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*Nov. 12-14.
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*Feb. 19.

THE BANK OF MONTREAL (DEFENDANT)..... APPELLANT;

AND

HIS MAJESTY, THE KING (PLAINTIFF), AND THE QUEBEC BANK, THE SOVEREIGN BANK OF CANADA AND THE ROYAL BANK OF CANADA (THIRD PARTIES)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Crown—Banks and banking—Forged cheques—Payment—Representation by drawee—Implied guarantee — Estoppel—Acknowledgment of bank statements — Liability of indorsers — Mistake — Action—Money had and received.

A clerk in a department of the Government of Canada, whose duty was to examine and check its account with the Bank of Montreal, forged departmental cheques and deposited them to his credit in other banks. The forgeries were not discovered until some months after these cheques had been paid by the drawee to the several other banks, on presentation, and charged against the Receiver General on the account of the department with the bank. None of the cheques were marked with the drawee's acceptance before payment. In the meantime, the accountant of the department, being deceived by false returns of checking by the clerk, acknowledged the correctness of the statements of the account as furnished by the bank where it was kept. In an action by the Crown to recover the amount so paid upon the forged cheques and charged against the Receiver General:

Held, affirming the judgment appealed from (11 Ont. L.R. 595) that the bank was liable unless the Crown was estopped from setting up the forgery.

Per Davies, Idington and Duff JJ., that estoppel could not be invoked against the crown.

Per Girouard and Maclennan JJ., that, apart from the question of the Crown being subject to estoppel, under the circumstances of

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

this case a private person would not have been estopped had his name been forged as drawer of the cheques.

Per Davies and Idington JJ.—The acknowledgment by the accountant of the department of the correctness of the statements furnished by the bank, being made under a mistake as to the facts, the accounts could be re-opened to have the mistake rectified.

The defendant bank made claims against the other banks, as third parties, as indorsers or as having received money paid by mistake, for the reimbursement of the several amounts so paid to them, respectively. On these third party issues, it was held,

Per Girouard and Maclennan JJ.—The drawee, having paid the cheques on which the name of its customer was forged, could not recover the amounts thereof from holders in due course. *Price* v. *Neal* (4 Burr. 1355) followed.

Per Davies and Idington JJ.—As the third party banks relied upon the representation that the cheques were genuine, which was to be implied from their payment on presentation, and subsequently paid out of the funds to their depositor or on his order, the drawee was estopped and could not recover the amounts so paid from them either as indorsers or as for money paid to them under mistake.

In the result, the judgment appealed from (11 Ont. L.R. 595) was affirmed.

APPEAL from the judgment of the Court of Appeal for Ontario(1) affirming the judgment of Anglin J. at the trial(2), whereby it was adjudged that His Majesty the King should recover from the said appellant the sum of $71,731.75 and costs, and whereby the claim of the said appellant against the above-named third parties (except as to the sum of $5.06 which they were adjudged to be entitled to recover against the Quebec Bank) was dismissed with costs.

The questions in this action arise on .twelve instruments in the form of bankers' cheques. The Government of Canada employs the Bank of Montreal as its banker, and at the bank's Ottawa branch keeps a large number of bank accounts under distinc-

(1) 11 Ont. L.R. 595. (2) 10 Ont. L.R. 117.

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tive titles, one of which is known as the "Department of Militia and Defence Account." The cheques in question purported to be drawn on this account between 18th December, 1901, and 17th October, 1902. They were apparently all drawn on the regular printed official forms of cheques used by the Department of Militia and Defence, and purported to be signed in the customary manner by the proper officers of that department. They were of three classes:

Six of them, aggregating $20,005, made payable to the order of Chas. Coté (a fictitious name assumed by one Abondeus Martineau, the supposed forger), were indorsed by the latter in the name "Chas. Coté," and were delivered by him to the Quebec Bank, which thereupon credited the amounts thereof to him in an account opened by him in that name in said Quebec Bank, and which afterwards collected the amounts thereof from the Bank of Montreal through the Ottawa clearing house.

Four of them, aggregating $30,200, made payable to the order of Chas D. Coté (a fictitious name assumed by said Martineau), were indorsed by the latter in the name of "Chas. D. Coté," and were by him dealt with in a similar manner in the Sovereign Bank of Canada, and the proceeds were afterwards collected by that bank from the Bank of Montreal through said clearing house.

Two of them, aggregating $25,500, were drawn payable to the order of said Martineau, and indorsed and delivered by him to the Royal Bank of Canada which thereupon placed the proceeds thereof to his credit in said bank, and which afterwards collected the amounts thereof from the Bank of Montreal through said clearing house.

