1901

*Mar. 26, 27.

*May 21.

IMPERIAL BANK OF CANADA (DEFENDANT) ..... APPELLANT;

AND

THE BANK OF HAMILTON (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Marked cheque—Fraudulent alteration—Payment by third party—Liability for loss—Negligence.

A man dealing with others is under no duty to take precautions to prevent loss to the latter by the criminal acts of third persons, and the omission to do so is not, in itself, negligence in law.

B. having an account for a small amount in the Bank of Hamilton had a cheque for five dollars marked good, and altering it so as to make it a cheque for $500, had it cashed by the Imperial Bank. The same day it went through the clearing house and was paid by the Bank of Hamilton to the Imperial Bank. The error was discovered next day by the former, and re-payment demanded from the Imperial Bank and refused. The Bank of Hamilton then brought an action to recover from the Imperial Bank $495, the sum overpaid on the cheque. The defendant contended that the note as presented to be marked good was so drawn as to make the subsequent alteration an easy matter, and the plaintiff's act in marking it in that form was negligence which prevented recovery.

Held, affirming the judgment of the Court of Appeal (27 Ont. App. R. 590), which affirmed that at the trial (31 O. R. 100), that there was nothing in the circumstances to take the case out of the rule that money paid by mistake can be recovered back, and the Bank of Hamilton was therefore entitled to judgment.

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*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick and Girouard JJ.

(King J. was present at the hearing but died before judgment was delivered.)

1901

IMPERIAL BANK OF CANADA v. THE BANK OF HAMILTON.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial (2) in favour of the plaintiff.

The facts are sufficiently set out in the above headnote, and more fully in the judgments published herewith.

Lash K.C. and *Bicknell* for the appellant referred to *Chambers* v. *Miller* (3); *London and River Plate Bank* v. *Bank of Liverpool* (4); *Pollard* v. *Bank of England* (5); *Boyd* v. *Nasmith* (6).

Douglas K.C. and *Stewart* for the respondent cited *Kelly* v. *Solari* (7); *Brownlie* v. *Campbell* (8) approving of *Bell* v. *Gardiner* (9); *Clark* v. *Eckroyd* (10).

THE CHIEF JUSTICE.—This is an appeal by leave from an order of the Court of Appeal affirming a judgment pronounced by Mr. Justice MacMahon at the trial of the action without a jury. There is no dispute as to the facts, and the questions we have to decide are entirely matters of law. The learned Chief Justice of Ontario dissented from the judgment of the court which was in favour of the present respondent who was also the respondent below and the plaintiff in the action.

It was proved at the trial that one Carl Bauer had an account with the defendants at their agency in Toronto, and that on the 25th of January, 1897, he drew a cheque in the following form:

(1) 27 Ont. App. R. 590.
(2) 31 O. R. 100.
(3) 13 C. B. N. S 125.
(4) [1896] 1 Q. B. 7.
(5) L. R. 6 Q. B. 623.
(6) 17 O. R. 40.
(7) 9 M. & W. 54.
(8) 5 App. Cas. 925.
(9) 4 Man. & G. 11.
(10) 12 Ont. App. R. 425.

1901

IMPERIAL BANK OF CANADA v. THE BANK OF HAMILTON.

The Chief Justice.

No. 136. TORONTO, ONT., January, 25th, 1897.

TO THE BANK OF HAMILTON.

Pay to Cash.....or bearer $

Five..... /100 Dollars.

(Signed) CARL BAUER.

This cheque Bauer on the same day presented to the ledger-keeper of the respondents who wrote the folio number of the account in the ledger on the cheque and stamped it with the words "Bank of Hamilton, Toronto, entered January 25th, 1897," and handed it back to Bauer who did not present the cheque to be cashed but took it away with him.

On the following day, January 26th, 1897, Bauer entered the figures "500" in the space after the $ mark and wrote the word "hundred" in the blank space after the word "five" in the body of the cheque and deposited it to his credit in an account with the appellants at their agency in Toronto, and immediately drew out nearly the whole sum. Bauer never had any greater sum to his credit with the respondents than the sum of $10.22. On the morning of the 27th January the appellants sent the cheque for $500 in the usual course through the clearing house to the respondents who paid it and stamped it with the words "Bank of Hamilton, Toronto, paid January 27th, 1897."

