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Mar. 15.

Coram STRONG, J.

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... PLAINTIFF;

AND

THE BANK OF MONTREAL.....DEFENDANTS.

Government cheque on deposit account with bank—Rights of payee endorsing for collection—Credit entry in payee's books, reversal of—Presentation by post—Sufficiency of notice of dishonor—Liability of drawer on non-payment.

The Dominion Government, having a deposit account of public moneys with the Bank of P.E.I., upon which they were entitled to draw at any time, the Deputy Minister of Finance drew an official cheque thereon for $30,000 which, together with a number of other cheques, he sent to the branch of the Bank of Montreal at O., at which branch bank the Government had also a deposit account. The said branch bank thereupon placed the amount of the cheque to the credit of the Dominion Government on the books of the bank, the manager thereof endorsing the same in blank and forwarding it to the head office of his bank at Montreal. The cheque was then sent forward by mail from the head office of the Bank of Montreal to the Bank of P.E.I. for collection, but was not paid by the latter bank which, subsequently to the presentment of the cheque, suspended payment generally.

Held:—(1). That the Bank of Montreal were mere agents for the collection of this cheque, and that, although the proceeds of the cheque had been credited to the Government upon the books of the bank, it never was the intention of the bank to treat the cheque as having been discounted by them; consequently, as the bank did not acquire property in the cheque, and were never holders of it for value, they were entitled on the dishonor of the cheque to reverse the entry in their books and charge the amount thereof against the Government. *Giles* v. *Perkins*, (9 East. 12); *Ex parte Barkworth*, (2 De G. & J. 194) referred to.

(2). That the mode of presenting a cheque on a bank by transmitting it to the drawee by mail, is a legal and customary mode of presentment. *Heywood* v. *Pickering*, (L.R. 9, Q.B. 428); *Prideaux* v. *Criddle*, (L.R. 4 Q.B. 455) referred to.

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(3). That although a collecting bank cannot enlarge the time for presentment by circulating a bill or cheque amongst its branches, yet, if it has been endorsed to and transmitted through them for collection, the different branches or agencies are to be regarded as separate and independent endorsers for the purpose of giving notice of dishonor. *Clode* v. *Bayley*, (12 M. & W. 51); *Brown* v. *L. & N. W. Ry. Co.*, (4 B. & S. 3) 26 referred to.

(4). That the defendants, whether considered as mere agents for the collection, or as holders, of the cheque for value, were, as regards the drawer, only called upon to show that there was no unreasonable delay in presentment and in giving notice of non-payment; and, no such delay having occurred, the Crown was not relieved from liability as drawer of the cheque.

In a letter from the manager of the Bank of Montreal at Ottawa to the Deputy Minister of Finance, which the defendants put in evidence as a notice to the Crown—the drawer—of the dishonor of the cheque by the drawees—the Bank of P.E.I., the fact of non-payment was stated as follows :—"I am now advised that it has not yet been covered by Bank of P. E. Island. In case of it being returned here again unpaid I deem it proper to notify you of the circumstances, as I will be required in that event to reverse the entry and return it to the Department."

Held:—That the words "not covered," as used in this letter, were equivalent to "not paid" or to "unpaid;" and, being so construed, the letter was a sufficient legal notice of dishonor. *Bailey* v. *Porter*, (14 M. & W. 44); *Paul* v. *Joel*, (27 L. J. Ex. 380) referred to.

THIS was an information filed by the Attorney-General for Canada, on behalf of the Crown, to recover the sum of $30,000, alleged to be due from the defendants.

The Dominion Government had a deposit account of public moneys with the branch of the Bank of Montreal at Ottawa, and, at the same time, had an account with the Bank of Prince Edward Island at Charlottetown, upon which they were entitled to draw on demand at any time by the usual official cheques,—some $80,000 remaining to the credit of the Government on the 14th November, 1881. On that date, an officer of the Finance Department, drew an official cheque, in the usual form, on the Bank of Prince Edward Island for the sum of $30,000, in favor of the branch of the Bank of Montreal

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at Ottawa, and sent it on the same day by post to the manager of the said branch. The letter was received by him on the following day, and, after being endorsed by him in blank and placed to the credit of the Government on the books of the bank, it was immediately forwarded by him to the head office of his bank at Montreal. On the 16th November, two days after the cheque was sent from the Finance Department, it reached the head office of the Bank of Montreal. There upon the manager at Montreal, having also endorsed the cheque, sent it to the cashier of the Bank of Prince Edward Island at Charlottetown, where it arrived in due course of post on the 18th November, and was delivered to the cashier of the Bank of Prince Edward Island on the 19th November. On the same day the cashier of the Bank of Prince Edward Island made a draft upon the head office of the Bank of Montreal for the sum of $30,420.54, in payment of this cheque and some other small items due to the Bank of Montreal by the Bank of Prince Edward Island, but this draft was not mailed until the 22nd November, and did not reach Montreal until the 25th November. At the time this draft was drawn the Bank of Prince Edward Island was indebted to the Bank of Montreal in the sum of $7,000. This being the case, the latter bank would not accept the draft, and, the same day it was received, the manager at Montreal notified the manager of his bank at Ottawa, by post, that the cheque had not been paid, and instructed the latter to immediately notify the Finance Department that such was the case. As soon as these instructions were received by the manager at Ottawa, he, on the 26th November, wrote to the Deputy Finance Minister, who had drawn the cheque, advising him of the non-payment thereof, and stating that in case the cheque were returned to him unpaid he would send it back to the Department, and reverse the entry which had been made whereby the amount of the

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cheque had been placed to the credit of the Government on the books of the bank. This letter was received by the Finance Department on the same day it was mailed. On Monday, the 28th November, and while the cheque was still in their possession, the Bank of Prince Edward Island suspended payment,—the fact of such suspension becoming known to the Finance Department on the same day. Upon a refusal by defendants to make good to the Crown the amount of the said cheque, action was brought.