All these cheques were paid as aforesaid by the Bank of Montreal shortly after their respective dates, and were forthwith charged and debited in said Department of Militia and Defence account, and also in the pass-book sheets, which, in accordance with the usual course of business with all the departments, were sent almost daily to the Department of Militia and Defence.

The learned trial judge found the facts substantially as above stated, and further, that all the cheques were forged by Martineau, who fabricated the official signatures of the signing officers by means of tracings from real signatures; that with one exception all these cheques purported to be regularly signed by the two proper signing officers of the Department of Militia and Defence; that one cheque, however, for $3,819.04 was signed by only one officer of the department; and that the Bank of Montreal was not guilty of any negligence or want of care in paying the cheques, with the exception of the one cheque for $3,819.04.

The learned judge also found that in the pass-book sheets rendered to the department the cheques in question were charged by the bank against the department as paid on its account, and that the cheques themselves were also sent to the department with the pass-book sheets containing charges for the same as the vouchers for such charges; that the cheques in question, after being duly received by the department, were lost or destroyed whilst in the possession of the Crown officers, and were not produced by the Crown at the trial; and further, that the cheques were in fact destroyed by Martineau to whom they were handed for examination by the accountant of the department; that receipts were given periodically for the cheques

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in question, which receipts also contained an acknowledgment of the correctness of the balances shewn at the credit of the department in the pass-book sheets; such balances having been arrived at after making the charges aforesaid in respect of the cheques in question.

Shepley K.C., and *Gormully K.C.*, for the appellants. As against the Crown the bank's case rested on contract by an account settled between them and on the customer's obligation to take reasonable care against exposing the bank to unnecessary danger of loss. See *Schofield* v. *Lord Londesborough*(1), at p. 523.

The acknowledgment by the department of the correctness of the accounts furnished by the pass-book sheets sent to it almost daily precludes the Crown from now denying that they were correct. *Bank of England* v. *Vagliano Bros.*(2); *Blackburn Building Soc.* v. *Cunliffe, Brooks & Co.*(3).

As to the third parties, these banks on presenting the cheques to the appellants warranted their genuineness. Chalmers on Bills, 6 ed., p. 211; *East India Co.* v. *Tritton*(4).

Apart from warranty the appellants paid these cheques on a mistake as to the facts, and can recover the amount so paid. The case of *Imperial Bank* v. *Bank of Hamilton*(5), is not against this position, but was decided on the ground that *Cocks* v. *Masterman*(6) did not apply to a case of simple forgery. But see *Kelly* v. *Solari*(7).

(1) [1896] A.C. 514.
(2) [1891] A.C. 107, 115.
(3) 22 Ch. D. 61.
(4) 3 B. & C. 280; 27 Rev. Rep. 353, 360.
(5) [1903] A.C. 49.
(6) 9 B. & C. 902.
(7) 9 M. & W. 54.

The third party banks did not present these cheques for payment as Martineau's cheques, but as their own, claiming to be holders in due course. See *Capital & Counties Bank* v. *Gordon*(1).

Aylesworth K.C., Attorney-General of Canada, and *J. H. Moss*, for the respondent cited *Schofield* v. *Lord Londesborough*(2); *Colonial Bank of Australasia* v. *Marshall*(3).

Lafleur K.C., and *Matheson*, for the Quebec Bank, third party, referred to *Gaden* v. *Newfoundland Savings Bank*(4).

J. A. Ritchie for the Sovereign Bank, relied on *Price* v. *Neal*(5), and also referred to *United States Bank* v. *Bank of Georgia*(6).

Geo. F. Henderson and *A. Greene*, for the Royal Bank of Canada, cited *Bavins, Junr. & Sims* v. *London & South-Western Bank*(7).

GIROUARD J.—As I understand these appeals I do not think it is necessary to review all the authorities quoted at bar upon forgery of negotiable instruments. The "Bills of Exchange Act," in my opinion, covers nearly the whole case, and as the House of Lords observed in *The Bank of England* v. *Vagliano Brothers* (8), with respect to the "Imperial Bills of Exchange Act," in construing a statute that expressly codifies

(1) [1903] A.C. 240.
(2) [1896] A.C. 514.
(3) [1906] A.C. 559; 75 L.J. C.P. 76.
(4) [1899] A.C. 281.
(5) 3 Burr. 1355.
(6) 10 Wheat. 333.
(7) [1900] 1 Q.B. 270.
(8 [1891] A.C. 107.