On the following day (January 28th), the respondents discovered the fraud and demanded repayment from the appellants who declined to restore the money. In the mean time Bauer had drawn a cheque for the full amount of the balance to the credit of his account with the appellants. At the time of the payment of the cheque by the respondents Bauer had to the credit of his account with them but twenty-two cents, and this appeared from the respondents' ledger.

The cheque as altered by Bauer and paid by the respondents was as follows:

No. 136. TORONTO, ONT., January 25th, 1897.

TO THE BANK OF HAMILTON.

Pay to Cash.....or bearer $500.00.

Five hundred and..... xx/100 Dollars.

(Signed) CARL BAUER.

Some evidence was given as to the usages of the clearing house and the practice of the respondents and other banks in making payments through it. I do not refer to this evidence, for in the view I take it is immaterial.

It is clear that the payment by the respondents was made under a mistake of fact, in reliance on what appeared on the face of the cheque which after the forgery presented the appearance of a marked cheque for $500.

The rule of law that money paid by mistake can *primâ facie* be recovered from the person who receives it must therefore apply unless the case can upon the facts stated come within some exception to that rule.

It was contended in the court below on behalf of the appellants that the judgment of Mr. Justice MacMahon was wrong and that the rule mentioned was improperly applied, and that for two reasons. First, it was said that the case of *Young* v. *Grote* (1) applied, and that the respondents were debarred from recovering by reason of their negligence in certifying a cheque which from its form was susceptible of alteration on account of the blank spaces left in it. In other words they set up the defence of estoppel by negligence. The majority of the Court of Appeal repelled this defence, and the Chief Justice in his judgment did not deal with this question. Secondly, it was insisted that the cheque having been paid on the 27th of January, and the amount paid not having been reclaimed until the morning of the 28th, there

(1) 4 Bing. 253.

1901

IMPERIAL BANK OF CANADA v. THE BANK OF HAMILTON.

The Chief Justice.

was such negligence in making the demand for repayment that the respondents were for that reason precluded from recovering.

The majority of the court overruled this defence also which was upheld, however, by the Chief Justice in his dissenting judgment in which he relied upon the authority of *Cocks* v. *Masterman* (1) and other cases following that authority.

Young v. *Grote* (2) was a case between a banker and his customer. The facts were that the latter having occasion to leave home had left some cheques signed by himself in blank for the purpose of his business with his wife which she was to hand over to the plaintiff's clerk for such amounts and on such occasions as she should in her discretion think fit. The clerk applied to her for a cheque which she gave him to be filled up for an amount and to be used for a purpose to be approved of by her. The clerk showed her the cheque filled up for the proper amount, but she omitted to notice that space was left which enabled the clerk, as he did, to commit a fraud similar to that perpetrated by Bauer in the present instance. The Court of Common Pleas held that the loss must fall upon the customer and not on the banker who had cashed the forged cheque.

It is not easy to ascertain from the report the exact *ratio decidendi* of the several judgments but in his judgment in the case of *Schofield* v. *Lord Londesborough* (3), Lord Watson seems to consider it attributable to one or the other or both of two principles, namely: first that one who signs a negotiable instrument in blank impliedly as regards third persons authorises it to be filled up for any amount for which the stamp is sufficient. The second ground was he thought that as between banker and customer it is

(1) 9 B. & C. 902. (2) 4 Bing. 253.
(3) [1896] A. C. 514.

by virtue of some rule of law or some implied agreement the duty of the latter to take reasonable care that cheques are so drawn as to present no opportunity for frauds on the former. Lord Watson does not say whether these grounds or either of them are sound, but he considers them to be reasons for distinguishing the older case from *Schofield* v. *Lord Londesborough*—the case before the House of Lords—in which the acceptor of a bill had enabled the drawer feloniously to convert an acceptance for £500 into one for £3,500 by means of blank spaces left in the bill when he accepted. It was held that this did not meet the defence of forgery set up by the acceptor against a *bonâ fide* holder for value of the altered acceptance. This decision proceeded on principles which have been applied in a variety of cases, and which are familiar to all for as the Lord Chancellor says in *Schofield* v. *Lord Londesborough* (1):

> A man for instance does not lose his right to his property if he has unnecessarily exposed his goods or allowed his pocket handkerchief to hang out of his pocket, but could recover against a *bonâ fide* purchaser of any article so lost notwithstanding the fact that his conduct had to some extent assisted the thief. It is true that stolen goods sold in market overt could be retained by a *bonâ fide* purchaser for value notwithstanding that they had been previously stolen; but the same result would follow equally whether the owner had been careful or careless in the custody of his goods.

