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Nov. 2.

IN THE MATTER OF THE PETITION OF RIGHT OF FRANCES AMELIA HOGABOOM, GEORGE A. CASE AND CHARLES MILLAR, EXECUTRIX, EXECUTORS AND TRUSTEES OF GEORGE R. HOGABOOM, DECEASED... } SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

AND

ANDREW S. KIRKPATRICK, ONE OF THE CREDITORS OF THE CENTRAL BANK OF CANADA, AND EDWARD STRACHAN COX, ONE OF THE SHAREHOLDERS AND CONTRIBUTORIES OF THE SAID BANK, PARTIES ADDED BY ORDER OF THE COURT TO REPRESENT RESPECTIVELY THE CREDITORS AND THE SHAREHOLDERS AND CONTRIBUTORIES OF THE SAID BANK.

Insolvent bank—Winding-up Act — Sale of unrealized assets—Set-off—Funds in hands of Receiver-General—Estoppel.

Where moneys belonging to the suppliants had gone to form part of a fund paid into the hands of the Minister of Finance and Receiver-General as unadministered assets in the case of the insolvency of a Bank in proceedings under *The Winding-Up Act*, (R. S. C. c. 129) and it was objected that the suppliants were not entitled to such moneys because of judicial decision to the contrary in other litigation in respect to the fund,—

Held that if it was clear that the matter had been really determined, effect should be given to the estoppel; but that where to give effect to it would work injustice, the court, before applying the rule, ought to be sure that an estoppel arises by reason of such decision.

In this case there was no estoppel, and a reference to the registrar was directed to ascertain what proportion of the fund in the hands of the minister properly belonged to the suppliants. The rule as to estoppel stated by King J. in *Farwell* v. *The Queen* (22 S. C. R. 558) referred to.

2. One of the equities or conditions attaching to the sale to H. was that a debtor had a right to set off against his debt the amount

which he had at his credit in the Bank at the date of its insolvency. It appeared that at the time of the Bank's insolvency certain of its debtors had at their credit in the Bank's books sums which they would, on payment or settlement of their debts, have a right to apply in reduction thereof, and the suppliants claimed that they were entitled to be indemnified in respect of such reductions out of the fund in the hands of the Receiver-General.

Held, that the suppliants were not entitled to such indemnity.

PETITION OF RIGHT for the recovery of moneys in the hands of the Receiver-General of Canada by virtue of proceedings taken to wind up the affairs of the Central Bank of Canada under *Revised Statutes of Canada*, chapter 129.

May 17th, June 6th and 7th, 1901.

The case was heard at Toronto.

F. Arnoldi, K.C., for the suppliants, contended that they had no recourse against the liquidators for not making the reductions by way of set-off in favour of the suppliants. That the suppliants were entitled to these reductions being made in their favour is undoubted, but the liquidators having been discharged by the competent authority therefor, we are in no position to re-open the matter against them. Our release is no bar to the recovery of moneys collected by the liqidators for our use and not accounted for by them to us. We say that we have shown that in the fund in the Receiver-General's hands are moneys belonging to us beyond all doubt. Hence we have brought our petition. (He cited *Schofield* v. *Lockwood* (1); *Clark* v. *Justin* (2); *Wood* v. *Doris* (3); *Annesley* v. *Annesley* (4); Ex parte *Symonds* (5); *Knapping* v. *Tomlinson* (6); *Olley* v. *Fisher* (7); *Delap* v. *Charlebois* (8).)

(1) 33 L. J. N. S. 106.
(2) 16 Ont. R. 68.
(3) 11 Ex. 493.
(4) 31 L. R. Ir. 457.
(5) Cox's Eq. Cas. 200.
(6) 18 W. R. 684.
(7) 34 Ch. D. 367.
(8) 22 S. C. R. 221.

