

Court of Appeal, }

Wellington. }

{ Full Court.
{ July 17. 1901.

POLLOCK v. THE BANK OF NEW
ZEALAND.

Cheque—Post-dated—Banker paying before date—Consequent dishonour of other cheques—Right to “accept” cheque as Bill of Exchange—Liability to customer—Bills of Exchange Act, 1883.

A post-dated cheque is a bill of exchange payable on demand on or after the day it bears date, and a banker who pays a post-dated cheque before its date, and thus reduces or exhausts the funds in his hands belonging to the maker, is liable for damages for dishonouring a cheque presented before the date of the post-dated cheque, which would, but for the wrongful payment of such post-dated cheque, have been duly honoured.

SPECIAL CASE stated for the opinion of the Court:—

The plaintiff issued a post-dated cheque, and it was presented before its due date to the defendant bank, and paid. After issuing such post-dated cheque, and before the day it

1901

POLLOCK
v.
BANK OF N.Z.
—
Court of Appeal

bore date the plaintiff gave a cheque in the ordinary course of business, but on presentation it was dishonoured, owing to the funds to the credit of the plaintiff's account with the defendant bank having been reduced, through the paying of the post-dated cheque.

Questions: (1) Whether the payment by the bank of the post-dated cheque was wrongful, and (2) whether the plaintiff was entitled to damages, answered in favour of the plaintiff.

Held, that such post-dated cheque was delivered subject to the condition that it should not be presented before a certain date, and that all holders, including the bank, had notice of the fact on the face of the cheque, and that such date must be taken to be the true date. Proof of the date of the manual operation of drawing had no effect.

[*McGill v. The Bank of North Queensland* (1895, Q.L.J., 262), considered but not followed.]

Mr. BELL appeared for the Plaintiff, and Mr. SKERRETT for the Defendant.

BELL for the plaintiff.—The question is whether a bank can pay a post-dated cheque before its date, and, incidentally, whether the bank can treat the cheque as a bill of exchange, which they may accept before the due date. "The Bills of Exchange Act 1883," Sections 13 and 73: "Chalmers on Bills," 5th Ed., p. 33 and 34; *Foster v. Mackreth* (L.R. 2 Ex., 163); *Bull v. O'Sullivan* (L.R., 6 Q. B., 209 and 212); *Emanuel v. Roberts* (9 B. and S., 421); *Whistler v. Forster* (32 L.R., C.P., 161); approved in *Gatty v. Fry* (2 Ex. Div., 265); *Royal Bank v. Scotland* (1894, 2 Q. B., 715); *Ex parte Richdale* (19 Ch. Div., 416). By what right can the bankers take away from us the power to stop the cheque? The cheque may have been given in anticipation of services to be rendered and not afterwards rendered: *Da Silva v. Fuller*, cited in "Chitty on Bills," page 188 and 279, referred to in *Morley v. Culverwell* (7 M. and W., 178); *Hinchcliffe v. Ballarat Banking Co.* (1 Vict. Rep. (L) 229); "Grant on Banking," p. 14; *Champion v. Gordon* (13 Amer. Rep., 682); *Way v. Towle* (13 Amer. State Rep., 552). The only authority against the plaintiff is *McGill v. The Bank of North Queensland* (Queensland Law Journal, 1895, p. 262.) This case is erroneous, and the plaintiff is entitled to recover damages.

FINDLAY, for defendant Bank.—As between banker and customer, a different rule applies as to post-dated cheques, from that applied as between maker and payee to whom the instrument has been delivered not as negotiable, but on a condition that it should not be used before its due date. "Chalmers on Bill of Exchange," p. 2; "The Bills of Exchange Act 1883," Sections 10, 12 and 13; "American and English Encyclopædia of Law," Vol. 5, p. 1032; "Grant on Banking," p. 20. If a post-dated cheque is a bill of exchange payable at a future date then the Bank is entitled to accept it, and if so may pay it: "Byles on Bills," p. 211. I rely on *McGill v. The Bank of North Queensland*, which is directly in point.