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the law, the court cannot interpret it by the light of previous decisions, except in the case of words of doubtful import or other exceptional circumstances. I accept this rule as a guide and intend to base the conclusions I have arrived at mainly upon the enactments of the statute, especially sections 24 and 54.

Section 24, par. 1, as amended by 60 & 61 Vict. ch. 10,—amendments which I believe are partly peculiar to Canada,—says that, subject to the provisions of the Act, where a signature on a bill is forged the forged signature is wholly inoperative, unless the party whose signature is forged is precluded from setting up the forgery. It further provides that if a cheque payable to order is paid by the drawee upon a forged indorsement out of the funds of the drawer, the latter shall have no right of action against the drawee for the recovery back of the amount so paid, unless he gives notice in writing of such forgery to the drawee within one year after he has acquired notice of the forgery.

This proviso does not meet the case of payment by the drawee upon a forged signature of the drawer, but only upon a forged indorsement, because in the former case he is supposed to know the signature of the drawer, and, in the latter one, is not presumed to know the signature of any indorser. I think the main action of the King against the Bank of Montreal is clearly covered by this first paragraph of section 24.

Is the King *precluded* from setting up the forgery? I do not propose to consider this question from the point of view intended by the "Audit Act" or arising out of any prerogative of the Crown. I do not think it is necessary to do so, to arrive at a correct solution of the question. I propose to examine the situation as

between mercantile men. Of course I do not lose sight of the relations of mandator and mandatary which undoubtedly exist between the drawer and the drawee so much so that, on the continent of Europe, cheques are generally called *mandats*. In fact the Act, sec. 74, declares that the duty and authority of a bank to pay them are terminated by notice of the customer's death.

But where is the estoppel in this case, either by language or conduct? Where is the negligence on the part of the Crown? A very clever scheme—as amusing as it was cunning—had been devised and carried out by one of its employees, who for months braved the watching eyes of employees of four banks and the government. He has frankly told the story in his examination in the penitentiary, and it is admitted that it is true in every respect. It is conceded that he obtained the large sum of money involved in these appeals by a series of crimes, always drawing the cheques upon government forms, forging the signature of the drawer, and using the name of a fictitious payee and indorser.

The Bank of Montreal claims that, in view of the daily and monthly statements and so-called settlements made with the departments of the government, the Crown is precluded from setting up the forgery. How these documents can amount to a ratification is more than I can conceive. The forgery was not known, not even suspected by any one. This is a very different case from *Ewing* v. *Dominion Bank*(1), decided by this court on the ground that appellants had, by their conduct, precluded themselves from setting up

(1) 35 Can. S.C.R. 133.

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the forgery, in which the Privy Council refused leave to appeal(1).

In face of the facts proved, I do not see how the Bank of Montreal can succeed, unless we hold that the employer is responsible for the crimes of his servants. The Crown may have certain privileges and safeguards provided for by the "Audit Act" and other prerogatives, but certainly it cannot be in a worse position than ordinary business men. I cannot see that the government has omitted any duty which it owed to the bank, and I must confess that none has been suggested at the argument which commends itself to my mind.

I would therefore dismiss the main appeal of the Bank of Montreal with costs.

Now with regard to the third party actions taken by the Bank of Montreal against three banks which, for value, in good faith and in the ordinary course of business, had received the amounts of the forged cheques from the Bank of Montreal, and handed them over to the forger or his order, I believe that these actions must also fail.

Paragraph 2 of the same section 24 has been quoted in support of the claim of the Bank of Montreal. It declares that if a bill bearing a forged indorsement is paid in good faith and in the ordinary course of business, by or on behalf of the drawee or acceptor, the person by whom or on whose behalf such payment is made, shall have the right to recover the amount so paid from the person to whom it was so paid, provided that notice of the indorsement be given, etc.

(1) [1904] A.C. 806.

But this enactment does not apply to a bill where the signature of the drawer is forged. In such a case there is no bill (section 3), and the section does not apply. In the latter case, the necessary inference of the section is that the drawee who pays the amount of such paper has no remedy whatever, except, of course, against the forger.

It is argued that the law of mistake applies to a case like this. In my humble opinion it does not, because it is governed by special rules established by the law merchant.

The appellants have invoked the authority of the *Imperial Bank of Canada* v. *The Bank of Hamilton* (1), confirmed by the Privy Council (2). But that case has no similarity to the present one. There the signature of the drawer was genuine and only the body of the cheque had been altered. Whatever was the jurisprudence in old days, it has been settled by the "Bills of Exchange Act," sec. 54, which limits the liability of the acceptor to the genuineness of the signature of the drawer, thus impliedly excluding his liability of the forgery of the body of the bill.

