In the Privy Council.

(No. 4 of 1898)

AN APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE MOLSONS BANK . . *(Plaintiffs) Appellants,*

AND

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

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

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RECORD OF PROCEEDINGS.

RECORD.

In the Supreme Court of Canada.

No. 1.

Statement of Case.

In the Supreme Court of Canada.

Case on appeal to the Supreme Court of Canada.

Between

Cooper & Smith, and John C. Smith, . *(Defendants) Appellants;*

and

The Molsons Bank . . . . . *(Plaintiffs) Respondents.*

Statement of Case.

This is an appeal from the judgment of the Court of Appeal for Ontario, pronounced on the Fourth day of February, 1896 (Mr. Justice Maclennan dissenting), reversing the judgment of the Queen's Bench Division of the High Court of Justice, whereby a judgment given at the trial in favour of the Respondents was set aside and the Respondents' action was dismissed.

RECORD.

In the Court of Appeal for Ontario.

No. 2. Statement of Case.

Case on appeal to the Court of Appeal for Ontario.

In the Court of Appeal for Ontario.

Between

The Molsons Bank . . . . . *(Appellants), Plaintiffs;*

and

Cooper & Smith, James Cooper and John C. Smith,

(Respondents), Defendants.

Statement of Case.

This is an appeal from the judgment of a Divisional Court of the Queen's Bench Division, composed of Mr. Justice Falconbridge and Mr. Justice Street, pronounced on the 13th day of June, 1895, whereby the judgment pronounced at the trial by Mr. Justice Rose in favour of the plaintiffs, for the amount of certain promissory notes made by the defendants payable to the plaintiffs, as follows:

Amount.	*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.

and interest thereon, was set aside, and judgment directed to be entered for the defendants, dismissing the action with costs.

In the High Court of Justice, Writ issued 2nd June, 1894.

No. 3. Statement of Claim, delivered 7th Sept., 1894.

In the High Court of Justice—Queen's Bench Division.

Writ issued the 2nd day of June, 1894.

Between

The Molsons Bank, ... *Plaintiffs;*

and

Cooper & Smith, James Cooper and John C. Smith, . *Defendants.*

Statement of Claim.

1. The plaintiffs are an incorporated bank carrying on business in the city of Toronto.

2. At the time of the making of the notes hereinafter mentioned, the defendants were merchants carrying on business in the said city.

3. On the 4th day of August, 1893, the defendants made their promissory note whereby they promised to pay the plaintiffs the sum of $25,000.00 four months after date. The said note became due on the 7th day of December, 1893, but the defendants did not, nor did either of them pay the same.

4. On the 7th day of August, 1893, the defendants made their promissory note whereby they promised to pay the plaintiffs the sum of $10,000.00 four months after date. The said note became due on the 11th day of December, 1893, but the said defendants did not, nor did either of them pay the same.

5. On the 11th day of August, 1893, the defendants made their promissory note whereby they promised to pay to the plaintiffs the sum of $5,000.00 four months after date. The said note became due on the 14th day of December, 1893, but the defendants did not, nor did either of them pay the same.

6. On the 14th day of August, 1893, the defendants made their promissory note whereby they promised to pay to the plaintiffs the sum of $10,000.00 four months after date. The note became due on the 18th day of December, 1893, but the defendants did not, nor did either of them pay the same.

7–37. These paragraphs are not printed because they embrace claims upon certain other promissory notes, the right to recover upon which was not pressed at the trial, and in respect of which the action was dismissed with costs.

The plaintiffs propose that this action be tried at the city of Toronto.

Delivered 7th September, 1894.

Statement of Defence

Of the defendants Cooper & Smith and John C. Smith.

No. 4.
Statement of Defence delivered 15th Sept., 1894.

1. The plaintiffs were the bankers of the defendants and discounted for the defendants promissory notes to the extent of $145,000.00, as follows:

Note A—$30,000.00.
Note B— 20,000.00.
Note C— 20,000.00.
Note D— 10,000.00.
Note E— 10,000.00.
Note F— 5,000.00, due 22nd September, 1893.
Note G— 25,000.00, due 7th December, 1893.
Note H— 10,000.00, due 11th December, 1893.
Note J— 5,000.00, due 14th December, 1893.
Note K— 10,000.00, due 18th December, 1893.

The proceeds of the said discounted notes were paid by the plaintiffs to the defendants. These defendants, Cooper & Smith and John C. Smith, also were indebted to the plaintiffs on overdraft $1,907.00.

2. The defendants deposited with the plaintiffs as collateral security for the payment of the said discounts a large number of promissory notes made by sundry debtors of the defendants to the order of the defendants, but no money was advanced by the plaintiffs to the defendants upon these last mentioned promissory notes. In order to give the plaintiffs title to these notes last referred to, the defendants endorsed their names on the same and deposited them with the plaintiffs as collateral security for the due payment of the discounted notes, but such endorsation was made solely and exclusively for the purpose of giving such title to the plaintiffs, and with the express understanding and on the express condition that the defendants should not be liable thereon, inasmuch as the said discounted notes and overdraft represented the whole indebtedness of the defendants to the plaintiffs, except on

some small notes or drafts discounted for the defendants by the plaintiffs, and for which actions are now pending. The plaintiffs became the depositaries of notes on said terms and on no other.

3. The plaintiffs brought several actions against the defendants in respect of said notes A, B, C, D and E, and obtained judgment against the defendants on the said notes for sums amounting in the aggregate to $83,218.00, or thereabouts.

4. The said notes above referred to as G, H, J and K, are four of the notes sued on in this action and referred to in paragraphs 3, 4, 5 and 6 of the plaintiffs' Statement of Claim.

5. An action was brought in this Court by the plaintiffs against the defendants on the $5,000.00 note above referred to in paragraph 1 as note F, and for said overdraft of $1,907.00 and is now pending, and the plaintiffs still claim that the defendants are indebted to the plaintiffs for the full amount of the said $5,000.00 note, and $1,907.00 overdraft.

6. Omitted, as refers to paragraphs 7–37, Statement of Claim.

7. Large sums of money have been paid to the plaintiffs, both before and since action on the said notes mentioned in paragraphs 3, 4, 5 and 6 of the plaintiffs' Statement of Claim, and upon the other promissory notes referred to in paragraph 2 of this Statement of Defence as deposited with the plaintiffs as collateral security as aforesaid, and the defendants under the terms of the agreement as to such deposit are entitled to have and receive credit for such large sums in reduction of any liability on the notes G, H, J and K, and F.

8. The defendants are not aware of the amounts received by the plaintiffs on the said collateral promissory notes and other notes, and the plaintiffs have full knowledge thereof, and the defendants pray an account of the same from the plaintiffs.

9. The plaintiffs have, in respect to certain moneys collected by E. R. C. Clarkson, as assignee for the benefit of the creditors of the defendants, filed a claim in respect of the four notes G, H, J, and K, sued on herein, and in respect of the other promissory notes discounted for the defendants as aforesaid, and have received a dividend thereon amounting to a large sum of money. The defendants claim credit in this action for a proportionate part of the said dividend.

10. The defendants, Cooper & Smith and John C. Smith, admit that they are indebted to the plaintiffs for a sum of money in respect of the notes referred to in paragraphs 3, 4, 5 and 6 of the plaintiffs' Statement of Claim, but the amount is far less than the amount of the last referred to four notes. These defendants are unable to say the amount of the balance of indebtedness to the plaintiffs, and submit to an account being taken to ascertain what they owe on the basis of this defence. These defendants say and submit that the judgment ought not to be for a sum which, together with the aforesaid judgments already recovered by the plaintiffs against them, and with the amount of the $5,000.00 and $1,907.00 mentioned in paragraph 5 of this Defence, would exceed the total amount now required to pay the plaintiffs the full indebtedness of the defendants.

11. By way of counter-claim, the defendants, Cooper & Smith and John

C. Smith, repeat the allegations hereinbefore made, and say that the plaintiffs were, and are, agents of the defendants in respect of the said promissory notes so deposited as collateral security, and that the defendants are entitled to an account of the moneys which the plaintiffs received thereon.

12. The defendants have requested the plaintiffs to admit that the defendants are entitled to credit for the moneys received by plaintiffs on the promissory notes so deposited as collateral security, but the plaintiffs persist in contending that the plaintiffs are entitled to judgment against the defendants in respect of both the principal debt, and also against the defendants as endorsers of said collateral promissory notes.

The defendants pray—

1. For an account of what the plaintiffs have collected for defendants.

2. A declaration that the defendants are not liable on any notes deposited with the plaintiffs as collateral security as aforesaid, and that the plaintiffs became depositaries of said notes on the terms aforesaid.

3. A declaration that the defendants are entitled to credit on the notes so discounted for all sums received by said plaintiffs on said collateral notes, and are entitled to hereafter receive credit on the notes in paragraphs 3, 4, 5 and 6 of the said Statement of Claim for all moneys the plaintiffs may hereafter collect on said collateral notes or any of them.

Delivered 15th September, 1894.

Joinder of Issue.

No. 5. Joinder of Issue, 3rd Oct., 1894.

The plaintiffs join issue on the Statement of Defence of the defendants herein.

Delivered 3rd October, A.D. 1894.

Notes of Trial.

No. 6. Evidence at trial 18th April, 1895.

Before Rose, J., Toronto Assizes, Thursday, April 18th, 1895.

Shepley, Q.C., for Plaintiffs; Foy, Q.C., for Defendants.

Mr. Shepley: Promissory notes for large sums were discounted by the bank, amounting to $145,000.00. The first five of these, amounting to $90,000.00, have been recovered upon; there is a judgment now in respect of that. Since the recovery of that judgment, other notes have matured; there are four notes for $25,000.00, $10,000.00, $5,000.00 and $10,000.00 respectively. The action is against James Cooper, John C. Smith, and Cooper & Smith as a firm.

His Lordship: What is the defence, Mr. Foy?

Mr. Foy: The collateral notes, my Lord, which were given as security, have been collected upon to the extent of about $90,000.00, and we are entitled to ask the main debt to be reduced by the amount of those payments. They have already judgment for about $83,000.00. If they apply it upon the 83,000.00 judgment, it would still leave a portion to go to the credit of this

action, and if they do not apply it upon that judgment—and they have hitherto refused to do so—then of course it is payment in full of the $50,000.00 sued upon here.

His Lordship: The action is upon collateral paper?

Mr. Foy: No, upon the direct paper.

His Lordship: And made by the firm.

Mr. Shepley: Made by the firm.

His Lordship—Endorsed?

Mr. Shepley: Payable direct.

Mr. Foy: The paper of the firm was originally $145,000.00, and they have received about $90,000.00 of the collateral paper in the bank.

His Lordship: That would leave about $55,000.00?

Mr. Foy: $55,000.00 or $56,000.00.

His Lordship: They say the whole should stand until the final adjustment?

Mr. Shepley: That is what the Court has decided we are entitled to do.

Mr. Foy: At the time your Lordship heard the case at Osgoode Hall we sought to have the credits given upon the first judgment. We thought what they had collected up to that date ought to be applied in reduction of those judgments. After the judgments were obtained an application was made to have credit given upon those judgments, but your Lordship decided that as these collateral notes were in respect of the whole $145,000.00, and not in respect of the $80,000.00, we had no right to force the bank to apply the first moneys that came in in payment of their first notes that matured; but this is an entirely different question, where now all the notes have matured, and they are suing for a claim which would give them a good deal over $100,000.00 when $50,000.00 would pay them.

Mr. Shepley: Perhaps it would be convenient if I were to read your Lordship's judgment upon the former occasion.

His Lordship: If you will just give it to me I will look at it, Mr. Shepley. Who are you appearing for, Mr. Barwick?

Mr. Barwick: For the defendant Smith, in a motion to consolidate two other actions with this one. In this action I do not appear.

His Lordship: Well, are your clients prepared to supplement the moneys which the bank has collected so as to give the bank the whole $145,000.00?

Mr. Foy: No, my Lord.

His Lordship: Is not the principle of this judgment to determine that the moneys collected by the bank are to be held to a special account to make good any deficit on the firm paper until that firm paper is paid in full?

Mr. Foy: I do not understand that that is the effect of the judgment, my Lord; your Lordship was dealing simply with that question.

His Lordship: I think, the second part of the judgment.

Mr. Foy: The first sentence will show.

His Lordship: Look at the last line of the second paragraph (reads), and then go to the bottom of the next paragraph (reads).

Mr. Foy: Yes, my Lord, quite true, they have that right; but your Lordship does not say they shall have the right they are seeking here,

because the collateral paper was only for $104,000.00, and the direct paper for $145,000.00.

His Lordship: You see, the principle of this decision is that the money be held by the bank to make good any loss the bank may sustain, but for this, in reference to the $145,000.00.

Mr. Foy: I submit that I have authority for the proposition I make, that we are entitled to credit for this, although the authorities would not go to the extent of saying that we were entitled to do it in the first instance before all the paper had matured.

His Lordship: I do not see how you can, unless—

Mr. Foy: Because it was exactly the same as a mortgagee's claim, the bank's claim; they have realized a part of their security, and it was not security given to indemnify them against any ultimate loss, it was simply a discount of paper with collateral paper put in as security for it. That was the position, the amount of paper was secured by these customers' notes.

His Lordship: I am afraid I have concluded myself as to that fact. "It seems to me that such paper was regarded by both parties as security available for the whole account if at any time," etc.

Mr. Foy: As security for the whole account, not for any particular part or portion. At that time we were seeking to get your Lordship to apply it to a particular part. Now I am asking that we get credit on the whole account, and that judgment should not go for a larger sum than would pay their debt in full. They are asking for more than that.

His Lordship: They want $55,000.00.

Mr. Foy: $50,000.00 odd would pay them.

His Lordship: If you are prepared to pay $55,000.00—

Mr. Foy: I say we are not prepared to pay.

His Lordship: I am afraid I am precluded, but perhaps you will make your statement.

Mr. Foy: Then, in case the matter may go further, would not it be convenient to have some evidence or admissions as to what—

Mr. Shepley: I will admit everything that I can admit.

Mr. Foy: What I understand, my Lord, is that there are judgments now for $83,100.00, and that there is another action pending for $5,000.00 on direct paper, and that the collateral paper at the time of the suspension towards the end of August, 1893, was $104,104.00.

Mr. Shepley: Admitted.

Mr. Foy: And that the amount collected on the collaterals up to the present time is $6,920.10, which sum was applied upon the first action in reduction of the amount sued on in the first action, and, in addition to that, collected since that $82,135.71; that none of this money, except the $6,920.10, has been credited upon any of the direct liabilities.

Mr. Shepley: You may add to that, that they are carried to suspense account.

Mr. Foy: Yes, those moneys have been carried to suspense account. Then, that the Sheriff declared a dividend upon the amount of this first judgment, the exact amount, however, is in dispute, and the plaintiffs also received

RECORD.

In the High Court of Justice.

No. 6. Evidence at trial —*continued.*

from the Sheriff, $1,567.15 in an interpleader matter, and $631.54 out of Cooper's personal estate, the sale of Cooper's personal estate by the Sheriff, and that the following letter was given by the Manager of the Molsons Bank to Cooper & Smith, dated the 13th of June, 1891: "I am pleased to inform you that our Board have granted you a line of credit to $150,000.00, to be secured by collections deposited, rate 6 per cent., one-quarter commission on all checks and collections outside of this city, as agreed upon with your Mr. Mason. Yours truly, C. A. Pipon, Manager." "The meaning of the above is not that the advance shall be fully covered by collections, but as near as you can. . C. A. P., Manager."

Mr. Shepley: Will you add to that the endorsement?

Mr. Foy: Notes were deposited with the bank from time to time, and a list of the notes deposited at the bank was inserted in the two books, and in each of them the following memorandum made: "The notes enumerated in this book are deposited with the Molsons Bank as collateral security for advances made to us by the bank in discounts and overdrafts." Before asking for the next admission, your Lordship, my learned friend, Mr. Shepley, wishes to see it. That an assignment was made by Cooper & Smith to E. R. C. Clarkson, on the 4th of October, 1893, of book debts.

His Lordship: The book debts as shown by the assignment?

Mr. Foy: They are not set out, my Lord—by the assignment, of which I put in a copy. That the Molsons Bank, through the manager, Mr. Pipon, on the 7th of October, 1893, made a statutory declaration of the bank's claim, a copy of which I also put in, and delivered it to Mr. Clarkson, and the bank is entitled to some dividend. That part of the claim referred to in Mr. Pipon's declaration is the $50,000.00 in suit in this action.

His Lordship: Then we may consider that disposed of?

Mr. Shepley—Will your Lordship permit me to add one other thing; that is, that I put in formally the proceedings upon the two issues that were tried before your Lordship up to the judgment?

His Lordship: Then it is judgment for the amount of the four notes in the pleadings?

Mr. Shepley: The four notes, $25,000.00, $10,000.00, $5,000.00 and $10,000.00.

His Lordship: The four notes sum up to $50,000.00 even money?

Mr. Shepley: Yes, my Lord.

No. 7. Judgment of Honourable Mr. Justice Rose.

Judgment of the Hon. Mr. Justice Rose.

I direct judgment to be entered for the plaintiffs for $50,000.00, amount of four notes within mentioned with interest thereon as claimed, with costs, and judgment to be entered for the defendants, dismissing the remaining claims in the action with such costs as the defendants have incurred in respect thereto, such costs to be set off against the plaintiffs' claim as allowed.

April 18th, 1895.

JOHN E. ROSE,
Judge.

RECORD.

In the High Court of Justice.

No. 8.

Defendants' Notice of motion to Divisional Court, 30th April, 1895.

Defendants' Notice of Motion to Divisional Court.

Take notice that a motion will be made before the Divisional Court of this Division at Osgoode Hall, Toronto, on Monday, the 20th day of May, 1895, at the hour of eleven o'clock in the forenoon, or at such other day and hour thereafter, as the motion may be made by the defendants by way of appeal from the judgment of the Honourable Mr. Justice Rose, delivered the 18th day of April, 1895, and that judgment for the plaintiffs be set aside and judgment entered for the defendants, or for such further or other order as may be deemed just, upon the following among other grounds :

1. That the plaintiffs have received payment in full of their claim of $50,000.00 sued on in this action.

2. That the total claim which the plaintiffs alleged against the defendants was $141,509.00 principal, made up as follows :

Notes due and in judgment on and prior to the 26th day of September, 1893	$83,100 00	
Notes sued on in action commenced on the 27th day of November, 1893	5,000 00	
Notes of defendants' customers sued on in said action, claimed by plaintiffs to be	1,489 00	
Overdraft claimed to be	1,920 00	
Amount of bank's claim, exclusive of present action	$91,509 00	
Notes sued on in this action (except the notes in respect of which plaintiffs abandoned all claim)	50,000 00	
Total principal		$141,509 00
That the plaintiffs have received from the Sheriff on said judgments (about)	$14,000 00	
And	631 00	
On interpleader proceedings	1,567 00	
From E. R. C. Clarkson, in respect of dividend on certain assignment for benefit of creditors (about)	10,000 00	
		$26,198 00
On collateral security referred to in the admissions at the trial and not credited by bank on any account		82,135 00
Total (about)		$108,333 00

The plaintiffs refused, and still refuse, to credit any of the collections on collaterals on the judgments of 1893, leaving, it is submitted, it in the power of defendants to apply, as they now do apply, the same on the $50,000.00 claimed in this action.

3. That if the sums collected on the collaterals cannot be wholly credited on the last named $50,000.00, then the defendants claim that the learned

RECORD.

In the High Court of Justice.

No. 8. Defendants' Notice of Motion to Divisional Court —*continued.*

trial Judge ought to have credited a proportionate part on the said $50,000.00 and compelled the plaintiffs to agree to apply a *pro rata* part on the existing judgments, or allow the whole to be applied in this action.

4. That the defendants are entitled at all events to a judgment that the plaintiffs should have satisfaction and execution for only the difference between the total indebtedness and the amount the plaintiffs have received on collaterals, and for a judgment that the defendants are entitled to a return of the amount collected on the collaterals and a return of the uncollected collaterals upon payment of the amount for which judgments have been awarded to the plaintiffs in this and prior actions.

5. The learned Judge proceeded upon the ground that the bank was not obliged to give any credit for sums collected on collaterals. The defendants submit that his Lordship was wrong in this. The contract is not, and does not purport to be that the collaterals and the sums collected thereon are to remain as security to indemnify the bank against any ultimate loss that may be sustained, but is merely a pledge of certain securities as collateral security to secure the debt, and accordingly, any moneys collected upon the securities are payments *pro tanto* on the debt, for which they have been mortgaged or pledged, and the bank is obliged to give credit in the same way as a Mortgagee or Pledgee would.

6. The learned trial Judge heard no argument at the trial, stating that he considered himself to have virtually decided the same question on an issue heretofore directed to be tried, and by him tried. The defendants submit that the present case presents quite a different question for decision. When the other issue was tried, the plaintiffs had judgment entered for their then past due debt, $83,000.00. The defendants sought to make the bank apply the collections that up to that time, had been made upon the collateral security in reduction of those judgments. The learned Judge held, that as the collaterals were security for the whole debt, and not for any part thereof, he could not compel the bank to apply the moneys received in respect of the past due liability only, as the amount of judgments and the receipts did not then exceed the total liability to the bank. The present issue is whether the bank is not compellable to give credit for the collections of $82,135.00 now that all the liability of the defendants to the plaintiffs had matured before this action, and whether the bank can retain judgments for over $130,000.00 when a very much smaller sum would satisfy the bank's claim.

And further take notice, that on such motion will be read the pleadings and proceedings herein, the evidence taken and admissions made at the trial, the said judgment, the other judgments obtained by the plaintiffs against the appellants, or any of them, and the other papers and proceedings herein.

Dated 30th April, A.D. 1895.

No. 9. Reasons for Judgment of Divisional Court, 13th June, 1895.

Judgment of the Divisional Court, Delivered by Hon. Mr. Justice Street, 13th June, 1895.

The defendants, a wholesale firm, were customers of the plaintiffs, and kept their account at the Toronto office of the plaintiffs.

On 13th June, 1891, in response to an application for a line of credit, the plaintiffs' manager wrote to the defendants as follows: "I am pleased to inform you that our Board have granted you a line of credit to $150,000.00, to be secured by collections deposited, rate 6 per cent.; the meaning of the above is not that the advance shall be fully covered by collections, but as near as you can."

The plaintiffs then advanced to the defendants large sums of money upon their notes, and the defendants handed to the plaintiffs from time to time numbers of their customers' notes as collateral security; these collateral notes were entered in a book which was headed as follows: "The notes enumerated in this book are deposited with the Molsons Bank as collateral security for advances made to us by the bank in discounts and overdrafts."

As the collateral notes matured they were from time to time withdrawn by the defendants for collection, other similar notes being substituted for those withdrawn.

In 1893 the defendants stopped payment, and in September, 1893, the plaintiffs recovered judgment against them upon notes then overdue for $83,000.00 or more, and placed executions in the Sheriff's hands. The Sheriff seized and sold goods of the defendants, but the amount was insufficient to pay all the executions in full, and he proceeded to a *pro rata* distribution under the Creditors' Relief Act.

Some of the other creditors disputed the amount of the plaintiffs' claim, insisting that it should be reduced by the amount of the collections made before and after the judgment was recovered upon the collateral securities. The defendants also applied in chambers to have satisfaction *pro tanto* or in full entered upon the judgment by reason of the payments received by the plaintiffs upon these collateral securities.

The latter motion came by way of appeal or adjournment before the Divisional Court of the Queen's Bench Division, who directed an issue styled Cooper *v.* Molsons Bank to be tried to determine whether before or since the recovery on the judgments, the plaintiffs had received any payments which ought to be applied in whole or in part on the judgments or any of them.

A similar issue styled Mason *v.* Molsons Bank was directed to be tried in the contestation made by the other creditors. Both issues were tried before Rose, J., on 13th April, 1894, who, on 20th April, 1894, delivered the following judgment:

(This judgment is printed on page 45 of this case.)

The formal finding endorsed upon the issue in Cooper *v.* Molsons Bank was that the defendants in that issue had not either before or since the recovery of the judgments in question received any payments, which either at the time of the receipt of the same ought to have been, or ought now to be applied in satisfaction in whole or in part of the said judgments or any of them.

Another action was begun later in 1893, for a further note of $5,000.00, Whether judgment has been obtained upon it does not appear.

The present action was begun on 2nd June, 1894, to recover judgment for $50,000.00 upon certain overdue notes, representing the balance of the claim of the bank, which had not been included in the previous actions.

RECORD.

In the High Court of Justice.

No. 9.

Reasons for Judgment of Divisional Court —*continued.*

The defence set up is that the plaintiffs having refused to credit the collections amounting to some $82,000.00 made upon the collaterals upon the amount of the earlier judgments, should be obliged to do so upon the debt now sued for, or that an account should be taken of the balance remaining unpaid to the plaintiffs after deducting the amounts of the former judgments, and the amounts realized upon the collaterals, and that the plaintiffs should have judgment for the balance only.

The plaintiffs, on the contrary, insist that they are not obliged to credit any of the sums received on the collaterals until their whole debt, after deducting the amount realized on the collaterals, should be paid.

There was no dispute at the trial about the facts. The action came on before Rose, J., at the Toronto Spring Assizes, on 18th April, 1895, and, after argument, the learned Judge expressed the opinion that he was concluded by the findings and conclusion he had come to in the former issues of Cooper *v.* Molsons Bank, and Mason *v.* Molsons Bank, and he, thereupon, ordered judgment to be entered for the plaintiffs for $50,000.00 and interest and the costs of the action.

During the Easter Sittings of the Divisional Court, the defendants moved by way of appeal from this judgment, upon the ground that the plaintiffs should have been ordered to credit the amounts received upon the collaterals upon their claim, and to recover judgment only for the balance, and upon the further ground that the learned Judge, under the different circumstances of the present case, was not bound by the result of the former issues.

The appeal was argued on 25th May, 1895, before the Divisional Court, Falconbridge and Street, JJ.

Foy, Q.C., for the appeal.

Shepley, Q.C., for the plaintiffs.

The cases which have been referred to with regard to the right of a creditor holding security to prove against the insolvent estate of his debtor without valuing his security, do not, it appears to me, affect the present question. Nor do I see that the judgment of my brother Rose in the issue of Cooper & Smith *v.* Molsons Bank, which stands unappealed against, compels the conclusion at which he felt himself compelled by it to arrive in the present case.

The plaintiffs advanced to the defendants some $145,000.00 upon a number of promissory notes for round amounts made by the defendants to the plaintiffs, and they also allowed the defendants to overdraw their account current at the bank for some $1,900.00.

The defendants deposited, according to agreement, with the plaintiffs a number of small notes belonging to them, which they had taken from customers who were indebted to them. When the defendants failed, the plaintiffs sued them upon those of their own notes which were overdue, and recovered udgment for some $80,000.00.

Before and after bringing those actions the plaintiffs had received certain moneys upon the collateral notes, and after the recovery of the judgments by the plaintiffs, the defendants and some creditors with whom the plaintiffs came into competition under the Creditors' Relief Act for moneys in

the Sheriff's hands, sought to have these moneys applied in part payment of the judgments.

My brother Rose, before whom the issues directed to dispose of this question were tried, decided that the plaintiffs were not bound to apply the moneys which the plaintiffs had recovered upon the collaterals in or towards satisfaction of the judgments which they had recovered. That decision stands unreversed and unappealed from, and it is binding between the parties and upon us as *res judicata.*

All the other notes of the defendants discounted by the plaintiffs have now become due, and this action is brought upon all of those not included in the judgments to which I have referred, excepting a note for $5,000.00, to recover which, as well as for the amount of the overdrawn account, another action was brought which is still pending.

The plaintiffs dispute their liability to credit upon the notes now sued on any of the moneys they have collected upon the collaterals, contending that they have carried those moneys to a suspense account, where they are entitled to keep them until they are paid enough money to extinguish their entire claim, taking into account the money realized from the collaterals.

The defendants insist that the plaintiffs are bound to credit the moneys received from the collaterals upon the notes now sued on, as they have elected not to apply them upon those embraced in the former actions.

I cannot see that the case of Eastman *v.* The Bank of Montreal, 10 Ont. 79, and the cases upon which it is based, support the contention of the plaintiffs under the circumstances of the present case. In the first place it is to be observed that since the decision in the Eastman case the law has been altered by statute, and a creditor coming in to prove under an assignment for the benefit of creditors is bound to state what securities on the estate of the insolvent he holds for his claim, and to value those securities, if any, and his proof is to be allowed for the balance only after deducting such value. Cap. 124, R.S.O., Sec. 19, Sub-sec. 4.

In the next place, the question here is not the amount for which the plaintiffs are entitled to rank upon an insolvent estate, but the amount for which they should have judgment against the defendants upon these notes —that is to say, whether the defendants now, in addition to the sums for which the plaintiffs have judgment against them, owe to them upon a proper accounting, any further sum, and if so, how much.

I can find in the documentary evidence of the terms on which these notes were deposited with plaintiffs—and that is the only evidence before us —nothing to take the deposit out of the rule which should be applied to a simple deposit of notes by a debtor with a creditor, as collateral security for the payment of his debt.

In such a simple case, I take it that when the creditor's debt matures and he receives payment of the collateral notes, he is not entitled to say that he will carry these payments to a suspense account, and recover judgment for the whole amount of his debt without crediting anything.

The object of depositing the collateral notes with the creditor was to enable him to pay himself by collecting them if the debtor failed to pay his

RECORD.

In the High Court of Justice.

No. 9. Reasons for Judgment of Divisional Court —*continued.*

debt when due, and the creditor cannot, without the consent of the debtor, collect the notes, and then, his debt being due, refuse either to pay himself or to give the money he has collected back to the debtor.

Special principles have been laid down governing this general rule where the question is one of proof against an insolvent estate, but even there the creditor is bound to credit the proceeds of collaterals realized by him before his proof is made. Forwood's Claim, L. R. 5, Ch. 18. *In re* Oxford, etc., Hall Co., L. R. 5, Ch. 433. Ex. p. Maxoudoff, L. R. 6, Eq. 582.

And as I have pointed out this rule no longer exists in this Province in the case of assignments for the benefit of creditors.

In the case of the Commercial Bank of Australia *v.* Wilson (1893), App. Cas. 181, to which we were referred, where two guarantors of the debt of a third person to a bank had paid to the bank a sum of money which the bank refused to accept as part payment of the debt, but only to place it at the credit of a suspense account, pending proof against the bankrupt estates of other guarantors, it was held that there was nothing requiring them to credit the money upon their debt before the period provided in the agreement, and that they might, therefore, rank for the whole debt.

But there the money paid them was not the money of their debtor, and there was a special agreement providing for its retention in a suspense account, both of which important circumstances are wanting here.

There being, therefore, in my opinion, no agreement here controlling the right of the defendants to have these payments applied on their debt to the plaintiffs, and no principle of law or equity applicable to the existing circumstances of the case entitling the plaintiffs to refuse to apply them, I think we are bound to order that the plaintiffs, now that their whole debt is overdue shall give credit for them, and as they must be taken to have elected upon the former proceedings to apply them upon the portion of their debt not then due, they must adhere to their election and apply them accordingly.

The admissions at the hearing show that after deducting the amount of the judgments already recovered, the collections on the collaterals are sufficient to satisfy the residue of the plaintiffs' claim, including the notes in question; the appeal should, therefore, be allowed with costs, and the action dismissed with costs.

Falconbridge, J., concurred.

No. 10. Formal Order of Divisional Court, 13th June 1895.

Formal Order, Divisional Court, dated 13th June, 1895.

Upon reading the Notice of Motion, made in this cause, during these present Sittings, by way of appeal on the part of the defendants from the Judgment herein, in favor of the plaintiffs, and upon hearing counsel for the parties on both sides;

It is ordered that the said appeal be, and the same is hereby allowed with costs, and the action dismissed with costs to be paid by the plaintiffs to the defendants forthwith after taxation thereof. On the motion of Mr. Foy, Q.C., of counsel for the defendants. By the Court.

(Signed) JAMES S. CARTWRIGHT, Registrar.

Judgment

Delivered by the Hon. Mr. Justice Street, for the Queen's Bench Divisional Court, 29th December, 1893, by which one of the issues afterwards tried by the Hon. Mr. Justice Rose, was directed.

The plaintiffs discounted certain notes of the defendants to the amount of $145,000.00, or thereabouts, which remain unpaid, and they have other claims against the defendants in respect of other advances.