In other words it would seem that there is no duty obliging a man who is dealing with others to take precautions to prevent loss to them by the criminal acts of third persons, and the omission to do so does not in the absence of some special and exceptional relationship amount to negligence in law. This is the law as I understand the judgment laid down by the House of Lords in *Schofield* v. *Lord Londesborough*.

(1) Page 522.

1901

IMPERIAL BANK OF CANADA v. THE BANK OF HAMILTON.

The Chief Justice.

Then if this is so and we are I think bound by the authority of that case, can there be any distinction between the case of a certified cheque like the present and an acceptance? I can see none and I entirely agree with Mr. Justice Osler and Mr. Justice Moss in the reasons given in their judgments. I would also refer to the case of the *National Bank of Commerce* v. *The National Mechanics Banking Association* (1) in which the Court of Appeals of the State of New York in an able and well reasoned judgment reaches the same conclusion in the case of a certified cheque raised in amount under circumstances precisely similar to those before us. I may also refer to that case as assigning the true reason for the decision in *Mather* v. *Lord Maidstone* (2), namely, that one who pays an acceptance to which his name has been forged is estopped from recovering back the money upon the ground that he is bound to know his own signature.

As I have said the learned Chief Justice did not in his judgment deal with the present case in the aspect in which it has just been looked at, but founded his opinion on another point. That point was this—it was said that the respondents having paid the cheque on the 27th were too late to recall the payment when on the morning of the 28th they discovered the fraud and consequent mistake in payment since the appellants might have been prejudiced and their position altered by the delay. For this not only *Cocks* v. *Masterman* (3) was relied on but other cases also, the principal of which was a decision of Mathew J. in *London & River Plate Bank* v. *Bank of Liverpool* (4). In all these cases however it will be found that they were mistaken payments by parties behind whom were others secondarily liable, recourse against whom

(1) 55 N. Y. 211.
(2) 18 C. B. 273.
(3) 9 B. & C. 902.
(4) [1896] 1 Q. B. 11.

might have been lost by delay and the holder thus prejudiced. In some of them also the principle of *Mather* v. *Lord Maidstone* (1) was applicable. I deny that there is any abstract rule of law which requires that the money paid shall be demanded on the day of the erroneous payment without regard to any question of prejudice to the holder. Each case must depend on the facts. If however there is any such rule of law it must be confined to the case of acceptances.

In the present case it is impossible that the delay could in the least degree have caused detriment to the appellants. This point also arose in the case before cited in the New York Court of Appeals (2), and was there held to be no defence, and I am convinced it has been properly decided against the appellants in the present case.

The appeal must be dismissed with costs.

GWYNNE J. (dissenting.)—The appeal must, in my opinion, be decided upon a wholly different principle from that upon which either *Young* v. *Grote* (3), or *Schofield* v. *The Earl of Londesborough* (4), was decided. Neither of these cases has really any application in the present case. The only negligence which it is all necessary to refer to, is the negligence of the respondents causing injury to themselves alone in paying a cheque drawn upon them by a customer of which the appellant was the *bonâ fide* holder for value and which, under the circumstances, as asserted by the respondents in their action and as proved by them, they were under no obligation to pay but which they did pay in due course upon presentment, notwithstanding that they possessed, and they alone possessed, the fullest possible means, of which they did not avail themselves, of

(1) 18 C. B. 273.
(2) See at p. 216.
(3) 4 Bing. 253.
(4) [1896] A. C. 514.

1901

IMPERIAL BANK OF CANADA v. THE BANK OF HAMILTON.

Gwynne J

knowing that by reason of the fraud of their customer, the drawer of the cheque, they were under no obligation to pay it, and the only question is whether or not they can recover from the appellants the amount so paid to them.

It now appears by the evidence in the action that on the twenty-fifth of January, 1897, one Bauer, (whom we must regard as having then been a customer of the respondents, (his bankers), drew a cheque upon them for the sum of five dollars payable to "cash, or bearer." On the same day he procured the respondents to mark it "good" with their stamp impressed thereon containing the words "Bank of Hamilton, Toronto, entered, January 25th, 1897." He then altered the sum "five" to "five hundred" in such a manner as not to create any, the slightest, suspicion that any alteration of or tampering with the cheque had taken place. It was to all appearances a perfectly valid cheque for five hundred dollars, marked by the respondents as good for that amount.