Section 54 provides that

> the acceptor of a bill, by accepting it, is precluded from denying to the holder in due course the existence of the drawer, the genuineness of his signature and his capacity and authority to draw the bill.

True, in this case, the cheques were not accepted, although cheques may be accepted like bills of exchange. True, also, the statute does not say: The drawee who accepts or pays is precluded, etc.; but is it necessary? Is it not to be implied? Paying a bill seems to me to be a stronger evidence of the above

(1) 31 Can. S.C.R. 344. (2) [1903] A.C. 49.

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facts or presumptions, than a mere acceptance. I cannot imagine that any authority is necessary to establish the soundness of this proposition. However, the decisions are not wanting upon this point.

Ever since *Price* v. *Neal*(1) has been decided, the jurisprudence has been considered as well settled at least so far as the present case is concerned. Lord Mansfield, stopping counsel from going on with his argument, saying that this was one of those cases that could never be made plainer by argument, continued:

> It was incumbent upon the plaintiff to be satisfied "that the bill drawn upon him was the drawer's hand," before he accepted or paid it; but it was not incumbent upon the defendant to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him; and he sends his servant to pay it and take it up. The other bill, he actually accepts; after which acceptance, the defendant innocently and *bonâ fide* discounts it. The plaintiff lies by for a considerable time after he has paid those bills, and then found out "that they were forged;" and the forger comes to be hanged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff himself, for negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first; and he paid the whole value, *bonâ fide*. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man.

It may be said that this decision is old. It was rendered the year before this country became part of the British Empire, in 1762. Moreover, it seems to lay down a principle not involved in its determination which may be considered as an *obiter dictum* as to the forgery of the body of the bill. But in respect of the forgery of the signature of the drawer, I venture to say that its soundness has never been questioned.

The trial judge in these cases, Anglin J., expresses

(1) 3 Burr. 1355.

doubts that it is yet law. I entertain no such doubts. Its principles are sanctioned by the Civil Code of Quebec and all the European Codes. They are embodied in the "Bills of Exchange Act," sec. 54, except as to the genuineness of the body of the bill.

Like nearly all the other decisions of Lord Mansfield, the true founder of commercial law in England, it has stood the attacks of both the bar and the bench for a century and a half. It is yet the leading case in England, the United States and Canada, when the facts are as in the present case. It is only when the forgery affects the body of the instrument by raising the amount that its soundness has been doubted or denied, although that point was not involved. The principal and in fact the only question was whether or not the drawee who accepts or pays a forged bill can recover the money back from the holder in due course. The jurisprudence seems to be overwhelming that he cannot.

In 1871, Mr. Justice Allen, speaking for the Court of Appeals of New York, in the *National Park Bank* v. *Ninth National Bank*(1), reviewed the whole jurisprudence:

> For more than a century (he says) it has been held and decided, without question, that it is incumbent upon the drawee of a bill to be satisfied that the signature of the drawer is genuine, that he is presumed to know the handwriting of his correspondent; and if he accepts or pays a bill to which the drawer's name has been forged, he is bound by the act and can neither repudiate the acceptance nor recover the money paid.
>
> The doctrine was broached by Lord Raymond in *Jenys* v. *Fawler* (2), the Chief Justice strongly inclining to the opinion that even actual proof of forgery of the name of the drawer, would not excuse the defendants against their acceptance. In 1762, the principle was flatly and distinctly decided by the Court of King's Bench,

(1) 46 N.Y. 77.

(2) 2 Strange 946.

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in the leading case of *Price* v. *Neal*(1), which was an action to recover money paid by the drawee to the holder of a forged bill. Lord Mansfield stopped the counsel for the defendant, saying that it was one of those cases that never could be made plainer by argument; that it was incumbent on the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted and paid it, but it was not incumbent for the defendant to inquire into it. This case has been followed, and the doctrine applied, almost without question or criticism, in an unbroken series of cases, from that time to this, and it has been distinctly approved in very many cases, which have not been within the precise range of the principle decided. See *Ancher* v. *Bank of England*(2); *Smith* v. *Mercer*(3); *Wilkinson* v. *Johnson*(4); *Cocks* v. *Masterman*(5); *Cooper* v. *Meyer*(6); *Sanderson* v. *Collman*(7); *Smith* v. *Chester*(8); *Bass* v. *Clive*(9); *Bank of Commerce* v. *Union Bank*(10); *Goddard* v. *Merchant's Bank*(11); *Canal Bank* v. *Bank of Albany*(12).