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Argument of Counsel

A. H. Marsh, K.C., for the creditors and contributories, (added parties):

The suppliants are estopped by the proceedings held in the High Court. The moneys which had been paid out to them were ordered to be returned into court by them, and they are now in the hands of the Receiver-General for the benefit of the creditors of the bank. (He cited *Shoe Machinery Co.* v. *Cutlan* (1); *Greathead* v. *Bromley* (2); *Barber* v. *McQuaig* (3); *Routledge* v. *Hislop* (4); *Flitters* v. *Allfrey* (5); *Alison's Case* (6); *The Queen* v. *Hartington* (7); *Houston* v. *Sligo* (8); *In re Hallett's Estate* (9); *In re Hallet & Co.* (10); *Hogaboom* v. *Receiver-General of Canada* (11); *Jack* v. *Jack* (12); *Williams on Executors* (13).)

F. E. Hodgins, for the Crown:

If it is true that the suppliants are estopped on their petition by reason of the judgment of the High Court, then the creditors and contributories of the Bank would have been entitled to the money claimed. (He cited *In re The Central Bank of Canada* (14). But if it is too late for them to recover them, then, possibly, the moneys should be paid to those who have not received dividends or were not considered in the winding-up proceedings.

F. Arnoldi, K.C., replied.

THE JUDGE OF THE EXCHEQUER COURT now (November 2nd, 1901) delivered judgment.

The suppliants, by their petition of right, claim to be entitled to a fund now in the hands of the Minister

(1) [1896] 1 Ch. 667.
(2) 7 T. R. 455.
(3) 31 Ont. R. 593.
(4) 2 El. & El. 549.
(5) L. R. 10 C. P. 29.
(6) L. R. 9 Ch. 24.
(7) 4 E. & B. 780.
(8) 29 Ch. D. 448.
(9) 13 Ch. D. 696.
(10) [1894] 2 Q. B. 237.
(11) 28 S. C. R. 192; 24 Ont. A. R. 470.
(12) 12 Ont. A. R. 476.
(13) 9th ed. pp. 1207, 1208.
(14) 30 Ont. R. 320.

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of Finance and Receiver-General of Canada, which was, in the matter of the winding-up of the Central Bank of Canada, paid over to him under *The Winding-Up Act* and certain orders of the High Court of Justice of Ontario, and which he now holds subject to the provisions of that Act. By the forty-first section of the Act it is provided that if after payment over to the Minister of Finance, the money is claimed, it shall be paid to the person entitled thereto. The amount of the fund now held by the Minister is stated to be $3,332.19, or thereabouts, and one of the creditors of the Bank has by order of the court been added to represent in this proceeding the whole body of the creditors, and one of the shareholders and contributories to represent the class to which he belongs.

The late George R. Hogaboom was the purchaser of the unrealized assets of the said Bank as they existed on the 22nd day of July, 1891. It was one of the conditions of sale that the liquidation should proceed in the meantime and that the purchaser of the assets should be bound by the acts of the liquidators in respect to any asset up to the acceptance of the tenders. Hogaboom, by his tender, offered $44,500 cash for all the assets of the Bank as they were on the 22nd of July, 1891, and to accept the cash received by the liquidators after that date in satisfaction of what it was received for. There were, it appears, some differences between the liquidators and Hogaboom as to the acceptance of this tender; but these differences were accommodated and the sale to Hogaboom of the unrealized assets of the Bank, with certain exceptions not now material, was approved and confirmed by the Master-in-Ordinary, and by the Chancellor of Ontario. By these orders (the order of the Master-in-Ordinary being made on the 3rd of October, 1891, and that of the Chancellor on the 23rd of October of the same

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year) Hogaboom was declared entitled to deduct from the amount of his tender for the moneys received by the liquidators between the 22nd day of July, 1891, and the 9th day of September, 1891, the sum of $2500, being part of the sum of $4819, the total amount of such moneys so received by the liquidators between the dates mentioned; and also to deduct therefrom all other moneys over and above the latter sum received and to be received by the said liquidators after the 22nd of July, 1891, and until the transfer of the said assets. It was also, among other things, ordered that the assets of the Bank, so purchased by Hogaboom, should be vested in him "subject to the encumbrances, "if any, existing, or the equities and conditions attach- "ing to any particular asset or assets on the 22nd of "July, 1891." On the 9th and 13th of October, 1891, the following correspondence passed between the solicitors for the liquidators, and the purchaser's solicitors:

"TORONTO, CANADA, October 9th, 1891.