So altered he transferred the cheque on the twenty-sixth of January, for value to the appellants, who caused it to be presented for payment to the respondents through the Toronto Clearing House and, on the twenty-seventh of January, the respondents paid the cheque and stamped it on that day with their stamp as "paid."

Doubtless they assumed that, having stamped the cheque upon the 25th of January, as "entered," they had funds to meet it, and that, therefore, they paid it upon presentment.

In this it appears the respondents were mistaken, but the mistake was one in respect to which they had in their possession the fullest possible means to avoid making. It was a mistake having its origin solely in their own default or negligence, for, if they had

referred to their own books, before paying the cheque, they would have seen, as they did see on the twenty-eighth of January, that the drawer of the cheque had no such sum to his credit in their hands.

It was thus that then, for the first time, the respondents discovered that the alteration from "five" to "five hundred" dollars had been made.

Having thus made discovery of the fact of forgery, the respondents demanded re-payment of the amount paid on the twenty-seventh of January, in excess of the "five" dollars for which amount they had marked the cheque before it was altered, the excess being claimed to be recoverable as money paid by mistake of fact. The mistake of fact, under the influence of which the cheque was paid, was, I think, as already observed, no other than a mistake in concluding from seeing the respondents' stamp of the 25th January on the cheque, that there were funds of the drawer's to pay it. That mistake led to the discovery, (on the twenty-eighth of January, when first they referred to the books), of the fact of alteration of the sum of five dollars for which the cheque had been marked to "five hundred." But the mistake under the influence of which the cheque had already been paid, at a time when no forgery was suspected or could have been discovered, save by a reference to the respondents' books, remained unaltered and if that mistake did consist, as I think it did, in ignorance of the fact that the respondents had no funds of the drawer's in their hands sufficient to pay the cheque, or in a mistaken belief that they had, then *Chambers* v. *Miller* (1) is an unquestioned authority that money paid by reason of such a mistake of fact cannot be recovered back.

Then it is to be borne in mind that the forged alteration was made by the drawer of the cheque him-

(1) 13 C. B. N. S. 125.

1901

IMPERIAL BANK OF CANADA v. THE BANK OF HAMILTON.

Gwynne J.

self and it affected only the liability the respondents had incurred by affixing their stamp to it on the twenty-fifth of January. In all other respects the cheque was perfectly good and was as binding upon the drawer, in the interests of and for the benefit of the respondents, for the full amount of the five hundred dollars after they paid the cheque and received it from the appellants as it had been in the hands of the appellants in the interest of and for the benefit of the appellants until payment, so that it cannot be said that the respondents paid the money, which is now sought to be recovered back from the appellants without having received any value or consideration for such payment, as could have been said if the forgery committed had been of the drawer's signature. The language of Erle C. J. in the above case of *Chambers* v. *Miller* (1) is precisely applicable in the present case, as imputing the respondents' loss occasioned by having paid the cheque to their own fault and negligence disqualifying them from recovering back the amount paid, rather than to what the law regards as a mistake of fact entitling the respondents to recover back the money paid.

He there says at page 182:

> With regard to cheques, the well known coure of business is this: When a cheque is presented at the counter of a bank, the banker has authority on the part of his customer to pay the amount therein specified on his account. The money in the banker's hands is his own money. *On the presentment of the cheque it is for the banker to consider whether the state of the account between him and his customer will justify him in passing the property in the money* to the holder of the cheque.

The presentment of the cheque to the bank of the respondents through the clearing house gave to the respondents full opportunity of determining by reference to their books whether or not they should pay the cheque. Of this opportunity they did not avail

(1) 13 C. B. N. S. 125.

themselves. If they had availed themselves of the opportunity so given they would have discovered, as they did discover on the day after they had paid the cheque immediately upon referring to the books, that the cheque which had been marked on the 25th of January was for $5, and not for $500.

Surely it is to their own fault and negligence and not to any mistake of fact that, under the circumstances, the respondents' payment of the cheque must be imputed; it was so held by Lord Mansfield in *Price* v. *Neal* (1).