The case was heard before Mr. Justice Strong.

Hogg and *Ferguson* for the Crown;

Robinson Q.C. and *Gormully* for defendants.

STRONG, J. now (March 15, 1886) delivered judgment.

This is an information filed by the Attorney-General for the Dominion against the Bank of Montreal, to recover the sum of $30,000. The information, in substance, states the following case :—

That on the 14th of November, 1881, the Receiver-General of the Dominion had a deposit account of public moneys with the branch of the Bank of Montreal, at Ottawa; that at the same date the Receiver-General had also an account with the Bank of Prince Edward Island, at Charlottetown, upon which he was entitled to draw on demand, at any time, by the usual official cheques, and in respect of which there was then upwards of $80,000 at his credit; that on the day before mentioned the Receiver-General caused to be drawn an official cheque, in the usual form, on his deposit account with the Bank of Prince Edward Island, in Charlottetown, which cheque was signed by the Deputy Minister of Finance, and was for the sum of $30,000, payable to the order of the defendants; and that, on the same day, this cheque, together with other cheques, were deposited with the defendants at Ottawa.

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It is further alleged that the defendants received this cheque for $30,000 as cash, and at once placed the amount thereof to the credit of the Receiver-General's account in the Ottawa branch; and that the defendants thereupon became the holders and beneficial owners of the cheque; that the defendant's manager or agent at Ottawa, Mr. Drummond, afterwards forwarded the cheque to the defendants in the City of Montreal, and it was thereupon charged by the defendants, in the books of the Bank of Montreal, at Montreal, to the Bank of Prince Edward Island, and then forwarded to that bank at Charlottetown; that the Bank of Prince Edward Island received the cheque and paid the same by charging the Receiver-General's account therewith, and forwarded the cheque itself, marked paid, to the Receiver-General at Ottawa, and such cheque is now in the possession of the Receiver-General; that the Bank of Prince Edward Island credited the defendants with the amount of the cheque, and sent to the defendants the necessary authority to charge their account with the Montreal Branch with the amount thereof; that the Bank of Prince Edward Island, shortly after the happening of the before mentioned circumstances, suspended payment, and the defendants now claim not to be liable to account for the proceeds of the cheque.

Upon this statement of facts the information claims judgment against the defendants for the sum of $30,000, and interest. The defendants, by their statement of defence, admit that for some time prior to the 15th of November, 1881, the Receiver-General of Canada had an account current with their branch at Ottawa to the credit of which very large deposits of public moneys were constantly being made; they further admit that on the last mentioned day they received from the Receiver-General the cheque for

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$30,000 mentioned in the information, but they deny that they received the same otherwise than as agents for the collection thereof, although they admit that, in accordance with their practice and usage, they at once credited the Receiver-General's account current with the amount thereof; they further say that on the same day, the 15th of November, their agent at Ottawa duly sent forward this cheque for collection to the head office of the defendants at Montreal, where it was received in due course of post, and that the defendants, with due diligence, transmitted it to their agents in Prince Edward Island for collection; that the Bank of Prince Edward Island did not pay the cheque, which still remains unpaid and dishonored; that the defendants gave due notice of the non-payment and dishonor, and thereupon debited the before mentioned account with the amount thereof, according to the usage and understanding upon which they received that, and all other cheques, for collection, and they submit that they are not liable to the claim of the Crown.

Upon this statement of defence the Attorney-General took issue.

Evidence was taken in the case under commission at Charlottetown, and also *viva voce* at the trial; and the examination of the defendants' agent at Ottawa, Mr. Drummond, taken previous to the hearing, was read on behalf of the Crown, and a similar examination of the Deputy Finance Minister, Mr. Courtney, was read by the defendants. From this evidence I find the following facts to be proved :—

The cheque in question, which was sent by Mr. Courtney, as Deputy Minister of Finance, and countersigned by the Assistant Auditor-General, is as follows :—

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FINANCE DEPARTMENT, CANADA,
OTTAWA, 14th November, 1881.

$30,000.

Bank of Prince Edward Island, Charlottetown, P. E. I. Pay to the order of the Bank of Montreal, at Ottawa, thirty thousand dollars.

(Signed) J. M. COURTNEY,
Deputy Minister of Finance.

(Countersigned).
W. ALLISON,
Asst. Auditor-General.