A number of notes were from time to time deposited with them by the defendants as collateral security for advances and discounts. The defendants having become insolvent, the plaintiffs have recovered judgments against them for a portion of their claim and have placed executions in the Sheriff's hands upon their judgments. Other creditors have also recovered judgments and placed executions in the Sheriff's hands. Under the various executions the Sheriff has seized and sold property of the defendants, and has the proceeds in his hands for distribution under the Creditors' Relief Act. The plaintiffs have collected upon their collateral securities and placed to the credit of "Cooper & Smith's collateral account" in their books some $47,000.00, which they decline to credit upon their judgment debt, or any part of their debt at present. This is a motion by the defendants to compel them to do so, or for an issue to determine the respective rights of the parties under these circumstances. It is plain that if the plaintiffs can be compelled to reduce their judgment debts by the amount collected upon the collaterals, their share of the money in the Sheriff's hands will be very largely reduced, and that of the other creditors will be correspondingly increased. Upon the affidavits before us, a dispute appears to exist as to the terms upon which the collateral securities were deposited, and the contention of the plaintiffs that, as a matter of law they are entitled to hold the money which they have collected and which they may collect upon their collaterals as a security for the ultimate balance which may be found due to them after all other sources of repayment have been realized, is one which cannot, we think, be said to be by any means beyond dispute under the circumstances here existing.

We think, therefore, in view of the very considerable sum involved, that the matter should be raised in a shape to enable either party to carry it further if so advised; this they could not do as a matter of right if we were to determine it upon the present appeal from Chambers. We think, therefore, that an issue should be directed to try the rights and liabilities of the plaintiffs, the Molsons Bank, with regard to the moneys collected by them upon their collateral securities, and to determine the manner in which they should be applied under the circumstances. As the other judgment creditors entitled to share with the plaintiffs in the money in the Sheriff's hands are really more interested probably than the defendants in the settlement of the questions involved, we direct the issue upon the terms that a substantial creditor join as a party with defendants to represent the class. The costs of the motion to the Master in Chambers and of the appeals, including that

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In the High Court of Justice.

No. 12.
Exhibits at Trial.
Formal Order of Divisional Court, 29th Dec., 1893.

before us, are reserved to be disposed of after the trial of the issue. The issue should be tried without a jury at one of the Toronto High Court sittings for trials.

Formal Order, made by the Divisional Court, dated 29th December, 1893.

Upon reading the order made, herein, in Chambers by the Honourable Mr. Justice MacMahon, on the 6th day of December instant, dismissing with costs an appeal of the above-named defendants from an order made, herein, by the Master in Chambers on the 9th day of November, 1893, and upon reading the said order made by the Master in Chambers aforesaid, by which the said Master in Chambers dismissed an application of the defendants above named, to set aside the judgment entered in each of the above-mentioned actions, and that the defendants might be allowed to defend the same, or that satisfaction might be entered up in each of the said actions for such sums as have been paid to the plaintiffs, either prior to or since the recovery of the said judgments on account of the promissory notes or indebtedness for which the said judgments have been recovered, and the said defendants above named, now appealing to this Divisional Court from the said orders made in Chambers as aforesaid; upon reading the affidavits of the defendant Smith, sworn on the 20th day of October last and filed in support of the said application, and the affidavit of William Henry Draper sworn, herein, on the 6th day of November last filed by the plaintiffs in answer, and the cross-examination upon his said affidavit of the said William Henry Draper, taken before John Bruce, a special examiner, on the 8th day of November last; and upon hearing counsel for both parties and judgment having been reserved till to-day;

And it appearing that in the actions above described the plaintiffs have recovered judgments as follows:

1. Judgment for $20,022.96 and costs, dated 22nd September, 1893.
2. Judgment for $20,036.08 and costs, dated 22nd September, 1893.
3. Judgment for $10,006.59 and costs, dated 22nd September, 1893.
4. Judgment for $10,011.50 and costs, dated 26th September, 1893.

1. It is ordered that the said orders of the Master in Chambers, and of the Honourable Mr. Justice MacMahon, in Chambers, be, and the same are, hereby respectively rescinded and set aside.

2. And it is further ordered, that James Mason, Charles Smith and Emile C. Boeckh, trustees under the last will and testament of John Smith, deceased, who are creditors of the above-named defendants, Cooper & Smith, be, and they are, hereby added as parties with the above-named defendants to the proceedings hereinafter directed, to represent the class of creditors of the said defendants, Cooper & Smith.

3. And it is further ordered that the parties above mentioned do proceed to the trial of an issue in the High Court of Justice, Queen's Bench Division, in which the above-named judgment debtors, James Cooper, John C. Smith and Cooper & Smith, together with the said creditors, James Mason, Charles Smith and Emile C. Boeckh, trustees under the last will and testament of

John Smith, deceased, shall be plaintiffs, and the said the Molsons Bank shall be defendants, and the question to be tried shall be :

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 so applied and to what extent.

4. And it is further ordered that the said issue be prepared and delivered by the plaintiffs therein within three weeks from this date, and be returned by the defendants therein within one week thereafter, and be thereupon tried at the sittings of the High Court for the trial of actions without a jury at Toronto, in the County of York, which begin on Tuesday, the sixteenth day of January next, and that the said issue may be entered for trial at such sittings at any time before or after the said sixteenth day of January, and that such trial shall proceed concurrently and along with the trial of a certain other issue relating to the same matters in question, which has been directed to be tried at the said sittings by order of the Judge of the County Court of the County of York, made on the second day of December instant, and in which the said James Mason, Charles Smith and Emile C. Boeckh, trustees under the last will and testament of John Smith, deceased, are plaintiffs, and the said the Molsons Bank, defendants.

5. And it is further ordered that the costs of this appeal and of the said applications to the Master in Chambers, and of the appeal to the learned Judge in Chambers, and the costs of the issue hereby directed, and all further and other questions be reserved until after the trial for other final disposition of the said issue to be then disposed of by a Judge in Chambers, or by the Court.

On the motion of Mr. Aylesworth, Q.C., of counsel for the defendants above named.

By the Court,

JAMES S. CARTWRIGHT,
Registrar.

No. 13.
Issue delivered pursuant to Order of Divisional Court, 18th Jan., 1894.

Issue for Trial Pursuant to Order of the Divisional Court, made on the 29th day of December, 1893.

1. The Molsons Bank recovered judgments against the above-named James Cooper, John C. Smith, and Cooper & Smith, for the following sums at the following dates :

(1) Judgment for $20,022.96 and costs, dated 22nd September, 1893.
(2) Judgment for $20,036.08 and costs, dated 22nd September, 1893.
(3) Judgment for $10,006.59 and costs, dated 22nd September, 1893.
(4) Judgment for $10,011.50 and costs, dated 26th September, 1883.

2. The said judgments were recovered in respect of four several promissory notes made by the said Cooper & Smith in favour of the said the Molsons Bank.

3. Before and since the recovery of the said judgments certain sums of money have been paid to the said the Molsons Bank in respect of certain securities which were held by the said bank as collateral securities to

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In the High Court of Justice.

No. 13. Issue pursuant to Order of Divisional Court —*continued.*

the promissory notes on which the said judgments were so recovered and to other liabilities of the said Cooper & Smith to the said bank, and the said Cooper & Smith claim that the amount of said payments ought to be applied in satisfaction, in whole or in part, of the said judgments, and it has been ordered by the said Divisional Court that an issue be tried to determine the question,

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 said judgments, or any of them; and, if so, when such payments (if any) ought to be so applied, and to what extent.

4. The above-named plaintiffs affirm, and the above-named defendants deny, that the said bank, either before or since the recovery of the judgments above named, have received payments which at the time of the receipt of the same ought to have been, or ought now to be applied in satisfaction, in whole or in part, of the said judgments, or of some of them.

And it having been ordered by the Divisional Court, as aforesaid, that the truth of the matters aforesaid be tried at the sittings of the Court for trial of actions without a jury at Toronto, and concurrently and along with the trial of a certain other issue relating to the like matters which has been directed to be tried at the said sittings by order of the Judge of the County Court of the County of York, made on the 2nd day of December, 1893,

Therefore, let the same be tried accordingly.

The plaintiffs propose that this issue be tried at the city of Toronto, in the County of York.

Delivered, 18th January, A.D. 1894.

No. 14. Order made by County Judge on 2nd Dec., 1893.

Order made by His Honour Judge McDougall, directing the trial of a certain issue under the Creditors' Relief Act, dated 2nd December, 1893.

Upon the application of the claimants in presence of counsel for the Molsons Bank, upon hearing read the contestation by the claimants of the scheme of distribution proposed by the Sheriff of Toronto, and the notice thereof given to the said the Molsons Bank, the affidavits of services thereof, the affidavit of Charles Smith and John C. Smith, the exhibits therein referred to, the order for substitutional service on James Cooper, the affidavit of W. H. Draper filed in answer to such contestations, and the other papers and proceedings herein, and upon hearing what was alleged by counsel for said applicants and for the Molsons Bank, and it appearing that the Sheriff of the city of Toronto has prepared and delivered to the creditors of the above-named debtors pursuant to the provisions of the said Act a certain list of creditors among whom he proposes to make distribution of moneys in his hands realized from the sale on the 13th day of October, 1893, of certain chattels of the above-named debtors, and has placed on said list the names of the said claimants as entitled to share in the said moneys to the extent of $18,800.50, and the name of the Molsons Bank as execution creditors entitled to share in the said moneys in respect of the following judgments:

(1) Judgment for $23,083.60, dated the 14th day of September, 1893.
(2) Judgment for $20,036.08, and costs, dated 22nd September, 1893.
(3) Judgment for $20,022.96, and costs, dated 22nd September, 1893.
(4) Judgment for $10,006.57, and costs, dated 22nd September, 1893.
(5) Judgment for $10,011,50, and costs, dated 26th September, 1893.
(6) Judgment for $24,544.98 and costs, dated 10th November, 1893.
(7) Judgment for $9,135.86, and costs, dated 11th November, 1893.

And the claimants above named having contested the Sheriff's said proposed scheme of distribution in so far as concerns the claim of the said Molsons Bank to share in the said moneys in respect of the judgments above mentioned,

It is ordered that the said Sheriff do retain in his hands during the contestation above referred to, the share in the said moneys proposed by the said scheme of distribution to be paid to the said Molsons Bank in respect of the judgments above mentioned, being in all the sum of $17,920.22 ; and that in the meantime the said Sheriff do deposit the said amount ($17,920.22) to his credit in the said Molsons Bank to a special account as provided in the said Act.

And it is further ordered that the said claimants and the Molsons Bank proceed to the trial of an issue in the High Court of Justice, Queen's Bench Division, in which the above-named claimants shall be plaintiffs and the Molsons Bank shall be defendants, and the questions to be tried shall be :

(1) Whether the said claimants have any status entitling them to raise the contentions contained in the next succeeding two questions.

(2) Whether, since the said judgments or any of them, and on or before the 26th day of November, 1893, the said bank have received any payments which ought to be applied in satisfaction in whole or in part, of such judgments or executions or any of them, and if so, to what extent.

(3) Whether the said bank is entitled to share in the said moneys in the Sheriff's hands as against the creditors of the said Cooper & Smith in respect of the full amounts recovered by the said judgments, and if not, then in respect of what amount the said bank is so entitled to share.

And it is further ordered that the said issue be prepared and delivered by the plaintiffs therein within four weeks from this date, and be returned by the defendants therein within one week thereafter, and be tried at the next sittings of the High Court for trial of actions at Toronto, in the County of York.

And it appearing that the debtors are appealing from the two last mentioned of the said judgments, namely, those for $24,750.62 and $9,209.45 respectively,

It is further ordered that the question raised by the said contestation as to whether any of said judgments of said bank are duplicate judgments or judgments for or in respect of the same debts or liability as any other of said judgments of the said bank, and if so, to what extent, and as to whether the said two last-named judgments or either of them are valid judgments in respect of which the said bank is entitled to share in the said moneys, be reserved until after the pending appeals in respect of said judgments shall

RECORD.

In the High Court of Justice.

No. 14. Exhibits at Trial continued. Order made by County Judge on 2nd Dec., 1893 —*continued.*

have been finally determined in the final Court of Appeal to which appeals in that behalf shall be taken.

And it is further ordered that the question of costs of this application and of said issue and all further and other questions be reserved until after the trial or other final disposition of the said issue, to be then disposed of by the said Judge of the County Court, unless disposed of at the trial or other final disposition of said issue.

JOSEPH E. McDOUGALL,
J.

No. 15. Issue delivered pursuant to Order of County Judge, 2nd Dec., 1893.

Issue for Trial under the Creditors' Relief Act, pursuant to the Order of His Honour the Judge of the County Court of the County of York, dated the Second day of December, 1893.

1. The defendants obtained judgments against Cooper & Smith for the following sums at the following dates, and placed executions in the hands of the Sheriff of the city of Toronto for and in respect of said judgments, to wit:

(1) Judgment for $23,083.60, dated 14th September, 1893.
(2) Judgment for $20,036.08, and costs, dated 22nd September, 1893.
(3) Judgment for $20,022.96, and costs, dated 22nd September, 1893.
(4) Judgment for $10,006.57, and costs, dated 22nd September, 1893.
(5) Judgment for $10,011.50, and costs, dated 26th September, 1893.
(6) Judgment for $24,544.98, and costs, dated 10th November, 1893.
(7) Judgment for $9,135.86, and costs, dated 11th November, 1893.

2. Many other judgments were obtained by creditors of the said Cooper & Smith against the said Cooper & Smith, and executions were placed in the hands of the said Sheriff in respect thereof.

3. Under the said judgments, or some of them, the Sheriff seized certain goods and chattels of the said Cooper & Smith and sold the same on the 13th day of October, 1893, and he did on the day last aforesaid enter in a book, under the provisions of the Creditors' Relief Act, a notice stating that such seizure had been made, and stating the amount that was levied by him.

4. The money levied by the Sheriff as aforesaid, was insufficient to pay all claims of execution creditors of the said Cooper & Smith in full, and the said Sheriff prepared, under Section 32 of the said Creditors' Relief Act, a list of the creditors entitled to share in the distribution of the amount so levied, and on the 18th day of November, 1893, sent to each of the creditors on said list a copy of the said list.

5. On the 8th day of November, 1893, the plaintiffs under and in pursuance of the said Creditors' Relief Act duly obtained and on the same day delivered to the said Sheriff, a certificate obtained under Section 9 of said Act, for the amount of the plaintiff's claim against said Cooper & Smith, to wit, for the sum of $123.746.22.

6. On the said list of creditors the plaintiffs appeared as execution creditors in respect of their certificate aforesaid for the said sum of $123,746.22, and as entitled to a dividend of $18,800.50, and the said defendants appeared on the said list as execution creditors in respect of their said judgments for

the several amounts thereof in full and interest and costs, and as entitled to a dividend of $17,920.22.

7. Under the provisions of the said Act the plaintiffs contested the said list, so far as regarded the said Molsons Bank's claim, and gave due notice thereof to the said Sheriff on the 25th day of November, 1893, stating their objections and grounds of objections, and duly complied with all the provisions of the said Act in respect thereof, and did also within eight days thereafter apply to His Honor the Judge of the County Court of the County of York for an order adjudicating upon the matters in dispute.

8. Upon the hearing of the last-mentioned application, the said Judge by his order dated the 2nd day of December, 1893, reciting the said contestation by the plaintiffs of the scheme of distribution proposed by the said Sheriff and the notice thereof given to the said defendants and certain affidavits filed, and on hearing counsel for the plaintiffs and defendants herein, did order, amongst other things, that the plaintiffs and defendants hereto should proceed to the trial in the High Court of Justice, Queen's Bench Division, at the next sittings of the High Court for trial of actions at Toronto of the following questions:

(1) Whether the said plaintiffs have any status entitling them to raise the contentions contained in the next succeeding two questions.

(2) Whether, since the said judgments or any of them, and on or before the 26th day of November, 1893, the said bank have received any payments which ought to be applied in the satisfaction, in whole or in part, of such judgments or executions or any of them, and if so, to what extent.

(3) Whether the said bank is entitled to share in the said moneys in the Sheriff's hands as against the creditors of the said Cooper & Smith in respect of the full amounts recovered by the said judgments, and if not, then in respect of what amount the said bank is so entitled to share.

9. The above-named plaintiffs affirm and the above-named defendants deny that the plaintiffs have any status entitling them to raise the contentions contained in the last preceding two questions, and that the defendants have since their said judgments or some of them, and on or before the 26th day of November, 1893, received payments which ought to be applied in satisfaction, in whole or in part, of such judgments or some of them.

10. And the said plaintiffs affirm and the said defendants deny that the said bank is not entitled to share in the said moneys in the Sheriff's hands as against the creditors of the said Cooper & Smith in respect of the said judgments or any part thereof.

Therefore let the same be tried accordingly.

The plaintiffs propose that this issue be tried at the city of Toronto, in the County of York.

Delivered, December ——, A.D. 1893.

RECORD.

In the High Court of Justice.

No. 17.
Exhibits at Trial.
Evidence upon Trial of Issues, 13th April, 1894.

Notes of Trial of Issues of Mason *v.* Molsons Bank, and Cooper *v.* Molsons Bank,

Tried before the Honourable Mr. Justice Rose, at Osgoode Hall, Toronto, Friday, the 13th day of April, 1894.

Counsel:

Mr. Aylesworth, Q.C., and Mr. Barwick, for the Plaintiffs;
Mr. Shepley, Q.C., for the Defendants.

Mr. Aylesworth: The cases presented before your Lordship for trial are these two of Mason *v.* Molsons Bank and Cooper *v.* Molsons Bank, and the issues arise in this way: The issue entitled Mason *v.* Molsons Bank arises under direction of His Honor Judge McDougall, upon proceedings taken under the Creditors' Relief Act. The Sheriff of the city of Toronto had in his hands last fall executions against the firm of Cooper & Smith aggregating some $317,000.00, and he realized upon those executions some $48,000.00, and thereupon proposed a scheme of distribution, distributing the $48,000.00 ratably among all the execution creditors, making a dividend of some 16 cents, approximately, upon the dollar. Among those executions which he proposed to pay in that way there were seven in favour of the Molsons Bank aggregating about $117,000.00, and in respect of which he proposed accordingly to pay to the bank a dividend of some $17,000.00. The right of the bank to be paid that dividend was contested by the trustees of the estate of the late John Smith, who were creditors of Cooper & Smith to the extent of $123,000.00, and upon that contestation His Honour Judge McDougall made an order on the 2nd of December last, directing the trial of the issue which is entitled Mason *v.* Molsons Bank. That order recites the recovery by the bank of the seven judgments I have referred to against Cooper & Smith; then orders the disposition that is to be made of the dividend in respect of those seven judgments proposed to be paid to the bank, $17,920.22, and then the trial of an issue in the Queen's Bench Division in which the trustees of the Smith estate should be plaintiffs and the Molsons Bank defendants, and the questions to be tried should be:

1. Whether the said claimants have any status entitling them to raise the contentions contained in the next succeeding two questions.

2. Whether since the said judgments or any of them and on or before the 26th day of November, 1893, the bank have received any payments which ought to be applied in satisfaction in whole or in part of said judgments or executions or any of them, and if so, to what extent.

3. Whether the bank is entitled to share in the said moneys in the Sheriff's hands as against the creditors of Cooper & Smith in respect of the full amount, and if not, then in respect of what amount the bank is so entitled to share.

I put in the order. This order was made on the 2nd of December last, and on the 29th of December the Queen's Bench Divisional Court made an order directing the trial of a further and somewhat wider issue between parties in the same interest as the trustees of the Smith estate, and in fact the Smith

estate joining with them. The order made by the Queen's Bench Divisional Court arose out of an application which was made by the defendants Cooper & Smith in four of the actions in which those judgments had been recovered. In four out of those seven actions the defendants Cooper & Smith made application to the Master in Chambers to have satisfaction entered up upon the judgments either in whole or *pro tanto*, contending that large amounts had been received by the bank subsequent to the judgments which had not been credited. The Master having refused to make that order the defendants appealed to a Judge in Chambers, and their appeal being dismissed they appealed to the Divisional Court and the Divisional Court made this order of the 29th December, rescinding the order of the Master in Chambers and Judge in Chambers, ordering that the trustees of the Smith estate, who are creditors of Cooper & Smith, should be added to the proceedings then directed, to represent the class of creditors, and then that the parties proceed to the trial of the issue before your Lordship now entitled Cooper *v.* Molsons Bank, and that the question to be tried shall be whether before or since the recovery of the judgments above mentioned the bank has 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 ought to be applied and to what extent.

His Lordship: Were the judgments general or on particular securities?

Mr. Aylesworth: They were in fact in respect of particular debts, of particular promissory notes. I put in that order. The issue, your Lordship will see, under that order is that the judgment debtors and also the trustees of the Smith estate join in affirming, while the bank denies, that the bank either before or since the recovery of the judgments above named have received payments which at the time of the receipt of the same ought to have been or ought now to be applied in satisfaction in whole or in part of the said judgments or some of them.

His Lordship: There is no question raised as to the status?

Mr. Aylesworth: No, my Lord. Of course the judgment debtors and creditors are joining in that affirmative.

His Lordship: The issue being determined in Cooper *v.* Molsons Bank, the other becomes immaterial?

Mr. Aylesworth: Yes, my Lord. This issue is the wider of the two and has no reference to the Creditors' Relief Act at all or any particular fund at all. It is to have satisfaction entered up *pro tanto*, the judgment creditors saying that although now we may not have assets available, such assets may come to us. One of the judgment debtors is interested in a large estate, and it may be a matter of not very long time when it might be of great consequence to him to have the exact amount of these judgments known, so that the issue in Cooper *v.* Molsons is the wider of the two, and is in the interest of the judgment debtors as well as creditors, who say that either at the receipt of these discounts or now there ought to be application of them made to a very large extent, all of which it is for the Court to determine.

His Lordship: What do you understand by the claim of the bank not to give credit?

RECORD.

In the High Court of Justice.

No. 17. Exhibits at Trial. Evidence upon Trial of Issues, 13th April, 1894 —*continued.*

Mr. Aylesworth: The claim of the bank, as it has been stated when these matters were under discussion before the County Judge and again in the Divisional Court, was, that having collected considerable sums in respect of promissory notes which were deposited by the debtors Cooper & Smith with the bank as collateral security—

His Lordship: That is customers' paper, I suppose?

Mr. Aylesworth: Yes, my Lord—to their general account, the bank were entitled to hold such collections as security generally for the account without making application of moneys so collected upon any particular debt.

His Lordship: That is applying it to the general balance? 10

Mr. Aylesworth: Yes, my Lord, and holding it in suspense. They conceded that they must ultimately credit it, but when, they declined at that stage of the matter to state and in the meantime simply kept it apart and, as it were, in suspense.

Mr. Shepley: We did not decline to state; we declined to make a statement at that stage.

His Lordship: I understand the bank said, "We have a claim against these debtors amounting to so much; we have certain customers' paper and other securities which we may realize upon from time to time; we will put that to suspense account, get our dividend upon the whole account and apply 20 the suspense account in reducing the balance."

Mr. Aylesworth: That was the position, but at the same time they did not take the position that they declined to say when they would make any application of the proceeds of the collateral account. They simply said, "We won't make it at present"; they did not promise to make it after they got the dividend.

His Lordship: I suppose they will?

Mr. Aylesworth: I suppose so, unless they expect another dividend. There might of course be further dividends, and if there was any prospect of it of course the position the bank had taken would warrant them in continuing 30 in that position and declining still, even although they had collected the uttermost farthing of the collateral account.

There are not many facts in dispute. I propose to state them to your Lordship, subject to my learned friend's amendment if I err in accuracy.

The account of Cooper & Smith opened with the Molsons Bank in the early summer, probably June, of 1891, and the firm suspended payment or ceased to do business about the 1st of September, 1893. Their position then was that they owed to the Molsons Bank $145,000.00, represented by promissory notes of Cooper & Smith to that amount which were payable directly to the bank. Of these promissory notes, amounting in all to $145,000.00, 40 $95,000.00 has passed into judgment and is represented in the seven judgments that I have referred to. The other $50,000.00 has not gone into judgment at all, is now overdue, but was not overdue at the time of the making of Judge McDougall's order. That $50,000.00 of promissory notes accrued due during the month of December at different dates, so that the condition of things, so far as the debt of Cooper & Smith to the Molsons Bank is concerned, about the 1st of September when the firm suspended

operations was the owing to the bank of $145,000.00 in respect of the direct advances or the promissory notes of the firm payable to the bank. There was in addition to that debt a further sum of perhaps $13,000.00 or $14,000.00 due or accruing due from Cooper & Smith to the bank consisting of $2,000.00 of overdraft on their general account and the remainder consisting of business paper which was under discount, customers' paper which had been sold to the bank, endorsed of course by Cooper & Smith. The bank at the same time held as collateral security to this indebtedness promissory notes of customers which had been deposited with them by Cooper & Smith and which aggregated $104,639.02.

His Lordship: I suppose you have all this tabulated?

Mr. Aylesworth: In some shape or other. I shall put in statements showing these things. The first judgment the bank recovered was on the 14th of September, in respect of a promissory note for $30,000.00, which matured a few days before that. No question arises upon that here in either of the issues for this very satisfactory reason: that with regard to that note the bank did what the debtors and creditors that I represent claim they ought to do with regard to all; that is to say that having collected up to the time that note matured due about $7,000.00 in respect of their collateral paper they credited it upon that note and took judgment merely for the balance.

His Lordship: Was that all past due at the time of the credit? Was there other firm paper past due?

Mr. Aylesworth: No, my Lord; that was the only thing then due of the firm paper. On the examinations for discovery the bank officer who was examined stated that that was done in order that there might be no difficulty made as to their recovering judgment with despatch, because it was important to the bank to secure, at as early a date as possible, the position of judgment creditor. At that time the bank deemed it of consequence to get the status of execution creditors as rapidly as possible. That is the explanation that is offered by the manager or assistant-manager of the bank to the circumstance that that credit was given. The credit was given, as I have said, the amount being $6,920.10, that being all that the bank had up to that time collected upon their $104,000.00 of collateral paper.

His Lordship: I suppose that did not alter their rights?

Mr. Aylesworth: No, my Lord, I do not say that it did. I shall argue that it was in pursuance of their ordinary course of business with this account, and that they subsequently changed that course of business under, as they say, the advice of their solicitors. The result of that credit was that the first judgment, which is in respect of a note for $30,000.00, is in amount only $23,355.00, and with respect to that judgment no question is raised before your Lordship now. Then judgments were recovered by the bank on the 22nd and 26th of September—four judgments—two in respect of notes for $20,000.00 each, and two in respect of notes for $10,000.00 each; that is in all $60,000.00 represented by those four judgments, and those are the four judgments in which actions application was made by the debtors to have credits given for the collateral paper which was collected and in respect of which the issue which is called Cooper *v.* Molsons Bank has been directed by the Divisional

Court. Four judgments aggregating $60,000.00 were recovered on the 22nd and 26th of September last.

Then the other two judgments that have been recovered are of special and peculiar character. The bank having, as your Lordship sees, $60,000.00 in judgment in respect of the four judgments I have last mentioned, and $30,000.00 more in respect of the first judgment, or $90,000.00 in all, had still accruing due $55,000.00 of direct paper; $50,000.00 of that $55,000.00 did not mature until December; the other $5,000.00 represented by one note fell due about the end of September, and when that $5,000.00 note accrued due, the bank issued a sixth writ on the 27th of September with special endorsement, the aggregate amount of the endorsement being $32,299.00; of that $32,299.00, $5,000.00 was the note which had accrued due on the 22nd of September; the remainder of that endorsement was largely, in fact almost wholly, in respect of some 117 of the collateral notes which had of course been endorsed by Cooper & Smith when deposited with the bank as collateral, and the bank accordingly sued Cooper & Smith upon such endorsement.

His Lordship: Was the discount account kept separately from the general account, or was customers' paper when it was put in carried to the credit of the general account?

Mr. Aylesworth: The collateral was not carried to the credit of the general account; it was just held by the bank without there being any account of it kept; held by the bank as security in their vault.

His Lordship: Not credited until collected?

Mr. Aylesworth: No, my Lord. Occasionally notes were collected by the bank, and when collected credited to the general account. The notes which were deposited as collateral were simply kept in a wallet by themselves in the vault by the bank. Whenever they did collect any they credited them to the general account.

His Lordship: At any rate they did not go to swell the firm's balance; the notes did not, but the proceeds would?

Mr. Aylesworth: Yes, my Lord. They were simply given to the custody of the bank as collateral security for the account. They were endorsed to the bank, however—or endorsed generally, I do not know which—and accordingly on the 27th of September the bank brought this sixth action against Cooper & Smith in respect of some $23,425.00 worth of such collaterally deposited paper, suing Cooper & Smith upon their endorsement of these collateral notes.

His Lordship: At this time had they judgment for the balance of the general account?

Mr. Aylesworth: No, my Lord; at this time they had judgment for $90,000.00; $50,000.00 of the remaining $55,000.00 had not matured and did not mature for a couple of months. They then, as I have said, included in their action of the 27th September, which is No. 6, $23,425.00 in respect of the 117 collateral notes, and they recovered judgment in that action under the order of the Court, Rule 744, in November, and in that judgment they included some (round figures) $16,000.00 in respect of these collateral notes. Then finally they issued a seventh writ on the 10th of November, practically all in respect of collateral paper similarly endorsed.

My learned friend, Mr. Shepley, suggests that I should explain to your Lordship—and if it is of any consequence it should be explained at this stage —something further as to this sixth judgment, that is the writ of 27th September. The total amount of the judgment recovered on that action was $24,750, and some cents. Of that $5,000.00 and some interest was the note that I have spoken of, a direct liability of Cooper & Smith to the bank; about $16,000.00 was in respect of a matter of endorsement.

His Lordship: Does the fact of judgment having been recovered on this paper make any difference as to the rights and liabilities of the parties?

Mr. Aylesworth: Only in this view, my Lord. We shall show your Lordship that a considerable quantity of this very collateral paper in respect of which this $16,000.00 judgment now stands is actually paid.

His Lordship: Would not that payment operate in the same way whether there was judgment or not?

Mr. Aylesworth: We say those payments must be credited to the paper which is in judgment. Suppose the maker of a note pays that very note to the bank, that note disappears and that judgment disappears.

His Lordship: Assume that it does; I do not see how it helps us with regard to the balance of account.

Mr. Aylesworth: It helps us in this way, that everything that has been paid in that way must be credited to that judgment.

His Lordship: Assume that it does. I am carrying my mind to the firm's account by which their debit balance to the bank is shown. Then we will assume, for the purpose of clearness merely, that an account was opened with this collateral paper merely for the purpose of keeping it in mind. As these notes would be paid, of course they would disappear from that account by credit, and there would be so much cash balance to the credit of that account. That would remain in suspense until applied. I do not see what difference it makes if you turn this general account into a judgment and turn this collateral account into a judgment. Until they were paid there would be no cash to apply. At present my mind does not reach the point of difference.

Mr. Aylesworth: One of the issues (the Mason issue) here asks your Lordship to find whether the bank is entitled to rank upon the dividend or money in the Sheriff's hands in respect to this judgment No. 6. Now if we show your Lordship that a quantity of the promissory notes in respect of which that judgment has been recovered have been paid in full to the bank, the bank is not entitled to hold that judgment against the endorsers.

His Lordship: Any more than it would be entitled to prove upon a note that had been paid, so that the question of note or judgment makes no difference in that sense.

Mr. Aylesworth: It makes no change in the rights.

His Lordship: Can it be seriously argued that there can be a ranking upon a judgment which has been satisfied to the extent that it has been satisfied?

Mr. Aylesworth: I do not know what position my learned friend takes with regard to that.

Mr. Shepley: I may say that this matter is fixed at the date of the

judgment. My learned friend cannot hold that money in the Sheriff's hands and eat it all up in the course of four or five years afterwards while it is lying there by payments made in the interim. That is our main contention in regard to that. There are subsidiary contentions.

His Lordship: All the firm owes the bank is the debit balance to the general account; the mere fact of it giving collateral paper does not increase its liability.

Mr. Aylesworth: That is our position; in short words what the bank has done is that they have recovered judgment—or if they take judgment for the $50,000.00 they have not sued upon they will have judgment for $200,000.00.

