allowed as payment *pro tanto.* The bank on its first action did credit $6,920.10 of such collections, and in filing proof of its claim before Mr. Clarkson, the Assignee, they gave credit for $28,939.99 of such collections. Rec., p. 7, l. 39.

2. If not payment then they are moneys received for use of the respondents and payable to them.

3. There is in this case no agreement that the bank can hold "in suspense" the moneys that actually come to their hands. Even if an attempt had been made to enter into such a Mahomet-coffin agreement, it is doubtful if it would be upheld. But there is no such agreement or attempt at such an agreement.

4. The collateral notes, before being converted into money, could be held without giving any credit, but once the money is in hands of the bank, it is payment *pro tanto*

5. To hold the contrary would be to reverse the long standing law of England and Canada as to a mortgagee giving credit for all moneys actually come to hand.

6. A question might arise whether the bank could be compelled to apply the first payments received in satisfaction of the first notes coming due, but no such question can arise in this action which is brought for the balance of the whole account, and wherein the respondents enter a counterclaim asserting their rights in respect of the collections.

7. To allow the appeal would be to give the bank judgment aggregating over $130,000.00 when less than $30,000.00 is owing.

(b)—As to court considering the question of *res judicata* when it was not pleaded.

8. It would be unfair to the respondents to permit a plea of estoppel to be now entered as respondents had no notice of any such question being raised. What occurred at the trial was no intimation of any such contention. Rec., p. 8, l. 28

9. The right of the appellants to now contend for an estoppel ought, it is humbly submitted, to be first disposed of. Against the claim for leave to raise such a plea, is the consideration of the absurd consequence which would follow the finding of the Privy Council that there were payments received on account, but yet that the respondents are debarred from getting the benefit of such payments—That would be indeed a travesty of justice.

10. Courts do not allow amendment so as to let in a plea of *res judicata* " because it would enable a party to avail himself of a technical rule " of law and not to determine the real issue which ought to be " determined."

11. One of the grounds of asking leave to appeal to the Privy Council was that the questions sought to be raised by this appeal are of great and general importance to Canadian banks. This question of *res judicata* can be of no general importance. It is limited to this one case.

12. The respondents proved their defence and counterclaim by admissions made by the bank's counsel at the trial. If any one is estopped, it is the bank who, after making admissions, which are tantamount to admissions of having received payments on account, ought now to be debarred from setting up anything that would contradict their own admissions. The bank is estopped from setting up an estoppel.

13. Assuming, however, that the appellants are entitled to argue that the matter was *res judicata*, the decision relied upon by the appellants as an estoppel is not at all the same as the issue in this action.

All that was decided in the former issue was that the bank having obtained judgment and issued execution against Cooper & Smith on their early maturing paper and having realized under their *fi. fas.* a sum of money (which, under the Creditors' Relief Act, Revised Statutes of Ontario, 1887, Chapter 65, was divisible *pro rata* between all execution creditors) could not be compelled after judgment and execution to apply a sum of $47,000.00 then in hand specifically on the said judgments, so as to lessen the dividend the bank had already entitled themselves to, by obtaining their judgment.

On the other hand this action and counterclaim raises quite a different question, viz., whether the bank can now, after they have obtained judgments for sums larger than their total claim, obtain an additional judgment of $50,000.00, in the face of a defence and a counterclaim and after the whole debt has matured.

The two issues, apart from the notes being different, are quite distinct The judgment in favor of the Bank in the first issue and that of the Supreme Court against the Bank in the present action, are quite consistent. It may have been proper that the Bank could not be forced at the time, in 1893 and 1894, to apply on the first portion of their debt all moneys that they received from collaterals; and also equally correct to now prevent the bank, when all its notes are due, from refusing to apply such receipts. The receipts at the time of the first issue, $47,000.00, and the judgments, $83,100.00, on the main debt, did not exceed the Bank's total claim.

14. The appellants' argument would interpret the first issue as being a determination of all questions that could possibly, then or in future, arise out of the collections; whereas, in fact, it was only an interpretation of a single small part—namely, what effect some partial collections had upon the then rights of the Bank.

One test that the issues are different is that the same evidence may sustain the bank in one issue and be against the bank in the other issue. For instance: If the bank's claim had been in judgments for say £10,000.00 and on unmatured paper £20,000.00 and the bank held £10,000.00 collateral paper, all of which was collected at the time the Sheriff seized, the decision in the first issue might reasonably be that the bank could rank on the £10,000.00 of judgments and not then give credit for the £10,000.00 collected, yet when the bank came to sue for the remaining £20,000.00 the decision could, without inconsistency, be that the bank would have to then give credit for the £10,000,00 collected.

15. Mr. Justice Street delivered the opinion of the Court when the first issue was directed. It was the same learned judge who delivered the judgment of the Queen's Bench Division in this present action, and held that the two issues were not identical. Words may be extracted from opinions of this learned judge when delivering judgment that might lead to arguments that the questions are similar, but a consideration of the whole scope of the matter shows otherwise.

16. If, however, the respondents are estopped from saying that the collections on collaterals are to be applied in reduction of any part of the bank's claim, so also is the bank estopped from so saying. But it is admitted that over $83,000.00 have come to the bank's hands from notes of the respondents deposited with the bank for collection. Then the result is that if these sums are not to be applied upon the debt due to the bank, they are moneys received to and for the use of the respondents and judgment ought to issue in favor of the respondents for the said $83,000.00 and interest.

17. If the respondents cannot now on their counterclaim assert their rights to the collections, they never can.

18. The respondents, owing to their financial troubles, may not be represented by counsel on the argument, and they submit their rights to the protection of the Honorable the Judicial Committee of the Privy Council, and they refer to the opinions of the judges of the Supreme Court, of Mr. Justice Maclennan of the Court of Appeal, and of Mr. Justice Street of the Queen's Bench; and to the present respondents' *factum* in the Supreme Court, where their contention and the cases in support thereof are set forth.

J. J. FOY,
Counsel for Respondents.

In the Privy Council.

On appeal from the Supreme Court of Canada.

BETWEEN

THE MOLSONS BANK - - - (*Plaintiffs*)
APPELLANTS,

AND

COOPER & SMITH, JAMES COOPER,
AND JOHN C. SMITH - (*Defendants*)
RESPONDENTS

Case

OF THE RESPONDENTS.

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17 Victoria Street, S.W.