The cheque was endorsed by the manager of the Ottawa branch of defendant Bank and by the manager of the Montreal office. This cheque, according to the evidence of Mr. Courtney given at the trial, was drawn and signed on the 14th November, the day on which it bears date, and was on that day sent through the post, together with other cheques, in a registered letter addressed to Mr. Drummond, defendants' agent or manager at Ottawa. This letter, according to Mr. Courtney's own admission, and according to Mr. Drummond's statement in his examination, would not have been, in due course of post, and was not in fact, received at the bank in Ottawa until the morning of the 15th of November, on which day it was transmitted by Mr. Drummond to the head office of the defendant bank at Montreal, having previously been endorsed by him in blank ; it would, therefore, have been received at the office in the Montreal bank on the 16th, by the post of which day the manager at Montreal, having previously also endorsed the cheque, sent it forward in a letter addressed to the cashier of the Bank of Prince Edward Island, at Charlottetown, where it arrived in due course of post on the evening of Friday the 18th November, between the hours of 9 and 10 o'clock, and was delivered to the cashier of the Bank of Prince Edward Island on the morning of Saturday the 19th ; that on the same day, the 19th, the cashier of the Bank of Prince Edward Island (Mr. Brecken) drew a draft on the bank of Montreal, at Montreal, for the sum

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of $30,420.54 which was made up of the amount of this cheque and some other small items due to the Bank of Montreal by the Bank of Prince Edward Island in respect of collections This draft was not, however, forwarded on the day on which it is dated, 19th November, but remained in the possession of the cashier who had signed it. On the morning of Monday, 21st November, the cashier, Mr. Brecken, left the Island for the ostensible purpose of visiting one of the neighbouring provinces, or the United States, on private business, but in fact, as afterwards appeared, absconded to avoid the consequences of his mal-administration of the affairs of his bank, and the improper abstraction of its funds.

The draft, which had been drawn as a mode of payment of this cheque, was not remitted to the Bank of Montreal until Tuesday the 22nd of November, when it was sent forward by the assistant-cashier by post, enclosed in a letter addressed to the manager at Montreal. This letter, which left Charlottetown by the mail of Wednesday the 23rd, reached Montreal early on the morning of the 25th, and came to the hands of the manager of the defendant Bank at that place on the opening of business on that day.

At the time the draft, which was sent in payment by the Bank of Prince Edward Island, was drawn, that bank, so far from having effects to meet their draft in the hands of the Bank of Montreal, were debtors on an overdue balance of their account with that bank to an amount exceeding $7,000. This being so, it was of course that the manager of the defendants' Montreal branch should not accept the proposed mode of payment by this unauthorised draft, which would have been in effect a mere grant of a further credit of some $30,420.54 to the Bank of Prince Edward Island. The manager, accordingly, on the same day (the 25th) on which he received the letter enclosing the draft, posted

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a letter addressed to the manager at Ottawa, giving him notice that the cheque had not been paid, and instructing him forthwith to give notice to that effect to the Deputy Finance Minister, the drawer. This letter was received at Ottawa by the manager there on Saturday, the 26th of November, and he immediately sent to the Deputy Finance Minister a letter in the words following: —

BANK OF MONTREAL,
OTTAWA, 26th November 1881.

J. M. COURTNEY, Esq.,
Deputy Minister of Finance.

DEAR SIR.—On the 15th inst. we received from you for credit, as usual, Receiver-General's cheque $30,000 on the Bank of Prince Edward Island. This was forwarded for account to our Montreal Branch by whom I am now advised that it has not yet been covered by Bank of Prince Edward Island. In case of it being returned here again unpaid I deem it proper to notify you of the circumstances, as I will be required in that event to reverse the entry and return it to the Department.

Yours truly,
(Signed) ANDREW DRUMMOND, *Mgr.*

This letter, as is admitted by Mr. Courtney, was received by him on the same day, the 26th November. On Monday, 28th of November, the fact of Brecken having absconded becoming known to the directors of the Bank of Prince Edward Island, that bank, being embarrassed and unable to meet its liabilities, suspended payment. The cheque, in the meantime, remained in the possession of the Bank of Prince Edward Island, at all events until after the failure of the bank, when, by some means not satisfactorily explained, either by the officials of the bank, or by the officials of the Government in Prince Edward Island, it was improperly and irregularly transferred from the possession of the bank there, to that of Mr. Pope, the Provincial Auditor-General and Deputy Receiver-General at Charlottetown, who immediately forwarded it to Ottawa. The fact of the bank's suspension and insolvency became known to Mr. Courtney, the Deputy Finance

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Minister, by telegraphic communication, on the morn- of the 28th.

I also find that the Bank of Montreal were mere agents for the collection of this cheque; and that, although the proceeds of the cheque were credited in account as before mentioned, it never was the intention of the bank, nor of the Finance Minister, to treat the cheque as having been discounted by the bank; and that the bank did not acquire the property in the cheque and, consequently, were never holders of it for value, but were entitled upon its dishonor to reverse the entry and debit the amount to the account current kept with the Receiver-General. I further find, and this finding I rest upon the evidence of Mr. Lockhead, the assistant-cashier of the Bank of Prince Edward Island, that the letter enclosing the draft was posted at Charlottetown on the 22nd of November, and that it reached Montreal on the morning of the 25th of November, and that notice was given as before stated. I also find that the Bank of Prince Edward Island was insolvent, and unable to pay this cheque from the time it first came into the hands of the cashier on Saturday, the 19th of November.

It is to be observed, in the first place, that the case presented by the information is not a question of negligence on the part of the bank, as an agent of the Government to collect the cheque, but a case of discount of the cheque by which the bank became holders thereof for value, and liable before presentment, to account for the proceeds to the Crown. The question of the real relation between the bank and the Crown arising out of this particular transaction, is not a question of law, but one purely of fact (*Giles* v. *Perkins* (1), and *ex parte Barkworth*) (2); and as a question of fact, it is not concluded by an entry in the books,—such entry being susceptible of explanation, and being, as I hold, in the

(1) 9 East. 12.

(2) 2 De G. & J. 194.

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present case sufficiently explained by the evidence of the defendants' late manager, Mr. Drummond, and of Mr. Gundry, the present manager, and by the attendant circumstances, and therefore to be construed in the way already indicated.