Cases have been distinguished from *Price* v. *Neal*(1) and its applicability to a transfer of a forged instrument, between persons not parties to it, has not been extended to forgeries of indorsements or handwriting of parties to negotiate instruments other than the drawer. But, as applied to the case of a bill to which the signature of the drawer is forged, accepted or paid by the drawee, its authority has been uniformly and fully sustained, and the rule extends as well to the case of a bill paid upon presentment, as to one accepted and afterwards paid. *Bank of St. Albans* v. *Farmers' and Mechanics' Bank*(13); *Levy* v. *Bank of the United States*(14); *Bank of United States* v. *Bank of Georgia*(15); *Young* v. *Adams*(16); *Gloucester Bank* v. *Salem Bank*(17).

A rule so well established, and so firmly rooted and grounded in the jurisprudence of the country, ought not to be overruled or disregarded.

Any number of decisions might be added to the foregoing. I will content myself with a reference to a few of them: *Salt Springs Bank* v. *Syracuse Savings*

(1) 3 Burr. 1355.
(2) 2 Doug. 637.
(3) 6 Taunt. 76.
(4) 3 B. & C. 428.
(5) 9 B. & C. 902.
(6) 10 B. & C. 468.
(7) 4 Man. & Gr. 209.
(8) 1 T.R. 654.
(9) 4 M. & S. 13.
(10) 3 Comst. 230.
(11) 4 Comst. 147.
(12) 1 Hill, 287.
(13) 10 Vt. 141.
(14) 4 Dall. 234.
(15) 10 Wheat. 333.
(16) 6 Mass. 182.
(17) 17 Mass. 32, 41.

Institution, 1863, (1); *Howard & Preston* v. *Mississippi Valley Bank of Vicksburg,* 1876, (2); *First National Bank of Marshalltown* v. *Marshalltown State Bank,* 1899, (3); *Crocker-Woolworth National Bank of San Francisco* v. *Nevada Bank of San Francisco,* 1903, (4). See also *Union Bank of Lower Canada* v. *Ontario Bank,* 1880, (5); *Ryan* v. *Bank of Montreal,* 1887, (6).

For these reasons I am of opinion that all the appeals should be dismissed with costs.

DAVIES J.—The nature of the plaintiff's case is of the simplest. The defendant has been acting for many years as banker for the plaintiff's government in Canada and has from time to time large sums of money standing to the credit of the plaintiff's government account against which certain government officials are authorized to draw cheques.

The defendant during the years 1901 and 1902 paid certain alleged cheques aggregating $75,705, and charged the same against the plaintiff's said account. These alleged cheques were proved at the trial, and found by the trial judge, to be forgeries and the amount represented by them has therefore been charged by the defendant against the plaintiff wrongfully and without authority.

Under these facts the plaintiff has a right to recover back the amount of the forged cheques sued for and improperly charged against him unless by some acts or series of acts or conduct on the part of the plaintiff's officials, the King has been estopped from

(1) 62 Barb. 101.
(2) 28 La. Ann. 727.
(3) 107 Iowa, 327.
(4) 139 Cal. 564, 573.
(5) 24 L.C. Jur. 309.
(6) 14 Ont. App. R. 533.

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denying the genuineness if the cheques or unless as contended by the defendant the accounts rendered from time to time by the bank to the Department of Militia must be treated under the circumstances as having been settled by agreement and cannot be re-opened.

It appears that the account of the Department of Militia and Defence upon which the forged cheques were drawn was an active one, a very large number of cheques being paid and charged against it daily, and during the period in question the practice was adopted by the defendants of making out what were called "pass-book sheets" which were sent frequently, and sometimes daily, by registered letter addressed to the accountant of the department with which were also enclosed the original cheques. At the end of each month a complete statement was sent shewing all cheques paid during the month, and the letters of credit and moneys received during the month by the bank and the balance at the credit of the department. With this monthly statement was sent a blank form of receipt to be signed by the accountant acknowledging that he had received the cheques entered in the statement and had examined the same and found the balance to be correct.

The accountant of the department assigned to Martineau (the forger of the cheques in question) the duty of comparing these statements with the cheques and the books of the department, and on his reporting them to be correct the accountant or his assistant was in the habit of signing the receipt and returning it to the bank. Martineau was, of course, on the lookout for the forged cheques as they were sent up from the defendant's bank, and immediately destroyed them,

but, as they were included in the pass-book sheets, he reported them along with the genuine cheques as being duly vouched and they were accordingly receipted for by the accountant along with the genuine cheques. The balances for each month which were thus acknowledged to be correct during the period in question included and charged against the Militia Department the forged cheques.