BELL in reply.—Under "The Bills of Exchange Act 1883," Sections 13 and 73, a bill of exchange or cheque may be post-dated. As to whether a banker could accept a post-dated cheque as a bill of exchange, in England he is forbidden to do so: "Grant on Banking," p. 335, 7 and 8 Vict. c., 32, Section 11. As to the banker not being obliged to look at the date: *Hinchcliffe v. Ballarat Banking Co.*, *Ex parte Richdale*. As to the Stamp Acts: *Bull v. O'Sullivan*.

Stout, C.J.—This case raises the question whether "The Bills of Exchange Act, 1883" has made any alteration in the law in reference to post-dated cheques. Before that statute a post-dated cheque was deemed not to be payable before the date it bore: *Da Silva v. Fuller*, quoted in "Chitty on Bills of Exchange," pp. 189 and 279; also by Baron Parke in *Morley v. Culverwell* (7 M. and W., 178); *Hinchcliffe v. Ballarat Banking Co.* (1 V.R., L., 229); "Grant on Banking," p. 14 (5th Ed., 1897). The case of *McGill v. Bank of North Queensland* (1895, Queensland Law Journal, p. 262) has, however, decided that under a statute similar in terms to ours, a post-dated cheque can be paid by a banker before its date. In coming to that decision the majority of the Court examined the statute, and interpreted it without reference to what the law was before it was passed, following the course suggested

by Lord Herschell in *Bank of England v. Vaghani Brothers* (L.R., 1891, A.C., pp. 144-145). The law merchant (see Section 98 of our statute) continues to apply to cheques unless the express provisions of the Act are inconsistent with it. Now what are the express provisions relied on by the learned judge who decided the Queensland case? The argument may be thus summarised. A cheque is a bill of exchange drawn on a banker payable on demand (Section 73), and the provisions of the Act relating to bills of exchange apply to cheques. A bill is payable on demand under Section 10 if it is so expressed to be payable, or if no time is expressed for payment. A bill is payable (Section 11) at a determinable future time which is expressed to be payable (1) at a fixed period after date at sight; (2) on or at a fixed period after the occurrence of a specified event. If a bill is issued undated, any holder may insert the true date of issue. Section 13 says the date on a bill is deemed to be the true date unless the contrary is proved. It is said that keeping in view these provisions of the statute the holder of a post-dated cheque may prove its true date, being the date of issue, and the banker can pay it as if the true date had been so inserted. I cannot yield to this argument. The date in the cheque was not meant to be the date of issue. Post-dated cheques were before the Act, and are now well known mercantile instruments, and they are not invalid (Section 13) by reason only that they are post-dated. A post-dated cheque is a direction to a banker to pay the cheque on the date it bears, and there is in my opinion no "express provision" that declares that this date can be altered to the date of issue. Were such a provision to be spelled out of the Act there could not have been since the statute any post-dated cheques. It was said in the Queensland case that the date on the cheque not being the date of its issue had no more effect than a direction to a banker not to honour a cheque bearing the true date of issue would have had. This does not seem to me to be so. The post-dated cheque is accord-

ing to the law merchant an express direction not to pay it until the date it bears arrives. And there must be some authority found in the statute expressly providing that such date can be treated as non-existent and another date inserted. There is no such express provision. Mr. Justice Harding based his decision on the ground that a post-dated cheque is in the nature of a bill of exchange, that the banker was entitled to accept this bill, and having paid it before its date the fund in his hands belonging to the owner could be held by the banker till the due date as against his acceptance. If this defence was available for the banker's action in that case it was available before the statute, for a post-dated cheque was called a bill of exchange: *Foster v. Macreth* (L.R., 2 Ex., p. 166); *Ex parte Richdale, in re Palmer* (19 Ch. Div., 408). I do not think the post-dated cheque is a bill to be presented to the banker for acceptance. It is a bill to be paid by the banker on demand at its date. It is not like a case of a cheque certified to be correct. The bank paid it, and therefore neither on the ground mentioned by his Honour the Chief Justice of Queensland, nor that of Mr. Justice Harding, can a post-dated cheque be paid by a banker before the date it bears. I am of opinion, therefore, that the payment of the cheque was wrongful, and that the plaintiff is entitled to damages for dishonour of the cheque mentioned. By so holding the Court will determine that the law as to post-dated cheques has not been altered by our Bills of Exchange Act.