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Then considering the bank as a mere agent for collection, what were its obligations and liabilities as such ? Although, as I have said, I consider the defendants not to have been holders for value in whom the property in this cheque had vested, but only agents for its collection, yet the obligations which rest upon a holder for value as regards presentment for payment in order to make the drawer of a cheque liable, may, I think, be regarded as a fair test to apply to the case of an agent for collection on behalf of the drawer, in order to ascertain if due diligence has been used. The law is well established to be that the drawer of a cheque is liable to a holder for value at any time within six years, notwithstanding any delay which may have occurred in its presentment, unless such delay is unreasonable and the drawer is actually prejudiced by it; and in such case it is held that the question of reasonable time is entirely one of fact. *Serle* v. *Norton* (1).

In a case of *Ramchurn Mullick* v. *Luchmeechund Radakissen, et al.* (2), Parke, B., in delivering the judgment of the Judicial Committee of the Privy Council, thus speaks of the liability of the drawer of a cheque:—

> The authority on which reliance is placed on the part of the appellant, in support of the doctrine contended for, is that of *Robinson* v. *Hawksford* (3), which is the case of a cheque presented some days after it was drawn, to the banker, and not paid in consequence of the countermand of the drawer ; and the court held, that if the drawee continued solvent, and no damage has arisen from delay of presentment, the drawer continued liable. If this had been a decision on a regular

(1) 2 Moo. & Rob. 401. (2) 9 Moore's P. C. Cas. at p. 69.
(3) 9 Q. B. 52.

bill of exchange, payable on or after sight, it would have been a strong authority for the plaintiff in error. It is not, however, the case of a bill of exchange, but of a banker's cheque, which is a peculiar sort of instrument, in many respects resembling a bill of exchange, but in some entirely different. A cheque does not require acceptance ; in the ordinary course it is never accepted ; it is not intended for circulation, it is given for immediate payment ; it is not entitled to days of grace ; and though it is, strictly speaking, an order upon a debtor by a creditor to pay to a third person the whole or part of a debt, yet, in the ordinary understanding of persons, it is not so considered. It is more like an appropriation of what is treated as ready money in the hands of the banker, and in giving the order to appropriate to a creditor, the person giving the cheque must be considered as the person primarily liable to pay, who orders his debt to be paid at a particular place, and as being much in the same position as the maker of a promissory note, or the acceptor of a bill of exchange, payable at a particular place and not elsewhere, who has no right to insist on immediate presentment at that place. There is a very good note on this subject in the case of *Serle* v. *Norton*, as to the difference between cheques and bills of exchange. We do not think that the case of a cheque is similar to that of regular bills of exchange, inland or foreign, drawn payable at or after date.

The reporter's note appended to the case of *Serle* v. *Norton* (1), of which Baron Parke expressed approval, concludes as follows :—

Although the holder of a cheque, who does not present it within a reasonable time, is guilty of laches, the consequences of such laches may vary according to the circumstances of each case.

It is also there said :

As between the drawer and the payee of the cheque, the question of reasonable time can scarcely arise unless some damage has arisen in consequence of the non-presentment.

In the case of *Heywood* v. *Pickering* (2) the law is also stated by both Blackburn, J. and Quain, J , to be in accordance with the foregoing extracts. To these authorities may be added references to *Robinson* v. *Hawksford* (3) and *Serle* v. *Norton* (4) cited by Baron Parke *ut supra*, and to *Chitty on Bills* (5), *Chalmers on*

(1) 2 Moo. & Rob. at p. 404.
(2) L. R. 9 Q. B. 428.
(3) 9 Q. B. 52.
(4) 2 Moo. & Rob. 401.
(5) 11 ed. p. 361.

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Bills and Notes (1), and to *Grant on Banking* (2), where it is said:

> As between the payee and the drawer the rule is that the drawer is not discharged, that is, the payee does not lose his remedy against the drawer by reason of non-presentment within any prescribed time, short of six years after taking the cheque, unless by his delay the drawer has been prejudiced or his position altered for the worse, as for instance, by the insolvency of the banker in the interval.

In the Imperial statute, 45 and 46 Vic., c. 61, by which the existing law as to bills, notes and cheques is codified, the 74th section enacts the rule to be precisely as before stated.

Assuming then, for the present, that the bank, although in truth mere collection agents, were bound to use the same diligence as a holder for value, let us see if they were sufficiently diligent to meet the requirements of the law applicable to such holders as against the drawers of cheques. If it should appear that the cheque was presented sufficiently early to comply with the rule applicable to the case not of a drawer, but of an endorser or transferror of a cheque, which is identical with that as to endorsers of bills and notes, and far more strict than that before stated as applicable to drawers of cheques, it will follow *a fortiori* that the presentment was sufficient to charge the drawer. By the law applicable to holders for value, as against the endorser, of a cheque they are bound to transmit the cheque drawn upon a bank in a place other than that in which they themselves reside or have their own house of business, for presentment, by the morning of the day after they received it. *Grant on Banking* (3), *Heywood* v. *Pickering*, (4) *Hare* v. *Henty* (5), *Bond* v. *Warden* (6).

The evidence shows that Mr. Drummond received

(1) 2 ed. p. 231.
(2) 4 ed. p. 49.
(3) 4 ed. p. 51.
(4) L. R. 9 Q. B. 428.
(5) 30 L. J. C. P. 302.
(6) 1 Coll. 583.

