Supreme Court of Canada
Rogers v. Calgary Brewing & Malting Co., (1917) 56 S.C.R. 165
Date: 1917-11-28

A. C. Rogers (Defendant). Appellant;

and

Calgary Brewing & Malting Company (Plaintiff) Respondent.

1917: October 15-16; 1917: November 28.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Bank and banking—Bill of exchange—Cheque—Payment—Presentment— Delay.

The appellant sent to the respondent a cheque drawn on the Estevan Security Company, and the Bank of Montreal, acting as agent for the respondent, sent the cheque direct to the drawee by post. Instead of insisting upon prompt payment of the cheque out of the funds which the appellant then had available with the Security Company, the Bank of Montreal gave to the latter almost one month's delay, and then accepted a draft of that company on another bank which was dishonoured; and immediately after the Security Company went into insolvency.

Held, that the appellant was discharged of his liability to the respondent for the amount of the cheque.

Davies J. though not dissenting formally was of the opinion that the case should be sent back for a new trial, so that the cause of the delay might be explained and the responsibility thus determined.

APPEAL from the judgment of the Supreme Court of Saskatchewan[1], affirming the judgment of Haul-tain C.J. at the trial[2], in favour of the plaintiff respondent.

A bill of exchange, drawn by the appellant on the Estevan Security Company, (where he had funds sufficient to meet it), payable on demand at Bienfait, Manitoba, was deposited by the respondent with the Bank of Montreal, at Calgary, on the 14th of November, 1914. The Bank of Montreal sent the appellant's

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bill by post directly to the Estevan Security Company, presumably on the day the bill was received. Until the 10th of December, 1914, nothing is known about the bill as far as the record shews, and, on that date, the Estevan Security Company sent to the Bank of Montreal a draft upon the Union Bank at Winnipeg for the amount of the bill, which draft the Union Bank refused to honour. The Estevan Security Company suspended payment on the 16th of December, 1914; and the respondent took action against the appellant for the amount of the bill.

[1] 34 D.L.R. 252, 2 W.W.R. 344.
[2] 9 Sask. L.R. 440, 33 D.L.R. 173, 1 W.W.R. 670.

J. A. Ritchie for the appellant.

P. M. Anderson for the respondent.

THE CHIEF JUSTICE.—The Bank of Montreal, acting as agent for the respondent to collect the amount of appellant's cheque or draft on the Estevan Security Company, sent that cheque direct to the drawee by post, and, instead of insisting upon prompt payment out of the funds which the appellant then had available with that company for the payment of his cheque, chose to give the company almost one month's delay, and at the end accepted a worthless draft of the company which immediately after went into insolvency. On these facts, I do not entertain any doubt that the appellant was discharged of his liability to the respondent for the amount of the cheque or draft, and that the appeal ought to be allowed. I am inclined also to doubt that there was a good presentment, and in any event notice of non-payment was not given in a reasonable time.

Suppose the Estevan Company had had sufficient funds with the Union Bank on which the draft was made, but the Bank of Montreal, in place of taking

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cash, had again accepted the draft of the Union Bank on some other bank. The process might have gone on indefinitely. Could it be suggested that the liability of the appellant would always have continued, and that he could have been held responsible for the failure of the Union Bank or any subsequent bank whose draft the Bank of Montreal might have taken? It would be just as true as in the present case that the respondents had never received cash.

It is no use for the manager of the Bank of Montreal to say that it did not appoint the Estevan Security Company their agent, because the bank does not appoint private bankers its agents if that is what it in fact did. Suppose, as counsel for the appellant suggested, it had sent the cheque to the express company for collection, and it had taken the worthless draft instead of cash, what answer could the Bank of Montreal have had in face of this action of its agent? Why should it be allowed to repudiate the agency, because it sent it direct to the company on whom it was drawn? Further, the Bank of Montreal did not repudiate the discharge by the draft, did not send back the draft, but accepted and presented it in due course.

I observe that Mr. Justice Brown says that he does not think the case of *Donogh* v. *Gillespie*[3], is applicable to the case at bar. If it could be held to be so, I should not be able to accept it as a binding authority. If an agent presents a cheque and accepts a banker's draft in place of cash, I cannot think the principal can claim that in so doing he was not acting within the scope of his agency. In a sense, every blunder or improper action on the part of an agent is unauthorized by his principal. Such a limitation on

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the liability of the principal for the acts of his agent would, however, render impossible any dealing with an agent; parties so dealing cannot always know the precise instructions he has received with reference to carrying out the transaction in which he is authorized to act.