It is urged on behalf of the defendants that these facts as above outlined constitute a breach on the part of the plaintiff of a duty owing to the defendants and that by reason of such breach of duty the plaintiff is debarred from recovering.

The natural and logical legal basis for such a defence is the principle of estoppel and, indeed, Mr. Gormully invoked the application of this principle on the facts proved as a good defence. The trial judge, however, held that estoppel could not prevail against the Crown; the appeal court of Ontario sustained that ruling and then an ingenious attempt was made by defendant's counsel to shift the ground of the defence and it was argued that by accepting the pass-book sheets and acknowledging their receipt and by acknowledging the correctness of the monthly balances shewn by the defendants, a contractual relation was established by implication and that the plaintiff was bound by the signature of the accountant of the department as by a settled account.

I agree with the courts below that the ordinary doctrine of estoppel cannot be invoked as against the Crown in any such case as this and on any such facts as are proved here.

With regard to the argument that a contractual obligation arose between the Crown and the bank out

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of the officer's signature to the acknowledgment of the correctness of the pass-book sheets as rendered, I am quite unable to appreciate it apart from the doctrine of estoppel.

Why the signature as to the correctness of these pass-book sheets should have a different effect from the signature of settlement to any ordinary account so as to prevent it being re-opened in case of the discovery of a mistake, I am at a loss to understand. The officer signing the account as correct was deceived into doing so by a clever forger. The same forger deceived the bank by the forged signatures. If the circumstances under which the accounts were acknowledged to the bank could be held to be an estoppel well and good. But the doctrine cannot be applied as against the Crown and outside of it I cannot find any contract settling the accounts as between the government and the bank and prohibiting their being re-opened in case of mistake.

The bank became the plaintiff's debtor for the money had and received and, outside of estoppel, nothing but payment, accord and satisfaction or a release under seal would be an answer to plaintiff's demand.

I assent to the argument of the Attorney-General that the "Audit Act" prescribes and defines the only means by which accounts between banks and the government can finally be settled and that no departmental officer has any authority outside of this Act to sign any settlement binding the Crown. The Crown cannot be estopped by the act of clerk or official.

In this case the pass-book sheets daily sent from the bank to the department were so sent as a matter of convenience to the respective officers of the bank and the department. Such a course would seem business-

like and proper; but it is quite outside of the "Audit Act" and I do not concede the argument of the defendant as to the limited usage of that Act or that it is to be strictly confined to the internal arrangements between the government departments and does not cover the dealings with the banks mentioned in it.

I am therefore of opinion that the appeal of the Bank of Montreal as against the King must be dismissed with costs.

The next question we have to deal with is the right of the Bank of Montreal to recover back these moneys from the several banks to which they paid the cheques respectively, notwithstanding the change of position to their prejudice which the delay had caused through these banks having in the meantime paid out the moneys received to the forger relying upon the payment of the cheques by the payee as representation of their genuineness. I have reached the conclusion that on this branch of the case also the judgment and reasoning of the Court of Appeal must on the findings of fact of the trial judge be sustained.

I have read the judgment prepared by Mr. Justice Girouard in which he also agrees with the conclusions of the Court of Appeal, but upon the sole ground that the cases of the three banks are governed by the principles laid down in the case of *Price* v. *Neal*(1), and *Smith* v. *Mercer*(2), principles emphatically affirmed by the Supreme Court of the United States and many of the states courts in the cases he cites.

The general doctrine asserted and supported by such very high authorities is that the acceptor of a

(1) 3 Burr. 1355. (2) 6 Taunt. 76.

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bill or cheque is presumed to know the handwriting of the drawer; that it is rather by his fault or negligence than by mistake if he accepts or pays on a forged signature, and that once paid he cannot on discovery of the forgery recover back the money irrespective of equities.

The rule contended for makes no distinction between the *bonâ fide* holder of a bill or cheque ignorant of the forgery who has discounted or paid money for the bill or cheque before he presents it for payment, and one who does so only after the payee has honoured the bill or cheque relying upon the representation of its genuineness which may be said to be made by the payee, and before having any notice or knowledge of the forgery.

