

counted as they matured. C., then, claiming the right to have the amounts realized from the collaterals credited to him, obtained from the Divisional Court an order directing the trial of an issue upon the question whether, before or since the recovery of said judgments, the bank had received any payments which ought to be applied in or towards satisfaction thereof, and if so, when and to what extent. The bank, while admitting the receipt of a considerable portion of the collaterals, claimed the right to exhaust all other means of obtaining payment of its debt before crediting the money so received, and the decision on the trial of the issue was that no money had been received which it was bound to apply in satisfaction of the judgments. After the last of the discounted notes had matured the bank sued C. on them, and the question of applying the proceeds of the collaterals was again raised, it being contended that, at all events after all the debt had matured, the bank was bound to appropriate. It was again decided in favour of the bank, not only on the question of law but also on the ground that it was *res judicata* by the decision on the issue.

*Held*, reversing the judgment of the Court of Appeal (23 Ont. App. R. 146), that the matter was not *res judicata*; that under the Judicature Act, *res judicata* as a defence, or reply to a counter-claim, must be specially pleaded; and if not, as the questions in litigation in the action were not identical with those involved in the issue, though depending on the same principle of law, the decision might be binding on inferior tribunals and courts of co-ordinate jurisdiction, but would not be binding as *res judicata* on courts of appellate jurisdiction.

*Held*, further, that though the bank was not obliged so long as the collaterals remained in its possession uncollected, to give any credit in respect of them, when it received payment of such collaterals or any part of them it operated at once as a payment of the principal debt.

Appeal allowed with costs.

*Foy, Q. C.*, for the appellants.

*Shepley, Q. C.*, for the respondents.