Williams, J.—I am of the same opinion. To arrive at a different conclusion it would be necessary to decide that a post-dated cheque was payable on a demand made by the holder at any time before the date and that the holder could sue upon it if not then paid. This is entirely contrary to mercantile custom. A person who gives a post-dated cheque gives it with the intention that it shall not be presented before the date, and the person who receives the cheque from the drawer knows that it is given with such an intention. Every one to

1901

POLOCK
v.
BANK OF N.Z.
Court of Appeal

1901
 POLLOCK
 v.
 BANK OF N.Z.
 Court of Appeal

whose hands the cheque comes before the date of it, including the banker upon whom it is drawn, has, by the fact of the date on the cheque, notice of the intention with which it was given by the drawer and received by the original holder. The 13th Section of the Bills of Exchange Act provides that the date of a bill is to be deemed the true date unless the contrary be proved. It does not prove the contrary to show that the mere manual operation of drawing took place at an earlier date unless it be also shown that it was the intention of the parties that the bill should have currency as from that date.

Denniston, J., concurred.

Conolly, J.—I am of opinion that the payment by the defendant Bank, on the 12th day of December of the post-dated cheque bearing date the 15th day of December, was wrongful, and therefore, that the plaintiff is entitled to recover damages for the dishonour of his cheque drawn and dated the 13th of December and presented for payment the same day; since but for the wrongful act of the plaintiff there would have been sufficient funds of the plaintiff in the Bank to meet it. A cheque is an order to the Bank to pay the sum indicated out of the amount standing to the maker's credit at or after its date. The fact of a cheque being post-dated indicates that there are not sufficient funds to meet it on the day that it is drawn, and that its payment on demand is only to take place at or after the date indicated.

Edwards, J., concurred.

Cooper, J.—The facts in this case are shortly these: The plaintiff, a butcher in Wellington, was on the 13th December, 1900, or for some time prior to that date a customer of the defendant bank, and kept a banking account with the defendant bank. On the 6th December, 1900, he gave to Messrs. Bunny and Rawson, solicitors, Wellington, a post-

dated cheque on the defendant bank bearing date the 15th December, 1900. On the 13th December, 1900, he gave to the Wellington Meat Export Company a cheque for £38 11s on the defendant bank bearing that date. On the 12th December, the cheque given to Messrs. Bunny and Rawson was presented for payment, and although it was dated 15th December, 1900, was paid by the bank. The effect of such payment was to reduce the plaintiff's balance to an amount below the sum of £38 11s, and when, therefore, the cheque, given to the Meat Export Company, was presented, there were not sufficient funds to meet it and it was dishonoured. The questions stated for the opinion of the Court are:—(1) Whether the payment by the defendant bank of the said post-dated cheque on the said 12th day of December, 1900, was wrongful or not? (2) Whether the plaintiff is entitled to damages from the defendant bank in consequence of the dishonour by the defendant bank of the cheque for £38 11s on the said 13th day of December, 1900. In my opinion both these questions must be answered in the affirmative. Dr. Findlay substantially based his argument in support of the defendant Bank upon a decision of the Supreme Court of Queensland, in the case of *McGill v. Bank of North Queensland* (Queensland L.J. 1895). In that case Griffith, C.J. and Real, J., held that a bank had a right to ignore the date upon a post-dated cheque and to pay it before the actual date upon the ground that the real date was the date of issue and not the date appearing on the cheque, and Harding, J. held that a post-dated cheque was equivalent to a draft drawn on the bank, payable on the date appearing on the cheque, but which if presented for acceptance before that date the bank were justified in either accepting or paying and holding, if accepted, sufficient funds then to the credit of the customer to cover the amount of the cheque, and therefore was entitled to debit the amount to the customer's account if paid before the actual date. I am quite unable to adopt the reasoning of the learned Judges deciding