"MESSRS. MORPHY, MILLAR, LEVESCONTE & SMYTH,

"Barristers, &c., Toronto.

Re Central Bank & Hogaboom.

"DEAR SIRS,—The amount of purchase money to be "paid by Mr. Hogaboom is $40,331.30 made up as fol- "lows:

"Purchase money, less deduction for cash received by the liquidators up to the 9th September..		$42,000 00
"The liquidators have received since the 9th of September, from		
"Ardagh.....$	50 00	
"Simpson	4 00	
"Jarmyn	41 25	
"J. R. Roustead, *re* Webb.....	61 71	

"Cordelia Young, interest.....	60 49	
"A. G. Brown.....	29 25	
"Wishert.....	25 00	
"McMillan.....	4 00	
"and there is in our hands received since the 9th September from		
"R. H. Young.....	1,390 00	
"Cockburn.....	3 00	
"Total.....		1,668 70
"Leaving.....		$40,331 30

"For this amount we would be pleased to receive "your cheque at once, less the $4,000 received today.

Yours truly,

(Sgd.) MEREDITH, CLARKE, BOWES & HILTON."

"TORONTO, 13th October 1891.

"MESSRS. MEREDITH, CLARKE, BOWES & HILTON,
"Barristers, &c., City.

"*Re Central Bank & Hogaboom.*

"DEAR SIRS,—Enclosed we beg to send you Mr. "Hogaboom's marked cheque for $36,331.30 payable "to Mr. Henry Lye and Mr. W. H. Howland, liqui- "dators of the bank, *re* purchase money Central Bank "assets. We send this cheque as being the balance of "the amount claimed by you in your letter to us of "October the 9th. We think the cheque is for more "than you are entitled to as the balance of the purchase "money, and that you have not given credit to us for "all the amounts received, and this cheque is sent "without prejudice to that contention, the right being "hereby reserved to us to claim that by this cheque "we have overpaid you, and that we are entitled to a "refund of the overpayment.

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"Kindly acknowledge receipt of the cheque upon "these terms, and we shall not expect you to use it "unless these terms are assented to.

"Yours truly,

(Sgd) MORPHY, MILLAR, LEVESCONTE & SMYTH."

"Enclosed cheque $36,331.30."

It is now alleged for the suppliants, and it appears to be true, that the sum of $1668.70 mentioned, was not all the moneys received by the liquidators after September 9th on account of the assets that Hogaboom had purchased. It is claimed that other sums amounting in all to $1201.10 were so received and applied by the liquidators to the purposes of the liquidation. The amount is not, it seems to me, satisfactorily established, but that circumstance will be referred to again. For the present it may be taken to be true that the liquidators received on Hogaboom's account and for his use, in addition to the sums of $4819 and $1668.70 mentioned, certain other moneys for which they did not account to him. These moneys were put to their credit as liquidators of the Bank and increased by so much the balance left in their hands, and the balance or fund now in the hands of the Minister of Finance. This is one ground on which the suppliants lay claim to that fund.

Then it happened that certain debtors of the Bank, whose debts Hogaboom purchased, had at the time of the Bank's insolvency various sums at their credit in the Bank's books, which they would on payment or settlement of such debts have a right to apply in reduction thereof. The suppliants contend that the liquidators should have made good to the purchaser such reductions, and because they did not do so the suppliants should now be indemnified out of the fund in question. But clearly that is not so. Each of such

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debts was purchased subject to the equities and conditions attaching to it; and one of such equities or conditions was undoubtedly that the debtor had a right to set off against his debt the amount which he had at his credit at the Bank at the date of its insolvency. The contention has no merits. It does not appear that the liquidators did anything to prejudice the recovery of any amount for which any such debtor was liable; and even if they had, that consideration could not be relied upon here. If any such thing had happened, if the liquidators had committed any such wrong to the prejudice of the suppliants, their remedy would have been by an action or proceeding against the liquidators. I expressed myself to that effect at the argument of this case, and I see no reason to doubt the correctness of the conclusion then arrived at. But the other ground on which the petition is supported stands in a different position. The suppliants' money, collected by the liquidators, has been applied to the purposes of the liquidation. It went to increase the balance in hand to the credit of the estate at the conclusion of the proceedings in liquidation. The fund held by the Minister of Finance is larger by the amount of such money than it otherwise would have been, and I see no reason why such fund may not now be taken to be in part composed of such money.