His Lordship: Assume that the firm of Cooper & Smith have gone to the bank and borrowed $1,000.00 and handed in collateral to the amount of $5,000.00, its liability would be $1,000.00 and no more; upon payment of that they would be entitled to have the collateral handed back. The matter of turning it into a judgment merely adds another thought.

Mr. Shepley: I think that matter is not before your Lordship at all, for this reason: all this contention with regard to our right to recover upon the collateral contemporaneously with the right to recover the principal debt was taken upon the motion for judgment.

His Lordship: You would have the right to judgment certainly. Take the first illustration I have suggested: the bank lends Cooper & Smith $1,000.00 and puts it to their credit. They hand in $5,000.00 customers' paper. The bank when suing the customers move for judgment against Cooper & Smith for that $5,000.00 as a matter of procedure, but all the bank could recover from Cooper & Smith would be the $1,000.00.

Mr. Shepley: But we would be entitled to rank upon the estate until we got that $1,000.00 in full. I understood my learned friend to contend—perhaps I was wrong in that—that we had no right to a double recovery.

Mr. Aylesworth: That is not in issue here.

Mr. Shepley: In respect of the principal debt and the collateral. The very judgment pronouncing against that contention my learned friend is now carrying to the Court of Appeal.

His Lordship: That judgment, I assume does not decide the right to rank. It would simply decide, as I apprehend now, the right to have judgment in respect of that liability. It does not increase the debit balance of the firm with the bank. I am speaking now argumentatively; when would you have a right to rank for more than $1,000.00?

Mr. Shepley: I am pointing out that the matter is not open upon this issue.

His Lordship: What I am keeping my mind directed to is what sums you have credited on the general account under this issue.

Mr. Aylesworth: The question whether the bank has a right to those duplicate judgments is in issue in the Court of Appeal, as my learned friend says, the defendants having appealed from the orders for summary judgment which were pronounced on the sixth and seventh writs, the contention being that certainly if the bank is entitled as a matter of procedure to double up judgments in that way and comes to Court as a matter of indulgence to get those judgments summarily, it must be upon terms that they will not seek to

rank twice upon the estate. That is of course a matter of terms, but otherwise there are objections to the recovery of those judgments which are raised upon the affidavits and upon the material filed in the motions for judgment.

His Lordship: I do not suppose, in any action upon that collateral paper, you plead any defence. You could only apply to the Court not to be made to pay more than the debt.

Mr. Aylesworth: The contention is, that if the Court is granting assistance to the plaintiffs in order to enable them to get judgment speedily and summarily, it ought to be upon such terms as would protect the creditors.

His Lordship: I should have thought that would be a matter for subsequent decision when you are made to pay. Unless there is authority I have an impression, but Mr. Shepley may of course remove it.

Mr. Aylesworth: In conclusion as to this judgment No. 6. It is not wholly in respect of collateral paper. There is, of the $24,000.00 in judgment in that action, $16,000.00 in respect of collateral, endorsed notes; about $1,500.00 in respect of similar collateral endorsements on bills of exchange and then $2,000.00 of overdraft. There is about $7,000.00 of that judgment which is not contested or not involved in the questions raised by the issue sent here by the County Judge.

Then the last judgment, to complete my reference to the judgments, is recovered summarily on a writ issued on the 10th of November and judgment recovered the next day, the 11th of November, for some $9,000.00, and that is almost entirely upon endorsements of collateral paper. There are, I think, one or two notes that were discounted and not met that are included in that judgment. That then is a history of the judgments. There are some statements prepared from the books of the bank and verified.

His Lordship: Are we advancing anything by going into the exact history of the accounts? Will that not settle itself if we can determine the principle?

Mr. Aylesworth: I have no doubt it will.

His Lordship: It will be a matter of accounting then.

Mr. Shepley: There will be no difficulty in accounting; the bank has given the fullest information in that respect.

His Lordship: Then I will not try to carry the figures in my mind.

Mr. Aylesworth: Very well, my Lord; that will relieve us of putting in a quantity of statements and papers. Probably the only evidence we shall desire to put before your Lordship on our part will be as to the course of business between the bank and Cooper & Smith during the two years that this account was carried. It opened in June, 1891, and closed in August, 1893. I have a statement here which has been verified by the manager of the bank in each instance.

His Lordship: I suppose that the ordinary course of banking business would be, as this collateral paper is paid the proceeds would go to the credit of general account?

Mr. Shepley: No, my Lord.

His Lordship: It would be in the ordinary course, as I understand banking business.

Mr. Aylesworth: That is the exact course taken here in every case, as I will show your Lordship. This document, which I put in, has been prepared by Mr. Mason, the bookkeeper and financial man of Cooper & Smith, and submitted to Mr. Draper, the manager of the bank, as part of his examination for discovery, and he has gone over it at his leisure after the examination and verified the entries and marked each one that is right "O.K.," and those that there is anything wrong about he has marked with the word "Discount," which explains itself, or which I can explain in a moment. It shows that starting with July, 1891, and going forward to May of 1893, there were about, I should estimate, sixty different collaterally deposited notes which were collected or paid directly to the bank. As a general rule the collateral paper was paid to Cooper & Smith and the amount so paid deposited by them as a part of their daily cash deposit with the bank and the notes withdrawn and given up to the maker. But there were, as I have said, perhaps sixty notes which were either paid by the maker direct to the bank or collected by the bank in some way or on account of which payments were made. Frequently the note would not be paid in full. This is a list of such notes, the gross amount being $8,000.00, not very much comparatively but a substantial amount, and in every case on such payment being made the bank immediately on its receipt credited the amount to the general account.

His Lordship: It seems to me it must be so, because there was no other account open.

Mr. Aylesworth: No other account was carried. Your Lordship will see that the date of credit is given in each case. Some of them are marked like this for instance, a man named Caswell, Qu'Appelle, 143 is marked "Discount credit deposit," the meaning being that the note, which had been one of the collaterals, shortly before it was maturing—it was payable at Qu'Appelle—was taken out of the bundle of collateral notes and credited to Cooper & Smith as a discount; that is, was bought, we may say, by the bank and forwarded to Qu'Appelle to be paid by the maker; on being paid, of course that was the money of the bank.

His Lordship: Had this firm a line of credit?

Mr. Aylesworth: Yes, my Lord, of $150,000.00, and that was represented at the time of the suspension by $145,000.00 of their own paper.

His Lordship: Had it exceeded its line of credit?

Mr. Aylesworth: At the time of the suspension it was not quite up to it.

Mr. Shepley: In addition to the $145,000.00, was of course the direct discount.

Mr. Aylesworth: I do not consider that part of the line of credit. There was customers' paper under discount sold to the bank. If that is to be considered as part of their line of credit, then they had exceeded it.

His Lordship: I should say it was.

Mr. Aylesworth: Then they had exceeded their line of credit by about $9,000.00. I was referring to this Qu'Appelle man's note as an instance of what was done in half a dozen or so cases in the history of this account; paper that was payable at a distance.

His Lordship: I should think that would have to be treated differently from paper merely held as collateral without being discounted. I mean treated differently for the purpose of ranking.

Mr. Aylesworth: I do not know that it arises here. It was paid before the suspension. I am speaking of the course of dealing.

His Lordship: Quite so. I am carrying that in mind, but on the question of principle that paper was treated differently.

Mr. Aylesworth: They have advanced their money for it, and having advanced their money they will simply charge it back. That is to say, collect it from their customer as endorser if it is not paid at maturity, and that is different altogether from the paper pledged to them.

His Lordship: Is there any paper of that kind not paid?

Mr. Aylesworth: That is, in judgment here?

His Lordship: Yes.

Mr. Aylesworth: A comparatively trifling amount in judgment No. 6. That is of small importance. I put this paper in, then. As I say, it is one prepared by Mr. Mason and verified by Mr. Draper—the pencil marks being those of Mr. Draper—as being indicative of the course of dealing.

Mr. Shepley: The only instance you have given you do not mean to say is typical of the whole paper?

Mr. Aylesworth: There are half a dozen such instances where paper is taken out of the collateral, discounted, credited and forwarded for collection.

His Lordship: And in respect of such paper I will find the word "discount"?

Mr. Aylesworth: Yes, my Lord. Where "O. K." is found, that simply means collateral paper paid in whole or in part and credited on the general account. The words "on account" in the third column are where the man paid a portion and not the full amount. Then I am reading, with my learned friend's consent, and I agree to his reading as well, if he wishes, extracts from Mr. Draper's examination.

His Lordship: To prove what?

Mr. Aylesworth: The course of dealing, just very shortly, one or two points. First Mr. Draper was examined before the issues were directed, on the Chamber application to have the balance credited, and in that examination I read questions 57, 58, 59.

His Lordship: I suppose nearly all the sales of the firm would be represented by paper?

Mr. Aylesworth: I suppose so.

Mr. Shepley: Perhaps half.

Mr. Aylesworth: Mr. Mason, the bookkeeper, thought more than half.

His Lordship: It is not of consequence.

Mr. Aylesworth: Then question 65.

His Lordship: It is of consequence in this way: Mr. Draper thought that the deposits would be largely made up of paper in the hands of the bank. It would be so if the cash received by the firm from the sale of goods not represented by paper did not go into the bank.

Mr. Shepley: The context of these questions would show just what is really meant by it.

Mr. Aylesworth: If there is any different meaning I will read more, but I thought I had read something that was definite by itself.

His Lordship: I do not suppose it is material. The fact that is intended to be represented there is that the bank collected the paper, and that the proceeds went to the credit of the account.

Mr. Shepley: What Mr. Draper has said is that he had no concern what they did with the notes when they took them away. He supposed when they were collected that they were paid into the bank.

His Lordship: One may take that for granted unless the contrary appears.

Mr. Aylesworth: Then questions 86 and 87, and in that connection the subject was returned to at questions 182, 183 and 184. Then I have already explained to your Lordship that the credit of $29,000.00 is detailed in the examination upon that point. In the subsequent examination for discovery in the issue I merely point out and read two questions to show what Mr. Draper says, Nos. 121 and 122.

His Lordship: There had been no assignment?

Mr. Aylesworth: There never has been any assignment for the general benefit of creditors. Some specific assets have been assigned.

Mr. Shepley: They have "suspended payment," whatever that may mean.

His Lordship: I was not following closely enough—from what hand comes this supposed dividend?

Mr. Aylesworth: From the Sheriff under the Creditors' Relief Act. Then turning to the history of the collateral account in the first examination, I read questions 125, 126, 127, 128, 129, 130, 131, 132, 133, 134 and 135.

His Lordship: Does the statute fix a date for the valuing of the securities?

Mr. Aylesworth: Under the Creditors' Relief Act nothing is said about valuing the security.

His Lordship: So it is on what might be called the common law?

Mr. Aylesworth: Yes, my Lord, the application of payments. Then I read from the same examination question 168. Mr. Shepley asks me to read No. 169. (Reads.) That is all that I have of that examination. In the subsequent examination, after the issue was directed, I was going to point out from it what Mr. Draper says as to the way the account opened. The first discount, he says, was on the 15th of April, 1891, of Mr. Smith's own promissory note for $15,000.00. The first collateral they got was on the 25th of June, 1891, a deposit of collateral paper to the amount of $7,315.00. I am making these statements from the examination.

His Lordship: As between debtor and creditor the matter of the application of these payments is of no consequence? It is only as between the other creditors, as to the amount which the Sheriff is to pay these creditors *pro rata.*

Mr. Aylesworth: It is of consequence to the debtors, but perhaps not of immediate direct consequence, because they have now judgments against them

in respect of this claim of the bank to the amount altogether of nearly $120,000.00 in round figures, and they have still $50,000.00 of liability which is overdue and not in judgment.

His Lordship: If the debtor wanted to get rid of the claim, say, of $145,000.00 which the bank originally had upon general account, he would have to pay that $145,000.00. Then ascertaining how much of that $145,000.00 remained, the firm would have the right to have credit for any moneys received, and any collaterals uncollected would be handed over on payment of the balance, so I do not see how it affects the debtors, the date of when the application is made. But it is material, and at present the only materiality I can see in my own mind is whether or not the Molsons Bank is entitled to have from the Sheriff a dividend upon the whole claim of $145,000.00 if it was in judgment, or upon the $145,000.00 less what it has received from the collaterals.

Mr. Aylesworth: It perhaps is not of consequence to the debtors when the credit is directed to be made, but it is of consequence that either on receipt or now credit should be directed upon account of the judgments recovered.

His Lordship: It seems to me that it is altogether *quia timet* for the debtors.

Mr. Aylesworth: Possibly, but it is of consequence that there should not be a judgment against them of $200,000.00, instead of $160,000.00.

His Lordship: As long as they have not a cheque for the debt I do not see that they can trouble the creditor.

Mr. Aylesworth: If the question was not raised now it might be necessary to raise it at any time when the debtors fell into property that would enable the Sheriff to levy.

His Lordship: That could be easily reached by directing a statement of how much is original liability. That would end the matter.

Mr. Aylesworth: No, my Lord, it is in the Sheriff's hands, and he therefore knows nothing of the source from which the judgments rank.

His Lordship: If there was any property upon which the judgments could levy a summary application could be made. There might be a declaration that such judgment was held so much for collateral and so much for original liability.

Mr. Aylesworth: The Court may find when the credit ought to be given. It is as to payments already made that the issue is directed.

His Lordship: I suppose he could have a declaration of how much of his original liability is represented by judgment and how much of his collateral is represented by judgment.

Mr. Aylesworth: We have a statement showing which ones of the collateral notes in respect of which judgment has been recovered, have been paid.

His Lordship: I was assuming you had.

Mr. Aylesworth: Those may go before your Lordship.

His Lordship: I was not required to go through the account. I shall endeavor as best as I can to decide principles, but I shall leave the accountants to do the clerical work.

RECORD.

In the High Court of Justice.

No. 17. Exhibits at Trial. Evidence upon Triai of Issues, 13th April, 1894. Evidence of John R. Mason.

John R. Mason, sworn. By Mr. Aylesworth:

Q. You were the managing man so far as the finances of Cooper & Smith were concerned? *A.* Yes.

Q. And were cognizant of the account that was current with the Molsons Bank? *A.* Yes.

Q. I wish to ask you as to the practice in dealing with that account. When the firm of Cooper & Smith received payment of a note which had been deposited with the bank, what was done? *A.* When a customer would remit the amount of a note or on account of it, it was credited to his account. If he remitted the full amount of the note it was credited to Bills Receivable account, and that disposed of the note as far as the customer was concerned, and the money went into the general cash account and was deposited in the Molsons Bank.

Q. What about the note itself? *A.* In the event of the note being paid in full I used to go up to the Molsons Bank about that time and take the note out of the wallet and credit the amount on a book kept in the wallet, a little pass-book showing the amount on hand, and as we deposited or withdrew the amounts were entered and the balance shown. When the customer paid the note I would take it out of the bank and return it to him.

Q. Was the firm banking with any other bank at this time? *A.* There was a small account subsequently opened at the Ontario.

Q. About when was that done? *A.* That was opened, I think, in 1892, the summer of 1892.

Q. That never amounted to very much? *A.* Not much; $25,000.00.

Mr. Shepley: I formally object to any evidence with regard to that.

Mr. Aylesworth: I am only seeking to emphasize the evidence of these notes being deposited in general in that way in the Molsons Bank.

Q. If the note was one that was payable out of the Province, what was the course of dealing? *A.* The notes that were payable at a distance and deposited in the bank as collateral, when it came within a few days of maturity they were taken by me out of the bank and handed to the cashier of Cooper & Smith, who put them on a deposit slip in the same manner as we deposit cheques. The bank charged a collection of about a quarter per cent. for collecting these notes, but the deposit was credited on the day it was made, usually four or five days before the note was due. In the case of British Columbia or Manitoba the notes were deposited a few days earlier to give time.

His Lordship: And were they immediately charged back if not paid? *A.* If not paid they were charged back.

Q. So that the bank would only give credit for them for a few days? *A.* Yes, they were just treated the same as cheques.

Q. If deposited I do not see how they were treated as cheques? *A.* They were deposited the same as any other paper could be deposited.

Mr. Aylesworth: You spoke of payments being made by makers of notes upon account? *A.* Yes.

Q. Where a note was not paid in full, what was the course of dealing in such cases? *A.* You mean payments made to Cooper & Smith on account?

Q. Yes, where a note was deposited collaterally with the bank. *A.* In that case the money was credited to the customers' account in Cooper & Smith's cash book.

Q. What was done with the money? *A.* The money was deposited in the general fund; it was put in the cash and deposited in Molsons Bank.

His Lordship: Was the bank notified at all? *A.* No, the bank was not notified in this instance.

Mr. Aylesworth: The bank would not know about this? *A.* No.

Q. What became of the note? *A.* It remained in the bank; in some cases it would be taken out before being paid in full, but usually it was allowed to remain in the bank until the customer retired it unless they got very far behind.

Q. Were the authorities of the bank aware of the course of dealing that was going on with respect to these collaterals?

His Lordship: Mr. Draper has said what the course of dealing was.

Mr. Aylesworth: I suppose the same thing with other cases where customers remitted direct to the bank? *A.* Yes.

Q. What was done then? *A.* The money was credited to Cooper & Smith's deposit account.

Q. When? *A.* I presume on the day of its receipt, and the bank notified us to that effect.

Cross-examined by Mr. Shepley.

Q. The cases in which customers' notes held by the bank as collateral were paid directly to the bank were very, very few, having regard to the bulk of the collateral paper? *A.* Yes.

Q. They were exceptional instances? *A.* There was a list of them.

Q. You know these two books, don't you? *A.* Yes.

Q. These books contain a statement of the collaterals deposited from time to time? *A.* Yes.

Q. During the period that you took out sixty notes amounting to some $7,000.00 or $8,000.00, can you give me an estimate of the quantity of collateral that was paid direct to the bank? *A.* I could not.

Q. A million, do you think? *A.* I could not say. It is a question that has not occurred to me, and I have not looked into it.

Q. At all events it would be very trifling by comparison? *A.* It would be a small amount,

Q. Rather accidental that the bank got any payments directly at all? *A.* The usual way—

Q. Just answer that first, because I will ask you about the usual way afterwards. It would be rather an accident that the bank got that? *A.* I would not call it an accident, because the customer knew the bank at which which his note was payable, and received notice from us in most cases.

Q. It was out of the usual course? *A.* In most cases the customers remitted to Cooper & Smith for the notes that were in the bank.

His Lordship: I want to know the practice, whether the customers were notified of their notes being in the bank? *A.* I usually sent our customers notice of the date of maturity and where they were payable at; in the great

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majority, I may say with few exceptions, and these are the exceptional notes payable at a distance, all the notes were drawn payable at the Molsons Bank, Toronto, and it was our custom to send notice of the maturity of the note some short time before the date of payment. In the great majority of cases the cash was remitted direct to Cooper & Smith by the customers, and the exceptions are that list you have got there.

Mr. Shepley: Then, was it not out of the usual course of dealing?

His Lordship: You have an answer to that, Mr. Shepley.

Mr. Shepley: If your Lordship thinks so.

His Lordship: I think so.

Mr. Shepley: Now on the first page of these two books there is a memorandum signed by Cooper & Smith that has been referred to on former occasions during this suit. You know about that? *A.* Yes, I do.

Q. This book is just the successor of this? *A.* Yes, No. 1 and No. 2.

Q. "The notes enumerated in this book are deposited with the Molsons Bank as collateral security for advances made to us by the bank in discounts and overdrafts. Cooper & Smith." This statement on the first page is a fair statement of the arrangement upon which the notes were deposited? *A.* Yes.

Q. And there was no departure from that? *A.* No.

Q. I see a statement of amounts here from time to time marked deposited with the dates; for instance, 25th June, I see deposited a large number of notes here amounting altogether to $7,315.00: on the 30th June another deposit amounting to $3,749.00. Then further on I see that from time to time some of these are marked as taken out? *A.* Yes.

Q. What does that mean? *A.* That means—I think I can explain better. This is the first deposit; on the 25th June, 1891, notes were deposited according to that to this amount, $7,315.00; 30th June there is another deposit; taken out on the 13th July, $359.69; that was a note that was paid, I presume, to Cooper & Smith; it was taken out by me and returned to the customer, that is what I would say without knowing the individual note.

Q. Then when we get further on after the notes commenced to mature, I see you took them out in large quantities; for instance, 19th November there is quite a long list of them; on the 4th December quite a long list; on the 8th May a very long list. Does that indicate this, because as I understand it both parties have made this statement before, and I want to see whether you agree with it, that when the notes were about to mature you took out of the bank for Cooper & Smith those of them that were about to mature, taking them out of the wallet you carried them away and attended to the collection yourself? *A.* No, that was not the way.

Q. You disagree then with what Mr. Smith and Mr. Draper have stated? *A.* I don't know what they stated; I haven't seen their evidence, but I will state exactly how it is. You see taken out on the 8th of February, these notes that are taken out on the 8th of February are probably notes that our customers had remitted from time to time on account until they had either paid them in full, or they may include some notes that were a long way past the date of maturity, and these notes the bank expected that we would take out and put in paper that was maturing. That would explain this entry here for instance, or it might also contain notes that we had just received payment for.

Q. Then do I understand you to say that it does not contain notes that had not yet matured but were near maturity? *A.* I would say that statement, "Taken out on 8th February," contained no notes that were maturing except it happened to be notes payable at a distance.

Q. You say that these notes marked here as taken out, except in exceptional instances, would not include notes that were then current and nearly matured? *A.* No, it would not.

Q. Then do you say it was not your custom as notes were about maturing to take them out of the bank? *A.* Not unless they were paid.

His Lordship: Unless they had been paid? *A.* Not unless they had been paid. There is just one exception that I want to call your attention to and that may be useful to know. These notes that were payable at a distance had to be taken out some time previous to maturity, and these were the ones that I said some time ago we put on a deposit slip and deposited in the Molsons Bank, and the amounts entered there as taken out may contain some of these notes, but they were principally about the end of each month; the notes mature on the fourth of the month payable at a distance, and they were taken out probably on the last day of the month and deposited in the bank to our current account.

Q. Then am I to understand as to notes that were payable near by that they were not taken out and deposited? Say Toronto or Hamilton? *A.* If a note was payable in Hamilton on the 4th we will say of May, the custom would be to take that out of the bank on the last day of April and deposit it.

Q. Would that apply to all? *A.* All notes maturing at a distance.

Q. That is, outside of the city? *A.* It would apply to all of them.

Q. But no notes payable in Toronto would be taken out? *A.* No, none, unless they were paid on that day.

Mr. Shepley: Even if they were not payable at the Molsons Bank? *A.* If it happened to be payable at another bank, say the Quebec Bank, these would be taken out and presented at the bank—taken out by me and presented at the bank, and if marked were put on deposit the same as an ordinary cheque.

Q. And if not paid? *A.* Were held by us. They were not redeposited.

Q. Then when you took a quantity of notes, I would gather from these books—which I will put in—I should gather from the contents of these books that at the same time, or practically the same time, you would deposit another lot? *A.* Yes, that was the custom.

Q. So as to keep this line of deposit full? *A.* Yes, that was the effort we made all the time, to have as much collateral in the bank as possible.

Q. Was that the arrangement between your firm and the bank that the discount account, the advances, should be fully secured by collaterals to an equal amount? *A.* No, that was not the arrangement.

Q. What was the arrangement? *A.* The arrangement was—I am going by memory now, there is a document showing it somewhere—that the Molsons Bank were to advance a certain sum, I think $150,000.00—I believe that was stated in a letter—to Cooper & Smith, and that this was to be secured by collaterals.

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Q. To an equal amount? *A.* No.

Q. To what amount? *A.* I don't think there was any amount stated.

Q. Secured by collaterals would mean to an equal amount? *A.* I am not certain whether there was an amount stated in that letter or not, that Mr. Pipon wrote to Cooper & Smith.

Q. Cannot you find that letter? While it is coming we will go on with something else. The advances were to be secured by collaterals, and Cooper & Smith were to be entitled to get advances to the extent of $150,000.00, giving that security? *A.* Yes.

Q. Then upon that arrangement the course of business was to discount this paper? *A.* To discount the direct paper that has been spoken of.

Q. There were also some instances in which you discounted your customers' paper? *A.* Very few.

Q. There were some? *A.* Yes, there were a few instances.

Q. At the time of the suspension of the firm there was also an overdraft? *A.* At the time of the suspension there was, I believe, an overdraft.

Q. And was not there from time to time an overdraft in the current account of the firm? *A.* Yes.

Q. And all these matters were secured by the collaterals deposited? *A.* Well, according to the terms stated in that memorandum.

Q. Then, to see that we understand it, you would bring in a bundle of customers' notes current, and you put them in a wallet at the bank? *A.* Yes.

Q. They would remain there under the terms of that memorandum, as collateral security? *A.* Yes.

Q. Then with regard to those that matured outside of Toronto, and with regard to those that matured or were payable at other banks in Toronto than Molsons, those would be taken out before maturity? *A.* The notes at a distance would be taken out before maturity and a note payable in Toronto would be taken out probably a day before it was due.

Q. Those would be taken out altogether and would never go back into that wallet? *A.* No.

Q. They would not any longer be part of that collateral deposit? *A.* No.

Q. But instead of those you would deposit current paper that you had received from your customers? *A.* We deposited paper we received from our customers, not directly representing the amount taken out but for the purpose of keeping up the general balance.

Q. For the purpose of keeping up the general collateral deposit you were bound to make such deposits? *A.* Yes.

His Lordship: Would you make that periodically as the paper came in? *A.* As the paper came in. The intention was to keep the amount of collaterals up as high as possible.

Q. That is, you practically put all your customers' paper in the bank? *A.* Yes.

Mr. Shepley: Then when you took those notes out that were payable at a distance you said you would deposit that to the credit of the current account? *A.* Yes.

Q. Just as though it had been a sight draft? *A.* A sight draft or cheque

or anything else; the bank gave us the privilege of depositing these notes as cash.

Q. At that time they had ceased to be held as collateral, for you had taken them out of the wallet? *A.* Yes, they had ceased to be held as collateral.

Q. That course of dealing went on until the firm's suspension. Do you remember the date of that? *A.* Somewhere about the 1st of September.

Q. Was it not the 25th of August? *A.* A few days before the 1st of September; it must have been somewhere about there. I don't remember the exact date.

His Lordship: When this paper was returned, if any of it was dishonored by the maker, was it sent back to you or did you replace it with your cheque? *A.* If the paper was dishonored it was received back by the bank and charged against the current account.

Q. What became of the paper itself? *A.* It was put in amongst the cheques. If the firm intended to make any disposition of it we would get it out and put in something to represent it.

Q. It would be sent back among the cheques and other vouchers at the end of the month? *A.* We would get it among the other vouchers at the end of the month; if there was anything done with the note itself it would be taken out of the bank and a voucher put in to represent it.

Q. The bank did not hold it, it was considered dishonored paper? *A.* Yes.

Q. And you were expected to look after it? *A.* Yes, it was charged back to the firm's account.

Q. In other words, the bank would not look after it? *A.* Yes.

Mr. Shepley: It was there at your disposal? *A.* It was put among the vouchers.

Q. You could get it whenever you wanted it? *A.* By giving a voucher for it.

Q. To represent it until the end of the month, when you got the whole of your vouchers? *A.* Yes.

Q. When the firm suspended the bank ceased to let you take away these collaterals, and asserted their right to keep them? *A.* I presume that was done; in fact I know it was done, but practically it was not said in so many words.

Q. At all events the occasion had arisen for which the security had been given? *A.* Yes.

Q. Then there are those cases in which payments were made on account, and you still left the note upon which they had been paid in the wallet, I think you said; I want to be sure, however, that that is so, that the bank would not have any knowledge of that. *A.* You mean that the bank would not have any knowledge of the payment made on the individual note?

Q. Yes. *A.* No, but I think the bank had a knowledge that we were in the habit of receiving payments on account of these.

Q. But they would not know in ordinary cases that you had received money? *A.* They would not know the individual case.

Q. When the note had been fully paid you would go and get it away from the wallet? *A.* That was the custom—yes.

Q. You may be right, and perhaps you are, but your statement of this does not quite agree with the statements we have heretofore heard as to the method of dealing with these collaterals.

His Lordship: I have not detected any practical difference. We have Mr. Draper's statement and this witness, and they substantially agree.

Mr. Shepley: I do not think there is any difference in the effect of it. There is this difference in the statement of Mr. Draper as I have understood it and the statement which this witness has made; Mr. Draper's statement is that the notes when about approaching maturity were all taken out and that Cooper & Smith attended to the collection of them.

His Lordship: That is practically what the witness says. Mr. Draper says they were put back in the account as discounts and sent for collection in the ordinary way.

Mr. Shepley: That did not come from Mr. Draper though.

His Lordship: I think so.

Mr. Shepley: When these notes had been collected by Cooper & Smith no doubt Mr. Draper said they were all deposited.

His Lordship: What Mr. Mason says would occur to one as the only practicable way of carrying on business. I have been trying to see how this examination helped us, either one way or the other, in addition to the statements already in.

Mr. Shepley: Subject to the letter spoken of, I do not know that I wish to ask the witness any further question.

Mr. Aylesworth: That is all, my Lord, with the exception of a date. I have not got here the notice of motion by which the application was made to have satisfaction entered up *pro tanto*. I only wish the date of it, but it is at least earlier than the 20th of October. I have a copy of the affidavit of Mr. Smith filed in support of the application, which is signed on the 20th.

Mr. Shepley: The 19th is the date.

Mr. Aylesworth: That is the date. That is the case then, my Lord.

Mr. Shepley: I think I shall have to call Mr. Draper, unless my learned friend will allow me to refer to the examination. I wish to 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; it has become welded together as one debt.

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. Another portion is represented by customers' paper under discount upon which money has been advanced; another portion by overdraft; the whole debt amounting to $165,000.00. Upon a portion of that debt which had matured up to a certain date, the 11th of 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.

His Lordship: I should have thought that beyond question, subject to

what Mr. Aylesworth may say, that you had your collaterals for the whole amount. In other words, if, on the day of the trouble arising between the bank and the firm, the firm had come to the bank and asked to have its collaterals, the bank could have said to the firm, "We will not give you any collaterals without a cheque for $165,000.00."

Mr. Shepley: I understood from the judgment of the Divisional Court that it was only because of the doubt whether that was so they directed the trial of the issue.

His Lordship: At present I may be quite wrong.

Mr. Aylesworth: I did not understand the Divisional Court that way. I do not think your Lordship has stated the position differently from what I have stated it.

His Lordship: I have not observed any great contrast.

Mr. Shepley: The matter before the Divisional Court was all upon affidavit. I do not think there was any substantial difference, with the exception of the difference that has arisen from Mr. Smith's evidence. He made an affidavit from which he has substantially receded. Upon that state of facts before the Court, what Mr. Justice Street said in his judgment was this, the contention of the plaintiffs that as a matter of law they are entitled to hold the money which they have collected or may collect, is one which cannot be said to be by any means beyond dispute.

His Lordship: That is a difference between holding it on the whole account. It is a difference in statement.

Mr. Aylesworth: That contention, the Judge says, cannot by any means be said to be beyond dispute.

Mr. Shepley: I want to make it beyond dispute in the evidence before your Lordship.

His Lordship: I do not think there is any contest of fact. Mr. Aylesworth admits that on the day the account was closed between the bank and the customer, if the customer wanted his collaterals he would have had to have given a cheque for $165,000.00. The collaterals were collateral to the whole account for $165,000.00.

Mr. Shepley: Then my learned friend admits that if the collaterals were paid in full—my learned friend has arranged to admit that—and if this dividend in the Sheriff's hands were also paid in full, our debt would not be paid in full.

Mr. Aylesworth: I have given figures which show that. That is the present dividend in the Sheriff's hands. It would be far more than enough to pay the judgment debt.

His Lordship: It would leave a deficiency of how much?

Mr. Aylesworth: The collaterals are $104,000.00, the dividend seventeen or eighteen thousand, and the judgment debt $95,000.00.

His Lordship: On the whole debt it would leave a deficiency of $45,000.00 in round numbers?

Mr. Aylesworth: Yes, my Lord.

Mr. Shepley: My learned friend read questions 168 and 169 as to the application of these collateral notes after they recovered the first judgment.