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the cheque on the 15th of November; that he forwarded it the same day to Montreal, and that it was dispatched from Montreal by the mail of the next day, the 16th, being the same mail as that by which it would have left if it had been posted at Ottawa on the 16th, addressed in the same way as the letter from Montreal was addressed, to the cashier of the Bank of Prince Edward Island. It is quite true that the bank had, on the assumption that it was bound to prove that it had used the same diligence as a holder for value in order to charge an indorser, no right to enlarge the time for presentment by circulating the cheque among its own branches. *Grant on Banking* (1). *Heywood* v. *Pickering*, *supra*; *Chalmers on Bills* (2). But there was here, in point of fact, no additional time taken consequent upon the indorsement and transmission of the cheque to the Montreal Branch. If it had been forwarded directly by the manager, Mr. Drummond, from the Ottawa Branch, it would have gone by the mail which left Montreal on the evening of the 16th, by which mail it was actually forwarded.

Next comes the question, was this transmission by mail a proper mode of presentment? On the authorities there can be no doubt that it was. The evidence of Mr. Drummond, and of Mr. Gundry, shows that it is the usual practice of bankers in Canada to present in this way cheques drawn, as this cheque was, on one of their own correspondents; and the evidence shows that there was no suspicion of the credit or solvency of the Bank of Prince Edward Island, which, if it had existed at the time the cheque was forwarded, might have made this an improper and negligent mode of presentment. I am of opinion, therefore, that this mode of presenting a cheque on a banker, by transmitting it to the drawee by mail, was a legal, and on the evidence, a customary

(1) 4 ed. 52. (2) 2 ed. 230.

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mode of presentment. *Prideaux* v. *Criddle* (1). *Heywood* v. *Pickering*, *supra*; *Bailey* v. *Bodenham* (2). *Grant on Banking* (3). When this course is adopted, the bank to whom the cheque is transmitted although themselves the drawees, are also considered, for the purpose of presentment, as agents for the holders of the cheque; and as such, are, I assume, entitled to be allowed the same time for presentment and giving notice of dishonor as if they had been independent agents for presentment, and in no other way connected with the transaction. This cheque was therefore presented in due time, and sufficient notice of its dishonor was given, if such presentment and notice were within the same time as would have been sufficient in case the cheque had been sent to another bank in Charlottetown instead of to the drawees themselves. *Heywood* v. *Pickering*, *supra*; *Prideaux* v. *Criddle*, *supra*. This last case, it is to be remarked, was not an action against the drawer but against the indorser or payee of the cheque, and, therefore, one in which the holder was bound to use the same diligence as in the case of a bill.

As before stated, in summarizing the evidence, the letter enclosing the cheque must have been (as appears from the depositions of Mr. McDonald, Postmaster at Charlottetown, and of the Honourable Mr. Davies), received at that place on the evening of Friday, the 18th of November. Its receipt on the evening of the 18th, after business hours, would, for the purpose of computing the time of the presentment, enure as a receipt on the next day, namely, on Saturday, the 19th of November:—*Bond* v. *Warden* (4); *Grant on Banking* (5), where it is said: "Where the cheque is not received till after banking hours, the time allowed the payee

(1) L.R. 4, Q.B. 455.
(2) 16 C.B., (N.S.) 288.
(3) 4 ed. 52.
(4) 1 Coll. 583.
(5) 4 ed. p. 51.

to present it does not commence to run till the first day after that on which he actually received it."

Therefore the presentment on Monday, the 21st of November, the first business day after the day of such receipt, was in sufficient time,—the rule being that where a cheque is drawn on a bank in a different place from that in which the payee resides, or has his place of business, the agent to whom the cheque is sent for presentment has all the next day after that on which he receives it to make the presentment. *Grant on Banking* (1); *Bond* v. *Warden*; *Heywood* v. *Pickering*; *Prideaux* v. *Criddle*; *Hare* v. *Henty*, *supra*; *Rickford* v. *Ridge* (2).

The next consideration which presents itself is, upon what day must we fix as that to which the actual presentment in the present case is to be attributed? There is not, of course, in a case like this, where a cheque is forwarded by mail to the drawees, a formal presentment as in the case of a cheque sent to an independent agent who presents it at the counter. When, therefore, under circumstances like the present, is presentment to be considered as taking place? In my opinion the drawee, being also the holder's agent, is at liberty to hold the cheque and treat it as unpresented as long as an independent agent could do so; and it is clear from the authorities before stated that another bank, or any other third party, could safely have held over this cheque for presentment until the first business day after that on which they received it, which would have been Monday the 21st, and this view of the law I think, receives countenance from both the cases of *Heywood* v. *Pickering* and *Prideaux* v. *Criddle* before cited. It therefore follows, that there having been a presentment on the 21st, which was in due time, notice of dishonor, if notice of dishonor is requisite in the case of a

(1) 4 ed. p. 51. (2) 2 Camp., 537.

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drawer, was in sufficient time if sent on the day following, namely Tuesday the 22nd, on which day, as appears from Mr. Lockhead's evidence, the letter from the Bank of Prince Edward Island to the Bank of Montreal, enclosing the draft on the latter, was actually posted, since it was received in Montreal on the morning of the 25th, which made it requisite that it should have been mailed at Charlottetown not later than the 22nd.

It is so familiar a principle in the law relating to negotiable instruments that a holder has the whole of the next day after due presentment to forward notice of dishonor, that it is not necessary to refer to authorities in support of that proposition.