Why then are not the suppliants entitled to that extent to such fund? Why may they not now have what is their own? Two reasons are set up. First it is said that the suppliants have themselves released the Bank and the liquidators from the claim now put forward. Among the many controversies that have arisen in respect of the purchase by Hogaboom of the unrealized assets of the Central Bank was one about the transfer to him of such assets. That controversy, with some other matters, was settled by an agreement

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bearing date the 22nd of July, 1892, by minutes of settlement made between the solicitors of the parties of the 3rd of March, 1893, and an order of the Chancellor of Ontario made on the 19th of June, 1893. The agreement, after reciting that "in the transfer of the "unrealized assets of the Central Bank of Canada to "George R. Hogaboom, the purchaser thereof, the "liquidators of the Bank have not been able to transfer "certain of the properties, notes, bills of exchange, and "choses in action mentioned in the schedule of the "said assets filed, by reason of the same not being "owned by or in the possession of the said Bank or "the said liquidators," proceeds as follows:

"Therefore in consideration of fifty dollars paid to "me by the liquidators of the Central Bank I hereby "release, discharge and abandon all claim against the "said Bank and the liquidators thereof for damages, "compensation or otherwise in respect of the non-"delivery to me of the said property, notes, bills of "exchange, mortgages, deeds, other securities, or evi-"dence of securities or choses in action mentioned in "the schedule annexed to the order vesting the unreal-"ized assets of the said Bank in me."

In the 'Minutes of Settlement' the following provision occurs:

"Hogaboom to be paid $50 as agreed on in full of all "claims against the liquidators of the Bank in respect "of assets not handed over, and the release already "executed and delivered to be and remain binding."

The order of the learned Chancellor follows in this respect the 'Minutes of Settlement' and is expressed in similar terms. The fifty dollars mentioned was eventually paid by a cheque dated September 26th, 1892, given by the liquidators expressed on its face to be "in full of agreement 22nd July, 1892." This cheque had been substituted for one of like amount

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and date which Hogaboon had refused to accept, and which purported to be " in full of settlement of all " claims against the Central Bank of Canada or the " liquidators thereof, excepting only the claim for books " and papers."

Now it is contended that any claim Hogaboom had to any moneys which the liquidators had collected on his account was included in this discharge. But that does not appear to me to be so. It is certain that this claim was not one of the matters then in controversy; and it is not covered by the terms of the release or of the minutes of settlement, or of the order to which reference has been made. It was a claim for money received from unrealized assets for Hogaboom's use and benefit, and not in any sense a claim for not handing over any such asset.

Then, in the second place, it is said that although it is true that the liquidators did, in addition to the sums of $4,819 and $1,668.70 accounted for, receive other moneys for Hogaboom's use and benefit which were not accounted for, but placed to the credit of the Bank's account in the liquidation proceedings, yet that must now be taken not to be true because in proceedings between the same parties it has been so decided. And that brings us to another controversy, and to another phase of the litigation that has taken place in reference to this fund. The story of this litigation is a long one and somewhat involved. But I shall attempt to be brief, omitting whatever does not appear to me to be material to a just disposition of the issue now depending. The liquidators of the Bank passed their accounts, paid the balance in hand into the High Court of Justice for Ontario and were discharged. Then, in succession to them, Mr. George S. Holmestead, the accountant of the Supreme Court of Ontario, was appointed liquidator, but nothing, I

