Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Molson's Bank v. *Cooper and Smith, from the Supreme Court of Canada, delivered 9th March* 1898.

Present :

THE LORD CHANCELLOR.
LORD HERSCHELL.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by the Lord Chancellor.*]

IN this case their Lordships are of opinion that the Appeal ought to be dismissed with costs. Their Lordships think it is right that in the first instance it should be pointed out that this Appeal has not been argued on the question of *res judicata*. Their Lordships do not consider that it was open to the Appellants, here, to argue that question. No leave to appeal on that subject was, certainly, intended to be given, and their Lordships, in view of what took place on the Application for special leave to appeal, are of opinion that no such leave was given.

The only question, therefore, before their Lordships at present is, what is to be done in reference to the Judgment which has been delivered on points other than those involved in the question of *res judicata ;* and on these points their Lordships are of opinion that the matter is not open to doubt. The whole question turns, first of all, on the construction to be placed upon the contract between the parties. That consisted of a letter written by the Bank to the Defendants in the action : "I

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" am pleased to inform you that our Board have " granted you a line of credit to $150,000, 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." It appears that the Bank had, at the time when the question arose, in pursuance of that contract, and by collections, received and realised sums amounting to $83,000. They brought an action which appears, together with what they had received already in that respect, to have represented $145,000, namely, the entire amount which was said to be due. This raises the question whether they are entitled to treat those sums of money which they have received in fact upon the realisation of these so-called securities, as not having been received and to recover in respect of the entire amount of the indebtedness, treating the indebtedness as $145,000. Their Lordships are of opinion that no such right can possibly exist. The bargain between the parties is intelligible enough, and is a very common one; that an overdraft should be allowed, and that cheques, bills, and securities, and so on should be deposited. The parties apparently have made their meaning very clear by saying that " The meaning of the above is not " that the advance shall be fully covered by " collections, but as near as you can." The facts upon which their Lordships have to proceed are found in a way that is not disputed, namely, that this sum of $83,000 dollars had been received. The Chief Justice says that " 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." It is not quite certain that it is very important whether that was so or not. It puts in a more striking light, perhaps, the injustice which would be done by enabling the Bank to do as they have thought proper to do; but what strikes their Lordships is that if they received the money, or if they turned their securities into money at the time that they did receive those securities or at the time they received the money, it is impossible to say that the indebtedness between themselves and their debtor, was otherwise than diminished by the amount of money which they put into their pockets. It is a very simple matter if looked at in that way; and one source of the confusion, that has apparently arisen in the course of some of these judgments and the arguments upon them, is, that the word " security " has been somewhat inaccurately used. When the collection was made by the Bank, they were realising their securities, in this sense, that the cheques or bills, or whatever they were, that were handed to them, they turned into money. When they turned them into money they were the Creditors, and they could not help diminishing *pro tanto* the indebtedness between themselves and their Debtor, when they had got the money which those securities represented in their hands. Such a thing never was heard of as turning the security into money and then claiming to have the original debt remaining at the original sum at which it previously existed. Their Lordships are of

opinion that the only question which could have arisen, and ought to have arisen, at the time that this action was tried, was the amount of indebtedness between the Plaintiffs and the Defendants. Nothing that could have been said or done at that time, either the solvency or the insolvency of the Defendants, or the question of what has been described as the ranking right before the Sheriff, when the Judgment was ultimately arrived at, could have affected the question of the amount of the Judgment which ought to have been recovered at the time this action was tried; and, indeed, the Sheriff would have no jurisdiction to deal with the amount of the Judgment. The fallacy throughout has been that this is a sort of accounting in which there is to be a question whether or not the amount at which the debt originally stood was to be treated, for some technical purpose or another, as still existing, and that, at some future time (what time, their Lordships think, has not been accurately stated) there is to be some general accounting in which all these things could be set out. No such question could have arisen or ought to have arisen before the Judge who tried this cause. The question which he had to determine was what was the amount of the indebtedness then existing between the parties; and when that question had been ascertained by proof of what was still due between the Creditor and the Debtor, that was the amount for which Judgment ought to have been given. Really a very simple question becomes somewhat confused when one begins to enter into other questions of some supposed rights of sureties or principals *inter se*. No such questions arise. The things which were handed over as securities for the debt were realised and turned into money, and when the Creditor is suing his Debtor for the amount of indebtedness which exists at that time,

the amount the Creditor has received in money in respect of these matters, clearly, must be taken from the debt, because at that moment the debt has been to that extent paid as between these two persons and for that amount, and for that amount only, ought Judgment to have been recovered.

For these reasons, their Lordships think that, the Appeal should be dismissed. The Respondents did not appear by Counsel at the argument, but they lodged a printed case; and costs up to the hearing will be paid by the Appellants to the Respondents.