The nature of the communication by the Bank of Prince Edward Island to the Montreal branch of the defendant bank, amounted in effect to a refusal, or admission of inability, to comply with the demand for payment which had been made, for no other interpretation can be placed upon the act of the drawees of the cheque in sending instead of funds to an amount sufficient to cover it what was, under the circumstances, a worthless draft. Then, although it is clear that the holders, or collecting bank, cannot enlarge the time for presentment by circulating a bill or cheque amongst its branches, yet, if it has been so transmitted and endorsed, the different branches or agencies are to be regarded as separate and independent endorsers for the purpose of giving notice of dishonor. *Chalmers on Bills* (1); *Clode* v. *Bayley* (2); *Brown* v. *L. & N. W. Ry. Co.* (3); *Grant on Banking* (4).

So that the Bank of Montreal having received notice on the 25th had, according to this rule, the whole of the 26th to give notice to the manager at Ottawa, who,

(1) 2 ed. p. 163, and cases cited.
(2) 12 M. & W. 51.
(3) 4 B. & S. 326.
(4) 4 ed. p. 429.

if this had been done, would have received the notice on the 28th of November (the 27th being a Sunday), and would therefore have been in good time if he, in turn had given notice to the Deputy Finance Minister on the 29th. Instead of notice being postponed to the last mentioned day it was, as before mentioned, given to the Receiver-General, through the Deputy Finance Minister, on the 26th, three days earlier than he was entitled to it, if the time is computed making due allowance for all the delays, the respective parties were entitled to take advantage of.

I must, therefore, determine that the cheque was presented in due time, and that due notice of dishonor was given, provided this notice was sufficient in form. This notice, as already stated, was given by the letter from Mr. Drummond, the defendants' agent or manager at Ottawa, to Mr. Courtney, the Deputy Finance Minister, the contents of which have already been stated. I construe the words "not covered," as used in this letter, as equivalent to "not paid" or to "unpaid" and being so construed, it appears to me clear beyond all question that this was a sufficient legal notice of dishonor. See *Bailey* v. *Porter* (1); *Chalmers on Bills* (2): and cases there collected, particularly *Everand* v. *Watson* (3); also *Paul* v. *Joel* (4),(per Bramwell B., in which case *Solarte* v. *Palmer* (5) is treated as a decision on a mere question of fact.) In the text book just quoted (*Chalmers on Bills*) (6) it is said that no notice of dishonor has been held bad in England for defect of form since 1841.

So far I have considered the case as though it were an action by the holder for value of a cheque against the payee, but this is a question of the liability, not of the payee or of an endorsee, but of the drawer,

(1) 14 M. & W. 44.
(2) 2 ed. p. 167 and cases there cited.
(3) 1 E. & B. at p. 804.
(4) 27 L. J., Ex. at page 384.
(5) 1 Bing. N. C. 194.
(6) 2 ed. at p. 168.

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which stands on a very different footing, and moreover, the contest here is, or rather should be as I hold, not as to the liability upon the cheque, but whether the Bank of Montreal, as agents for collection, are liable for negligence. The difference between the liability of the drawer of the cheque, and that of the drawer of a bill, or of an endorser or party transferring a cheque, is pointed out by Parke, B. in the extract from the judgment of the Privy Council already given. It follows, therefore, that even if we consider this cheque as having been held by the bank as holders for value, which is putting it in the strongest possible way against the defendants, the question to be decided is not whether due notice was given by the bank according to the rules established as regards bills and notes and parties to cheques other than the drawers, but whether the Government as drawers of the cheque were actually prejudiced by some omission of the defendants. This principle is laid down generally, and must apply, so far as I can see, as well as to notice of dishonor as to presentment.

I can find no English case in which it has been held that notice of dishonor is essential to entitle the holder of a cheque to recover against the drawer The point was raised in the case of *Heywood* v. *Pickering*, before cited, (1), but the objection was at once met by the answer that it had not been taken at the trial. In the extract I have before given from the judgment of the Privy Council in the case of *Ramchurn Mullick* v. *Luchmeechund Radakissen, et al.* (2) it is said that the drawer of a cheque is in the same position as the maker of a promissory note or the accept or of a bill payable at a particular place and "not elsewhere," who is not liable unless the note or bill has been presented at the place indicated, but who is clearly

(1) L. R. 9 Q. B. 428. (2) 9 Moore's P.C. Cas. at p. 70.

not entitled to notice of dishonor. This would seem to imply that such a notice was not required in order to charge the drawer of a dishonored cheque. Upon principle, too, it would seem doubtful whether there is such an analogy between the drawer of a bill and the drawer of a cheque as to make notice to the latter requisite. By drawing a cheque the drawer, as is said in the case last referred to, appropriates so much money in the hands of his agents, the bankers, to the payment of the payee of the cheque. In such a case it may well be that, in the absence of any settled rule of the law-merchant, or any proved usage to the contrary, it is incumbent upon the drawer to be himself vigilant, and to watch the solvency of his banker. I shall not, however, in the present case, venture to lay down that notice is not necessary; but I feel compelled to hold that delay in giving it, in order to constitute a defence, is subject to the same conditions as laches in presentment, namely, that it is in every case a question of fact dependent on the particular circumstances of the case whether there has been unreasonable delay; and further, that no delay or laches alone is sufficient to disentitle the holder to recover, but that in order that laches in this respect be fatal, it must be shown that the drawer has suffered actual prejudice from the holder's default.

In the case of bills and notes, and probably as regards cheques also, where the question involves the liability of the payee who has transferred the cheque, the rule is that presentment must be made and notice given within the time ascertained by well known rules, originally fixed by mercantile usage, but so long recognized by the courts that they have become well established rules of law; but this, as before pointed out, does not apply to the case of a drawer of a cheque which has been dishonored.