In *Cocks* v. *Masterman* (2), a bill purporting to be accepted by A., payable at his banker's, was paid by the bankers on presentment, they believing the acceptance to be in the handwriting of A., a client of theirs. The next day discovering that the acceptance was a forgery, they notified the holders to whom they had paid the amount of the bill, and brought an action to recover it back. It was contended upon two grounds that the plaintiffs could not recover. First, that the bankers should have satisfied themselves of the genuineness of the acceptance before paying, and; secondly (and upon this the court unanimously proceeded expressly guarding itself from being understood as giving any opinion upon the first point), that the holder of the bill is entitled to know on the day when it becomes due, whether it is a honoured or a dishonoured bill, and that, if he receive the money, and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back.

Now, as to the first point taken in that case, in respect of which the court guarded itself from being understood to express an opinion, there cannot, I think, be entertained a doubt that where, as in the present case, a cheque having a bank's stamp thereon

(1) 3 Burr. 1354.

(2) 9 B. & C. 902.

1901

IMPERIAL BANK OF CANADA v. THE BANK OF HAMILTON.

Gwynne J.

certifying to its genuineness, which must be taken to be the purpose of affixing the stamp so as to give it transferable value, and the amount of the cheque has been altered, after being so stamped and before being used by the drawer, in such a perfectly deceptive manner that the alteration was incapable of detection by any means whatever save by reference to the bank's own books, by the use of which means the alteration immediately becomes plainly patent to the bank, and the bank without the use of such means, being satisfied apparently upon seeing its own stamp, pays the amount to a *bonâ fide* holder for value, such a payment must be regarded as in the bank's own wrong and must be attributed to its own default and neglect and cannot be recovered back upon a suggestion that the payment was made under the influence of what the law regards as a mistake of fact. And the language of the court as above extracted from *Chambers* v. *Miller* (1), is, I think, in support of this view.

The second ground in *Cocks* v. *Masterman* (2), upon which the court unanimously proceeded, is however precisely in point in the present case.

In *Mather* v. *Lord Maidstone* (3), the principle upon which *Cocks* v. *Masterman* (2) was decided, was in 1856 affirmed in the following language by Jervis C.J.

> As a general rule the holder of a bill of exchange has a right to know whether or not it has been duly honoured by the acceptor at maturity, and when the bill is presented, if the acceptor pays it, the money cannot be recovered *back if the acceptor has the means of satisfying himself of his liability to pay it, though it should turn out that the acceptance was a forgery.*

And by Cresswell J.:

> A man accepts a bill of exchange purporting to be drawn by one Thompson, and pays it, and if it afterwards turned out to be a forgery, he cannot afterwards be permitted to say that he paid the money under a mistake,

(1) 13 C. B. N. S. 125. (2) 9 B. & C. 902.
(3) 18 C. B. 295.

and in *The London and River Platte Bank* v. *The Bank of Liverpool* (1), *Cocks* v. *Masterman*, as approved and affirmed in *Mather* v. *Lord Maidstone*, is again recognised as having established

a clear unimpeachable rule which ought not to be tampered with.

The Court of Appeal of Toronto seems to have been of opinion that the respondents had a superior equity to the appellants which entitled them to recover back the money from the appellants.

In what does that superior equity consist?

No blame, default or negligence of any description in the transaction is attributable or attributed to the appellants. The alteration was so well made as to give no ground of suspicion, and the appellants could not by any means have discovered the forgery. They were holders for full value of the cheque as altered. On the other hand, the respondents had, and they alone had ample means of discovering the forgery by simple reference to their own books. Surely the default, omission or neglect to avail themselves of so ready a method in their possession to have detected the forgery of their own acceptance and so to protect themselves cannot be said to give to them *an equity* superior to the right of the innocent holder for value to retain the money paid to them by the respondents in satisfaction of a cheque which, upon such payment, the appellants transferred to the respondents, who became as entitled to recover the amount from the drawer, equally as the appellants themselves would have been if the respondents had not paid the cheque.

There is no case in the books to support the respondents' claim to recover back the money paid by them to the appellants, but, on the contrary, the judgment in their favour in the present action is in direct contra-

(1) [1896] 1 Q. B. 7.

1901

IMPERIAL BANK OF CANADA v. THE BANK OF HAMILTON.

Gwynne J

diction of a principle well established by the cases above referred to, all tampering with which is to be deprecated.

I am of opinion, therefore, that the appeal should be allowed with costs, and the action dismissed with costs.