In the one case it is obvious that the holder having first paid out his money on the faith he himself had in the genuine character of the bill or cheque or in the credit and responsibility of the person from whom he received it, could not be said to have relied upon the subsequent act of the payee in paying the bill or cheque, while in the other case he may well have done so. But no such distinction was made in the case of *Price* v. *Neal*(1), relied on. As a matter of fact the holder of the first bill in that case appears to have paid for it to the person from whom he received it before it was presented to and paid by the drawee. The rule proceeds upon the idea that a banker's supposed duty to know his customer's signature can be invoked as well by a third party (the holder of the bill) as by the banker's customer. So far as the rule has been held applicable to the case of a holder who cannot be said in any way, in parting with his money, to have

(1) 3 Burr. 1355.

relied upon any act or representation of the drawee in paying the bill or cheque on presentation and not to have altered his position or been prejudiced in any way in consequence, it has been subjected to much criticism and challenge.

The rule has only been embodied in the "Bills of Exchange Act" so far as acceptances are concerned, nothing being said as to the effect of payment. The extent to which that section 54 of the Act applies with regard to acceptances is not now before us. If the rule laid down so broadly in *Price* v. *Neal*(1) is to be held in force now it must be as part of the law merchant, and it is at least significant that the Act is limited to declaring the effect of acceptances of bills while the effect of payment is not referred to.

There is a distinction between the facts in the cases of the Royal Bank and the Quebec Bank on the one hand and on that of the Sovereign Bank on the other. In the case of the first two banks the forger deposited the cheques in dispute in the savings bank branch of the bank and under the special conditions set out in the evidence. In the one case the depositor was precluded from drawing the money out for three days and in the other for fifteen days, ample time in each case to ensure that the cheques would be presented for payment and either paid or refused payment before the depositor had any right to withdraw any of the moneys. I would not think that the decision of the House of Lords in the case of *Capital & Counties Bank* v. *Gordon*(2) was applicable to a deposit on such special conditions or that it could be held under the authority of that case that the crediting of the cheques to the depositor's account made the

(1) 3 Burr. 1355. (2 (1903) A.C. 240.

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money his. It was, in the circumstances of the deposit and credit made in these two banks, merely a conditional credit and subject to the special terms to which the depositor must be taken to have assented when he deposited his money. *Gordon's Case*(1) does not go further than to determine that, in the absence of special agreement to the contrary, the crediting a depositor with the amount of cheques deposited by him makes that credit a fund upon which the depositor has a right to draw. But, of course, the parties by special agreement can alter that and this I would hold was done. In that case these two banks would be merely collecting agents for the payee of the cheques, and not having indorsed the cheques, but having collected the moneys for the payee and paid it out to him before they had any notice of the forgeries would not be liable to refund the moneys to the Bank of Montreal.

As there is no indorser on any of these cheques to whom notice of dishonour had to be given in order to hold them liable, and the rule laid down in *Cocks* v. *Masterman*(2), as explained and qualified in *Imperial Bank of Canada* v. *Bank of Hamilton*(3), cannot be invoked, I prefer to rest my judgment in the case of all of the three banks substantially upon the ground on which the Court of Appeal determined them, namely, that by paying the cheques to the persons presenting them the Bank of Montreal represented to them that the cheques had in fact the genuine signatures of the drawers, and if upon the faith of that implied representation the holders of the cheques received the moneys, as I think they did, and subse-

(1) (1903) A.C. 240. (2) 9 B. & C. 902.
(3) [1903] A.C. 49.

quently paid them away to the person who deposited the cheques with them or otherwise had their positions altered to their prejudice respectively, in consequence of such implied representations and in ignorance of the forgeries, they cannot be compelled subsequently by the drawee who paid the money on discovering that the cheques were forgeries to pay back the money.

For these reasons I think the appeal should be dismissed with costs, as well against the King as against the three several banks.

IDINGTON J.—I am unable to find any contract in the facts presented here that would preclude the Crown from the right to have rectification of such a clear mistake or series of mistakes as occurred in one or more of its subordinate officers assenting to a stated account and incidentally thereto, in some instances, assenting erroneously to the number of cheques alleged in the statement as correctly representing the number chargeable. I see nothing, but the possible something that might rest on the doctrine of estoppel, not binding on the Crown, that could be considered if the case were one between private persons or corporations, that in law could by any possibility support the appellant's defence to this action. I think, therefore, the appeal as to the Bank of Montreal against the Crown must fail.

In regard to the rights of the appellants to recover back from each of the third parties such respective sums as either got by reason of their presentation for payment of one or more of the forged cheques, there arise some more difficult questions.

Upon the facts presented in this case the right to recover cannot rest on any implied guarantee.

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Nor do I see how the contention, set up here for the first time, that sub-section 2 of section 24 of the "Bills of Exchange Act," 1890, as amended by 60 & 61 Vict. ch. 10, entitles the appellants to recover can be maintained.