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If I am right in the opinion already expressed, that there was such promptitude in presenting the cheque and giving notice as would, according to legal rules, have been sufficient to charge an endorser, then of course the question of reasonable notice and prejudice to the Crown does not call for any further consideration. But, assuming that I have taken too favourable a view of the defendants' case in this respect, in order to give the case the fullest consideration, I proceed to discuss the questions of fact which on this hypothesis become material.

In the case of bills of exchange, if notice is given to a subsequent indorser at a day earlier than the holder was bound to give it, this does not excuse the endorser so receiving notice in delaying notice (which he is bound to give in order to charge subsequent parties) beyond the usual time, that is, beyond the next day after that on which he himself received notice; and is not a sufficient excuse for any laches in this respect that, though notice was not given by him in due time, yet, owing to the holder not having availed himself of all the delay to which he was entitled, the drawer, or first endorser, has in fact received notice within the same time as he would have received it if the holder had availed himself of all the time to which he was legally entitled. As regards the drawer of a cheque, who, as already shown, is liable unless there has been undue delay in giving him notice of dishonor, by reason of which he has suffered prejudice, no such rule applies; and it may well be said that he has reasonable notice if he receives it as early as he would have been strictly entitled to it if he had stood in the position of an indorser instead of a drawer, although some of the intermediate parties may not have been sufficiently prompt. The forwarding of presentment and the actual prement of this cheque, whether it is to be con-

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strued as having been made on Saturday, the 19th of November, or on Monday, the 21st, was, as it appears to me, in due time according to the strictest rules applicable to the presentment of a bill. I have already stated that I consider the presentment to have been made on Monday the 21st November, in which case there could be no doubt but that the notice of dishonor sent on the 22nd was also sufficiently early; but supposing I am wrong in determining that presentment is to be considered as having been made on the 21st instead of on the 19th November, and that it is to be ascribed to the latter date, does it follow that the notice sent on the Tuesday was even then too late, having regard to the obligation which is imposed on the drawer of showing undue delay by which actual prejudice has been caused? To establish such undue delay and actual prejudice, the Crown must be able to show from the evidence that if notice of the dishonor of the cheque on the 19th had been sent in due course of post, with allowance for the usual interval between the receipt and the repetition of the notice by the intermediate endorsers at Montreal, they would have been able to take some steps or proceedings which would have enabled them to withdraw from the Bank of Prince Edward Island funds to the amount of the cheque; and that when they received the notice sent them on the 26th, they were too late to take such steps to protect their interests as might have been taken if the notice had been received one day earlier. It is, I think, a fair inference from the evidence that the bank was equally as insolvent on the 19th as on the 21st; if this was not so, it was incumbent on the Crown to prove it; they may have resorted for this purpose to the books of the Bank of Prince Edward Island, now in the hands of the official liquidators, to which they could have had access, and the production of which, for

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the purposes of evidence in this cause, they could have enforced. This the Crown solicitors have not done; and the court is consequently left in ignorance of the precise state of the affairs of the bank on both these material days, the 19th and 21st. No question was asked as to the position of the bank as regards solvency on these particular days, either of Mr. Lockhead the assistant-cashier, or of the president, or of Mr. Haviland, a director, all of whom gave testimony on other points. I have no doubt, however, that the learned advisors of the Crown exercised what, from their point of view, was a wise judgment, in not putting the books in evidence; for the circumstances of this case make it impossible to suppose that they would not if produced, have disclosed a state of insolvency and inability to meet this cheque existing as early as the 19th of November. Then, assuming that the cheque was dishonored on the 19th, and that the regular notice, consequent on that dishonor, had been given to the Crown, such notice (allowing the endorsers, the bank at Montreal, and the payees, the branch at Ottawa, the usual time for giving notice) would not have reached the Deputy Minister of Finance until Monday, the 28th of November. That this is so, is plain by the simple computation of time, making all allowances for the delays allowed by law in the stricter case of bills of exchange. Notice consequent upon the dishonor on the 19th would have been in due time if posted at Charlottetown on Monday the 21st of November, from which place it would have been dispatched by the mail leaving early on the morning of the 22nd, which would have made it due at Montreal on the morning of the 24th; the defendant bank, receiving it on that day, would have had until the next day, the 25th, to give notice to the payees, the branch at Ottawa, where it would have been received on Satur-

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day the 26th; thus making it the duty of the manager at Ottawa to give notice to the Deputy Minister of Finance on Monday, the 28th, the day of the actual suspension of the bank. Again, if it were obligatory on the branch at Montreal to give notice to the branch at Ottawa on not receiving payment by the return mail after the receipt of the cheque by the Bank of Prince Edward Island on the 19th of November, it would still appear that there was no undue delay which could have caused actual prejudice to the Crown, inasmuch as even in that case, the strictest which can be put against the defendants, the notice actually given reached the Deputy Finance Minister as soon as he would have been entitled to receive it if the bank at Montreal and the manager at Ottawa had chosen to take advantage of all the time they were entitled to. The return mail from Charlottetown to a letter received there on the 19th was that which left Charlottetown on Monday the 21st (no mail leaving that place on Sunday) and was due at Montreal early on the morning of Wednesday the 23rd, so that notice by the bank there to the Ottawa branch would have been in due time if sent on the 24th; this notice would have been received at Ottawa on the 25th, and the manager there would have had until the next day, the 26th, to give notice to the drawer, on which day notice was actually given to and received by Mr. Courtney, the Deputy Minister of Finance. I cannot see, therefore, that there was any undue delay in giving notice to the officers of the Crown which can be considered as prejudicial, having regard to the comparison before made between the time at which notice was in fact received by the Deputy Minister, and that in which, in the strictest view which can be taken against the defendants, they would have been bound to give it. For I consider in