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think, now turns on that. In the end there was a sum left unadministered, and the suppliants obtained two orders of court for the payment out to them of this balance. The orders were made on the representation that such balance formed part of the unrealized assets of the Bank. Knowledge of this having come to the Minister of Finance, an application was made on his behalf to have the orders set aside and the money repaid into court. In the litigation that ensued three principal questions, one of fact and two of law, were in issue: (1) Was this balance part of the unrealized assets of the Bank that Hogaboom purchased, and the representation on which it had been paid out to the suppliants true or not? And had the court authority (2) either on the application of the Minister of Finance, or (3) of its own motion, to set aside the orders and to direct the suppliants to repay the money into court? These issues were determined against the suppliants; the moneys that had been wrongfully taken out of court were with interest returned thereto; and thereafter they came into the hands of the Minister to be held, as we have seen in accordance with the provisions of *The Winding-Up Act*. It is possible that when the suppliants applied to have this balance in court paid out to them they had some extraordinary notion that the purchaser of the unrealized assets had a claim to any balance of the estate not administered, no matter where it came from. But such a view would of course be found too absurd for serious litigation. So they set up a claim to retain the moneys that had been paid out to them on, so it appears, the two grounds on which they now rely and which have already been discussed. And there are, in the reasons that more than one learned judge gave for the judgment that was pronounced, expressions of opinion that the suppliants were not entitled to any

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part of the moneys that had been paid out to them. But that expression of opinion does not appear to have been absolutely necessary to support the judgment that was given. Beyond question the moneys obtained from the court were not as a whole part of the unrealized assets of the Bank; they had been obtained on a representation that was not true, and it was clear that the suppliants ought to put them back. It would, it seems to me, have made no difference if the suppliants had made clear to the court what they appear to have failed to make clear, but which now is said to be clear, namely, that this fund was larger than it otherwise would have been because in it were included certain moneys, not accounted for, that the liquidators had received for the use and benefit of the suppliants. In any event it seems to me that the order of the court must have been that as the money had been improperly obtained from the court, it should be paid back. If after that the suppliants had any just claim to any part of it they should have established the claim in a proper proceeding taken for that purpose. The question is not free from difficulty. The rule as to when a party is concluded by a former judgment was stated by Mr. Justice King in *Farwell* v. *The Queen* (1), in the following terms:

" Where the parties (themselves or privies) are the " same, and the cause of action is the same, the estop- " pel extends to all matters which were, or might " properly have been, brought into litigation. Where " the parties (themselves or privies) are the same, but " the cause of action is different, the estoppel is as " to matters which, having been brought in issue, " the finding upon them was material to the former " decision."

(1) 22 S. C. R. at p. 558.

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This rule as to estoppel in such cases is one that in general tends to the furtherance of justice, though perhaps in a particular case it might appear to work injustice. But while that would afford no reason for a refusal to enforce it in the particular case, it would seem to suggest that the court should be very certain that the case is within the rule if to enforce it would be an injustice to any one. Now it does seem to be right and but common justice that if moneys that belonged to the suppliants have gone to form part of the fund in qustion, such moneys should to that extent be paid out to them, and that it would be a great injustice to deny them what is really and in fact their own. And I should, I think, resolve in their favour any doubt I have on the question of estoppel. But doing that I shall take precautions that no mistake is made, and that they do not get anything to which they are not honestly entitled.

Since the hearing of the case an application has been made on the part of the suppliants to submit further evidence to establish the amount that they are entitled to, but I think it would be more convenient to refer the question to the Registrar of the court for an enquiry and report. It is one that ought to be capable of exact and conclusive determination. The question to be so referred will be: Whether in addition to the two amounts of $4,819 and $1,668.70 that the liquidators of the Central Bank accounted for to Mr. Hogaboom, the purchaser of the unrealized assets of the bank, they collected between the 22nd day of July, 1891, and the date of the transfer to him of such assets, any other sum or sums on his account and for his benefit, not accounted for to him but applied to the purposes of the liquidation, and if any such sum or sums were so collected and applied, the amount thereof?

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The first part of the question is referred for greater certainty, and with the object that if further enquiry should show that the liquidators accounted to Mr. Hogaboom for all the moneys they received to his use, there may be no question of that issue having been disposed of at the present time.

Upon the Registrar's report being filed any party hereto may apply for directions as to the judgment to be entered, as well as to costs.

Judgment accordingly.

Solicitor for the suppliants: *W. N. Ferguson.*

Solicitor for the respondent: *E. L. Newcombe.*

Solicitors for the added parties: *Marsh & Cameron.*