that case. They have, in effect, declined to follow the decisions in England, which have in my opinion settled definitely the nature and effect of a post-dated cheque, and Griffith, C.J. has based his judgment on the statement that *Forster v. Mackreth* (L.R. 2 Ex. 163), is not now law, the principle decided in that case having, he says, been destroyed by the provisions of the Queensland Bills of Exchange Act, a statute which appears to be similar to the English Act of 1882 and our own statute of 1883. In my opinion the Bills of Exchange Act has on this point made no alteration in the law. It has simply codified the rules of Common Law and the law merchant so far at any rate as cheques are concerned, and this was, in fact, admitted by Dr. Findlay. A post-dated cheque is in effect an authority from a customer to a banker to pay on, or (according to the custom of bankers), within a reasonable time after, its date the amount named, and to charge that amount to the customer's account. It differs from a cheque bearing the date of issue, in this respect only, that the demand upon the banker to pay and the direction to and authority of the banker to pay cannot be made nor arise until the arrival of the actual date of the cheque. As expressed by Kelly, C.B., in *Forster v. Mackreth*, it is "a bill of exchange at so many days' date as intervene between the day of delivering the cheque and the date marked upon the cheque." By Section 13 of "The Bills of Exchange Act, 1883" the post-dating of a bill of exchange does not invalidate the instrument. A post-dated cheque is, therefore, in effect, a bill of exchange, payable on demand, with a post-date upon which the demand is to be made, and it is an instrument well known and frequently issued in this colony. As far back as 1776, and while the law merchant was then in process of formation, it was held, in *Da Silva v. Fuller* (Scl. Ca., 236), referred to in "Chitty on Bills" (11th Ed., p. 188), that a banker was not justified in paying a post-dated cheque before its actual date. In 1868, nearly one hundred years later, the Court

of Queen's Bench, in *Emanuel v. Roberts and others* (9 B. and S., 121), held that a banker was justified in refusing payment of a post-dated cheque before its due date, and that the custom of bankers to do so was a part of the contract between banker and customer. In *Bull v. O'Sullivan* (L.R. 6, Q.B., 209), the Court held that a post-dated cheque, payable to order was an instrument payable to order on demand, on its date, and was therefore properly stamped with a penny stamp, and this had also previously been determined in *Whistler v. Forster* (32 L.J., C.P., 161); and later, in 1877, in *Gatty v. Fry* (L.R. 2, Ex. Div., 265), the Court held that a post-dated cheque, payable to bearer, was sufficiently stamped with a penny stamp. In that case, Cleasby, C.B., says that a post-dated cheque is not payable on the day it is issued, but on the day of its date. In *Ex parte Richdale, In re Palmer* (L.R. 19, Ch. Div., 409), has been decided by the Court of Appeal, and in that case the Court held that a post-dated cheque was equivalent to a bill of exchange, payable on a future date, namely, the date of the cheque, and that there was no obligation on the part of the drawer to stop payment of the cheque when the bankruptcy of the person to whom it was given intervened between the date of the issue of the cheque and its actual date. All these cases were decided before the law was codified in England by "The Bills of Exchange Act, 1882." Since that Act came into operation, the Court of Appeal in England has, in *The Royal Bank of Scotland v. Tottenham* (1894, L.R., 2 Q.B., 715), followed these cases, and has expressly approved of *Gatty v. Fry* and *Ex parte Richdale*. In Victoria, in *Hinchcliffe v. The Ballarat Banking Co.* (1 V.R., L., 229), the Court determined the exact point in question, in the present case against the bank, holding that a post-dated cheque is a bill of exchange, payable at a future date, and that a banker may render himself liable to an action by the customer for negligence if he pays such cheque before the day it bears date. The case of *Morley v. Sulverwell* (7 M. and W., 174), disposes of the

1901

POLLOCK

v.

BANK OF N.Z.

Court of Appeal

1901

REX

v.

MABIN.

Court of Appeal

contention that a banker may, although the cheque is not due, pay it before its due date, and appropriate his customer's funds as a security for the banker's protection against such payment. Parkes, B., referring to *Da Silva v. Fuller*, says: "It has been so held in the case of a banker's cheque, payable to bearer. If a banker pays it before it is due he is not protected." There is no authority to support the view taken by the Queensland Court, and there is ample authority the other way. As, therefore, the first question must be answered in the affirmative, so must the second question. The Bank, by paying the post-dated cheque before its actual date, wrongfully debited its amount against the plaintiff's account. But for that debit there would have been sufficient funds to meet the cheque for £38 11s.; a cheque which the Bank ought to have paid, but which they, in breach of their duty to the plaintiff, dishonoured. The plaintiff is, therefore, entitled to damages for the wrongful dishonour of this cheque.