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I want to add to that Nos. 185, 186 and 187; then 193, 194, 195, 196, 197, 198 and 199. Then I desire—not to base a present argument upon it, but so that the material may be complete—to put in a statement of these advances upon the direct paper from time to time, of which my learned friend has a copy. Then I also desire, with the same object in view, to put in a statement showing the daily balance. It shows in a comprehensive way what was put in every day and what was taken out every day, and the daily balance. Also a statement in three parts for convenience sake, showing the collections on account of the collateral.

Mr. Aylesworth: Up to what date? I have only to 31st January.

Mr. Shepley: It is up to a later date than yours. I think, my Lord, that that is all.

(Mr. Aylesworth having proceeded with his argument for a few minutes.)

Mr. Shepley: If your Lordship would allow me—although I said that was all I had—to read a line or two from Mr. Draper's examination. Questions 75 (reads), 76, 77, 78, 79, 81, 82, 83, 84, 85 and 89.

The argument was then completed and judgment reserved.

Certified correct.

JOHN AGNEW, Official Reporter.

No. 18. Extracts from examination of W. H. Draper.

Questions and Answers in the cross-examination of W. H. Draper, on his Affidavit, taken 8th November, 1893, referred to in foregoing Notes of Trial.

57. *Q.* Had they more than one account in the bank? *A.* No, just one account.

58. *Q.* And the notes were paid to them, and they made their deposits? *A.* I think so.

59. *Q.* And you imagine that these deposits would be largely made up of the notes which they took away from you and collected? *A.* I have no doubt.

65. *Q.* When did Cooper & Smith cease taking away these notes? *A.* I fancy at the time of the trouble. The book shows the date. The last entry appears to have been made on the 23rd August last.

75. *Q.* Under what arrangements were the notes allowed to be withdrawn from that? *A.* No special arrangement—no arrangement at all in fact.

76. *Q.* They couldn't get them without your consent? *A.* They took them with our consent, of course.

77. *Q.* And it was intended from the beginning that they should take them with your consent? *A.* Oh, yes, I think so.

78. *Q.* And collect them themselves? *A.* Yes.

79. *Q.* Paying the proceeds into your bank, I suppose? *A.* No, there was no agreement as to that. We did not care what they did with them. They would naturally look after them in the proper way.

81. *Q.* They would pay in the proceeds—that is what you suppose? *A.* We imagine so; still, as soon as the collaterals went out of the office we did not look after them at all—they were not our property any more.

82. Q. But you expected them to pay them in—you expected to get the benefit of those collaterals, didn't you? *A.* No.

83. *Q.* I mean of the whole of the collaterals in the bank, you expected to get the benefit? *A.* Of course, as long as they were our property we would hold them.

84. *Q.* And the only way you would get the benefit of them was by their being paid into the bank here? *A.* Not exactly. As long as they were here they were collateral; as soon as they went out, they were no longer collateral.

85. *Q.* They were at liberty then to do with them as they liked? *A.* Yes.

86. *Q.* Were any of the notes paid here do you know? *A.* An odd one would be paid here.

87. *Q.* And what would be done with the proceeds of that? *A.* Placed to the credit of the firm.

89. *Q.* After they had ceased to collect these notes, you went on collecting them? *A.* After the trouble, of course we took measures to collect in the securities.

125. *Q.* While the firm was carrying on business, they got the benefit of the collateral notes as they became due, did they not? *A.* They withdrew them as they matured, I suppose.

126. *Q.* Under an arrangement with the bank? *A.* They took them simply away from us. We permitted them to take them away from us. That was all.

127. *Q.* There was no arrangement with the bank? *A.* No special arrangement. That was the manner in which the thing was done. Of course we were consenting parties to their taking the notes.

128. *Q.* And they did that from the beginning? *A.* Yes, that was the practice.

129. *Q.* And recognized by the bank during the whole time that the account was here, until the time they got into difficulties? *A.* Yes, that was our practice from the beginning to the end, as far as I understand.

130. *Q.* And any other practice would not have allowed them to carry on their business, would it? *A.* I am not quite so sure about that; that was the practice they had been in the habit of working, and was what they suggested to us no doubt, and what was consented to.

131. *Q.* That was suggested to you from the first? *A.* That was part of the original arrangement; it was one of the details of the accounts.

132. *Q.* That they should be allowed to take out the maturing paper and collect it themselves? *A.* Yes.

133. *Q.* And you expected it to come back here in the shape of deposits? *A.* We did not expect anything about it at all; merely we knew that they would take care of the thing in the ordinary way and look after the money.

134. *Q.* And it would naturally come back to the bank in that way? *A.* They would place it, no doubt, to their credit unless they had some other use for it.

135. *Q.* When any money was collected by you on the rare occasions you speak of, it was placed to their credit? *A.* It went to the current account.

168. *Q.* Can you give me any reason why you changed your style of applying payment of those collaterals? *A.* Our solicitors advised us to that effect.

169. *Q.* It was by reason of the advice of the solicitors that you ceased to apply the collaterals in payment, is that it? *A.* Yes, that is partly the reason.

182. *Q.* If the money were paid to you—supposing a man paid his note to you, what was done with it then? *A.* The invariable practice was to give it over to the firm.

183. *Q.* And that was the understanding on which the account was opened? *A.* I don't know that there was any question as to small details like that at all. I don't think there was.

184. *Q.* But whenever a note was paid, it was credited to the firm? *A.* Yes, always; that firm always got the benefit of it.

185. *Q.* So that I am right in assuming that if it hadn't been for the advice of your solicitors you would have gone on giving them credit on the maturing paper with the maturing collaterals? *A.* No, I would not say that.

186. *Q.* You said a moment ago that the only reason why you stopped doing it was on the advice of your solicitors; I suggested if there was any other reason, and you said no? *A.* I know that the solicitors' reason for it was a simple one. We hadn't an execution in and there was trouble down there, and we were very anxious to get a status in the matter, and in order to prevent any possible objection to our writ we did give credit for the first sum in order to get in without any possible defence. That was the reason we did.

187. *Q.* And the reason you think you changed was on the advice of your solicitors? *A.* There was no longer any necessity for it.

193. *Q.* It wasn't your course then, I understand, to collect these collaterals? *A.* No, it was never our course to collect these collaterals.

194. *Q.* As this book shows, collaterals to a considerable amount would be taken out one day and about the same date a different amount put in? *A.* That was about the idea, yes.

195. *Q.* The idea being to substitute current collaterals for maturing collaterals? *A.* Yes, that is it.

196. *Q.* And to keep the balance as near to the agreement as possible? *A.* As far as possible.

197. *Q.* Was there ever any other agreement with regard to these collaterals than the agreement in that book? *A.* That was the only agreement with regard to collaterals.

198. *Q.* Supposing the firm had a maturing note as collateral to their account, one of their own notes, and that matured, what entry would you make with regard to that? *A.* That note would be charged against their current account, and the renewal went to the credit of the current account, less the discount.

199. *Q.* Was there ever enough money in the bank to the credit of their

general account to pay these maturing notes? *A.* No, seldom or never; the notes were large, very large.

Questions and Answers in the Examination of W. H. Draper for Discovery, Taken 1st February, 1894, Referred to in the Foregoing Notes of Trial.

No. 19. Exhibits at Trial. Extracts from examination of W. H. Draper —*continued.*

121. *Q.* Did you ever speak to either of them of the applications you were making or intending to make on that note of $30,000.00 which fell due on the 4th of September? *A.* I think not.

122. Q. Do you remember? *A.* My present belief is that I spoke to neither of them about that application; I don't think either of them cared. We got our judgment in the ordinary way—by service.

Judgment of the Hon. Mr. Justice Rose, Delivered after Trial of the two Issues, 20th April, 1894.

No. 20. Reasons for Judgment of Mr. Justice Rose, 20th April, 1894.

I do not find any agreement that the bank was to collect the notes deposited as security for amounts advanced under the letter of the 13th of June granting a line of credit up to $150,000.00, and apply such collections as made in payment of such advances.

I find that the agreement was that the firm of Cooper & Smith were to secure any advances made by depositing customers' paper, or, as put in the letter, "by collections deposited," and that when any of such deposited paper matured it was the duty of the firm to look after it, and this they did by withdrawing the paper from the wallet in which it was placed for deposit in the bank, and either received the amount from the customer direct or placed it in the bank for collection. That if such paper was collected by the firm, the proceeds were not in anywise controlled by the bank, but were either deposited by the firm to their credit or otherwise disposed of as they might desire. If the paper was collected by the bank, the amount was placed to the credit of the firm's account, and was at their disposal; but the proceeds of such paper, whether collected by the firm directly or through the bank, was in nowise treated as security for the advances made under the letter of the 13th of June. On the contrary, whenever any paper was withdrawn by the firm from the wallet it ceased to be security. It was the duty of the firm to place in the bank all the customers' paper they could procure so as to cover, as nearly as possible, the advances made.

It seems to me that such paper so deposited was regarded by both parties as security available for the whole account if at any time, by reason of misfortune, the firm became unable to meet their obligations to the bank. At such moment the right of the firm to withdraw any paper would cease, and the bank would become entitled to hold it, or the proceeds, if paid, as security for the whole account, and not for any particular part or portion thereof; and, I think, it then became proper for the bank to open a suspense account to the credit of which should be carried all moneys realized from the payment of any of such deposited paper.

After the account was thus closed for the purpose of liquidation, I think, the firm ceased to have any control over either the deposited paper or the

proceeds thereof, until they were in a position to offer to the bank payment in full of the advances. To enable the firm to make such payment in full, I have no doubt they might direct the bank to credit all moneys received in payment of such deposited paper to the account for advances, or, in other words, upon payment to the bank of the sum which would equal the difference between the total amount of advances and the amount received from collections of the deposited paper, the firm would become entitled to a receipt in full and to have delivered to them any paper or other securities then held by the bank.

The fact that the bank had recovered judgment for a portion of the advances would not give the firm any new rights, and, if to credit any portion of the moneys received from collections of the deposited paper would for any reason be a detriment to the bank, it seems to me an *a fortiori* case that the firm could not require such appropriation.

Nor can I see that the creditors of the firm have any higher right than the firm, or any right to require the bank to apply any moneys in hand to the payment of judgments obtained against the firm for any portion of the advances.

The judgments once obtained and execution having been placed in the Sheriff's hands, I think the right of the bank to a *pro rata* share became then established, subject to the judgment debts being reduced by payment before payment by the Sheriff under the Creditors' Relief Act.

This disposes of all the bank claim under such Act, except under the judgments against the firm as indorsers on the deposited paper.

So long as such judgments stand unsatisfied, I see no reason why the bank may not claim a *pro rata* share in respect of them. I have nothing to do with the propriety of such judgments on the issues referred to me. I assume them to be regular and valid, and if unpaid the bank must share in respect to them.

There are two judgments against the firm as indorsers upon such deposited paper, and such judgments also include amounts advanced to the firm. If any of such deposited notes have been paid by the parties primarily liable, I do not think the bank is entitled to a dividend in respect to such notes. The judgments have been to such extent paid and satisfied. The amounts thus paid have no doubt been carried to the credit of the suspense account as above stated. In arriving at the above conclusions I have followed what I believe to be the principles laid down in Eastman *v.* Bank of Montreal, 10 O. R. 79; Young *v.* Spiers, 16 O. R. 672; Bowerman *v.* Phillips, 15 A. R. 679; and Commercial Bank of Australia *v.* Official Assignee of the Estate of Wilson & Co. (1893), A. C. 181, especially at page 186. Of course the bank can be paid from all sources only one hundred cents on the dollar.

The parties will be able, I hope, from the above expressions of opinion to make the necessary application of credits, when I will enter formal directions for judgment on the record.

So far as I have any power over the costs, I think the bank should have their costs, as they have substantially succeeded. The payments made upon the deposited paper upon which judgments were obtained were at the date of the contestation comparatively trifling.

Formal Findings of the Honourable Mr. Justice Rose, Endorsed on Record of Issue Directed by Divisional Court (Cooper *v.* Molsons Bank).

I find that the defendants in the issue have not—either before or since the recovery of the four several judgments in the issue mentioned—received any payments which either at the time of the receipt of the same ought to have been or ought now to be applied in satisfaction in whole or in part of the said judgments or any of them.

20th April, 1894.

JOHN E. ROSE,
J.

No. 22.
Formal Finding of Rose, J., in Mason *v.* Molsons Bank, 20th April, 1894.

Formal Findings of the Honourable Mr. Justice Rose, Endorsed on Record of Issue Directed by County Court Judge under Creditors' Relief Act (Mason *v.* Molsons Bank).

1. I do not determine whether the plaintiffs have any status entitling them to raise the contentions raised by the within issue.

2. I find that with respect to the judgment in the within issue sixthly mentioned, being the judgment for $24,544.98, the defendants did, after the recovery thereof and on or before the 26th day of November, 1893, receive from the makers of certain specific promissory notes therein included (the said judgment being in part against the debtors Cooper & Smith as endorsers thereof and the said makers being as between themselves and the said Cooper & Smith primarily liable for the payment thereof) the sum of $1,384.63 in specific payment of or on account of the said notes respectively, which sum ought to be applied in reduction of the said judgment and of the execution founded thereon, and that with respect to the judgment in the within issue seventhly mentioned, being the judgment for $9,135.86, the defendants did, after the recovery thereof and on or before the 26th day of November, 1893, receive from the makers of certain specific promissory notes therein included (the said judgment being in part against the debtors Cooper & Smith as endorsers thereof and the said makers being as between themselves and the said Cooper & Smith primarily liable for the payment thereof) the sum of $1,264.80 in specific payment of or on account of the said notes respectively, which sum ought to be applied in reduction of the said judgment and of the execution founded thereon, and that save as aforesaid the defendants did not since the recovery of the judgments in the within issue mentioned or any of them, and on or before the 26th day of November, 1893, receive any payment which ought to be applied in satisfaction in whole or in part of the said judgments or any of them or of the execution founded thereon.

3. I find that with respect to the judgment in the within issue sixthly mentioned, being the judgment for $24,544.98, the defendants did, after the recovery thereof and after the 26th day of November, 1893, and on or before this date, receive from the makers of certain specific promissory notes therein included (the said judgment being in part against the debtors Cooper & Smith as endorsers thereof and the said makers being as between themselves and the said Cooper & Smith primarily liable for the payment thereof) the further sum

RECORD.

In the High Court of Justice.

No. 22. Exhibits at Trial. Formal Finding of Rose, J., in Mason *v.* Molsons Bank —*continued.*

of $4,688.14 in specific payment of or on account of the said notes respectively, which sum ought to be applied in reduction of the said judgment and of the execution founded thereon, and that with respect to the judgment in the within issue seventhly mentioned, being the judgment for $9,135.86, the defendants did, after the 26th day of November, 1893, and before this date, receive from the makers of certain specific promissory notes therein included (the said judgment being in part against the debtors Cooper & Smith as endorsers thereof and the said makers thereof being as between themselves and the said Cooper & Smith primarily liable for the payment thereof) the further sum of $3,721.75 in specific payment of or on account of the said notes respectively, which sum ought to be applied in reduction of the said judgment and of the execution founded thereon, and that save as aforesaid the defendants did not since the recovery of judgment in the within issue mentioned or any of them, and on or before this date, receive any payment which ought to be applied in satisfaction in whole or in part of the said judgments or any of them, or of the executions founded thereon.

4. I find that the defendants are entitled to share in the moneys in the Sheriff's hands mentioned in the within issue for the full amount respectively of the judgments numbered 1, 2, 3, 4 and 5 in the said issue, and for the amount of the judgment numbered 6 in the said issue after reducing the same by the said sums of $1,384.63 and $4,688.14, and for the amount of the judgment numbered 7 in the said issue after reducing the same by the said sums of $1,264.80 and $3,721.75.

5. And I direct that the plaintiffs do pay to the defendants the costs of the said issue.

Dated 20th April, 1894.

JOHN E. ROSE,
J.

No. 23. Order of Divisional Court after Trial of Issue, 23rd May, 1895.

Order of Queen's Bench Divisional Court after Trial of Issue Directed by that Court, dated 23rd May, 1895.

Upon the application of counsel for the Molsons Bank in presence of counsel for defendants and for James Mason, Charles Smith and Emile C. Boeckh, trustees under the last will and testament of John Smith, deceased, named in the order of the 29th day of December, 1893, upon hearing read the said order and the orders and proceedings therein recited, and the issue thereby directed, and the finding of the Honourable Mr. Justice Rose thereon, and upon hearing what was alleged by counsel aforesaid,

This Court doth declare that the said the Molsons Bank, up to the 20th day of April, 1894, have not either before or since the recovery of the four several judgments in the above-mentioned actions, and in the said order and issue mentioned, received any payments which, either at the time of the receipt of the same ought to have been or ought now to be applied in satisfaction, in whole or in part, of the said judgments, or any of them, and doth order and adjudge the same accordingly.

And this Court doth further order and adjudge that the defendants and the said Mason, Smith and Boeckh, trustees as aforesaid, do pay to the said Molsons Bank the costs of the said issue by the said order directed, and the costs of this application to be taxed as the costs of a motion in Chambers forthwith after taxation thereof.

And that the defendants do pay to the plaintiffs the costs heretofore taxed to the plaintiffs under the order made by the Master in Chambers on the 9th day of November, 1893, with interest since the taxation thereof, and the costs directed to be paid by the defendants to the plaintiffs under the order made by the Honourable Mr. Justice MacMahon on the 6th day of December, 1893, forthwith after taxation thereof.

On motion of Mr. Shepley, Q.C., of counsel for the plaintiffs.

By the Court,

JAMES S. CARTWRIGHT, Registrar.

No. 24.
Assignment of Cooper & Smith to Clarkson, 4th October, 1893.

Extract from assignment, Cooper & Smith to E. R. C. Clarkson.

James Cooper and John C. Smith by indenture, dated 4th October, 1893, assigned to E. R. C. Clarkson all moneys, securities for moneys, book debts, notes, drafts, debts, accounts, choses in action, rights and credits, belonging, due or owing to the partnership firm of Cooper & Smith which have not been seized under execution or effectually attached at the instance of creditors of the debtors, together with all books, documents and papers in any way relating to the assets hereby assigned.

To have and to hold the same unto the said Trustee, his executors, administrators and assigns, in trust to collect, call in and realize the same, and after deducting all proper costs, charges, expenses and commissions in connection with the collection, realization and administration of same, to apply the balance in and towards payment of the creditors of the debtors, the r just debts ratably and proportionately and with preference or priority.

No. 25.
Proof of claim of Bank under this assignment, 7th Oct., 1893.

Proof of claim of the Molsons Bank before E. R. C. Clarkson, Assignee.

I, Charles Ashworth Pipon, of the City of Toronto, Manager of the Toronto Branch of the Molsons Bank, do solemnly declare:

1. That I am the duly authorized agent of the above-named claimant.

2. The above-named debtors are indebted to the above creditors in the sum of $155,992.07 in respect of the matters mentioned in the schedules hereto attached, marked respectively A, B, C and D, less the sum of $28,939.99 received.

3. In said schedule "A" are the particulars of the judgments recovered against said debtors with interest and costs.

4. In said schedule "B" are the particulars of the notes of said debtors, for which judgment has not yet been recovered.

5. In said schedule "C" are the particulars of the paper matured and current, discounted by the said debtors with the said creditors.

RECORD.

In the High Court of Justice.

No. 25. Exhibits at Trial. Proof of claim of Bank under assignment —*continued.*

6. In said schedule "D" are the particulars of the overdraft of the said debtors.

And I make this solemn declaration conscientiously believing the same to be true, and knowing that it is of the same force and effect as if made under oath and by virtue of the Canada Evidence Act, 1893.

Declared before me, at the City of Toronto, in the County of York, this 7th October, A.D. 1893.

CHAS. A. PIPON.

McDOWALL THOMPSON,
A Commissioner, etc.

SCHEDULE "A."

Date of Judgment.	*Damages.*	*Costs Taxed.*	*Writs.*	*Interest.*	*Total.*	*Date of Executions.*
14th Sept., 1893	$23,083 60	....	$24 00	$87 31	$23,194 91	14th Sept., 1893
14th Sept., 1893	57 77	....	6 00	0 28	64 05	16th Sept., 1893
22nd Sept., 1893	20,036 08	$45 34	12 00	49 54	20,142 96	22nd Sept., 1893
22nd Sept., 1893	20,022 96	45 24	12 00	49 45	20,129 65	22nd Sept., 1893
22nd Sept., 1893	10,006 57	45 24	12 00	24 65	10,088 46	22nd Sept., 1893
26th Sept., 1893	10,011 50	45 04	12 00	18 21	10,086 75	26th Sept., 1893
	$83,218 48	$180 86	$78 00	$229 44	$83,706 78	

SCHEDULE "B."

Name of Makers.	*Date.*	*Term.*	*Due Date.*	*Amount.*
Cooper & Smith.	.....	.....	7th Dec., 1893	$25,000 00
" "	.....	.....	11th Dec., 1893	10,000 00
" "	.....	.....	14th Dec., 1893	5,000 00
" "	.....	.....	18th Dec., 1893	10,000 00
				$50,000 00
" "	19th May, 1893.	4 months.	22nd Sept., 1893	5,000 00
			Interest to date	12 32
				$55,012 32

SCHEDULE "C."

Particulars of this schedule omitted by consent.

Total amount of current paper.....$13,216 00
Total amount of past due paper 2,139 05

SCHEDULE "D."

September 2nd, 1893. To amount of overdraft acknowledged:		
By debtors	$1,907	00
To interest to date	10	92
	$1,917	92

RECAPITULATION.

Amount of indebtedness as shown:		
By schedule "A"	$83,706	78
" " "B"	55,012	32
" " "C" (current paper)	13,216	00
" " "C" (past due)	2,139	05
" " "D"	1,917	92
	$155,992	07
Less amount received on account	28,939	99
Total indebtedness	$127,052	08

No. 26. Agreement under which Defendant paid over, 5th Dec., 1894.

Agreement under which certain Dividends were paid over by E. R. C. Clarkson, Assignee, *re* Cooper & Smith.

IT IS AGREED that the Smith Estate and the Molsons Bank shall immediately receive full dividends out of the funds in the hands of E. R. C. Clarkson, Assignee, upon the respective amounts of their claims as now filed with him, but upon the understanding that both parties shall be bound to refund the said dividends respectively to the extent, if any, to which they may be reduced by reason of the claims upon which they are founded being reduced by the final decision which may be given with respect to the rights of the parties respectively to rank against the said funds in the hands of the said E. R. C. Clarkson under the assignment to him.

Dated this 5th day of December, 1894.

FOY & KELLY,

For the Smith Estate.

MACLAREN, MACDONALD, MERRITT & SHEPLEY,

For the Molsons Bank.

RECORD.

In the High Court of Justice.

No. 27. Exhibits at Trial. Affidavit of W. H. Draper, 6th Nov., 1893.

Copy of Affidavit referred to in Order dated December 29th, 1893, Printed *ante* p. 16.

Affidavit of William H. Draper, filed in other actions.

I, William Henry Draper, of the City of Toronto, in the County of York, Assistant Manager for the above-mentioned Molsons Bank at Toronto, make oath and say:

1. I have a good knowledge of what is hereinafter set out.

2. I have read the affidavit of J. C. Smith, one of the above-named defendants, filed on the application herein to have the judgments in the above-mentioned actions reduced by the amount of certain collaterals alleged to have been paid.

3. In respect to what is alleged in paragraph 7 of the said affidavit, it is not true that any money has been paid to the said bank on account of the said promissory notes, and further, it is not true that any sum of money whatever applicable specifically to the payment of the said judgments has been received or collected by the said bank since the recovery of the said judgments.

4. In respect to paragraph 8, it is not true that the said promissory notes with others were discounted by the plaintiffs for the defendants and the customers' paper taken as collateral security therefor; but the said customers' notes were taken from the said defendants by the plaintiffs as collateral security for the whole of the defendants' account as appears from the agreement in writing, a copy of which is now shown to me and marked Exhibit "A."

5. In respect to paragraph 9, it was the custom of the plaintiffs to hand to the defendants the said customers' paper about the date of its maturity, receiving in lieu thereof other paper of a like character, and they had no knowledge of what became of the proceeds of the paper so handed out. If the proceeds were deposited by the defendants with the plaintiffs, it was credited to the running account, the amount of which was subject to the cheque or order of the defendants at any time.

6. There is in all due to the plaintiffs $155,935.70, exclusive of interest, and including discounts of firm paper to the sum of $145,000.00, business paper to the sum of $9,028.00, and an overdraft of $1,907.70. Of this only $83,000.00 or thereabouts has been rendered into judgments. The amount received in respect of collaterals the plaintiffs are holding as collateral to this indebtedness, some of which has not matured, the amount not yet matured being between $50,000.00 and $60,000.00.

7. It is not true that there was any understanding to the effect mentioned in paragraph 9.

8. The plaintiffs are entitled under the agreement with the defendants, and such was the understanding of the agreement between the plaintiffs and the defendants, that all collaterals deposited with the plaintiffs should be held as set out in the agreement above mentioned, and the plaintiffs have not received any amounts on collateral paper which should be applied specifically in reduction of the judgments obtained as set out in the said affidavit of J. C. Smith, as I am advised and verily believe. (Signed) WM. H. DRAPER.

Sworn before me at the City of Toronto, in the County of York, this 6th day of November, A.D. 1893. W. T. ALLAN,
A Commissioner, etc.

Exhibit "A" referred to in foregoing affidavit:

Toronto, 25th June, 1891.

The notes enumerated in this book are deposited with the Molsons Bank as collateral security for advances made to us by the bank in discounts and overdrafts.

COOPER & SMITH.

Reasons for Appeal.

The appellants submit that the judgment of the Divisional Court dismissing the action is erroneous and ought to be reversed, and the judgment in favor of the appellants, pronounced at the trial by the Honorable Mr. Justice Rose, restored, on the following among other grounds:

1. The defence relied upon by the respondents at the trial was payment, and this defence was sought to be established by showing that the appellants had collected certain promissory notes, deposited with them by the respondents in pursuance of a certain agreement, and that, under the terms of the agreement in pursuance of which the promissory notes so collected had been so deposited,the appellants were bound to credit the moneys so collected upon the notes, the subject matter of the suit.

2. The appellants were the bankers of the respondents, and, under the arrangement made when they so become such bankers, the respondents became entitled to discount, from time to time, their own paper, to the amount of $150,000.00, depositing with the appellants, as collateral security, upon terms as to which the parties are not agreed, their customers' notes and acceptances to an equal amount.

3. At the time the respondents suspended payment, the appellants had discounted and were holding the paper of the respondents to the amount of $145,000.00. Under the agreement spoken of, as to the terms of which the parties are not agreed, the appellants held, as collateral security for these advances, the notes and acceptances of customers of the respondents to the amount of about $104,000.00.

4. After the suspension, and as the respondents' notes, making up the $145,000.00, matured, from time to time actions were brought upon them, and judgments recovered against the respondents, until, in all, $90,000.00 of the $145,000.00 was represented by judgments. A suit was brought, and is still pending, upon a note for $5,000.00, also part of the $145,000.00, and this action is upon the last maturing $50,000.00 of the notes representing the $145,000.00.

There are, therefore, judgments for	$90,000.00
Suit pending for	5,000.00
This suit for	50,000.00
Total	$145,000.00

RECORD.

In the Court of Appeal for Ontario.

No. 28.
Reasons for Appeal
—continued.

5. The respondents, under their defence of payment, contended at the trial that they were entitled to credit, under the terms of the agreement before mentioned, for so much of the $104,000.00 of customers' paper as had, up to the date of the trial, been collected. The appellants, on the other hand, contended that, under the terms of the agreement before mentioned, they were entitled to hold the moneys so collected, as security against any ultimate balance that might be due them, after enforcing their remedies in respect of the direct or principal liability of $145,000.00; among which remedies was the right to recover judgment against the respondents upon the promissory notes making up that direct or principal liability, as they matured, irrespective of the moneys collected upon the customers' paper. This, they contended, the agreement in question entitled them to do, so long as they received no more, from all sources, than the full amount of the principal liability. This the respondents, on the other hand, contended the agreement did not entitle them to do.

6. The first issue at the trial was, therefore,—What was the agreement upon which the appellants held this customers' paper? Was it an agreement by the terms of which, as contended by the respondents, the appellants were bound to give credit upon the principal liability when it matured, for all moneys theretofore realized out of such customers' paper? Or was it an agreement by the terms of which, as contended by the appellants, they were entitled to hold such moneys unapplied or in suspense, as a security against any ultimate loss, after resorting to all their ordinary remedies against the debtors upon the principal obligation?

7. Upon this issue the appellants gave the "conclusive evidence" spoken of in the Duchess of Kingston's case, viz:—the judgment of a Court of concurrent jurisdiction, directly upon the point, and between the same parties.

8. The trial Judge determined the case upon this evidence, and the Divisional Court, while admitting that the judgment so given in evidence "is "binding between the parties and upon us as *res judicata*," proceeded, notwithstanding, to entirely disregard it, and to express an independent and opposite view of the nature and terms of the agreement in question.

9. The judgment so given in evidence, as having decided the same point between the same parties, was pronounced under the circumstances stated in the judgment delivered by Mr. Justice Street, for the Divisional Court, in December, 1893, directing the trial of a certain issue. The motion then before the Divisional Court was a motion by the present respondents to compel the present appellants to give credit upon certain judgments, recovered upon the earlier maturing notes comprised in the $145,000.00 of direct or principal liability, for the amounts up to that time realized by the appellants by collection of the customers' paper. The Divisional Court then said: "A dispute appears to exist as to the terms upon which the collateral "securities were deposited, and the contention of the plaintiffs that, as a "matter of law, they are entitled to hold the money which they have collected, "and which they may collect, upon their collaterals, as a security for the "ultimate balance which may be found due to them, after all other sources of "repayment have been realized, is one which cannot, we think, be said to be

"by any means beyond dispute, under the circumstances here existing; . . "... we think, therefore, that an issue should be directed to try the "rights and liabilities of the plaintiffs with regard to the moneys collected by "them upon these collateral securities, and to determine the manner in which "they should be applied under the circumstances."

10. The issues so directed came down for trial before Mr. Justice Rose, and was tried on 13th April, 1894. At this trial evidence was given by both parties as to the nature and terms of the agreement under which the customers' paper was deposited, and as to the course of dealing between the parties under that agreement. The issue upon the agreement was the precise issue, which is raised by the plea of payment in this case, and the determination of that issue necessarily depended upon what might then be determined as to the nature and terms of that agreement.

11. Upon the issue so tried by him, Mr. Justice Rose delivered his judgment on 20th April, 1894, and that judgment will be found at p. 45 of the case. He finds what it was necessary to find in order to determine the issue before him, and what he was expressly directed by the judgment of the Divisional Court to find, viz., what the agreement was under which the customers' paper was deposited. He says: "The firm ceased to have any "control over either the deposited paper, or the proceeds thereof, until they "were in a position to offer the bank payment in full of the advances. . . . "If to credit any portion of the moneys received from collections of the "deposited paper would, for any reason, be a detriment to the bank, it seems "to me an *a fortiori* case that the firm could not require such appropriation."

12. This judgment was subsequently formally affirmed by the Divisional Court, on the making of the final order after the trial of the issue. See p. 48 of the case.

13. The appellants submit that the respondents cannot again litigate the terms of the agreement in question, and the rights of the parties under it, in respect of the proceeds of the collateral paper. The terms of the agreement in fact, and the rights of the parties under it in law, have become, by the judgment referred to, conclusively established.

14. It is difficult to understand what view the Divisional Court took, in the present case, of this contention, as, while they apparently concede its correctness, they determine the case without any reference to it. It is possible that they may have thought that the judgment referred to was only an estoppel as to the portion of the principal debt then under consideration. But the agreement controlled the rights of the parties in respect of the whole debt; and the determination of what the agreement was, was a determination once for all, and as to the whole debt. It cannot be that the appellants, whenever they bring an action for an instalment of the debt, are to be bound to litigate the agreement over again.

15. Upon this branch of the case the appellants rely upon *In re* South American and Mexican Co., Ex p. Bank of England, L.R. 1895, 1 Chy., 37, and Flitters *vs.* Allfrey, L.R. 10 C.P., 29.

16. But even if the judgment referred to does not operate as an estoppel, it is submitted that the judgment appealed from is erroneous on the merits.

RECORD.
In the Court of Appeal for Ontario.
No. 28.
Reasons for Appeal
—continued.

In other words, Mr. Justice Rose's decision upon the rights of the appellants under the agreement in question was the correct one, upon the evidence and the law.

