

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, J.J.A.

I. F. Hellmuth, K.C., and R. S. Robertson, for the appellants.

Sir George C. Gibbons, K.C., and R. T. Harding, for the liquidator, the respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—The argument for the respondent that the filing of the affidavit of its local manager by the Traders Bank of Canada with the liquidator, enabled the latter to deal with the bank as the only claimant in respect of the debt set out in that affidavit, and that, in consequence, the settlement made between the bank and the liquidator, on the basis of such claim, prevents the appellants from ranking on the estate, leads to one of two results, each equally inconsistent with the terms of the arrangement as expressed in the consent minutes. One is, that the bank in fact released the sureties, although in form reserving its right against them; the other, that, if it did not release them, the bank's consent not to rank must be read as covering and including the sureties, and thereby leaving them liable to the bank, but unable to come on the estate of their debtor.

The memorandum of settlement is as follows (Brown being assignee for the benefit of creditors and the liquidator of the company and suing as such):—

“H.C.J.

“Brown v. Traders Bank.

“1. The defendants to be entitled to the proceeds of the real estate and ice franchise, \$25,000, referred to in the pleadings, but agree not to rank upon the estate in the hands of the plaintiff as liquidator.

“2. The defendants to pay to the plaintiff the sum of \$1,000.

“3. Each party to pay own costs of suit.

“4. The other securities held by the defendants to be declared valid.

“5. The bank to retain and hereby reserves all its rights against all securities in its hands and against the guarantors of their debt.

“June 15th, 1909.”

The trial Judge directed judgment to be entered in the action in accordance with the above consent; but no formal judgment is produced.

The affidavit filed by the bank is not such a claim as a secured creditor is entitled to file under sec. 76 of the Winding-up Act,