SEDGEWICK J. concurred in the judgment of Mr. Justice Girouard.

GIROUARD J.—I do not see that we can decide this case otherwise than the learned judges of the two courts below have done, although I fear that the conclusion arrived at will be injurious to our commercial intercourse, not only at home, but also abroad, and more particularly in the neighbouring States of the American Union, where a different principle generally prevails.

I quite agree with them that there was no negligence on the part of the Bank of Hamilton in not discovering and giving notice of the raising of the cheque until the morning after it went through the Clearing House. In fact, according to the custom among bankers, the verification with the books of the bank is not made, and cannot be made, before that time. At all events, the Imperial Bank was not prejudiced by the delay.

But can we say as much about its conduct in accepting or marking the cheque in the incomplete form in which it was presented?

From the beginning of the argument I felt that *Young* v. *Grote* (1), which had been the standard authority for more than half a century, had been well decided and expressed the law of England; even as late as 1891, we find it quoted as a binding authority

(1) 4 Bing. 253.

by the House of Lords in *The Bank of England* v. *Vagliano* (2).

I can see however that a distinction should be made between that case and the present one, the former arising out of the relation of mandant and mandatory, which does not exist in that of the acceptor or certifyer and holder of a cheque. But is not negligence to affect the latter case as the former one? Is not the acceptor or certifyer under some obligation or duty to the public when dealing with an instrument transferable by mere delivery?

I never supposed that there is a duty on his part to guard against crime; that evidently concerns the lawmaker; but I certainly thought that he should not facilitate its commission by others and that, at least, he should be prudent, and that having occasioned damage by not filling the blanks which were the immediate cause of the fraud upon the holder in due course, he, and not the latter, ought to suffer. Negligence by the bank on which a cheque is drawn, is especially recognised by secs. 78, 79 and 81 of the Bills of Exchange Act, as an important element of responsibility to the holder in the negotiation of crossed cheques. Why not apply the same principle to the action of the bank negligently certifying a cheque, especially if we consider that there is no obligation on its part to accept or certify, but merely to pay. The principle of negligence seems to rule over all the operations of business men, whether under the common law the law merchant, or any other law. A decision holding the bank so acting responsible to the holder would be more in accord with the notions of right and wrong I have learned from the writings of that great jurist, Pothier, which led to the ruling in *Young* v. *Grote*, and also in a case still more in point decided

(2) [1891] A. C. 107.

1901

IMPERIAL BANK OF CANADA v. THE BANK OF HAMILTON.

Girouard J.

unanimously by the Court of Appeal of the Province of Quebec; I refer to *Dorwin* v. *Thomson* (1). In my humble opinion, that ruling is the mere application of the elementary principle that every person is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill. I have always been under the impression that this principle was held good in every country, in England as well as everywhere else, in commercial as well as in civil matters. But after much conflict of opinion, the House of Lords in *Schofield* v. *The Earl of Londesborough* (2), has held that it did not apply to a case where a drawer of a bill of exchange availed himself of spaces, which he had purposely left, to raise the amount of an acceptance from five hundred pounds to three thousand five hundred pounds, and that the acceptor, who had not filled the spaces, was not liable to a holder in due course. Rightly or wrongly, the highest tribunal of the Empire has overruled *Young* v. *Grote*, in so far as the general principle of negligence can be applied, because, observe their Lordships, it was founded upon the civil law and the authority of Pothier, which, they add, form no part of the mercantile law of England.

Already this decision has undergone an unusual amount of adverse criticism which will be found summarised in Am. & Eng. Encycl. of Law (2 ed.) vo. "Bills and Notes," page 332; La revue Legale, 1890, p. 436, and in a valuable book on the principles of Estoppel, just published by Mr. Ewart, K.C. of the Winnipeg Bar.

We are bound by the decision of the House of Lords, till set aside by an Act of the Canadian Parliament. I cannot distinguish this case from *Schofield* v. *Londesborough*, because in the latter case the instrument was

(1) 13 L. C. Jur. 262. (2) [1896] A. C. 514.

a bill of exchange and not a cheque. The Bills of Exchange Act, 1890, sec. 72, declares that a cheque is a bill of exchange drawn on a bank, payable on demand.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Laidlaw, Kappele & Bicknell.*

Solicitors for the respondent: *McCarthy, Osler, Hoskin & Creelman.*