17. All the evidence which was before Mr. Justice Rose on the trial of the issue was formally before him on the trial of this action, and the appellants will contend that the law and the evidence fully support his conclusion that the proceeds of the customers' paper are a security in the hands of the appellants for such ultimate balance as may remain due, after the appellants have resorted to all their remedies in respect of the principal liability.

18. Upon this branch of the case the appellants will rely upon the following, among other cases :

Bonser *vs.* Cox, 6 Beav. 84.
U. S. *vs.* Lewis, 92 U.S. 618.
Bk. of Australasia *vs.* Wilson, L.R. 1893, App. Cas. 181.
Beaty *vs.* Samuel, 29 Gr. 105.
Eastman *vs.* Bk. of Montreal, 10 O.R. 79.
Young *vs.* Spiers, 16 O.R. 672.
Exp. Wilson, 1 Atk. 109 ; 2 Ves. Sr. 113.
Exp. Bk. of Scotland, 2 Rose, 197 ; 19 Ves. 310.
Exp. Reed, 3 D. & C. 481.
Exp. Phillips, 1 M.D. & D. 232.

GEO. F. SHEPLEY,
Counsel for Appellants.

No. 29.
Reasons against Appeal.

Reasons against Appeal.

The respondents submit that the judgment of the Divisional Court is correct, and ought to be upheld on the grounds set forth in the opinion of Mr. Justice Street, and on the following among other grounds :

1. The total amount due to the plaintiffs, the bank, on all accounts from the defendants to the bank is less than the sums for which the bank already has judgments and execution—$31,000.00 or less would pay the bank in full of all its claims. They have judgment for larger sums, and have chosen not to apply any of the payments on these judgments. They herein seek in this action for judgment for an additional $50,000.00. To give the bank such judgment would be to declare the defendants are indebted to the plaintiffs in an amount far in excess of the true amount.

2. By way of attempt to explain the peculiar demand of the bank, they claim that there was an agreement that moneys collected on collateral securities should not be deemed payment. There was no such agreement, as is perfectly plain from the facts admitted at the trial, and set forth in the Appeal Case.

3. In the appellants' fifth reason for appeal, they claim the existence of some special and extraordinary agreement, that they were entitled to hold in

suspense certain moneys collected on collateral security against any ultimate balance that might be due to them after enforcing their remedies, as set forth in the said fifth reason.

4. No such special and extraordinary agreement ever was entered into by the defendants, but the plain, ordinary and everyday agreement that the bank should lend money, and that the debtor should deposit collateral securities in respect of such loans.

5. The real agreement is set forth in the Notes of Trial, and admitted by the plaintiffs, and is referred to in the two next succeeding paragraphs hereof.

6. The Molsons Bank head office is in Montreal, the Toronto office is a branch. The head office was communicated with by the branch office, and the manager of the branch office, on instructions from head office, gave to the defendants a letter, dated the 13th of June, 1891, showing the terms upon which the plaintiffs would deal with the defendants. That letter is in the following words: "I am pleased to inform you that our Board have granted "you a line of credit to $150,000.00, to be secured by collections deposited, "rate 6 per cent., one-quarter commission on all cheques and collections "outside of this city, as agreed upon with your Mr. Mason. Yours truly, "C. A. Pipon, Manager."

"The meaning of the above is not that the advance shall be fully covered "by collections, but as near as you can. C. A. P., Mgr."

7. In pursuance of this, promissory notes were deposited with the bank by Cooper & Smith from time to time, and a list of the notes deposited at the bank was inserted in two books, and in each of them appeared the following memorandum: "The notes enumerated in this book are deposited with the "Molsons Bank as collateral security for advances made to us by the bank in "discounts and overdrafts." That is the plain and ordinary agreement which the respondents above refer to, and not the extraordinary and special agreement that the appellants are driven to contend, existed between the parties. If it was intended that the agreement should be of that special kind, proper words to express that intention would be found in the manager's letter. In Commercial Bank of Australia *v.* Wilson (1893) Appeal Cases, 181, an agreement of a special kind is to be found, but the language used is specific and precise that such was the intention of the parties, and moreover, as pointed out by Mr. Justice Street, it was a case of two guarantors of a debt of a third person paying into a bank a sum of money which the bank refused to accept as part payment, but agreed with the guarantors whose money it was to hold pending proof against the bankrupt estates of other guarantors.

8. The other admissions at the trial corroborate the respondents' interpretation of this agreement. For instance:

(*a*) In the first action which the Molsons Bank brought against Cooper & Smith, they credited the collections on collaterals up to the time of the issue of the writ, and which amounted to $6,920.10.

(*b*) In proving the amount of the bank's claim as creditor for the purpose of ranking upon the moneys in the hands of E. R. C. Clarkson, Assignee, of the book debts, C. A. Pipon, Manager of the bank, made a declaration, dated the 7th of October, 1893, setting forth the then indebtedness, and credited in

such statement on account the $23,939.99 collected by the bank on these collateral notes up to that date.

(*c*) This declaration was drawn by the appellants' solicitors.

(*d*) This declaration or proof of claim is to be found at the end of the Appeal Book. It was part of the respondents' evidence at the trial, and would more conveniently appear in that part of the Appeal Case.

9. The respondents submit that the above facts and admissions entirely place it beyond the power of the bank to contend that there was any special and extraordinary agreement such as the appellants contend for.

10. With respect to the appellants' contention that the point in issue herein has already been adjudicated upon, the respondents submit as follows :

11. The plaintiffs did not plead in reply to the defendants' Statement of Defence or otherwise that the matter ever had been adjudicated upon.

12. The respondents observe that the Appeal Book contains a great deal of matter that did not appear at the trial. At page 13, the plaintiffs' counsel is reported as follows : " Will your Lordship permit me to add one thing, that " is, that I put in formally the proceedings in the two issues that were tried " before your Lordship up to the judgment." The greater part of what is printed in the Appeal Case, is claimed to be put in by the appellants in pursuance of that request. The respondents submit that all that now appears in the Appeal Case was not put in, and that it was not intended that it should be put in, and that it could not be put in, and that all that was asked at that time to be put in would be the formal proceedings, pleadings and judgments, and not the evidence, and the respondents object to that evidence being considered as part of the evidence before the Court below or this Court. Moreover, the trial herein was on 18th April, 1895, and the appellants print as part of the Case an order of the Queen's Bench Divisional Court, dated 23rd May, 1895. This did not exist at the time of the trial. It, however, was in existence before 13th June, 1895, when the judgment now in appeal was delivered.

13. The matter in issue in this action is not *res judicata*. The issues previously tried, and the issues in this case are not only not identical issues, but are very different issues, and decide very different questions.

14. The issues that were directed in the former proceedings were issues by the Queen's Bench Divisional Court, and this Court at the time of delivering the judgment herein was fully seized of what the meaning and effect of the other issues were, and the Honorable Mr. Justice Street in delivering judgment herein says : " Nor do I see that the judgment of my brother Rose in " the issue of Cooper & Smith *v.* The Molsons Bank, which stands unappealed " against, compels the conclusion at which he felt himself compelled by it to " arrive in the present case." This shows that Mr. Justice Street, who formed one of the Court who directed the issues, and who delivered the opinion of the Court directing such issues, and who was one of the Court that made the order of 23rd May, 1895, and who was therefore thoroughly familiar with the nature of those issues, did not consider that the questions involved in those issues were the same questions involved in the issues in this case.

15. The respondents might well rest upon this expression of opinion from

the learned judge, who was engaged in delivering judgment in both of those matters that are now claimed to be identical, but the respondents venture to add the following observations:

16. The judgment of the Honorable Mr. Justice Street, on the 29th December, 1893, directing the issues to be tried, is to be found on page 20 of the Case. From it, it will be observed that at that time the plaintiffs had recovered judgments for a portion only of their claim, and that other creditors had also obtained judgments against Cooper & Smith. He, therefore, directs an issue to try the rights and liabilities of the Molsons Bank with regard to the moneys collected by the bank upon their collateral securities, and to determine the manner in which they should be applied under the circumstances then existing. The formal order directing the issues shows the limited nature of the issues.

17. In the third paragraph of the issue so directed, it clearly appears that the collateral securities were collateral, not only to the promissory notes upon which the then existing judgments of $60.000.00 were recovered, but also to other liabilities of the said Cooper & Smith to the said bank, and by the fourth paragraph, the plaintiffs affirm that the bank had not received payments which ought to be applied in satisfaction of the then existing judgments.

18. Now here a clear distinction appears between that issue and the issue of this case. The question there to be tried was whether the bank, holding collateral securities of $104,000.00 in respect of a debt of $145,000.00 (part of which was due and part not due), could be compelled, in December, 1893, to apply any part of the collections then in hand in reduction of the existing judgments of $60,000.00, rather than hold those collections against the notes that had not yet matured, and until they all matured. This also appears from the observations of the plaintiffs' counsel at the trial of the issue before Mr. Justice Rose, on the 13th of April, 1894. On page 48 of Case he is reported to say: "I wish to 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.

"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 had matured up to 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."

19. The question in the present case is a different one, namely, whether now, when all the obligations of Cooper & Smith to the Molsons Bank have matured, the bank is not compellable to give credit for the collections on actions brought for balance of debt. Mr. Justice Street so expresses it on page 14, where he says: "I think we are bound to order that the plaintiffs, "now that their whole debt is overdue, shall give credit for them," etc.

20. The bank's contention in the issues directed was a very fair and

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equitable one, namely, that as the collateral notes were collateral to their whole debt of $145,000.00, they could not be compelled to apply what they had received in payment of the first maturing liabilities, as the result would be to enable the bank to rank for only a small sum under The Creditors' Relief Act in respect of the moneys then in the Sheriff's hands, and as their whole debt due and to come due was in excess of their judgments after crediting all collections then made. On the other hand, the bank's present contention that, in addition to their existing judgments, they should have judgment for $50,000.00 without crediting collections, is the opposite of fair and reasonable, and shows the two questions are not identical.

21. The judgment delivered by the Honorable Mr. Justice Rose on the 20th of April, 1894, also shows that the two issues are not identical. He says: "It seems to me that such paper so deposited was regarded by both "parties as security available for the whole account;" and further on he says: "The bank would become entitled to hold it (the paper), or the proceeds, if "paid, as security for the whole account, and not for any particular part or "portion thereof."

The issue in the present case, on the contrary, is whether, now that all the debt of the bank has matured, they can obtain further judgments without first crediting collections made on collaterals. This, it is submitted, is an entirely different issue.

In the one case it was decided that the bank could no tbe compelled, after having obtained a judgment for a portion of the debt, to reduce the amount by collections on collaterals held in respect of matured and unmatured paper.

In the present action it is quite consistent with that judgment to hold that, in an action for the balance of the whole debt, collections upon collaterals deposited in respect of the whole debt must be credited. Any other holding would be most unjust to the respondents, and would be giving judgment making them liable for an amount which they do not owe. On the other hand, it was deemed unfair to the bank to compel them to apply the collaterals (which were not equal to the total debt) in reduction of the $60,000.00 debt, which had matured, and which had been reduced to judgment without any defence being raised such as has been raised by them herein.

22. The bank's disposition to be too grasping is further exemplified by paragraphs 7 to 37 of the Statement of Claim in which they also sought to get judgment on the collateral paper in addition to judgment on the direct liability.

23. The distinction between the two issues that are claimed by the appellants to be identical is made more apparent by a case cited by the appellants and relied upon by Mr. Justice Rose in his decision on the first issue in 1894.—Eastman *v.* Bank of Montreal, 10 Ont. 79.

In that case it was held that a creditor was not, after establishing his claim against an insolvent's estate in the hands of an assignee, obliged to credit moneys collected on collaterals subsequently to the date of establishing his claim. The same case, however, decides that such a creditor must give credit, in reduction of his claim, of all moneys he had collected on collaterals

up to the time of proving his claim, and the learned Chancellor further held that if the creditor's claim had been established at a later date, the creditor would have had to give credit for receipts upon collaterals up to that later date.

In the first issue decided by Mr. Justice Rose, the Molsons Bank had established its claim to the extent of $60,000.00 by judgment and execution in Sheriff's hands, and the bank was asked to give credit for sums subsequently received on collaterals, and the above case of Eastman *v.* Bank of Montreal was cited and relied upon against that contention.

In the present case the bank has not yet established its claim to the additional $50,000.00, and is, under the authority of the same case, obliged to give credit for all payments received up to the time it establishes that claim.

24. Beaty *v.* Samuel, 29 Gr. 105, and other cases cited by the appellants do not assist their contention. They simply decide that before the amendment to the Act respecting Assignments by Insolvent Persons, a creditor was not obliged to value his securities which had not been converted into cash.

The respondents here are not contending that the appellants have to give credit for any of the collateral securities still uncollected.

25. The respondents, among other authorities, rely upon Daniel, Negotiable Securities, Section 833, p. 787.

Byles 15 Ed. 434.

Malpas *v.* Clements, 19 L.J. Q.B. 435.

Benning *v.* Thibaudeau, 20 Supreme Court 110.

Mason *v.* Bogg, 2 Mylne & Craig, at page 447.

J. J. Foy,
Of Counsel for Respondents.

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Reasons for Judgment in Court of Appeal.
Hagarty, C.J.O.

Reasons for Judgment in the Court of Appeal.

Hagarty, C.J.O.

Plaintiffs were the bankers of defendants, a trading firm in Toronto. On 13th June, 1891, the plaintiffs had agreed to give them a line of credit up to $150,000.00, to be secured by collections deposited, rate 6 per cent. "The "meaning of the above is not that the advances shall be fully covered by collec- "tions, but as near as you can." There was a pass book in which the deposited notes were entered and it is headed in defendants' writing: "The notes "enumerated in this book are deposited with the Molsons Bank as collateral "security for advances made to us by the bank by discounting from time to "time the defendants' own notes."

Large dealings took place between the parties up to 24th August, 1893, when defendants assigned under the statute. The whole amount of their debt to the bank was about $145,000.00 on discount, and about $2,000.00 on overdraft, in all $147,000.00. About $105,000.00 of collaterals had been given to bank.

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Reasons for Judgment. Hagarty, C.J.O. —*continued.*

The bargain between the parties was clearly proved and admitted. It was one which the parties had an undoubted right to make, and it is for us to find its meaning.

No decision of the Courts on any substantially similar state of facts has been cited to us.

The defendants on the argument seem to regard the agreement as if its legal effect was that all moneys received from time to time on the collaterals should be applied to meet and discharge all moneys then due on the whole account.

The bank insist that such a course would jeopardize or exhaust this collateral fund, and in fact destroy it as a security to them beyond the discounted paper, and as an ultimate asset for resort.

As to the meaning of the word "collateral," in itself, it may be interpreted apparently according to the nature of the dealing in which it is used.

In re Athill, Athill *v.* Athill, 16 Ch. D. 211, it is well discussed. Hall, V. C., says that taken by itself it is not equivalent to "secondary" or "auxiliary," or "only to be made use of in aid."

The case seems very clear on its facts which are very different from the present as to two contemporaneous mortgages. His decision was affirmed on appeal.

Sir George Jessel adopts his view. He says that there was no contract to the effect that one mortgage must be exhausted before the other; that if the parties meant that, they should have said so; that "collateral" by itself does not necessarily mean "secondary;" that it is at all events susceptible of the strict meaning of "parallel" or "additional," and adds: "Why should it "have one meaning rather than the other if the nature of the transaction does "not require us to depart from its literal meaning? There is no doubt upon "the authorities that it is a question of construction, of course having regard "to the nature of the transaction, and the position of the parties and their "dealing with the properties." Cotton, L. J., is equally explicit. He says that Lord Eldon expressly refused to lay down any rule as to the meaning of "collateral," but went upon the whole of the transaction in determining whether one estate should bear all the burden before the other.

In our case I think we must find out what the parties contracted for, and what they respectfully meant and understood as their bargain.

A large line of credit up to $150,000.00 was to be opened with trading customers. The bank were to discount their business paper or their own notes, and for the large advances to be thus made, the bank asked for some security beyond the ordinary discounted paper. They did not advance any money on the so-called "collaterals." The defendants themselves declare in writing that they are deposited as collateral security for advances on discounts or overdraft.

It is not denied but that all these collaterals were deposited as a security for every part of the whole debt. Judgment has from time to time been obtained, as the defendants' notes representing the whole debt matured, and execution issued and some moneys realized. In all the judgments previously recovered (in all about $9,000.00), no credits have been given out of the receipts

on collaterals except about $6,900.00 credited on a note of $30,000.00, and these judgments stand unchallenged. There remains this $50,000.00 claim now in appeal, and a still outstanding further claim in a pending suit of $5,000.00, and all receipts on collaterals remain still in plaintiffs' hands.

The decision of the Queen's Bench Division directs judgment to be entered for the defendants. This must be on the issue of payment, or rather on the defendants' counterclaim for the moneys received on the collaterals and on which they claim an account. As has been already decided in the judgments already recovered, no payments have been made out of collaterals (except the sum already mentioned), and it would be now hardly possible to apply the principle of the earliest credits as applicable to payment of the portions of debt falling due from time to time.

I think I must agree with the judgment of my brother Rose on the trial of the interpleader issue. The Divisional Court refer to this as a judgment unreversed and unappealed from and binding as *res judicata.*

But they considered that however binding up to the time of delivery, it was not so binding on them as to the note sued on in this action.

I am unable to appreciate the distinction. All these suits have been brought since the assignment by the defendants, and the suit now in appeal was not the final one, as a $5,000.00 claim was still in suit.

Mr. Justice Rose says: "It seems to me that such paper so deposited "was regarded by both parties as security available for the whole account, if "at any time, by reason of misfortune, the firm became unable to meet their "obligation to the bank. At such moment the right of the firm to withdraw "any paper would cease, and the bank would become entitled to hold it, or the "proceeds, if paid, as security for the whole account, and not for any particular "part or portion thereof; and, I think, it then became proper for the bank to "open a suspense account to the credit of which should be carried all moneys "realized from the payment of any of such deposited paper. After the "account was thus closed for the purpose of liquidation. I think the firm "ceased to have any control over either the deposited paper or the proceeds "thereof, until they were in a position to offer to the bank payment in full of "the advances. To enable the firm to make such payment in full, I have no "doubt they might direct the bank to credit all moneys received in payment "of such deposited paper to the account for advances, or, in other words, upon "payment to the bank of the sum which would equal the difference between "the total amount of advances and the amount received from collections of "the deposited paper, the firm would become entitled to a receipt in full, and to "have delivered to them any paper or other securities then held by the bank.

"The fact that the bank had recovered judgment for a portion of the "advances would not give the firm any new rights, and if to credit any portion "of the moneys received from collections of the deposited paper would for any reason be a detriment to the bank, it seems to me an *a fortiori* case that the firm could not require such appropriation."

Mr. Justice Rose tried both actions, and in the one now in appeal followed his ruling in the previous suit, which stands unappealed from.

He has placed a construction on the original contract between the parties which stood unchallenged. *Re* Bank of England (1895) 1 Chy., 37.

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I cannot see why such construction should not also govern this case; and I repeat my inability to understand why it does not apply equally to govern this case.

Apart from any question of *res judicata*, I agree with his construction of the contract which the parties made and had a right to make.

I think the appeal must be allowed and the judgment of the trial judge restored, with leave to defendants to move as advised as to the final appropriation of the moneys received by the plaintiffs.

Burton, J.A.

Burton, J.A.

This case is presented in a somewhat different form from that to be found in any of the cases cited, and the main question to be decided is what were the terms of the agreement upon which the collaterals were held.

Those terms are to be found in the letter from the manager of the bank, in which a line of credit to the extent of $150,000.00 is granted, to be secured by collections deposited—not to the full extent of the advance, but as near it as the borrowers could.

The bank then advanced to the defendants from time to time large sums upon their own notes, collaterally secured by the deposit of notes which were entered in a book, under this heading: "The notes enumerated in this book "are deposited with the Molsons Bank as collateral security for advances "made to us by the bank in discounts and overdrafts."

As these collateral notes were about to mature, they were withdrawn by the defendants and others substituted.

The rule in equity for the administration of assets is thus defined in Rhodes *v.* Moxhay, 10 W. R. 103: "The creditor is entitled to prove for the "whole amount of his debt, and to take a dividend upon the whole without "prejudice to his rights against securities he may hold subject, of course, to "this qualification, that he must not ultimately receive more than 20 *s.* "in the £. To hold otherwise would be virtually to deprive the secured "creditor of any advantage from his security."

Now, as I read the agreement upon which the advances were made, collaterals were to be lodged as those advances were made, which, whether in the form of customers' paper or in collections from that paper, were to stand as security for the whole amount of the discounts or overdrafts.

The permission to withdraw paper from time to time and to substitute other paper for that so withdrawn, was apparently an act of grace, forming no part of the original agreement, but granted to facilitate the debtors' operations, so as not to keep them out of funds, the bank being quite satisfied so long as good collateral paper was deposited with them.

No questions arise in this case, as in so many of the cases cited, where a struggle exists between creditors in bankruptcy, or under our own Insolvent Act when in force, or the Act against preferences; the principle of those Acts being that all creditors are to be put on an equal footing; and therefore, if a creditor chooses to prove, he must sell or value whatever property he holds belonging to the insolvent debtor; but even in those cases, if he has the estate

of a third person, that principle does not apply, and in case of contract, except in such cases, a Court never interferes with the rights and remedies which a creditor, either expressly or by implication, secures to himself in that way.

Then, does it make any difference as between these parties that the collaterals consist of customers' paper handed to the bank by the debtors? As between them they were to stand as collateral to and security for the principal debt so long as any portion of that debt remained unpaid, and whether due or not due.

In Commercial Bank of Australia *v.* Official Assignee of Wilson (1893) A. C. 181, the debt was secured, it is true, by guarantors, friends of the insolvent, who afterwards substituted money in place of their personal responsibility, and, as in this case, for a smaller amount than the whole debt; and the Lord Chancellor's remarks in that case seem pertinent. "The bank," he says, "no doubt would be entitled, whenever default should happen to be "made, to appropriate that money to the payment of the principal debt *pro* "*tanto*, and as soon as they made that appropriation it would undoubtedly "operate as payment; but down to the time of appropriation their Lordships "are unable to see anything which would discharge the principal debtor.

Although in that case the money was not deposited by the debtor, I do not see any difference in principle, if we are satisfied that the securities were delivered as collateral security for each and every portion of the discount authorized. If the paper was still running, it is clear that the bank could hold it until every penny of their debt was satisfied; but why should they not also hold the proceeds of the paper, which was held as collateral security? How could the debtors, of their own mere motion and against the will of the bank, convert that which was intended as security into a payment? It has been suggested that although that could not be done during the currency of the principal debt, it is different now that the whole debt is overdue. I am unable to appreciate the distinction; on the contrary, if the argument is sound that it can be treated as a payment at all, then it follows, I think logically, that each payment as received should be credited on the debt. I do not comprehend how the maturity of the debt can alter the nature of the receipt; if it was not a payment when received, it cannot become any more a payment because the original debt is due.

This Court had to consider the question of the right of a mortgagor to insist upon the proceeds of a policy of fire insurance held as collateral security by a mortgagee being applied in reduction of the mortgage debt, and was unanimously of opinion that the mortgagee held the insurance money, as he held the policy, as collateral or additional security for the mortgage money, and that he was not obliged to apply it in payment, even though some portion of the mortgage money was overdue. But even after the maturity of the mortgage, when I concede that an application might be made to compel an appropriation, it would, in my opinion, be open to the mortgagee to show that there was another fund, on which he was entitled to rank, and to rank upon that estate for the full amount due before the appropriation.

But I think that in that case the mortgagor could not plead and claim the benefit of the policy moneys as a payment.

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I think that the direction of the Divisional Court for the application of the moneys in hand to the payment of this particular portion of the debt was erroneous.

The time had arrived, it is true, when the debtor was entitled to have the money applied, but he had no right to demand that it should be applied in any particular manner; that is the right of the bank. It has been suggested that if the bank's contention be correct they could keep the money unapplied as long as the debtors lived. I do not think anything so unreasonable was thought of, and I am quite clear it could not be listened to in a Court of Justice, but I think that if there is an existing fund on which they are entitled to rank, they should have the privilege of doing so before making any appropriation.

To my mind this is simply what we should have called a common law action to recover the amount due on several promissory notes, and in their defence the defendants have claimed that the proceeds of their collateral notes should be treated as payment. That is the fallacy throughout. They have claimed, in other words, themselves to make the appropriation to the notes sued on. They have no such right.

It is true that in one of the paragraphs of their defence, they ask a reference, but it is simply a reference to ascertain the amount received by the bank, about which I imagine there is no dispute, and which could be readily ascertained by an application to the bank; but if, contrary to my firm conviction, there is any dispute upon that point, I see no harm in such a reference if coupled with the condition that the costs of it should be borne by the defendants if they fail to establish that the plaintiffs' admission of the amount collected is incorrect.

They have in no portion of their defence claimed that the plaintiffs should make an appropriation of the amount so received; on the contrary, they have proceeded upon the assumption that they had the right to make the appropriation, but, as the facts are now all before us, I see no objection to the defence being amended by claiming that the plaintiffs be compelled to appropriate the moneys on hand, to such portion or portions of the debt as they shall be advised.

On that defence so amended, it would be in our power to make such an order. If on such an appropriation sufficient of the proceeds should be applied to wipe out the sums sought to be recovered in this suit, it should be dismissed and the defendants allowed their costs; if, on the contrary, a portion only is paid, the plaintiffs should recover the difference only with their costs of the suit.

As to the costs of this appeal, it would, perhaps, be right to mention them again after the appropriation is made.

Osler, J.A.

Osler, J.A.

On the question of estoppel the case may be stated thus: The plaintiffs discounted notes of the defendants, while they were carrying on business, to the amount of $145,000.00, or thereabouts, and in the month of September, 1893,

five of these notes, to the amount of $90,000.00, were due and unpaid and the plaintiffs recovered judgments thereon. Four other notes, amounting to $50,000.00 became due in December, 1893, and are the subject of the present action, and one note, which also became due in September, forms the subject of a third action, which is still pending. The defendants stopped payment and ceased to carry on business in 1893, but made no general assignment for the benefit of creditors under the Act. A large quantity of notes had been from time to time deposited by the defendants with the plaintiffs as collateral security for advances and discounts upon which at the date of the recovery of the first judgments the plaintiffs had collected and placed to the credit of what they called "Cooper & Smith's collateral account," a very large sum, amounting to upwards of $47,000.00, and they have since collected further sums thereon. After the recovery of those judgments and while executions were in the sheriff's hands, the defendants applied to the court to set them aside and for leave to defend, or that satisfaction ought to be entered up in each of the actions for such sums as had been paid to the plaintiffs, either prior to or since the recovery of the judgments on account of the promissory notes or indebtedness for which the judgments had been recovered, or for an order to compel the plaintiffs to give credit upon their judgments for the amount collected upon the collaterals and to reduce the judgment debt accordingly. This motion was dismissed, but on appeal to the Divisional Court the order dismissing it was reversed and an issue was directed in the terms which I will presently mention. In the judgment of the Divisional Court the question was stated thus: "Upon the affidavits before us a dispute appears to exist "as to the terms upon which the collateral securities were deposited and the "contention of the plaintiffs, that as a matter of law they are entitled to hold "the money which they have collected and which they may collect upon their "collaterals as a security for the ultimate balance which may be found due to "them after all other sources of repayment have been realized, is one which "cannot be said to be by any means beyond dispute under the circumstances "here existing. We think, therefore, in view of the very considerable sum "involved, that the matter should be raised in a shape to enable either "party to carry it further if so advised. This they could not do if we were "to determine it upon the present appeal from Chambers. We think, there-"fore, an issue should be directed to try the rights and liabilities of the "Molsons Bank with regard to the moneys collected by them upon their "collateral securities and to determine the manner in which they should be "applied under the circumstances." The issue so directed was as follows: "Whether before or since the recovery of the judgments (*i.e.*, the judgments "for the $90,000.00) 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."

The issue came on to be tried before Rose, J., in April, 1894. He reserved judgment, and on the 20th of April, 1894, determined the issue in favor of the plaintiffs. The question before him turned entirely, and necessarily so, on the terms of the agreement under which the plaintiffs had received and collected

the collateral paper. In his judgment he said: "It seems to me that such "paper so deposited was regarded by both parties as security available for the "whole account if at any time by reason of misfortune the firm became unable "to meet their obligation to the bank. At such moment the right of the firm "to withdraw any paper would cease and the bank would become entitled to "hold it, or the proceeds, if paid, as security for the whole account, and not "for any particular part or portion thereof, and I think it then became proper "for the bank to open a suspense account to the credit of which should be "carried all moneys realized from the payment of any such deposited paper. "After the account was thus closed I think the firm ceased to be in a position "to have any control over either the deposited paper or the proceeds thereof, "until they were in a position to offer to the bank payment in full of the "advances, or, in other words, payment to the bank of the sum which would "equal the difference between the total amount of the advances, and the "amount received from the collection of the deposited papers." And the formal finding of the learned Judge was: "I find that the defendants in the "issue have not either before or since the recovery of the four several judg- "ments in the issue mentioned received any payments which, either at the "time of the receipt of the same ought to have been, or ought now to be, "applied in satisfaction in whole or in part of the said judgments or any of "them."

On motion to the Divisional Court on reading the order of the 29th of December, 1893 (the order directing the issue) and the orders and proceedings therein recited and the issue thereby directed and the finding of the learned trial Judge it was on the 23rd of May, 1895, ordered and declared that up to the 20th of April, 1894, the plaintiffs had not either before or since the recovery of the judgments received any payments which, either at the time of the receipt of the same ought to have been, or ought now to be, applied in satisfaction in whole or in part of the said judgments or any of them.

The present action was commenced in June, 1894, and by their statement of defence, the defendants claim the right to have credited upon the notes in question the amount collected by the plaintiffs upon the collaterals. On the trial of this action Rose, J., held that he was concluded by his former judgment on this point. His decision has been reversed by the judgment now in question, and the Divisional Court have held that the agreement between the parties was not such as to entitle the plaintiffs to carry the payments on the collaterals to a suspense account and that they were not entitled to recover judgment for their whole claim without giving credit for anything so received.

The question is whether the defendants are not estopped by the finding of Rose, J., on the trial of the issue and the judgment of the court thereon.

The principles of the law of estoppel by judgment are thus stated in the judgment of De Grey, C.J., in the Duchess of Kingston's Case, 2 Sm., L.C., 9th ed., p. 813:

"The judgment of a court of concurrent jurisdiction directly upon the "point, is as a plea, a bar, or as evidence conclusive between the same parties "upon the same matter directly in question in another court. . . . .
"But neither the judgment of a concurrent or exclusive jurisdiction is evidence

"of any matter which came collaterally in question, though within their juris-
"diction, nor of any matter incidentally cognizable, nor of any matter to be
"inferred by argument from the judgment."

And in Barrs *v.* Jackson, 1 Y. & C. C. C. 585, 2 Sm., L. C., 9th ed., pp. 863, 864, Knight-Bruce, V. C., said: "It is, I think, to be collected that the "rule against re-agitating matter adjudicated, is subject generally to this "restriction, that however essential the establishment of particular facts may "be to the soundness of a judicial decision, however it may proceed on them "as established, and however binding and conclusive the decision may as to "its immediate and direct object, be, those facts are not all necessarily estab-"lished conclusively between the parties, and that either may again litigate "them for any purpose to which they may come in question, provided the "immediate subject of the decision be not attempted to be withdrawn from "its operation so as to defeat its direct object."

Now the question is, what was in issue between these parties on the trial before Rose, J., in April, 1894. It was the trial of an issue directed by the Court for the purpose of enabling them to determine what they should do with the application the defendants had made to them.

"The issues are only a proceeding in a cause for the purpose of ascer-"taining a fact for the guidance of the Court in dealing with the right; and "what determines the right between the parties is the decree, and in order to "determine what the decree really decides it is essential to see what were the "rights which were in dispute between the parties, and which were alleged "between them;" Robinson *v.* Duleep Singh, 11 Ch. D. 798, at p. 813. So in Hobbs *v.* Henning, 17 C. B. N. S. 791, at p. 827, it is said: "If the judg-"ment can only be adduced in evidence, and is not pleadable as an estoppel, "the meaning may be ascertained by adducing in evidence the preliminary "proceedings and other matters referred to in the judgment."