As a matter of fact, I should suppose the transaction was carried out in accordance with common banking practice and the intention of the Bank of Montreal.

The appeal should be allowed with costs.

DAVIES J.—In this appeal, I would very much have preferred to refer the case back for a new trial, so that the cause of the long delay on the part of the Estevan Security Company in remitting to the Bank of Montreal its draft on the Union Bank of Winnipeg which was dishonoured, in payment of the cheque or bill of exchange of the appellant Rogers in favour of the respondent which the bank had forwarded to the Estevan Company for payment, might be explained and the responsibility for that delay determined.

As, however, this view is not shared by my colleagues, I cannot see that any useful purpose will be served by my dissenting formally from the judgment allowing the appeal proposed to be delivered.

So far as my personal assent to that judgment is concerned, I simply desire to say that it is given with very grave doubt, arising out of the absence of any evidence on the material fact of delay above referred to

The only plea placed upon the record by the appellant was one of payment, and that did not call for any explanation of this delay, and that was, I assume, the reason why no evidence on the point was given.

[3] 21 Ont. App. R. 292.

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IDINGTON-J.—The appellant owed respondent and gave it a cheque on the Estevan Security Company, a private bank in Bienfait in Saskatchewan, for $700, dated 11th November, 1914, for which due credit was given in an account rendered on the 30th of the said month, by respondent to appellant. Respondent then, on the 14th of the same month, indorsed it over to the Bank of Montreal (at Calgary) where respondent carried on business, as I infer from the date of credit given in said account, and the stamp marking of that bank on face of the document.

The learned trial judge says this was done for collection, but I cannot so find from the evidence. That is barren of a good many details relative to the dealings with this cheque regarding which we might have been informed.

In law, however, I cannot say that there is any substantial difference in the result so far as appellant is directly concerned, whether it was left for collection or discounted, and placed to the credit of respondent.

In either event it was the act of the respondent that entrusted it to the Bank of Montreal, which must be held the agent of respondent, unless treated as holder of the cheque.

The bank sent it direct to the Estevan Security Company. But when it did so does not appear.

It does appear that the said banking company sent as its payment of it, a cheque dated 10th December, 1915, in favour of the Bank of Montreal on the Union Bank at Winnipeg, which seems to have been accepted by said Bank of Montreal without objection, and in turn sent by it to Winnipeg for presentation.

The Union Bank refused payment of that cheque, and the Bank of Montreal had it protested on the 14th of the said December.

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On the 16th December, 1914, the respondent telegraphed appellant as follows:—

December 16th, 1914.

To A. C. Rogers, Bienfait.

Bank advise draft seven hundred Estevan Security on Union Bank unpaid. See Security Company at once.

C. B. & M. Co., LTD.

The Estevan Security Company had closed business that day by reason of its insolvency.

The appellant had money in that private bank sufficient to meet the cheque which was handed over to him with his bank book, marked by a stamp of that company, as paid on the 10th December.

I am of the opinion that upon the foregoing facts, the judgment of the learned trial judge and of the majority in appeal upholding it, cannot be sustained and should be reversed.

I have chosen to call the document now in question a cheque, though on a private bank, and thus not a cheque within the meaning of our "Banking Act"— but under that properly called a "bill of exchange."

There was a time when that distinction could not properly have been made, and when it would have been called as I have called it, a "cheque."

I have done so designedly for the reason that there are some considerations which I need not dwell upon, which shew that the position of the respondent holder would be worse if in relation to a bill of exchange than a cheque.

The curious may find in the case of *Robinson* v. *Hawksford*[4], many cases and authorities referred to where the law is discussed at a time when the distinction between a cheque on a private banker and a chartered bank did not seem to exist.

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And though it was urged then that the original consideration could have been sued upon, Patterson J. remarked that he thought not when the holder had vitiated the cheque by unreasonable delay.