It seems to me that the liability covered by, if not created by, this sub-section is only applicable to the case of the forged indorsement of a genuine bill of exchange. It surely never was intended to be extended to the case of a forged bill, which in law is no bill.

The remaining ground taken on which to rest these claims is the right to recover money paid by mistake.

Let us bear in mind that the action for money had and received by means of which this right has usually been asserted, rests upon the principle that *primâ facie* it is against equity and good conscience that the party who received it should retain it, and remember further that in many instances this *primâ facie* case is answered by virtue of conditions existing at the time of payment, or subsequent events creating, so to speak, a countervailing equity that would make it against equity and good conscience to insist on the return of the money.

A mere messenger, for example, receiving money by mistake, and handing it over to his employer, occupies a position that no one would think should render him liable in an action for money had and received once he has in good faith discharged his duty of paying it over. The banker collecting bills of exchange is in somewhat the same position.

The whole business of bankers dealing with negotiable securities presents many phases somewhat analogous to the cases of agency, wherein it would be in-

equitable to ask for a return of the money from the very hand that received it.

The case here is clearly not that of an agent collecting, but of a bank discounting what was a forgery, but supposed to be a genuine bill, and placing to the credit of its customer the supposed value of such discounted bill.

But when the question of pure agency is thus eliminated how much nearer are we to a solution of the question before us?

Wherein does the actual position of the banker when he has, for a trifling percentage given credit for the proceeds of a discounted bill, substantially differ from that of the mere agent?

The case of the *East India Company* v. *Tritton*(1) was held to be a case of agency. But the reasoning upon which the court proceeded was that when the agent had received the money he had no anwser to his principal, then asking it from him.

Apart from special rules of business the banker may have relative to particular accounts or classes of accounts, what answer can he make (to a demand by his customer for the money credited to him), in the absence of all knowledge or means of knowledge of fraud, or wrong, and in face of the fact that the discounted bill has been paid him, and the assurance thus been given by the drawee that the bank may rely on it? When the nature of the banker's business is thus considered, his position in such a matter (even when he is not acting as a mere agent), is such that he can but seldom be supposed to have the money, paid him by mistake, remain with him. The equity to recover it back soon ceases, as a general rule. The attempts

(1) 3 B. & C. 280.

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to harmonize the requirements, in this regard, of reason and justice, with settled rules of law as set forth in decided cases, may not have been uniformly successful.

I will not venture upon the unnecessary task, where so many have failed, of formulating as was done in *Cocks* v. *Masterman*(1) a hard and fast rule applicable to all cases of the kind.

I have no doubt, however, that there are many cases, including those in question here, where the delay in discovery and consequent demand for rectification, coupled with change of position by reason of such delay, and the recipient banker having paid over in good faith, and in due course of business the moneys received in payment of forged bills, would render it manifestly unjust that the bankers who were in duty bound to pay such bills, if genuine, and made the mistake of assuming them so, should recover as claimed here.

The case of *The Imperial Bank* v. *Bank of Hamilton*(2) has clearly rendered the hard and fast rule laid down in *Cocks* v. *Masterman*(1) no longer a safe guide, in the wide form there given, and possibly shaken some other cases.

The result, however, leaves untouched the reasoning and principles of law upon which such equities as arise here rest, and I think furnish an answer to the appellants' claims in question.

It enables us to affirm that, in law, there is a wide distinction between the cases, where of necessity the money paid by mistake must pass from the hand receiving it, and the cases where it has not and by reason of the nature of the dealing is not intended to do so.

(1) 9 B. & C. 902.

(2) (1903) A.C. 49.

The Imperial Bank had in fact paid away its money to the forger before it presented the forged cheque to the Bank of Hamilton.

The case did not give rise to any such equities as exist here.

The judgment, as I read it, implies that notice of the mistake must be given within a reasonable time, and before loss has been occasioned by the delay in giving it.

I need not repeat the fact in question here bearing upon these points, for they are so fully and clearly set forth by Mr. Justice Anglin in his judgment as to render further attempted elucidation of them useless.

I think the appeals should be dismissed with costs.

MACLENNAN J. concurred with Girouard J.

DUFF J.—I agree for the reasons stated by Chief Justice Moss in the court below.

Appeal dismissed with costs.

Solicitors for the appellant: *Gormully, Orde & Powell.*
Solicitors for the respondent,
His Majesty, the King: *Barwick, Aylesworth, Wright & Moss.*
Solicitors for the respondent,
The Quebec Bank: *Nellis, Matheson & Thompson.*
Solicitors for the respondent,
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