Here, therefore, we are obliged to go behind the mere words of the issue and judgment thereon to ascertain what were the rights in dispute between the parties.

That the plaintiffs had moneys in their hands which would ultimately, under some circumstances, be available as a discharge *pro tanto* of the liability of the defendants for advances, and discounts was not denied. What was in dispute was on what terms the collateral securities and payments received by the plaintiffs on account of them were held. Whether such payments were immediately applicable so as to be pleadable as payments on the direct liabilities, or whether the plaintiffs were entitled to place the whole to a suspense account as security for the ultimate balance which should be due to them after all other sources of payment had been realized.

That this was the real dispute may be gathered from the order directing the issue and the proceedings therein mentioned, as well as from the terms of the issue itself, viz.: "Whether the bank have received any payments which "ought to be applied, etc., and if so, when such payments ought to be applied, etc."

The cardinal matter therefore in dispute on the trial of the issue was as to the terms of the agreement on which the bank held the collaterals and the

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moneys they had collected thereon, "or," as is said in the judgment delivered by the Court directing the trial of the issue, "which they may collect" thereon, for the bank claim they were all held on the footing of the same agreement.

Rose, J., held that the terms of the agreement were such as to entitle the bank to place the collections to a suspense account for the purpose above described, and that the defendants were not entitled to set off such payments as had been made against the claim of the bank then in judgment. Now, the plaintiffs are suing for another portion of their direct liability, as I have called it, and again the defendants, this time by their pleadings, assert the right to have the collections made on account of the collaterals applied on the claim. Again the cardinal question is as to the terms on which the bank held the collaterals, and the collections made on account thereof. No new facts appear beyond these that some further payments on the same account have been received; but it has now been held that the bank were not entitled to carry the collections to a suspense account, or to recover judgment without giving credit for what they have received.

The immediate subject of the decision in each of these proceedings was the same, viz., the nature of the agreement under which the bank held the collaterals. If the judgment in appeal is right, then that of Rose, J., and the judgment affirming it, must be erroneous; but the time had passed when the latter could be impeached, and therefore the former cannot stand, as it would directly defeat the earlier decision by withdrawing from its operation, that which, in the language of Knight-Bruce, V. C., was its immediate subject. The defendants can now neither deny that the agreement was as Rose, J., held it to be, nor assert that it is not applicable to all the collaterals which were deposited under it and held by the bank. I refer to *In re* May, 25 Ch. D. 231; De Mora *v.* Concha, 29 Chy. D. 268; Concha v. Concha, 11 App. Cas. 541; Houston *v.* Marquis of Sligo, 29 Ch. D. 448; Flitters *v.* Allfrey, L. R. 10 C. P. 29; *In re* South American and Mexican Co. (1895), 1 Ch. 37; Heath *v.* Weaverham, 10 R. 274.

For these reasons I am of opinion that the appeal should be allowed. I am not to be understood as deciding that at the proper time and on a proper application the plaintiffs may not be compelled should they refuse to do so to give credit on their judgment for all moneys received by them. All I decide is, that at the present time and on this record the defendants not being prepared to pay off the whole claim, the plaintiffs are entitled, as they were held to be entitled in the former action, to judgment, so that they may be in a position to rank for the face of it upon any dividend sheet which the sheriff may hereafter prepare under the Creditors' Relief Act.

Maclennan, J.A.

Maclennan, J.A.

The question in this appeal is as to the application by a creditor, holding what is commonly called collateral security for his debt, of the proceeds of such security towards payment.

The plaintiffs were the bankers of the defendants, and on the 13th of June, 1891, had agreed to give them a credit of $150,000.00, to be secured by

"collections deposited" to an equal or nearly equal amount. The meaning of that was made clear by the heading of a pass book between the parties in which were entered particulars of customers' notes belonging to the defendants, deposited with the plaintiffs as collateral security for their advances, and thus expressed: "The notes enumerated in this book are deposited with the "Molsons Bank as collateral security for advances made to us by the bank in "discounts and overdrafts." This heading was signed by the defendants. The advances were made by discounting from time to time the defendants' own notes.

On the 24th of August, 1893, the defendants suspended payment. At that time the plaintiffs held ten promissory notes of the defendants, maturing at various dates between the 4th of September and the 14th of December following, for the aggregate amount of $145,000.00, all of which had been discounted, besides which the defendants owed the plaintiffs $1,907.00 on an overdrawn account. The defendants also at that time held as collateral security under the agreement above referred to, customers' notes, the property of the defendants, deposited with them, to the amount of about $105,000.00. As the principal notes became due the plaintiffs sued upon them, and before the end of September, 1893, they had recovered five several judgments upon five of the notes for sums aggregating $83,000.00. The first of these judgments was recovered on the 14th of September upon a note for $30,000.00 due on the 4th of that month; and in that action they credited the defendants with $6,921.32, which had up to that time been collected on the collateral notes. In the subsequent actions, however, they did not credit the collections which they had made in the meantime on the collaterals, and they issued execution for the full amount of all their judgments.

Under these executions, and executions issued by other creditors of the defendants, the sheriff seized a large quantity of goods and chattels, the property of the defendants, and sold the same and received the proceeds for distribution under the provisions of the Creditors' Relief Act.

On the 4th of October, 1893, the defendants made an assignment of their book debts and credits, etc., except the goods seized by the sheriff, for the equal benefit of all their creditors.

On the 27th of November, 1893, the plaintiffs commenced an action against the defendants upon another (the sixth) note, which had become due on the 22nd of September, for $5,000.00, and also for the sum of $1,907.00, the amount of the overdrawn account, and that action is still pending.

In the beginning of November, 1893, a contention was made by the defendants, that they were entitled to have credit upon the executions in the sheriff's hands for the money up to that time collected by the plaintiffs on the collateral notes, amounting, as was alleged, to about $47,000.00, and an application was made to the Court to compel the plaintiffs to submit to such credit being given. On the 29th of December, 1893, an order was made in aid of that application for the trial of an issue, whether before or since the recovery of the judgments the bank had received any payments, which ought to be applied in satisfaction thereof, in whole or in part, and if so, when they ought to be applied, and to what extent.

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That issue was tried and the finding thereon, bearing date the 20th of April, 1894, was that the defendants had not received any payments which they were bound to apply as contended, and thereupon an order was made, bearing date the 23rd of May, 1894, declaring that the plaintiffs up to the 20th of April, 1894, had not received any payments which either at the time of the receipt thereof, ought to have been, or at the date of the said order, ought to be applied in satisfaction in whole or in part of the judgments, or any of them; and the defendants were ordered to pay the costs of the issue and the application.

The present action was commenced on the 2nd of June, 1894, and it is to recover the last four of the ten notes, aggregating $50,000.00, which all fell due in the month of December, 1893; and the defence set up is payment or satisfaction, either in whole or in part, by the money received by the plaintiffs on the collateral notes. At the trial, on the 18th of April, 1895, it was admitted that the plaintiffs had, up to that time received upon their collaterals, over and above the sum of $6,921.32, which was credited in the action on the first note, the sum of $82,135.00, none of which had been as yet applied by them in any way upon the indebtedness of the defendants.

Mr. Justice Rose, who tried the action, gave judgment for the plaintiffs for the full amount of the notes sued upon, holding that they were not obliged to credit the money in their hands against the notes in question; and the learned judge appears, from the notes of the argument before him, to have proceeded upon the ground that the question was *res judicata* by reason of the order of the 23rd of May, 1894, made upon the issue above referred to between the same parties. The defendants appealed from that judgment, and the Divisional Court set it aside and dismissed the action. The ground upon which this was done was that the plaintiffs having refused to apply the money on that part of the debt already in judgment, must apply it somehow, and therefore must apply it upon the claim in the present action. The present appeal is by the bank from that judgment.

The question raised in this action is one of great general importance, for there must be many banking accounts secured just in the way in which this one was. I do not think, however, there is any doubt or difficulty about the principles of law upon which it must be decided. All that we have to do is to apply to the facts the principle involved in the agreement of the parties, that the collateral notes in question were in the hands of the bank as security for the account, that is, for every part of the debt. It is not disputed by any one that such is the meaning of the agreement. While the business went on smoothly and prosperously, the debtors came to the bank from time to time, received the notes about to fall due, and themselves received payment from their customers, replacing the notes withdrawn from the bank by others. But that was not their right, it was matter of consent by the bank in each case, and the bank could have refused to part with the notes and have insisted upon receiving the money themselves. Therefore when the debtors got into difficulty and stopped payment, the customers' notes then in the hands of the bank became and were to them a security for every part of the debt represented by the ten notes under discount and the overdrawn account. The debt

amounted to $147,000.00, while the notes deposited only aggregated about $105,000.00. If all the collaterals were good and certain to be collected the security was still inadequate. There would be a deficiency under the most favorable circumstances of $42,000.00. Under these circumstances and in the absence of any agreement to the contrary, I think it is perfectly obvious that it was for the bank to decide upon what part of their debt they would apply the money which they might receive from time to time on the collections. They were clearly not obliged to continue to do as they did at first when they credited the $6,921.32 then in their hands upon the first note which matured, but it is equally clear that they had a right to do so. They had a right to sue for that note, and to hold the sum then in their hands to see whether the other notes would be paid. They had the same right when the next four notes successively fell due, and when they sued upon them and recovered judgment and execution, as I understand the facts, all they had in their hands up to November, 1893, was $47,000.00, and there were still four notes amounting to $50,000.00 yet to mature in the month of December. When they were called upon to apply the money then collected upon the executions in the sheriff's hands, they had a clear right to say: We do not know whether these other notes will be paid or not, if not we may prefer to apply the money on them or some of them. Until they become due we shall make no application, and when they do, if not paid, we shall consider in what way it will be most for our interest to apply our security. Therefore I think my brother Rose was quite right in deciding, upon the issue tried by him, that the plaintiffs were not bound to apply the money on the executions, and I think they were entitled to make what they could by these executions under the provisions of the Creditors' Relief Act without crediting the money in their hands.

The application out of which the issue arose was one to compel the plaintiffs to apply the money in their hands upon their judgments and executions, and was made in the beginning of November, before the last four notes became due; and although the order directing the issue was made on the 29th of December, after the notes had all become due, the aim and purpose of the issue was still to compel the plaintiffs to apply the money to the judgments, and I think the finding and the order upon the issue do no more than decide that the plaintiffs could not be compelled to do so. They do not decide and of course could not decide, that the plaintiffs were not bound to apply the money at some time, and in some manner in and towards the satisfaction of their claims against the defendants, but only that they were not bound at or before the 20th of April, 1894, to apply it on the particular judgment debts therein named.

On the 18th of December, 1893, the last of the notes became due, and it is necessary now to consider how that affected the rights of the parties. The whole debt was now due, and the plaintiffs had a certain sum of money in their hands, perhaps at that time about $50,000.00. That sum was a security for their whole debt and for every part of it. By their diligence they had recovered judgments for a large part of it, and a large quantity of goods had been seized. There were other executions in the sheriff's hands besides the plaintiffs', but still the goods seized became and were to an important extent

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a further security to the plaintiffs for part of their debt. It is evident that it was not for the interest of the plaintiffs to apply the money in their hands to that part of their debt for which they had now got other security. They had the undoubted right so to apply it, but they were not obliged to do so. So, too, when the debtors made an assignment of certain assets for the general benefit of their creditors, this also became a further security for what it might be worth to the plaintiffs. But as this security was equally applicable to the whole debt, it would seem not to affect the question of the application of the money in hand, except to the extent to which it was applied before proof of claim.

What, then, were the rights of the parties with respect to this money when this action was commenced? I am unable to agree with the view taken either by my brother Rose or by the Divisional Court. The former decided on the issue tried before him that the plaintiffs were not compellable to apply the money on their executions. But when the remaining notes became due the situation was changed, and the question was not the same on the trial of the present action. The time had arrived for application in some way, and I do not see how the question in the present action could be regarded as *res judicata*. So also I think the Divisional Court were wrong in deciding that because the plaintiffs had refused to apply the money to the executions they must submit to apply it to the notes sued on in this action. The defendants did not refuse to apply in that sense. The application to compel them was premature, being made before the last four notes matured. They resisted that application, and resisted rightly and successfully. But just as they were not compellable to apply the money on the executions, so they are not compellable to apply it on the present notes, as the Divisional Court has determined. Their right is to elect on what part or parts of their debt they will apply it, and that also is their obligation.

Considerable stress was laid in the argument before us upon the fact that the customers' notes were "collateral" security, and therefore, a sort of secondary security, which the bank could hold in reserve until they had exhausted all their remedies on the principal notes by judgment, execution or otherwise. I do not think the word has any such meaning. It means no more than additional, and implies no different, or greater, or inferior right of the creditor in respect thereof than he possesses in respect of what may be called the principal security.

That this is so is now settled by the Court of Appeal in *In re* Athill, Athill *v.* Athill, 16 Ch. D. 211, at pp. 218, 220, where in the administration of the assets of a debtor a debt was held to be borne proportionately by the persons entitled to the principal security and what was called a collateral security held by the creditor. The notes in question here were, therefore, in my opinion, just simply security and nothing more. The debtor's notes were not security at all. They represented the debt which was secured. The collateral notes were the debtor's property in the bank's hands, and were redeemable, and when the bank made collections the money they received was the defendants' money in their hands just as the notes had been. The bank were mortgagees. They held the money as security for the defendants'

account. The meaning of that was that if the defendants did not pay, then this money could be applied in payment. The default had now occurred, the whole debt was due. The plaintiffs had a right to apply the money towards payment, and the debtor had a corresponding right to have it so applied That was the very purpose for which the fund was provided. Nothing can be clearer than that a mortgagee after his debt is due is bound at once to apply any money then in his hands realized from his securities in reduction *pro tanto* of his debt. So here, the whole debt having fallen due on the 18th of December, 1893, it was the duty of the plaintiffs to apply the money then in their hands. Their debt, however, was about $140,000.00, and the money in their hands something over one-half; their debt was composed of several parts, a number of judgments with executions, and a number of promissory notes, just become due, and an overdrawn account. They could choose how they would apply the money, but some application of it the debtors were entitled to. They made no application of it, and on the 2nd of June, 1894, they commenced the present action for notes amounting to $50,000.00. The defendants have pleaded all the facts, and ask to have an account of the money collected on the collateral security and to have it applied on the debt. As already stated, it was admitted at the trial that the plaintiffs had then in their hands $82,135.00, besides what had been credited in the first judgment, derived from the collateral security. They simply joined issue on the defence and made no offer to apply the money in their hands. I think the action ought not to have been dismissed. It is a mortgagee suing for his debt, admitting that he has a large sum in his hands derived from his security. The whole debt is due and the time has arrived for taking the mortgage account and ascertaining what is due after applying the money in the plaintiff's hands.

That is what ought to have been done, and that is what should be done now. The plaintiffs must decide how they will apply the money in their hands, their right being to apply it in the way most beneficial to themselves. If the parties cannot agree there may be a reference. If in the result the notes now sued upon or any part thereof be not paid, the plaintiffs should have judgment therefor with costs, otherwise the action should be dismissed with costs. In any case there should be no costs of the appeal.

It was contended by Mr. Shepley, for the plaintiffs, that they were entitled to hold the money in hand unapplied in a suspense account until they had exhausted all their legal remedies by judgment and execution or otherwise against the property of the debtors. No authority was cited to us for that proposition, and I know of none, nor of any principle of law to support it. If it were well founded the plaintiffs could keep the money unapplied as long as their debtors or any of them lived, in hopes of realizing something under these executions. I think such a dealing with securities could only be warranted by a clear and express agreement. I have not found any instance of such a dealing. On the other hand the following cases are very significant treating it as they do as a matter of course that the creditor must apply money realized from his securities in reduction of his debt where it has become due: Kellock's Case, L.R. 3 Ch. 769, a judgment of the Master of the Rolls affirmed

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by the Court of Appeal; Benning *v.* Thibaudeau, 20 S.C.R. 110; Eastman *v.* Bank of Montreal, 10 O.R. 79. See also Edmonds *v.* Hamilton Provident and Loan Society, 18 A.R. 347.

I ought, perhaps, to guard against a misapprehension of my meaning in saying that the plaintiffs had a right to refuse to make application of the money in their hands until their whole debt became due. That statement is too general. Their strict right, as I understand it, is to hold in reserve without application, a part of the money on hand equal to the part of the debt still to mature; all in excess of that they ought to apply from time to time without waiting for the maturity of the whole debt. 10

Appeal allowed, MACLENNAN, J.A., dissenting.

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Formal Judgment in Court of Appeal.

Formal Judgment.

In the Court of Appeal for Ontario.

Tuesday, the 4th day of February, 1896.

Between

The Molsons Bank . . . . *(Plaintiffs), Appellants;*

and

James Cooper, John C. Smith and Cooper & Smith,
(Defendants), Respondents.

This is to certify that the Appeal of the above-named Appellants from the 20 judgment of the Queen's Bench Division of the High Court of Justice of Ontario, pronounced on the thirteenth day of June, 1895, having come on to be argued before this Court on the fourteenth day of November last, whereupon and upon hearing Counsel as well for the Appellants as the Respondents this Court was pleased to direct that the matter of the said Appeal should stand over for judgment; and the same having come on this day for judgment: It was ordered and adjudged that the said Appeal should be and the same was allowed with costs as well of the Respondents' motion to the Divisional Court as of this Appeal to be paid by the Respondents to the Appellants forthwith after taxation thereof: And that the judgment in favor of the Appellants 30 pronounced by the Honorable Mr. Justice Rose at the trial hereof should be and the same was restored.

And the Appellants consenting thereto, it was further ordered and adjudged that the said Appellants should forthwith after the actual distribution of the fund hereinafter mentioned by the Sheriff of the City of Toronto among the creditors entitled thereto, including the Appellants (who by the restoration of the said trial judgment become entitled to participate therein in respect of the execution founded or to be founded on the said judgment), make such appropriation as they may be advised, upon and in *pro tanto* satisfaction of the indebtedness of the Respondents to the Appellants in the first para- 40 graph of the Statement of Defence referred to of the moneys collected by the Appellants, the proceeds of the collateral promissory notes in the second

paragraph of the Statement of Defence mentioned, such appropriation to be evidenced by letter addressed to Messrs. Foy & Kelly, Solicitors for the Respondents.

The fund to be distributed by the said Sheriff, and after the distribution whereof the said appropriation by the Appellants is to be made, is the fund referred to in the petition of the said Sheriff presented on the twenty-second day of October last, and in the order or direction of the Honorable Mr. Justice Meredith made thereupon on the twenty-fifth day of October last.

A. GRANT, Registrar.

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10 In the Supreme Court of Canada.

Between

Cooper & Smith, and John C. Smith, . *(Defendants) Appellants;*

and

The Molsons Bank . . . . . *(Plaintiffs) Respondents.*

Appellants' Factum.

1. The action is by the Molsons Bank against Cooper & Smith, as makers of four promissory notes, payable to the order of the Bank, amounting in all to $50,000.00.

The trial was before Mr. Justice Rose without a jury, on admissions of 20 evidence to be found at page 5 of the Case.

The trial Judge entered judgment for the plaintiffs for $50,000.00 and interest. On appeal by the defendants the Queen's Bench Divisional Court, Street, J., and Falconbridge, J., reversed the judgment of the trial Judge and dismissed the Bank's action with costs. The Bank appealed to the Court of Appeal for Ontario, who (Maclennan, J.A., dissenting) allowed the bank's appeal.

This appeal to the Supreme Court is brought by the above Appellants, who seek to restore the judgment of the Divisional Court.

2. Apart from the question of *res judicata*, which will be separately 30 considered, the question at issue is comparatively short and governed by principles of frequent application in mortgage actions. The evidence also is (apart from *res judicata*) very short, and consists of admitted facts.

The proceedings printed on page 15 *et seq.* of the Appeal Case are proceedings, evidence, orders and judgments had and made in connection with certain issues directed to be tried in previous matters and put in by the bank in support of the *res judicata* raised by them, but those proceedings have no bearing upon this case, except in considering the question of *res judicata.*

3. The Appellants further submit that the decision of this Court in 40 Benning *v.* Thibaudeau, 20 Supreme Court, 110, is conclusive of the case in the Appellants' favor, and establishes that after the maturity of the principal debt a creditor can only claim judgment or payment of the true balance due to him after first deducting the amount realized in cash from securities deposited as collateral to the main debt.

4. The question for adjudication is whether a creditor can get judgment for his principal debt in full without any deduction of sums he has collected on collateral notes given him as security for such debt.

5. The Respondent Bank's claim in this action is, as before stated, for $50,000.00, part of what was a total indebtedness of $146,907.00, made up as follows :

Note	"A"	$30,000.00	
"	"B"	20,000.00	
"	"C"	20,000.00	= $90,000.00
"	"D"	10,000.00	less 6,900.00
"	"E"	10,000.00	

The Bank had $83,100.00 in judgments in September, 1893.

" "F" 5,000.00 due 22nd September, 1893; action is pending thereon.

"	"G"	25,000.00	
"	"H"	10,000.00	Notes due December, 1893, and sued on herein, by writ dated 2nd June, 1894.
"	"J"	5,000.00	
"	"K"	10,000.00	
		$145,000.00	
		1,907.00	overdraft in Bank, sued on with note "F."
		$146,907.00	

Notes "A" to "E," both inclusive, had previously to this action been sued on by the bank. No defence was entered, and judgments were recovered thereon against these appellants for $83,100.00, that being the amount of those five notes, less the sum of $6,900.00 which the bank had collected on collaterals before the commencement of the action in respect of note "A."

Note "F" matured on the 22nd September, 1893, and an action was commenced on it by the Bank, and also on the $1,907.00 overdraft, but not prosecuted to trial.

Notes "G" to "K" inclusive, matured in December, 1893, and are the notes in question in this action.

6. Thus at the commencement of this action, the Bank held judgments for $83,100.00, and a pending action for $6,907.00.

Admissions.

7. The admissions made at the trial (see page 7, line 30, of the Case) were as follows :

That the Bank, at the time of the suspension of the firm of Cooper & Smith in August, 1893, had collateral securities consisting of notes of customers of Cooper & Smith for $104,104.00.

That in addition to the $6,920.00 above referred to, collected prior to the action on note "A," the Bank had up to the day of the trial of this action, collected from collateral notes a further sum of $82,135.71, none of which had been credited upon any of the direct liability of Cooper & Smith, but it was carried by the Bank to a suspense account.

That these collateral notes were deposited by the Appellants with the Bank under an agreement contained in a letter of which the following is a copy :

"Toronto, 13th June, 1891.

"I am pleased to inform you that our Board have granted you a line of "credit to $150,000.00, to be secured by collections deposited, rate 6 per cent., "one-quarter commission on all checks and collections outside of this city, as "agreed upon with your Mr. Mason.

"Yours truly,

"C. A. PIPON, Manager.

"The meaning of the above is not that the advance shall be fully covered "by collections, but as near as you can.

"C. A. P., Manager."

That the collateral notes were deposited with the Bank from time to time, and a list of these notes was entered in two books in the Bank in each of which the following memorandum was made :

"The notes enumerated in this book are deposited with the Molsons "Bank as collateral security for advances made to us by the Bank in discounts "and overdrafts.

"(Signed,) COOPER & SMITH."

It was further admitted that the Bank had through the Sheriff collected certain sums upon the first named judgments, the amount of which at the time of the trial of this action was in dispute, but which has since been ascertained to be $15,098 00

And had received in an interpleader matter..... 1,567 00

And out of Cooper's personal estate..... 631 00

It was also admitted that Cooper & Smith had made an assignment to one Clarkson of certain book debts for the benefit of their creditors, and that the Bank on the 7th of October, 1893, filed a claim for the amount of Cooper & Smith's indebtedness to the Bank. They have since collected a certain dividend on this claim amounting to about 10,000 00

$27,296 00

It was also admitted that the Bank's claim filed with the Assignee, Clarkson, was in part made up of the $50,000.00 sued on in this action. (See claim at p. 49 of Case.)

Add this $27,296.00 to the $6,920.00 and the $82,135.00 collected on collaterals, and we find the Bank had collected and in hand $116,351.00 leaving a debt due to the Bank of only $30,556.00.

8. The Appellants' contentions are these :

(*a*) That in any event the Bank's total judgments all told, whether in this action or the prior actions, should not exceed $30,556.00.

(*b*) That if judgment be entered in this action it ought to be not for $50,000.00 but for at most $30,556.00 and only on condition that the Bank releases the prior judgments and notes, and will apply any further collections in reduction of the judgment.

(*c*) That (in the alternative) the Bank having insisted on retaining their prior judgments and ranking in full on them for moneys in the Sheriff's hands, and garnishing moneys under them, the Bank must now apply the money in satisfaction of the four notes sued on herein, and that the judgment of the Divisional Court in so holding is right and ought to be restored and this action be dismissed.

(*d*) That if any difference arises between the parties as to the correctness of the figures above referred to, there should be a reference, this Court decreeing what are the principles that govern and that the result be according to what will be ascertained on taking the accounts, on the above basis. The Appellants ought also to have the benefit of any sums collected since the trial.

9. The substance of the Appellants' contention is, therefore, that there ought not now to be judgments and executions against them for more than the true balance, $30,556.00, due to the Bank. Whether those judgments stand in the form of judgments on the former notes or on the four notes sued on herein is not of much practical importance.

10. The Respondents on the other hand erroneously contend that they are entitled to judgment for $50,000.00 and interest in addition to existing judgments of $83,100.00.

11. Suppose the Bank had not sued at all on the earlier notes and were now suing on all the notes amounting to $145,000.00 made by the Appellants, could the Bank contend on the construction of the letter in paragraph 7 that it was entitled to judgment for more than the true balance? It is submitted it could not. What possible right is there for the Bank to get by various actions on the several notes, judgments for larger sums than they could obtain if all the notes were sued for in one action? The question becomes simplified if viewed as one action. The matter boiled down is simply: "Can "a creditor who has in hand a large sum of money collected from his debtor's "assets which were mortgaged to the creditor and deposited with the express "purpose of securing payment, obtain judgment for the full amount of his "original debt, or only for the balance after deducting the cash in hand?"

If that question is answered according to the Appellants' contention, then it is of no great practical importance whether the judgment of the Court take the form of (*b*) or (*c*) on this page of the Factum. It ought not to affect the question even of costs. A reference to the Statement of Defence will show that the Appellants were willing to allow a judgment or judgments to stand or be against them for the true balance remaining on the whole debt on taking the accounts on the above basis and on the principle now contended for. But the Bank refused and denied this and joined issue on that defence and went to trial seeking to both maintain the old judgments and to get an additional judgment of $50,000.00 and interest.

The whole litigation has been in consequence of the Bank's refusal to now take the money out of suspense account and apply it in reduction of the whole debt.

12. But it is also submitted that the said refusal of the Bank and the stand taken by it throughout the proceedings that the Bank would not apply

any part of the collections on the prior judgments, entitled the Divisional Court to treat as they did the moneys as applied on the notes in question in this action. It is not necessary for the dismissal of this action to hold or find that the Bank has applied or (as held by the Divisional Court) that the Bank has elected to apply any of the collections on the notes in question herein. All that is necessary to find, in order to call for the dismissal of this action, is that the Bank has, under all the circumstances of the case, failed to establish that it is entitled to a judgment for any sum in addition to the existing judgments.

13. Granting, for argument, that the Bank has the right to say upon what branch or portion of the debt it will apply the collections, it is submitted that it ought, before judgment is entered in this action, to make its election so as to allow the Court to pronounce the proper judgment. The Bank ought not to be first allowed judgment and then make election after it has ranked for a sum in excess of what is really due.

14. In any event, the Bank has received a payment of about $10,000.00 from the Assignee, Clarkson, which ought to be credited in part on the $50,000.00 claim, as it was a dividend *pro rata* on the whole claim. The Court of Appeal seems to have overlooked this. A variation of the judgment to this extent, at least, is asked for, in case the action is not wholly dismissed, or if a judgment be not entered in the other form contended for by the Appellants. The dividend was about eight cents on the dollar. This means about $4,000.00 on the $50,000.00 notes.

15. The Appellants in support of their contention refer to the opinion of Mr. Justice Maclennan at p. 70 of the Case, and the authorities cited by him, and particularly to Benning *v.* Thibaudeau, 20 Sup. Court, 110.

See same case Sub nom. Thibaudeau *v.* Benning, M.L.R., 5 Q.B. 425.

Ontario Bank *v.* Chaplin, 20 Sup. Ct. 152 and M.L.R., 5 Q.B. 407.

Re Rochette 3 Que. L.R. 97.

Kellock's case, L R. 3 Chy. 769.

Eastman *v.* Bank of Montreal, 10 Ont. R. 79.

Malpas *v.* Clements, 19 L.J. Q.B. 435.

Forwood's claim, L.R. 5 Chy. 18.

In re Oxford, L.R. 5 Chy. 433.

Ex parte Maxoudoff, L.R. 6 Eq. 582.

16. The Respondents, the Bank, to succeed in their contention, would have to show that there was some special and unique agreement providing for a suspense account to continue after maturity of the whole debt. But there is no evidence of anything but the ordinary agreement of a loan secured by notes as collateral.

Comments on Decisions Cited by Respondents.

17. In support of Respondents' contention that credits are not to be given, they cited in the Courts below a number of cases which on examination do not sustain the Respondents' view; but, so far as they at all apply, support the Appellants' contention.

Bonser *v.* Cox, 6 Beav. 84.

So far as it decides that a creditor against two estates for the same debt is entitled to a dividend from both estates, the case is not in point. So far as it decides that the creditor can only be admitted as a creditor for the balance of his claim, £459, instead of the full claim of £3,200, it is an authority in support of the Appellants.

Ex parte Wildman or Wyldman 1 Atk. 109, 2 Ves. Sr. 113. This was a case under the English Bankruptcy Law, and was a question of ranking on two bankrupt estates, and has no application.

Ex parte Royal Bank of Scotland, 2 Rose, 197, 19 Ves. 310. This is also a Bankruptcy case. But it is favorable to the Appellants so far as it holds that all payments prior to proof must be credited, although payments after proof in Bankruptcy need not be deducted.

Ex parte Reed, 3 Deacon & Chitty, 481. *Ex parte* Phillips 1 Montague, Deacon & DeGex, 232. Cases under English Bankruptcy Law, and do not touch the point of this case.

Beaty *v.* Samuel, 29 Grant 105 has no application. In that case the security had not been converted into cash.

Young *v.* Spiers, 16 Ont. R. 672 followed Eastman *v.* Bank of Montreal, the case next referred to.

Eastman *v.* Bank of Montreal, 10 Ont. R. 79. Assignment by debtor of his estate for benefit of creditors. Claims put in by two banks who each hold notes as collateral security for their respective claims. Held that all sums collected by the Bank on collaterals up to time of establishing their claims should be deducted. Held, also, sums subsequently collected need not be credited. A question also arose as to whether one of the Bank's claims was fully established at an earlier or a later date. The learned Chancellor held that if the claim had been established at the later date, all collections until the later date would have to be deducted.

The Appellants say that this, so far from upholding Respondents' contention, supports the Appellants. Until judgment entered in this case the Bank has not established its claim.

Lewis *v.* United States, 92 U.S. 618. The Court says at p. 623: "A creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor." It does not appear whether these collaterals had been converted into money at the time. From p. 619 it appears that the holders of the collaterals claimed the right to apply the proceeds thereof to another and later debt arising in the same way as the earlier debt in question.

The U.S Court recognized and cited as authority for what we have quoted above, Kellock's case 3 Ch. App. 769, and hence Lewis *v.* United States is no authority for any proposition contrary to Kellock's case, which is in favor of Appellants.

Commercial Bank of Australia *v.* Wilson, L.R., 1893, App. Cas. 181. This is the only case the Respondents have cited in which a sum of money in the hands of a creditor has been held to properly remain in the creditor's hands without being applied in reduction of the debt. But it is not only clearly distinguishable from the case in hand, but shows what the view of the

Judicial Committee of the Privy Council would be if the facts had been similar to the facts in this case. Street, J., in the Divisional Court, and Maclennan, J., in the Court of Appeal, point out the distinction.

The agreement expressly provided that the Bank of Australia had declined to receive the money from a guarantor in reduction of the debt, but agreed that the sum should be deposited to a separate account to be appropriated by the Bank in satisfaction in part or in whole when and so soon as the Bank may deem prudent, and without prejudice to the Bank's right to look to the other guarantors for the full amount of the guarantee, and that the sum be credited to a special suspense account. There was also an express proviso and condition that nothing in the agreement contained should release or in any manner prejudice or affect any claim the Bank had against a co-guarantor, John Wilson and others.