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a case like the present the court is only called upon to ascertain if there was, between the day of the dishonor and the day on which notice was actually given to the drawer, any undue delay, and without regard to any intermediate notices as in the case of bills; and in order to ascertain this, it is a fair test to apply to the actual facts to inquire if the notice was actually received within such time as it would have been required to be given in the case of a bill sent for payment in this way, to the demand for payment of which no answer had been received by return mail, allowing for such delay in respect of intermediate indorsers as the holders would, in the case of a bill, have been by law entitled to, if they had, in fact, availed themselves of it. But if I am wrong in this, it by no means concludes the case against the defendants, for it lay on the Attorney-General to show not merely that there had been undue delay, but that by such delay the Crown had been prejudiced in fact; and this is not to be presumed, as in the case of a bill, or as regards the indorser or transferror of a cheque. Of this fact I can find no evidence, but the just inference from all the circumstances stated in the depositions is, that the Bank of Prince Edward Island was insolvent on the 19th, the day on which the worthless draft by which the absconding cashier of that bank sought to shift the payment of this cheque upon the defendants themselves, already then their creditors to a large amount, was drawn. No bank officer, unless his bank were in desperate straits, would have resorted to such a hopeless operation as this, which almost involved a confession of insolvency; and, in the absence of all evidence or explanation to the contrary, we may conclude from it that the Bank of Prince Edward Island had no means on that day, the 19th of November, of paying this cheque.

This is further confirmed by the flight of the cashier, whose misconduct had brought about the ruin of the bank, on the morning of the following Monday, the 21st of November. The only evidence found in the depositions bearing upon the fact of the ability of the Bank of Prince Edward Island to pay on the 19th of November, is that of Mr. McLean, the cashier of the Merchant's Bank of Prince Edward Island, who says, in his examination-in-chief, that he thinks he could have obtained payment of a cheque on the Bank of Prince Edward Island for this amount of $30,000. upon the 19th. But this is only a mere opinion of a person not personally conversant with the state of the affairs of the Bank of Prince Edward Island; a mere outsider who could have known nothing of these matters except from rumour and his own dealings with the bank, as to the latter of which he says nothing. This statement of Mr. McLean amounts to nothing more, therefore, than a conjecture on his part, and cannot be regarded as sufficient evidence when more conclusive and direct evidence could have been obtained by the Crown from the books of the bank, which must have shown the position of affairs on the 19th of November, 1881. A further observation to be made on the statement of this witness is, that on cross-examination when called upon to explain how he thought such a payment could have been obtained on the 19th, he says that he believes he could on that day have obtained payment of the amount of this cheque, not in cash, but by means of a draft drawn by the Bank of Prince Edward Island on some of its correspondents; but this is not to say that the bank itself could have paid this cheque in cash, or that it had a credit with any correspondents which would have authorized such a draft, which is the point to be proved. This witness therefore fails to establish any material fact.

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Then, so far as appears from the testimony and the documentary evidence in the case, the Crown, if it had had notice of the failure of the Bank of Prince Edward Island to pay the cheque on the very day it was received at Charlottetown, that is on the 19th of November, could have taken the proceedings preliminary to the issue of an extent, and thus secured a lien on the assets of the bank, and also asserted its right to priority of payment over other creditors; but this it could equally well have done on the 28th of November, and, for all that appears to the contrary, with the same effect as on the 21st. That the Crown would have been entitled to priority in the distribution of the assets of the bank, has been already determined by the Supreme Court of Canada in the case of *The Queen* v. *The Bank of Nova Scotia* (1), a decision which is not in any way affected by the recent judgment of the Judicial Committee of the Privy Council in the appeal of the *Exchange Bank of Canada* v. *The Queen* (2), the latter decision proceeding entirely upon the peculiar law of the Province of Quebec with reference to the priority of Crown debts.

On the whole therefore, my conclusion is that the information fails, and must be dismissed. The reasons for this conclusion may be summarised as follows: first, I find that the cheque never was paid; secondly, that the defendants, whether considered as mere agents for collection, or as holders of the cheque for value, are, as regards the drawer, only called upon to show that there was no unreasonable delay in presentment and in giving notice of non-payment, and that in any event the Crown, as drawer, is not discharged from liability unless some actual prejudice or loss was caused to it by the omission of the defendants in these respects; thirdly, I find that there was a presentment of the

(1) 11 Can. S. C. R. 1. (2) 11 App. Cas. 157.

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cheque on the 21st November, which was in due time, and that due notice of dishonor to bind an endorser on non-payment on that day was given with sufficient promptitude; and lastly, even if wrong in assuming that the cheque was dishonored on the 21st, and not on the 19th, and that it should be considered as having been presented on the earlier of these days, I find, as facts, that reasonable notice of that presentment and dishonor was given to the proper officers of the Crown, and that it is not proved that any actual prejudice or loss was caused to the Crown by omission to give notice at an earlier day than that on which it was given.

The dismissal of the information must of course be with costs.

Solicitors for Plaintiff: *O'Connor and Hogg.*

Solicitors for Defendants: *Stewart, Chrysler and Gormully.*