It will thus be seen that special clauses were inserted in that agreement to prevent what might have been the operation of law in the absence of the special clauses.

Another important distinction is that the money so deposited to the special suspense account was not in any sense money of the principal debtor, but money of guarantors. It was not money that the debtor had any claim to whatever. His indebtedness was none the less by reason of the guarantors having deposited the money. In the Molsons Bank case, however, the moneys received on collections were the moneys belonging to the debtor and from collaterals expressly deposited to enable the Bank to receive payment of their debt, "placed by the debtor in the hands of the creditor for this very purpose," to quote the language of Sir H. Strong, 20 Sup. Ct., at p. 115.

Mr. Justice Burton, in his opinion in favor of the Respondents (p. 64), cites the last mentioned case, and also refers to Edmonds *v.* Hamilton Provident, 18 A. R. 347.

It is respectfully submitted that the latter case does not support the Respondents' view. In that case the whole mortgage debt was not due, although a part was overdue when a fire occurred, and the mortgagee collected some insurance money. It was held that as the insurance money was collateral to the whole mortgage debt and not to a part, the mortgagee was not compellable to apply it before maturity, he could not be forced to apply it on a part. It is an authority, however, for the correctness of the judgment of Rose, J., in the trial of the issues he had previously tried, and which are referred to in the question of *res judicata*.

18. Chief Justice Hagarty's opinion (p. 61) does not cite any authority for a creditor holding in suspense money collected. His Lordship seems to think that the position between the debtors and the creditor at the time this action was brought was the same as when the prior issues were tried by Rose, J., and that all the debt had not matured, and it is submitted that his conclusion of law is wrong in consequence of his misapprehension of that important fact. See p. 63, line 18. He says: "All these suits have been "brought since the assignment by the defendants, and the suit now in appeal "was not the final one, as a $5,000.00 claim was still in suit."

His Lordship is also, it is respectfully submitted, wrong in his statement of fact that the defendants had assigned under the statute. Page 61, lines 38 and 39.

His Lordship ignores the existence of any difference between securities uncollected and cash collected from collateral securities expressly deposited to enable the Bank to receive payment, and to enable the debtors to make payments.

19. Mr. Justice Osler's decision does not touch at all on the points above considered, and deals exclusively with the question of *res judicata*. He considers himself bound by a judgment upon other issues previously tried between the same parties.

20. The case stands, therefore, as to judicial opinion thus:

Justices Rose and Osler consider themselves bound by prior decision of a prior issue between the same parties.

The Chief Justice of the Court of Appeal decides on what the Appellants submit is a misapprehension of the facts, and Mr. Justice Burton upon what the Appellants submit is an error of law.

Justices Street, Falconbridge and Maclennan take the Appellants' view.

As to *Res Judicata*.

21. The Bank contends that the Appellants are estopped from asserting that the Bank is in this action bound to credit the moneys by it collected on collateral securities. The Bank says that judgment was given upon the same point between the same parties by Mr. Justice Rose on the 20th day of April, 1894, and prints in the Appeal Case the pages 15 to 51 as evidence thereof.

22. The Appellants point out in the first place that there was no reply by the Respondents of estoppel or of *res judicata*, but simply a request to put in certain papers and proceedings after defendants had closed their defence and in reply thereto.

As to the necessity of pleading the estoppel, see Hughes *v.* Rees, 10 Practice R. 301. Outram *v.* Morewood, 3 East, 346.

23. Amendment ought not to be allowed. It was refused in Edevain *v.* Cohen, L. R. 43, Chy. D. 187, because it was proposed merely "to enable Appellant to avail himself of a technical rule of law, and not in order to determine the real issue which ought to be determined" (p. 190). Especially ought not the amendment to be allowed in this case, as the facts which the Appellants produced at the trial to support their defence were not disputed, but were all admitted by the Bank. The facts so admitted the Bank is estopped from denying. Hence not only should the Bank not be permitted to put in a reply which would contradict their own admitted facts, but if it were put in it could not contradict the facts admitted. Estoppel of an estoppel.

24. The appellants further say, that the issue directed to be tried in 1893, and which was tried by Rose, J., in 1894, was an entirely different point, and raised and decided an entirely different question, as will be seen from an examination in detail of that issue, and the following statement of what the first issue was:

Notes B, C, D and E, referred to in paragraph 4 of this Factum, and amounting to $60,000.00, had in September, 1893, passed into judgments.

In November, 1893, these Appellants applied in Chambers for an Order that satisfaction might be entered up in the actions on notes B, C, D and E for such sums as had been paid to the Bank either prior to or since the recovery of the said judgments on account of the promissory notes or indebtedness for which the said judgments have been recovered.

The Master in Chambers, and afterwards Mr. Justice MacMahon, on appeal from the Master, refused this application. An appeal was taken to the Queen's Bench Divisional Court, and an order (pp. 15, 16) was made on 29th December, 1893, directing an issue to be tried, so that the Court might be advised what order to make, on the said motion that had been made in Chambers.

The issue directed was, "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 judg- "ments or any of them, and if so, when such payments, if any, ought to be "so applied and to what extent."

This issue was to aid in deciding what order ought to be made on the Chamber application for an order to enter up satisfaction on judgment for part of the debt.

An issue was accordingly prepared (see p. 17) to try the above question, and in it appears (p. 18, line 11) the following paragraph :

"The plaintiffs affirm and the defendants (the Molsons Bank) deny that "the said Bank, either before or since the recovery of the judgments above "named, have received payments which at the time of the receipt of the same "ought to have been, or ought now, to be applied in satisfaction in whole or "in part of the said judgments or of some of them."

Issue tried 13th April, 1894.

Judgment was delivered 20th April, 1894, and the following finding was made by Rose, J., and endorsed by him on the Record :

"I find that the defendants in the issue have not, either before or since "the recovery of the four several judgments in the issue mentioned, received "any payments which either at the time of the receipt of the same ought to "have been or ought now to be applied in satisfaction, in whole or in part, of "the said judgments or any of them.

"JOHN E. ROSE, J.

"20th April, 1894."

The Queen's Bench Divisional Court on 23rd May, 1895, thirteen months afterwards, made the order set out on page 48, declaring that the Molsons Bank, up to the 20th day of April, 1894, have not either before or since the recovery of the said four judgments referred to in the said issue, received any payments which either at the time of the receipt of the same ought to have been or ought now to be applied in satisfaction in whole or in part of the said judgments or any of them.

25. From the above it appears that the application was made in November, 1893, before the notes in question in this action came due, to have the $47,000.00, the amount of the then collections, applied in reduction of the then existing judgments, and that the real question in issue was whether

before the maturity of the whole debt for which the collaterals were security, the Bank could, after having obtained judgment for a part, be compelled upon that part to give credit for moneys that were security for the whole debt. The debtors contended that collections as received should be credited by the Bank, and the Bank contended that as the collateral notes were security for the whole debt of $146,907.00, some of which had not matured, and not security for any particular part thereof only, the collections were not specifically applicable to the payment of the said existing judgments. That this was the question is clear from the orders and judgments, but it is further most explicitly shown by the affidavit of Mr. Draper, the Assistant Manager of the Bank, filed by the Bank on their resisting the application in Chambers, and referred to in the order (on p. 16) directing the issue. A copy of this affidavit is printed on page 52 of the Case. See particularly paragraphs 3, 4, 6 and 8, wherein Mr. Draper denies that any sum has been received specifically applicable to said judgments, and that the customers' notes were taken as collateral security for the whole of Cooper & Smith's account and that the amounts received by the Bank in respect of collaterals, the Bank "are holding as collateral to this indebtedness, some of which has not matured, the amount not yet matured being between $50,000.00 and $60,000.00."

The debtors had, on the other hand, contended that by the course of pealing and custom prevailing between the debtors and the Bank, the earliest payments were specifically applicable to the earliest maturing notes. That was the question submitted for adjudication, and is entirely different from the one in question herein. As Maclennan, J.A., has pointed out in his opinion, page 74, line 13.

"The former (Mr. Justice Rose) decided on the issue tried before him, "that the plaintiffs were not compellable to apply the money on their execu- "tions. But when the remaining notes became due the situation was "changed, and the question was not the same on the trial of the present "action. The time had arrived for application in some way, and I do not "see how the question in the present action is regarded as *res judicata.*" ". . . The application to compel them (the Bank) was premature, being "made before the last four notes matured. They resisted that application, "and resisted rightly and successfully."

The Appellants now concede that they were, as a matter of law, premature in their former application, and properly failed. But they submit that they are not estopped from now resisting further judgments, or from asking the collections to be now credited, when they are sued for the remaining part of the debt.

But the Respondents say that Rose, J., interpreted the contract to be that not only could the Bank keep the collections in a suspense account at that time, but ever afterwards. That he so held or had authority to so hold, the Appellants deny. If he did so, it was not necessary for his decision. But assuming that he formed such an opinion, then we submit it was not part of the issue he was trying, and could not bind these Appellants. The Appellants recognized after its delivery that his opinion was correct in holding that they were premature in their application, and hence they did not appeal, as they

could not hope to succeed in their application that satisfaction *pro tanto* should be entered upon the judgments which they then held for part of the debt. Can they now be held bound by anything more than that, as there was nothing to appeal from? Suppose they had appealed, and had come to an Appellate Court and said that we admit Judge Rose is right in his conclusion that we cannot force the Bank now to apply the credit on the $60,000.00 judgments, and we do not claim that we can reverse his order; but we find that he has construed the agreement as to its general effect in a way that may be prejudicial to us in respect of notes yet to come due, and we appeal on that ground. Would such an appeal have been for a moment entertained? It is submitted that it would not. We would be told such an appeal if successful would not reverse the order already made, and that we could litigate the question of credits after the maturity of the whole debt when the proper time arrived.

Mr. Justice Osler at the conclusion of his judgment (p. 70, line 31), says that he is not to be understood as deciding that at the proper time and on a proper application the plaintiffs may not be compelled to give credit on their judgments for all moneys received by them. What is the effect of this? Is it not that while he says that the former issue is binding as *res judicata*, yet it is not binding for all purposes and to the full extent that the preceding part of his judgment would lead us to think? Does it not mean that the previous decision was only in respect of the then existing circumstances and not binding when the circumstances have changed? Is not the concluding sentence of his judgment an answer to the preceding part of his judgment?

It is important to note that it is the same Divisional Court that directed the issue in 1893, and decided in 1895, that the issue was not identical with the issue in this present case, and that it was the same learned Judge (Mr. Justice Street) who delivered the opinion of the Court in both cases. He would know in delivering his later judgment what was his intention as to the nature of the issue he had previously directed. He has held it was not a case of *res judicata*, and he was thoroughly familiar with both issues. He says, p. 12, line 31, "Nor do I see that the judgment of my brother Rose in the issue "of Cooper & Smith *v.* The Molsons Bank, which stands unappealed against, "compels the conclusion at which he felt himself compelled by it to arrive in "the present case."

Mr. Justice Osler cites from the opinion of Mr. Justice Street, in 1893, some observations that would go to show that the extent of the issue that was directed was very large. But Mr. Justice Street in the Divisional Court was not led by this into concluding there was *res judicata*. Moreover, Mr. Justice Street was speaking "upon the affidavits before us," and a reference to the said affidavits will show that the plaintiffs' contention simply was that no money was then in hand specifically applicable to the judgments then in question.

The issue directed and framed is not so extensive as contended, and could not have been ordered, but was only an issue to determine a fact which would enable the Court to say if satisfaction should be entered upon the existing judgments.

26. The following are authorities that Judges' opinions are not used in evidence :

Freeman on Judgments, 4th Ed., 443, sec. 249.
Davis *v.* Millaudon, 87 Am. Dec. 517, 17 La. Ann. 85.
Van Fleet, Former Adjudications, 773-4.
Buckingham's Appeal, 60 Conn. 143.
Penouilh *v.* Abraham, 43 La. Ann. 214.
Robinson *v.* N. Y., L. E. & W. Ry., 64 Hun. N. Y., 41.

27. James, L.J., in Robinson *v.* Dunleep Sing, 11 Chy. Div. at p. 813, says :

" The issues are only a proceeding in a cause for the purpose of ascer-
" taining *a fact* for the guidance of the Court in dealing with the right, and
" what determines the right between the parties is the decree, and in order to
" determine what the decree really decides it is essential to see what were
" the rights which were in dispute between the parties and which were alleged
" between them."

28. The question has never been litigated between the parties to this action whether the bank is entitled to a judgment or judgments for more money than would pay it off in full, or whether the credits must not be given in reduction of the whole as contra-distinguished from a particular part of the debt.

To have decided that the bank must (as contended in the first issue) have applied the earliest payments in reduction of the earliest notes would have been unfair to the bank, for it would have deprived it of the right to rank in November, 1893, for the full amount of its debt on what the Sheriff had for distribution. So on the other hand to now hold that no reduction should be made, now that all the debt is due, would be to err on the other side, and permit the bank to rank for four times the amount of its true claim. This well explains the great difference between the two issues which the bank claims are identical issues.

29. Mr. Justice Osler considers that (p. 70, line 17) the immediate subject of the decision in each issue was the same, namely, the nature of the agreement under which the bank held the collaterals, and that if the judgment in the issue first tried was right, the judgment of the Divisional Court must be wrong.

It is with great respect submitted that in the first issue the agreement was only being construed and applied so far as it affected the special circumstances and facts then existing. We must bear in mind that it was an issue directed to try a fact arising out of and connected with a motion to have satisfaction *pro tanto* entered on the roll of existing judgments. Moreover, the debtors had allowed judgment to go by default, while here the matters are set up by way of defence to the action.

30. There was, as before pointed out, no dispute as to the facts put forward as the defence to the present action. The agreement was in writing. The only dispute is one of law; namely, whether credit has to be given now. The question of law in the prior issue was whether credit could then after judgment be forced upon the bank before maturity of all the debt.

The case of Eastman *v.* Bank of Montreal, 10 Ont. R. 79, hereinbefore referred to at page 82 of this Factum, and cited by Mr. Justice Rose (p. 46 of Case), as authority for his decision in the first issue, is an excellent illustration of the essential difference between the two different law points raised by the two cases. The case of Eastman *v.* Bank of Montreal decides, as the bank contended in the first issue, that moneys collected after the establishment of a claim need not be credited for the purpose of ranking; and at the same time decides that moneys collected before the creditor's claim is established, must be credited for purposes of ranking. That is the applicants' present contention. Clearly they are not identical points, but different.

31. Freeman, 4 Ed., p. 443, sec. 249. The effect of a judgment as *res judicata* is not limited or enlarged by the reasons given by the Court for its rendition.

32. Freeman, p. 449, sec. 253. There must be the following identities between the two suits:

1. Identity of subject-matter.
2. Identity of cause of action.
3. Identity of purpose or object.

33. Freeman, pp. 446-7, sec. 258. "No judgment or decree is evidence "in relation to any matter which came collaterally in question nor to any "matter incidently cognizable or to be inferred from the judgment only by "argument or construction. An estoppel cannot be created by mere argument." See also 2 Smith's Leading Cases, 9th Eng. Ed., at p. 832, also pp. 837 and 849.

34. Freeman, p. 464, sec. 257. "Extends only to facts in issue." If these appellants were now disputing the fact of the existence of the written agreement or its wording, it could be said that we could not again litigate that question of fact. The two cases differ only in what is the correct application of the law to the two different sets of circumstances existing at the different times.

Freeman, p. 468, sec. 259. "The best and most invariable test as to "whether a former judgment is a bar is to enquire whether the same evidence "will sustain both the present and the former action."

35. Heath *v.* Overseers, etc., Weaverham, L. R. (1894) 2 Q. B. at p. 113, per Charles, J.: "In order to discover whether that is really so (the matter is "*res judicata*), it is necessary to examine the decision and see on what "materials it was given."

And on page 114 he says: "Surely it cannot prevent us from enquiring "into matters which have since arisen."

Per Collins, J., at p. 115: "We are entitled to go behind that decision "and to see on what facts it was given, in order to say whether it amounts to "an estoppel or not." . . . "I do not think that decision precludes us "from dealing with the matter in the light of new facts which were not before "the Court then, and taking those facts into consideration."

Newington *v.* Levy, L. R. 6 C. P., 180.

Bramwell, B., at page 189: "I think if new circumstances had arisen a "fresh action might have been brought. If, for example, the action were "brought too soon, or if, as here, there was a release operative at the time

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No. 32.
Appellants' Factum
—*continued.*

"pleaded, but defeasible by something which occurred subsequently, etc., etc., "would not be *res judicata* as to the matter subsequently arising."

Concha *v.* Concha, L. R. 11 Ap. Cases, 541.
Nottawasaga *v.* Hamilton & N. W. Ry., 16 Ont. A. R., 52.
Commissioners of Leith *v.* Inspector of Poor, L. R. 1 H. L. Sc. App., 17.
Chisholm *v.* Morse, 11 U. C. C. P., 589.
Adamson *v.* Adamson, 28 Grant, 221.
Harris *v.* Mulkern, L. R. 1 Ex. Div., 31.

Freeman, p. 454, note 2, sec. 254: "The tendency of the English Courts "is to confine the effect of a judgment of estoppel to the issues actually litigated."

J. J. FOY,
Counsel for Appellants.

No. 33.
Respondents' Factum

Respondents' Factum.

1. The respondents, hereinafter called the bank, were, prior to the 24th August, 1893, the bankers of the appellants, Cooper & Smith, a firm carrying on at Toronto the business of manufacturers of boots and shoes. On the said 24th August, 1893, the appellants suspended payment.

2. By a clerical error the learned Chief Justice of Ontario is made to say, at page 90 of the Case, that the appellants on that date (24th August, 1893) "assigned under the Statute." This is erroneous.

3. By the agreement under which the respondents became the appellants' bankers, the appellants, hereinafter called Cooper & Smith, were entitled from time to time to borrow from the bank by discount of their (Cooper & Smith) notes, moneys to the extent of $150,000.00, which were to be secured by the deposit with the bank of customers' paper to as nearly as possible an equal amount. This agreement is established by the oral evidence, and is summarized in a letter from the manager of the bank to Cooper & Smith, which is set out in the Statement of Counsel at the trial, and is printed at page 13 of the Case. That letter is dated 13th June, 1891, and is as follows:

"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, 6 per "cent. One-quarter commission on all cheques and collections outside of "this city, as agreed upon with your Mr. Mason.

"Yours truly,
"C. A. PIPON, Manager.

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

The agreement is also referred to in the pass-book, in which a register was kept of the customers' paper deposited with the bank, in the following words:

"The notes enumerated in this book are deposited with the Molsons "Bank, as collateral security for advances made to us by the bank in discounts "and overdrafts. COOPER & SMITH."

4. The course of dealing between the bank and Cooper & Smith under this agreement, up to the date of the latter's suspension, is shown by the evidence of Mr. Draper, the assistant manager of the bank, at pp. 42, 43, and 44 of the Case, and by the evidence of Mr. Mason, the financial manager of Cooper *v.* Smith, at pp. 34 and 35 of the Case. In brief, the course of dealing may be stated thus: The bank, from time to time, discounted the promissory notes of the firm for large sums, and, as collateral security under the agreement, the firm from time to time deposited with the bank its customers' notes and acceptances, withdrawing them from time to time as they were about to mature, and treating them when so withdrawn as their own property, but constantly depositing current customers' paper, so as to keep the total amount held by the bank as nearly as possible equal to the amount of the current advances.

5. At the date of the suspension the bank held—having from time to time discounted them—the promissory notes of Cooper & Smith following:

Note A—	$30,000.00	Maturing at different dates between 1st September and 22nd September, 1983.
Note B—	20,000.00	
Note C—	20,000.00	
Note D—	10,000.00	
Note E—	10,000.00	
Note F—	5,000.00,	Maturing 22nd September, 1893.
Note G—	25,000.00,	Maturing 7th December, 1893.
Note H—	10,000.00,	Maturing 11th December, 1893.
Note J—	5,000.00,	Maturing 14th December, 1893.
Note K—	10,000.00,	Maturing 18th December, 1893.
Total....	$145,000.00.	

which sum, $145,000.00, with an overdraft of about $2,000.00 in the firm's current account, practically covered the indebtedness of the firm to the bank at the date of suspension. At the same date the bank was holding as security for their debt, under the agreement already referred to, customers' paper to the face amount of about $104,000.00.

6. As soon as the suspension took place, the bank proceeded to enforce actively all its remedies. Notes A to E, above set out, were placed in suit as fast as they matured, and judgments against Cooper & Smith upon them were recovered, and executions placed in the Sheriff's hands. An action was also brought against Cooper & Smith for the amount of note F, $5,000.00, and the overdraft, $2,000.00, which action is still pending; and this action was brought after the maturity of notes G, H, J and K, against Cooper & Smith as the makers of such notes, and in it the bank is seeking to recover judgment for the amount of such four notes.

7. The bank has from time to time, in the exercise of its rights under the agreement, collected the customers' paper held as security, to the amount of about $82,000.00.

8. The substantial defence set up by Cooper & Smith in this action is payment; and the contention made on their behalf is that the bank is bound

to credit upon the notes in suit the proceeds realized by the collection of the customers' paper held as collateral security.

9. The bank does not question the right of the defendants to receive, ultimately, credit for all moneys collected upon the collateral security, nor does the bank claim a right to be paid more than the amount actually due to it by Cooper & Smith; but the bank does claim that holding, as it does, two securities for the same debt, one being the personal obligation of the debtors, and the other the obligations of third persons, customers of the debtors, and the debtors being insolvent, the bank has a right to enforce its remedies against both securities to the fullest possible extent, subject, of course, to its receiving in the whole no more than one hundred cents in the dollar on the amount actually due by Cooper & Smith.

10. The practical question arises in this way: The Sheriff of the city of Toronto is about to levy for distribution among the creditors (including the bank) who have executions in his hands, a sum of about $7,000.00 out of other property of Cooper & Smith, the debtors. This will only pay a small dividend to such creditors, the executions in the Sheriff's hands (including the bank's executions) amounting to nearly $300,000.00. This is a fund to which only creditors having executions against Cooper & Smith can resort. The bank claims the right to recover judgment and have execution for the full amount of Cooper & Smith's debt, so as to rank upon the fund in question, —part of Cooper & Smith's estate—for such full amount without giving credit for the amount collected from the other security—the customers' paper.

11. In other words, the bank claims the right to hold in suspense the amounts collected upon the collateral paper to meet any ultimate deficit which may remain after they have exhausted their remedies in respect of the principal obligation against the estate of their debtors.

12. The question which lies at the root of the matter is, of course, whether the agreement under which the moneys were advanced and the collateral security deposited gives the bank the right claimed on its behalf. Accordingly it will be found that the parties framed their contentions accordingly. The bank contended that under the terms of that agreement they were entitled to hold the proceeds realized by collection of the customers' paper as security against any ultimate balance that might be due them after enforcing their remedies in respect of the direct or principal liability of $145,000.00, among which remedies was the right to recover judgment and have execution against Cooper & Smith for the amounts of the respective promissory notes, making up that direct or principal liability, as they matured, irrespective of the amounts collected upon the customers' paper. This they contended the agreement in question gave them the right to do, so long as they received no more from all sources than the full amount of the principal liability. This the debtors on the other hand contended the agreement did not enable the bank to do, contending under their plea of payment that the agreement compelled the bank to credit the receipts from collaterals upon the principal obligation, and to rank against the general estate of the insolvent debtors for the balance only of the principal obligation after giving such credit.

13. The first issue to be determined at the trial was, therefore, What was

the agreement upon which the bank held this customers' paper? Was it an agreement which gave the bank the rights contended for on the bank's behalf? Or was it an agreement which compelled the bank to treat the proceeds of the collaterals at that stage and under the circumstances already pointed out as payment *pro tanto?*

14. Upon this issue the bank gave the "conclusive evidence" spoken of in the Duchess of Kingston's case, viz., the judgment of a Court of concurrent jurisdiction directly upon the point and between the same parties. The trial Judge, Mr. Justice Rose, gave effect to this evidence, holding that the prior judgment between the same parties upon the same point was a complete estoppel. Of this view are also the Chief Justice of Ontario, Mr. Justice Burton and Mr. Justice Osler. The bank also contended that even if there was no estoppel the prior judgment was right, and that the same conclusion ought now to be come to upon the facts and the law. Mr. Justice Rose, the trial Judge, was the judge who had pronounced the prior judgment, and no doubt would have determined this case in the same way had there been no estoppel. The Chief Justice of Ontario and Mr. Justice Burton, while holding that the matter is *res judicata* by the prior decision, also agree with that prior decision upon the merits.

15. The prior decision referred to above and given in evidence as having determined the same point between the same parties, was pronounced under the following circumstances. The bank had recovered judgment against Cooper & Smith upon the principal notes numbered A to E in the fifth paragraph hereof. The rest of the notes representing the principal obligation had all matured. An action was then pending on note F and for the overdraft, but no suits had then been brought upon the notes G, H, J and K, now sued upon, although they had all matured. On the 29th December, 1893, the Queen's Bench Divisional Court, upon the application of Cooper & Smith in the suits in which judgment had then been recovered, directed an issue to be tried between Cooper & Smith and the bank, for the purpose of determining what were the rights of the bank (under the agreement under which they had advanced the moneys to and received the customers' paper from Cooper & Smith) in respect of the moneys then realized and thereafter to be realized by collection of such customers' paper. Mr. Justice Street delivered the judgment of the Divisional Court directing the issue. (See page 15 of the Case.)

16. In that judgment the contention put forward as to the rights of the bank under that agreement is very clearly stated: "Upon the affidavits before "us a dispute appears to exist as to the terms upon which the collateral "securities were deposited, and the contention of the plaintiffs (the bank) that "as a matter of law they are entitled to hold the money which they have "collected and which they may collect upon their collaterals as a security for "the ultimate balance which may be found due to them after all other sources "of repayment have been realized, is one which cannot, we think, be said to "be by any means beyond dispute under the circumstances here existing. ". . . We think, therefore, that an issue should be directed to try the "rights and liabilities of the plaintiffs (the Molsons Bank) with regard to the

" moneys collected by them upon their collateral securities, and to determine " the manner in which they should be applied under the circumstances."

17. The issue so directed came on for trial before Mr. Justice Rose, on 13th April, 1894. At this trial evidence was given by both parties as to the nature and terms of the agreement under which the customers' paper was deposited, and as to the course of dealing between the parties under it. The issue upon the agreement was the precise issue raised by the plea of payment in this case, and the determination of that issue necessarily depended on what might then be determined as to the nature and terms of that agreement.

18. At the trial of that issue the bank made precisely the same contention which is made by it in this suit. Its position and contention were clearly understood. They depended upon the original agreement, and the Court was asked then to declare that under that agreement the bank had the identical right which it is claiming in this action. This is very clearly put in the notes of the trial at page 24, line 16 of the Case:

" His Lordship: I understand the bank said, ' We have a claim against " these debtors amounting to so much; we have certain customers' paper " which we may realize upon from time to time; we will put that to suspense " account, get our dividend upon the whole account, and apply the suspense " account in reducing the balance.' "

19. Upon the issue so tried by him, Mr. Justice Rose delivered his judgment on the 20th April, 1894. (See page 45 of the Case.) He finds what it was necessary to find, in order to determine the issue before him, and what the judgment of the Divisional Court directing the issue expressly directed him to find, and what is also necessary to be found in this action, in order to make a determination upon the plea of payment, viz., what the agreement was under which the customers' paper was deposited. He says: " I do not find any agreement that the bank was to collect the notes deposited " as security, . . . and apply such collections as made in payment of " advances. . . . It seems to me that such paper so deposited was " regarded by both parties as security available for the whole account, if at " any time, by reason of misfortune, the firm became unable to meet their " obligations to the bank. At such moment, the right of the firm to with- " draw any paper would cease, and the bank would become entitled to hold it, " or the proceeds, if paid, as security for the whole account, and not for any " particular part or portion thereof; and I think it then became proper for the " bank to open a suspense account, to the credit of which should be carried " all moneys realized from the payment of any of such deposited paper. After " the account was thus closed for the purpose of liquidation, I think the firm " ceased to have any control over either the deposited paper or the proceeds " thereof until they were in a position to offer to the bank payment in full of " the advances. . . . If to credit any portion of the moneys received from " collections of the deposited paper would for any reason be a detriment to " the bank, it seems to me an *a fortiori* case that the firm could not require " such appropriation."

20. This judgment was formally affirmed by the same Divisional Court which had directed the trial of the issue. (See page 48 of the Case.)

21. It is submitted that Cooper & Smith cannot again litigate the terms of the agreement in question, or the rights of the parties under it in respect of the proceeds of the customers' paper deposited as collateral security. The terms of the agreement in fact, and the rights of the parties under it in law have, *qua* this question, become by the judgment referred to conclusively established. It has been contended that the judgment has not this conclusive effect, because only the portion of the principal debt, which was then in the shape of judgments, was under consideration. But the agreement controlled the rights of the parties in respect of the whole debt, and the determination of what the agreement was, was a determination once for all and as to the whole debt. Can the bank, whenever it brings an action for an instalment of the debt, be compelled to litigate *de novo* what the agreement was and what the bank's rights under it are?

22. Upon this branch of the case the respondents rely on the following authorities:

Re S. American & Mexican Co.
Ex p. Bk. of England, L. R., 1895, 1 Chy., 37.
Flitters *v.* Allfrey, L.R., 10, C. P., 29.
Bigelow on Estoppel, 5th ed., pp. 90, 100 and 160 n.
Van Fleet on Collateral Attack, p. 29.
Black, § 614.
Hobbs *v.* Henning, 17 C. B., N.S., 791.
Robinson *v.* Duleep Singh, L. R., 11 C. D., 798.

23. But it will be contended by the respondents, if necessary, that the conclusion arrived at by Mr. Justice Rose on the trial of the issue was right, and that upon the same evidence, which was all put in at the trial of this action, the same result must have followed.

24. It is abundantly clear as it is submitted, that the bank under the agreement in question, had a perfect right to hold the collateral paper and its proceeds, if and when collected, until they had ranked upon the debtors' general estate for their whole debt, and received the utmost dividend possible out of it. It was a security for any ultimate balance which might afterwards remain due.

25. Mr. Justice Maclennan, who dissented from the majority in the Court below, is of opinion that the moment the last instalment of the principal obligation matured, that which up to that moment had been (whether in the shape of customers' paper or of moneys realized from collection of it) security only, became *payment*. No authority was cited for such a proposition. If it is a sound proposition of law, then a bank advancing moneys and taking security of this nature, has only to make a trifling portion of the debt—say five shillings—due at the expiration of fifty years in order to enable it to enforce its remedies in every direction with perfect safety. All the collateral security held may be realized, carried to suspense account, and held to meet any ultimate balance due after exhausting all other remedies, and such a banker may, in fact, assert every right for which the bank here contends, while a banker next door, who has preferred lending at short dates, must the moment the last instalment of the principal obligation falls due, carefully carry the

proceeds of all collaterals to the credit of his debtor, and rank upon the debtor's general estate for the balance only. It is submitted that no such rule can be maintained upon principle or authority.

26. Another suggestion which has been made, is that the moment the collateral paper held is paid by the person primarily liable, the proceeds of such paper become payment; though before such payment the paper itself was undoubtedly security only, and formed no obstacle in the way of the assertion by the creditor of all his rights against the debtor's general estate. This proposition may not unfairly be submitted to a similar test. A borrows $1,000.00 from B, and on the same day borrows another $1,000.00 from C. D, who is A's debtor, has given him two notes for $500.00 each, one payable at a month, the other at a year. A hands D's short-dated note to B as collateral security to the advance made by him, and hands D's long note to C as collateral security to the advance made by him. Within a month A becomes insolvent, and his general estate will pay 50c. on the dollar. D's short note is paid to B at maturity. B is only permitted to rank for $500.00 upon A's general estate, and loses $250.00. C, however, holding the long-running security, ranks on A's estate for his whole $1,000.00, gets his $500.00 out of that estate, and at the expiration of the year D pays him the other $500.00. And yet nine business men out of ten would have said that B held better security than C.

27. It is submitted that whether the security remains in its original shape as commercial paper, or ripens into its legitimate fruit—money—can make no difference.

28. Upon this branch of the case the respondents will rely upon the following cases:

Bonser *v.* Cox, 6 Beav. 84.
U. S. *v.* Lewis, 92 U. S. 618.
Bank of Australasia *v.* Wilson, L. R. 1893, Ap. Cas. 181.
Beaty *v.* Samuel, 29 Gr. 105.
Eastman *v.* Bank of Montreal, 10 O. R. 79.
Young *v.* Spiers, 16 O. R. 672.
Ex p. Wilson, 1 Atk. 109; 2 Ves. Sr. 113.
Ex p. Bank of Scotland, 2 Rose 197; 19 Ves. 310.
Ex p. Reed, 3 D. & C. 481.
Ex p. Phillips, 1 M.D. & D. 232.
Rhodes *v.* Moxhay, 10 W. R. 103.
Athill *v.* Athill, L. R. 16, C. D. 211.

GEO. F. SHEPLEY,
Counsel for Respondents.

Reasons for Judgment in the Supreme Court.

The Chief Justice: The facts which have given rise to this appeal, and as to which there is no dispute, may be stated as follows: The appellants, Cooper & Smith, in June, 1891, carried on business in partnership in Toronto. The respondents are a bank having a branch or agency office at the same place. The appellants having applied to the respondents for a line of credit, the respondents' manager, Mr. Pipon, on the 13th June, 1891, wrote and addressed to the appellants a letter in the terms following:

"I am pleased to inform you that our Board have granted you a line of "credit to $150,000.00, to be secured by collections deposited, rate 6 per cent, "one-quarter commission on all checks and collections outside of this city, as "agreed upon with your Mr. Mason.

"Yours truly,

"C. A. PIPON, Manager.

"The meaning of the above is not that the advance shall be fully covered "by collections, but as near as you can."

In the interval between the date of this letter and the 24th of August, 1893, when the appellants stopped payment, the respondents made large cash advances to the appellants. These advances were made in the way of discount by the respondents of the appellants' promissory notes. The appellants, in conformity with the terms of the letter of the respondents' manager of the 13th of June, 1891, handed to the respondents from time to time large numbers of their customers' notes, as collateral security for the advances so made. A list of these collateral notes was kept in a book, to which the appellants' book-keeper affixed the following memorandum:

"The notes enumerated in this book are deposited with the Molsons "Bank as collateral security for advances made by the bank in discounts and "overdrafts."

The collateral notes so deposited, as they matured, were from time to time withdrawn by the appellants for collection, other similar notes, all being paper received by the appellants from their customers, being substituted for those so withdrawn.

In August, 1893, the appellants stopped payment. At the time of their failure the respondents held ten promissory notes of the appellants, maturing at various dates between the 4th of September and the 14th December, 1893, for the aggregate amount of $145,000.00. All of these notes had been discounted by the respondents, and the appellants had received the proceeds. The appellants were also indebted to the respondents in the sum of $1,907.00, being the balance of their overdrawn account.

The respondents, at the date of the appellants' failure, held as collateral securities, under the agreement of June, 1891, customers' notes, which the appellants had deposited with them to the amount of about $105,000.00. Of course no withdrawal of these collateral notes was permitted by the respondents after the suspension. From that date these notes were collected by the respondents directly, and the question involved in this appeal is, what application the respondents were bound to make of the moneys so received. As

the principal notes fell due the bank sued the appellants upon them and recovered judgments, and before the end of September, 1893, they had recovered five several judgments upon five of the appellants' notes, for sums aggregating $83,000.00. In the first of these actions, in which judgment was recovered on the 14th of September, 1893, the respondents sued upon a note for $30,000.00, due on the 4th of that month, and in that action gave the appellants credit for $6,921.32, the amount which had up to that time been collected on the collateral notes. In the subsequent actions, however, the bank did not credit the moneys which they had in the meantime collected on the collaterals, and they issued executions for the full amount of all their judgments. The proceeds of the collaterals the bank retained as a reserve fund, carrying it to the credit of the appellants in what they called a "suspense account."

Under the respondents' executions, and the executions of other creditors of the appellants, the Sheriff seized a large quantity of goods and chattels, the property of the appellants, and having sold the same held the proceeds for distribution under the Creditors' Relief Act, the amount realized not being sufficient to pay off all the execution creditors in full.

On the 4th of October, 1893, the appellants made not a general but a specific assignment for the benefit of their creditors of certain book debts and other credits and property not comprising such as had been seized by the sheriff.

On the 27th November, 1893, the respondents commenced an action against the appellants upon another promissory note (the sixth) which had fallen due on the 22nd of September, 1893, for $5,000.00, and also for $1,907.00, the amount of the overdrawn account.

In the beginning of November, 1893, the appellants raised the contention that they were entitled to have credit upon the executions in the Sheriff's hands, for money up to that time collected by the bank on the collateral notes, amounting, as it was alleged, to about $17,000.00, and an application was made to compel the respondents to give such credit to the Master-in-Chambers who refused the application, which refusal having been upheld on appeal to Mr. Justice McMahon in Chambers, the appellants further appealed to the Divisional Court of Queen's Bench. Upon this last-mentioned appeal the Divisional Court, on the 29th December, 1893, made an order discharging the order of the Master and that of Mr. Justice McMahon confirming it, and directing an issue to be tried upon the question:

"Whether, before or since the recovery of the judgments above men-
"tioned 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 so applied, and to what extent?

This issue, together with one which had been previously directed by an order of Judge McDougall, the County Court Judge, to the same effect, was tried before Mr. Justice Rose on the 13th of April, 1894, who, having reserved the case for consideration, subsequently, and on the 20th April, found that the respondents had not received any payment which they were bound to apply as contended, and subsequently an order was made, dated the

23rd of May, 1894, declaring that the respondents, up to the 20th April, 1894, had not received any payments, which either at the time of the receipt thereof ought to have been, or at the date of the said order ought to be applied in satisfaction, in whole or in part, of the judgments or any of them.

The present action was commenced on the 2nd of June, 1894. It was brought to recover the last four of the ten notes, aggregating $50,000.00, which all fell due in December, 1893, and the defence set up was payment or satisfaction, in whole or in part, by the money received by the respondents on the collateral notes. The appellants also, by way of counter-claim, prayed for an account of what the bank had collected on the collateral notes and for a declaration that the appellants were entitled to credit on the notes discounted for all sums received by the respondents on the collateral notes, and were entitled to thereafter receive credit on the appellants' notes sued upon, for all moneys the respondents might thereafter collect on the collateral notes or any of them.

The respondents joined issue on the statement of defence and did not reply specially either to the defence or counter-claim. At the trial of the action on the 18th of April, 1895, it was admitted that the bank had, up to that date, received upon the collaterals, over and above the sum of $6,921.32 which was credited in the action on the first note, the sum of $82,135.00, none of which had as yet been applied in any way to reduce the debt due by the appellants. Mr. Justice Rose, who tried the action (without a jury) gave judgment for the respondents for the full amount of the notes sued upon, holding that the respondents were not obliged to credit the money in their hands against the notes in question, but were entitled to retain the fund so realized as a reserve fund, carrying the amount to the credit of a "suspense account," thus following his previous decision on the trial of the issue, which the learned Judge considered *res judicata* of the question involved. The appellants appealed from that judgment to the Divisional Court, which Court set aside the judgment and dismissed the action, for the reasons stated in a judgment delivered by Mr. Justice Street, in which it was held that the respondents were bound to apply the money in reduction of the appellants' debt to the respondents, and that no such application having been previously made, it ought to be applied *pro tanto* in payment of the notes sued upon.

I have taken the foregoing statement of the facts, which are in no way disputed, from the judgments of Mr. Justice Maclennan and Mr. Justice Street.

The respondents then appealed to the Court of Appeal, and that Court allowed the appeal and restored the judgment of Rose, J. The present appeal is from this order.

From this judgment of the Court of Appeal Mr. Justice Maclennan dissented.

The learned Chief Justice and Mr. Justice Burton held that the bank were not bound to apply the money received from the collateral notes, but were entitled to hold that money as a reserve fund carried to the credit of a suspense account.

Mr. Justice Osler proceeded entirely upon the ground of estoppel, holding

that the judgment on the trial of the issue operated as *res judicata* of the question involved in the present action.

Mr. Justice Maclennan was of opinion that the respondents had a right to hold the money which they had received from the collateral notes in suspense until all the notes became due, but that as soon as the notes which were sued on in this action (which were the last in point of date to become due) had matured, the bank ought to have applied the funds in their hands to the reduction of the aggregate debt.

The object of the bank in not applying the money received by them was in order that they might prove for their whole debt unreduced by any payments, and so obtain a larger dividend of the money levied under the execution, and remaining in the Sheriff's hands to be applied on the executions *pro rata* under the Creditors' Relief Act.

Although the bank credited the amount they had collected from the collaterals to an account in its books called a suspense account, it does not appear that they set apart the fund or separated it in any way from their other moneys with which they carried on their business as bankers. The presumption, therefore, is that they have been and are making profits of this money belonging to the appellants, for which they rendered no account to the appellants and gave them no credit by way of interest or otherwise, whilst at the same time they are seeking to charge the appellants with interest on the judgments which they have recovered.

As regards the point of estoppel, I am of the opinion that it constitutes no answer to the counter-claim of the appellants. Under the system of pleading introduced by the Judicature Act, it has been decided that *res judicata* as a defence, or as a reply to a counter-claim, must be specially pleaded. This was decided by the English Court of Appeal in the case of Edevain *v.* Cohen, 43 Ch. D., 187.

This consideration alone is sufficient to dispose of the question of estoppel, and upon it I am of opinion that we ought to decide this point against the respondents, for, having regard to the way in which the appellants were forced in the trial of the issues, which involved no question of fact but a mere question of law, no amendment ought to be permitted. Further, I agree with the view of Mr. Justice Maclennan, that the question litigated in this action, brought to recover on notes which were not even due when the issue was directed, cannot be considered as the same identical question as that involved in the issue, although it may depend upon the same principle of law, and might, therefore, according to the established rules of judicial comity, be binding upon inferior tribunals and courts of co-ordinate jurisdiction, though not, *res judicata*, binding upon appellate jurisdictions. I consider, therefore, that the whole question as to the rights of the appellants and the obligations of the respondents as to the application of this money in the hands of the latter, derived from the collaterals, is at large.

I entirely agree with the proposition that a creditor holding a collateral security—by which term I understand a security co-ordinate with the obligation for the principal debt, and co-ordinate with any other security held for that debt, and not as implying a secondary or subordinate security only to be

resorted to after prior securities have been exhausted—(Athill *v.* Athill, 16 Ch. D., 211) cannot be compelled by his debtor to release his security by turning it into money to be applied in reduction of the debt, but is at liberty to sue for and recover the full amount of his debt whilst continuing to hold his security unrealized. This was always the law in a case of mortgages, and was acted on in the administration of assets until altered by Statute.

The creditor had the right to reserve any security which had not been liquidated or realized, in order that he might exercise his own judgment as to the most advantageous time and manner of realizing it.

The remedy of the debtor, if he objected to such reservation, was to pay the debt in full, and thus redeem the security. The principle upon which courts of equity acted was, that the mortgagee or secured creditor was entitled to make the most of his securities.

Thus a mortgagee out of possession was entitled to proceed (to the great oppression of the debtor, it is true) concurrently with an action on the covenant, an action of ejectment and a bill of foreclosure; and, in practice, these concurrent proceedings were generally resorted to. As Sir W. Page Wood, L. J., says in Kellock's case (3 Ch. App., 776): "Courts of equity "allow the mortgagee to proceed at one and the same time with a bill to "foreclose, an action on the covenant and an action of ejectment. They "do so upon this principle, that the mortgagee has a right to say, 'The "bargain by my debtor is that he will pay me, and I am entitled to insist "upon that. I have also the pledge in my hands, which no one can take from "me without paying me in full; and it is for me to say when I will choose to "realize that pledge.' The pledge may be of very great value at one time and "not of much value at another time, and the bankruptcy rule prevents the "creditor from taking any benefit by his personal demand against the debtor, "except on the terms of selling at a time when the property pledged may, "perhaps, not sell for half as much as it would fetch if the creditor could "choose his time for realizing it."

In the case of Mason *v.* Bogg (2 Mylne & C., 447) the question arose before Lord Cottenham what were the rights of a creditor who held a security in the case of the administration of assets under a decree where the estate was insolvent. It is contended against the creditor that, in such a case, he was bound first to realize his security; or, as in bankruptcy, to value it, and then restrict his proof in the administration suit to the balance. This contention was, however, repelled by the Lord Chancellor, who thus laid down the rule: "A mortgagee has a double security. He has a right to proceed against both "and to make the best he can of both. Why he should be deprived of this "right because the debtor dies, and dies insolvent, it is not very easy to see."

This rule has since, both in England and the Province of Ontario, been altered by Statute as regards administration suits, and the rule which always prevailed in bankruptcy procedure, requiring the creditor to value or realize his security, and give credit for the valuation or amount realized, has been substituted for it.

In Kellock's case (3 Ch. App., 776) the question arose in the winding-up proceedings, and it was there held by the Lords Justices that the creditor was

not bound to follow the bankruptcy rule, but was entitled to the benefit of that which prevailed in the Court of Chancery in administration suits. This rule, which entitles a secured creditor to choose his own time for turning his security into money, has, however, no application to the case of a creditor who had actually realized his security. In such case, the money coming into the creditors' hands must be treated as payment in full, or *pro tanto*, as the case may be, for the reason of the rule that the creditor is not bound to realize his security, but may retain the same in order that he may sell to the best advantage, then ceases to exist.

Another rule, which at first sight would seem to furnish an argument for the respondents here, was that the creditor is not bound to accept a partial payment. It is his right to say to the debtor, "I will not be paid in dribblets. "Pay me in full and redeem my security, or leave me to do the best I can "with it."

To apply these principles to the present case, I quite agree that so long and so far as the collateral notes remained unpaid in the respondents' hands there was no obligation to give any credit in respect of them, and the bank was entitled to sue for and recover judgments for the full amount of the direct notes constituting the principal debt due to them by the appellants. So soon, however, as money came into their hands by the payment of the collaterals, which they were bound to use due diligence in enforcing payment of, they were in the position of a creditor who had agreed to receive and who had received a partial payment and were bound to appropriate those moneys in the payment, in the first place, of interest, and then to the reduction *pro tanto* of so much of the principal debt as had fallen due.

In the first instance the bank did this by giving credit in the first action which it brought for the sum then in hand received from collaterals. The device of carrying moneys so received to the credit of a suspense account seems to have been an after-thought resorted to for the purpose of obtaining a larger dividend out of the fund in the hands of the Sheriff.

That the receipt by a creditor of the proceeds of a collateral security is to be treated as a payment is shown by the case of Peacock *v.* Pursell, 14 C. B., N.S., 728. There the creditor had been asked to accept a current bill of exchange, of which the debtor was the holder, in part payment, the balance of the debt being paid in cash. The creditor refused to accede to this, but agreed to retain the bill as collateral security. When the bill became due it was not paid and the creditor, by neglecting to give notice of dishonor, lost recourse upon the drawer. The Court held that by this neglect the creditor was in the same position as if the amount of the bill had been paid to him. The Court there treated the case as one in which the bill had been paid, held that a payment would have operated *ipso facto* in satisfaction of the debt without requiring any act of appropriation by the creditor.

Erle, C. J., says: "The legal effect of taking a bill as collateral security "is, that if when the bill arrives at maturity the holder is guilty of laches and "omits duly to present it and give notice of its dishonor, if not paid, the bill "becomes money in his hands as between him and the person from whom he "received it. That being so, the plaintiffs' debt is satisfied."

Wills, J., delivered judgment to the same effect, saying: "But if the "creditor, when the bill falls due, is guilty of laches, whereby the security "becomes deteriorated or valueless, it becomes equivalent to actual payment. " . . . By their laches the plaintiffs have converted this into a money "payment."

This case shows clearly that if a creditor accept from his debtor a negotiable security, the amount of which is afterwards paid to the creditor by a party to the bill, that operates at once as a payment of the principal debt.

It may be said, however, that whilst that may be so where the amount realized from the collateral security is sufficient to satisfy the whole debt, yet where it is not equivalent in amount to the principal debt, the creditor is not bound to treat it as a partial debt, since he is not obliged to accept payment in dribblets. Had I not been successful in finding an authority directly in point I should, however, nevertheless have considered that a creditor who takes a collateral for less than the amount of his debt, impliedly agrees that the money realized from such security shall be treated as a partial payment.

This, indeed, was the decision of the Court in Benning *v.* Thibaudeau, a case decided upon an appeal from the Courts of the Province of Quebec, but depending upon principles of law identical with those we have to apply in the present case. Moreover, the result of a contrary decision would, as will be made apparent hereafter, have been so unjust and unreasonable to the debtor and his other creditors that for that reason it was considered inadmissible. Whilst I say this of Benning *v.* Thibaudeau (20 Can. S. C. R. 110), I am far from saying that, decided as it was upon the law of Quebec, it was a decision directly binding upon the Court of Appeal.

The case of Thompson *v.* Hudson (L. R. 10, Eq. 497) is, however, a case directly in point in the appellants' favor.

The defendant in that case, in order to secure two several debts to the North-Eastern Railway Company, had made two separate mortgages to trustees for the railway company. By the rule prevailing in Courts of Equity which has obtained the denomination of the consolidation of securities, the mortgagees, having their two mortgages in hand, were entitled to treat the two debts as consolidated into one single liability, and for that consolidated debt to hold both the mortgaged estates as security for the aggregate debt, as was contended by the defendants' counsel, and contended by counsel for the plaintiff in the case of Thompson *v.* Hudson.

The mortgagees there having sold, under their power of sale, one estate for a price less than the whole amount of the debt, sought to do precisely what the respondents seek to do here, viz., to hold the money so produced by the sale of part of the security as a reserve or suspense fund, and to go on charging interest on the whole debt, treating the money accruing from the sale as money which they were not bound to deduct from their debt.

The Chief Clerk took the account on this footing, but on appeal to the Master of the Rolls the contrary was determined, and that for reasons entirely applicable to the present case. Sir Roundell Palmer and Sir R. Baggally, arguing for the mortgagees, insisted that "the principle is that a mortgagee "is not bound to receive payment of his debt by dribblets." The observations

of the Master of the Rolls have a direct bearing upon the contention of the bank in the case before us, viz., that it is entitled to hold the money it has derived from the collaterals as a reserve fund put in a suspense account, whilst the money itself, as we are entitled to presume, is mixed with the general funds of the bank, and used in carrying on its banking business, a presumption which the device of bookkeeping resorted to does not remove.

Lord Romilly, M.R., says: "The railway company had then in hand "upwards of £20,000.00 after all interest and costs had been paid, which was "the property of Hudson. What were they to do with it? They might pay it "over to him; they were not bound to do so. But I think it impossible that "they can contend that they are entitled to keep this money, to make interest "upon it for ten years and still to charge interest on the whole amount due to "them on the larger sum. . . . It is a case of this description: A mort-"gagee in possession, with a power of sale, sells a large portion of the estate— "say over half—and receives purchase money sufficient to pay all interest and "costs, and half the principal due. Can the mortgagee say, I will charge "interest in future on the whole debt and only allow the mortgagor the rents "received for the unsold moiety, and nothing in respect of interest on the money "received and employed by the mortgagee? I think not. I am of opinion, "therefore, that the third exception must be allowed, and that the proper mode "of adjusting the account in such a case is to wipe off so much of the principal "as the surplus of the purchase money, after payment of interest and costs, will "discharge, and then go on with the account as against a mortgagee in posses-"sion with an altered and diminished debt. See what injustice a different "rule would inflict. . . . It is true, as said by counsel for the railway "company, that a mortgagee is not obliged to accept payment of part of the "debt, and that the whole must be paid if any; but then why do they retain "£20,000.00 belonging to Mr. Hudson? If they merely kept down the interest "and paid the balance over to Mr. Hudson I should assent, but not when they "actually keep in their hands and make interest on the sums received at a "rate, if employed in the conduct of the railway, as I assume it to have been, "at least as great as they are able to charge Mr. Hudson on this account."

The order made by the Master of the Rolls was that the purchase money received by the mortgagees should be deducted from the capital secured by the mortgage.

This case in all essential principles appears to me to be an authority for the appellants in the present case, and to show conclusively that if the bank proposes (as of course it does) to retain the moneys coming into their hands as the proceeds of the collateral notes, they were bound to apply those moneys in reduction of their debt, as well to such parts of it as are in judgment as to such not recovered, by first crediting these receipts on the interest and deducting the balance from the principal of the debt due them by the appellants. The proposal to retain the money in a reserve fund until it is to the advantage of the bank to apply it (that is, for an indefinite time, for none of the learned Judges in the Court of Appeal suggest any determinate time at which the appropriation ought to be made) is totally inadmissible consistently with what is laid down as law in Thompson *v.* Hudson.

As to the case decided by the Privy Council of the Commercial Bank of Australia *v.* Official Assignee of Wilson (1893), A. C. 181, it has, in my opinion, no application whatever to the present appeal; the bank in that case were not bound to apply the funds which the guarantors had placed in their hands under an express agreement that it should not be applied in payment of the debt of the principal debtor.

The appeal must be allowed, the order of the Court of Appeal and also that of the Divisional Court discharged, and a judgment based upon the counter-claim entered, declaring that the appellants are entitled to have all moneys received by them as the proceeds of promissory notes lodged by them with the respondents as collateral security under the agreement of the 13th of June, 1891, in the pleadings mentioned, duly applied and credited to them in account, the said moneys so received being first applied in payment of interest and the balance in the reduction of principal. The judgment must further direct that an account be taken upon the principle above indicated, and that the judgments and executions issued by the respondents do stand as security only for the balance found to be due to the respondents on taking the account directed.

The respondents must pay the costs of this action in this Court and in all the courts below, up to the present time, such costs to be deducted from the amount found due to the respondents.

Further directions and subsequent costs must be reserved.

Taschereau, J.: I am of opinion that the appeal should be allowed with costs. I adopt the reason of Street and Maclennan, JJ., in the courts below.

Sedgewick, King, and Girouard, JJ., concurred in the opinion of the Chief Justice.

No. 35.
Respondents' Factum on Speaking to the Minutes.

Respondents' Factum on Speaking to Minutes of Certificate.

1. The judgment pronounced by Mr. Justice Rose at the trial of the issue directed by the Divisional Court (page 45 of Case), declares that the moneys collected by the respondent bank upon the collateral notes, which are the subject of the present discussion, up to the date of that judgment, 20th April, 1894, are not applicable in satisfaction of the four judgments which had theretofore been recovered.

2. The subsequent order of the Divisional Court (page 48 of Case) affirms this declaration in terms.

3. Apart altogether from any application of the doctrine of Estoppel, either to the moneys *subsequently* collected upon the collateral notes or to the portions of the debt *subsequently* maturing, it is submitted on behalf of the respondent bank that this adjudication is conclusive with regard to the judgments which had *then* been recovered, and the contention that the moneys which had *then* been collected on the collaterals should be applied *pro tanto* upon those judgments.

RECORD.

In the Supreme Court of Canada.

No. 35. Respondents' Factum on Speaking to the Minutes —*continued.*

4. The judgment upon the trial of the issue and the order of the Divisional Court made thereunto, are not now open to review, no appeal ever having been made therefrom, and are conclusive with regard to all matters which were then ripe for adjudication, and were then actually adjudicated upon.

5. The immediate subject of the decision of Mr. Justice Rose upon the issue directed by the Divisional Court, and of the order of the Divisional Court made thereafter, was the alleged obligation of the bank to apply the moneys collected on the collaterals up to the 20th April, 1894, in satisfaction *pro tanto* of the judgments which, before that date, had been recovered, and it is submitted that the judgment now being settled will not be permitted to defeat that former adjudication by withdrawing from its operation that which was its immediate subject.

6. It is therefore submitted that the certificate now being settled should not interfere with the result of that former decision, but should be confined to an adjudication with respect to moneys collected upon the collaterals *after* 20th April, 1894, and their application upon so much of the debt as was not in judgment prior to 20th April, 1894.

7. In the alternative, it is submitted that the certificate now being settled should, if it deals at all with moneys collected on the collaterals prior to 20th April, 1894, be confined to directing their application to that portion of the debt not in judgment prior to 20th April, 1894, and, if it deals at all with the judgments recovered prior to 20th April, 1894, should be confined to directing the application thereon of moneys collected upon the collaterals subsequently to 20th April, 1894.

No. 36. Appellants' Factum on Speaking to the Minutes.

Appellants' Factum on Speaking to Minutes of Certificate.

1. The collections by the bank on collaterals up to 20th April, 1894, amounted, the bank says, to about $75,000.00.

2. If the bank's contention be correct, namely, that the collections on collateral securities up to the 20th April, 1894, are not applicable in satisfaction of the $83,000.00 of judgments by reason of Judge Rose's judgment, then the appellants contend that that that ?udgment is binding on the respondents as well as on the appellants, and the appellants are entitled to claim that the amount of the money in the hands of the bank unapplied by them on the bank's debt not in judgment, viz., at most, $55,000.00 are moneys received by the bank for the use of the appellants, and ought to be directed to be paid over to them, and that the necessary amendments be allowed to be made by appellants in their counter-claim asking judgment in their favor for such excess. This would produce practically the same result as is accomplished by the certificate as settled by the Registrar of the Supreme Court. The only difference would be that the bank would then in their interest apply to set off the balance of the $83,000.00 of judgments against the judgment in favor of Cooper & Smith. If such a variation be made in the judgment of the Supreme Court, the appellants in that case would not only have succeeded in resisting

the plaintiffs' claim in this action *in toto*, but also in obtaining a substantial judgment on their counterclaim, and they submit that the judgment should be then further varied by a direction that the bank pay the appellants' costs without any clause permitting the bank to set off in such a way as to deprive the solicitors of their lien for costs.

3. The bank admits having received on collections up to the 20th of April, 1894, the sum of about $75,000.00, exclusive of interest. If the $75,000.00 is not, as contended by the bank, to be applied upon the existing judgments, but only upon the rest of their claim amounting to, at most, $55,000.00, what does the respondent say should be done with the remaining $20,000.00? It cannot be contended that the bank can keep it. Respondents' *factum* makes no suggestion as to what disposition is to be made of it.

4. The bank not having pleaded, and having been refused permission to plead the judgment of Rose, J., it cannot now ask in the present certificate of judgment to get any variation by reason of that judgment.

5. The foregoing is sufficient to dispose of the respondents' contention. But the appellants further submit that both Judge Rose's judgment and the judgment of the Supreme Court can exist without conflict for the following reason :

At the time Mr. Justice Rose tried the case, no action or counterclaim was pending wherein Cooper & Smith claimed an account from the bank. No defence had been put in to the actions brought by the bank, who obtained their judgments for the full amount of the notes then due. The position of the matter is now entirely different from what it was at the time Mr. Justice Rose tried the issue which was directed to him. The appellants' contention was, as set forth on page 100 of the judgment of the Chief Justice of the Supreme Court, that they were entitled to have credit upon the executions then in the Sheriff's hands. This was a Chamber application, which eventually went to the Queen's Bench Division, by whom the issue was directed. Mr. Justice Rose was trying the same point as came before the Master in Chambers. The bank was seeking to get a dividend on their judgments in respect of the money then in the Sheriff's hands. The bonk got benefit of their contention in the issue tried by Rose, J., namely, to rank on the moneys then in the Sheriff's hands.

In this present action, however, a distinct counter-claim has been set up, upon which Cooper & Smith are entitled to judgment for the amount of money the bank received for their use. It is not to be assumed that if Mr. Justice Rose were trying an *action* brought by Cooper & Smith against the bank, or were trying a counter-claim set up by Cooper & Smith, he would have decided against Cooper & Smith. All that Mr. Justice Rose decided was that in the then circumstances of the case, and on the record before him with its limited issue, the appellants could not reduce the bank's then claims already in judgment so as to reduce the amount of the bank's dividend from the Sheriff. The appellants' rights now are much greater in an action than on a claim not in suit or not in judgment.

6. The respondent is now seeking to change the unanimous judgment of the Supreme Court. The appellants submit that this cannot be done.

RECORD.

In the Supreme Court of Canada.

No. 37.
Formal Certificate of Supreme Court.

In the Supreme Court of Canada.

Wednesday the 9th day of December, A.D. 1896.

Present:

The Honourable Sir Henry Strong, Knight, Chief Justice.
" " Mr. Justice Sedgewick.
" " Mr. Justice King.
" " Mr. Justice Girouard.

The Honourable Mr. Justice Taschereau being absent his judgment was announced by the Honourable the Chief Justice, pursuant to the statute in that behalf.

Between

Cooper & Smith, James Cooper and John C. Smith, *(Defendants) Appellants*,

and

The Molsons Bank, - - - *(Plaintiffs) Respondents.*

The appeal of the above named appellants from the judgment of the Court of Appeal for Ontario, pronounced in the above cause on the fourth day of February, in the year of our Lord one thousand eight hundred and ninety-six, reversing the judgment of the Queen's Bench Division of the High Court of Justice for Ontario, rendered in the said cause on the thirteenth day of June, in the year of our Lord one thousand eight hundred and ninety-five, having come on to be heard before this Court on the twenty-first and twenty-second days of May, in the year of our Lord one thousand eight hundred and ninety-six, in the presence of counsel as well for the appellants as for the respondents; whereupon and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment,

1. This Court did Order and Adjudge that the said appeal should be and the same was allowed, and the said judgments of the said Court of Appeal and of the Queen's Bench Division should be and the same were reversed and set aside.

2. And this Court did further Order and Declare that the promissory notes deposited by the appellants with the respondents, as collateral security, were so deposited under an agreement dated the thirteenth day of June, in the year of our Lord one thousand eight hundred and ninety-one, as collateral security for advances made by respondents to appellants in discounts and over-drafts, and that the appellants are entitled to have all moneys received, or to be received by the respondents, as the proceeds of such notes, duly applied and credited to them in their account with the respondents, and whether said account is in judgment or not, as payments thereon, and that the said moneys that have been so received be first applied in payment of interest, and the balance in reduction of principal of the dates of the receipt of said moneys.

3. And this Court did further Order and Adjudge that it be referred to a referee, or other proper officer of the High Court of Justice for Ontario, to take an account of the indebtedness of the appellants to the respondents, and to ascertain and state what is the balance owing by the appellants to the respondents after crediting all moneys the respondents have received on said collateral notes and all other moneys received in payment by the said respondents.

4. And this Court did further order and adjudge that the respondents do pay the appellants' costs of this action in this Court, and in all the Courts below up to and inclusive of this order, and of the entry of the judgment thereon, by deducting the amount of such costs from the amount that may be found due to the respondents by said referee or officer of the Court below.

5. And this Court did further order and adjudge that the judgments heretofore recovered by the respondents against the appellants and the executions thereon, be reduced to the amount that the said referee, or other officer, shall so find to be due, less also the costs aforesaid.

6. And this Court did further order and adjunge that the respondents' action be dismissed.

7. And this Court did further order and adjudge that the question of further directions and subsequent costs be reserved until after the said referee or other officer shall have made his report.

ROBERT CASSELS, Registrar.

In the Supreme Court of Canada.

No. 38.
Registrar's Certificate to Record.

Certificate by Registrar of Supreme Court.

I, Robert Cassels, hereby certify that the printed document annexed hereto, marked "A," is a true copy of the original case filed in my office in the above appeal; that the printed documents also annexed hereto, marked "B" and "C" are true copies of the *factums* of the appellants and respondents respectively deposited in said appeal, and that the document marked "D," also annexed hereto, is a true copy of the formal judgment of this Court in the said appeal;

And I further certify that the document marked "E," also annexed hereto, is a copy of No. 5 of Volume 6 of the Supreme Court Reports, containing a true copy of the reasons for judgment delivered by the judges of this Court in the above appeal.

ROBERT CASSELS, Registrar.

Dated at Ottawa, this 27th day of April, A.D., 1897.

In the Privy Council.

No. — of 1897.

An Appeal from the Supreme Court of Canada.

BETWEEN

THE MOLSONS BANK (*Plaintiffs*) *Appellants,*

AND

COOPER & SMITH, JAMES COOPER AND JOHN C. SMITH

(*Defendants*) *Respondents.*

RECORD OF PROCEEDINGS.

POOLE & ROBINSON,
15 Union Court, Old Broad Street
for Appellants.

S. V. BLAKE,
17 Victoria Street,
for Respondents.

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