Be that as it may, I am clearly of the opinion that the respondent cannot recover herein; if for no other reason than the credit given coupled with the most unreasonable delay which clearly led to the loss of apparently the entire sum through the bank accepting another

[4] 9 Q.B. 52.

cheque or bill in its stead, upon the principle laid down in the cases of *Smith* v. *Ferrand*[5], *Strong* v. *Hart*[6], *Lichfield Union* v. *Greene*[7], and by the late Mr. Justice Street (no mean authority) upheld in appeal, in *Boyd* v. *Nasmith*[8], and that the appeal should be allowed throughout, and the action be dismissed with costs..

DUFF J.—I am of the opinion that this appeal should be allowed with costs.

ANGLIN J.—I am, with respect for the learned judges who have taken the contrary view, of the opinion that this appeal should be allowed.

The material facts are as follows:

An inland bill of exchange drawn by the appellant on the Estevan Security Company payable on demand at Bienfait, Manitoba, was deposited by the payee (respondent) with its bankers at Calgary on the 14th November, 1914, for the present I assume for presentment and collection. These bankers had no agency at Bienfait. Instead of employing the Bank of Hamilton, which had a branch office there, to execute their mandate, the bankers sent the appellant's bill

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by post directly to the Estevan Security Company, presumably on the day they received it. From that time until the 10th of December, nothing further is known of the bill so far as is disclosed by the record. On the 10th of December the Estevan Security Company (with which from the 11th of November the appellant had funds on deposit sufficient to meet his bill) sent to the respondent's bankers a draft on the Union Bank at Winnipeg for the amount of the bill and on the same day stamped the latter. "Paid." On presentment at Winnipeg, the Union Bank refused to honour the Security Company's draft. The latter company suspended payment on the 16th of December, and on the following day, the appellant received a telegram, sent on the 16th, informing him that his cheque (bill) had not been paid. Owing to the hopeless insolvency of the Estevan Security Company, any claim the respondent might have to rank in its liquidation in respect of his deposit with it is of little, if any, value.

[5] 7 B. & C. 19.
[6] 6 B. & C. 160.
[7] 26 L.J. Ex. 140.
[8] 17 O.R. 40.

Assuming that the respondent's bankers adopted a usual and proper course in sending the bill drawn by the appellant by the post to the drawees ("Bills of Exchange Act," R.S.C. c. 119, s. 78 (*d*); s. 90 (2)), they thereby constituted the latter their agents to present to themselves. If so, they must be accountable for the conduct of those agents in regard to the presentment for payment and a like accountability rests on the respondent. If there was a presentment, either it was grossly dilatory if not made until the 10th of December or, if it was made in due course after the receipt of the bill by the Security Company, there was what must, in the absence of any explanation, be deemed an inexcusable delay in giving notice that payment had been withheld. Unless the bankers received the money

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by return of post, the absence of an answer should have been considered as a dishonour and notice thereof should have been given promptly. At all events, at least some inquiry should at once have been made, and that should have been followed up by steps to enable the appellant to protect his interest. So far as is disclosed by the evidence, nothing whatever was done. I am, therefore, of the opinion that, assuming there was a presentment of the bill, because there was undue and unaccounted for delay either in that presentment or in giving notice of dishonour by the agents of the holder, for which it cannot escape responsibility, the drawer is discharged. If authority for this view be needed, the case of *Bailey* v. *Bodenham*[9], supplies it.

It is a fair inference from the facts in evidence, that if the bill had been presented across the counter, as it might have been, it would have been paid. That the drawer was damnified to the extent of the face value of the bill by the failure of the bankers to discharge their duty, is therefore apparent. It follows that it is immaterial whether the instrument should be regarded as a cheque or as an inland bill of exchange. For reasons concisely stated by Winter D.C.J. in *Revelstoke Saw Mill Co.* v. *Fawcett*[10], I think it is not a cheque but a bill payable on demand, with the result, accurately stated by that learned judge, that, without proof of actual damage (which, however, exists in this case), the drawer was discharged not merely in respect of the bill, but also from his liability on the original transaction for which it was given.

Although the only plea of the defendant is payment, the defence of negligence in regard to presentment and notice of dishonour was fully investigated at the trial,

[9] 16 C.B.N.S. 288.
[10] 8 West. W.R. 477.

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and the issue upon one or both of these defaults was clearly before the court. Moreover, the defence based on the bankers' default is tantamount to a plea alleging that the plaintiff is thereby estopped from denying payment. No injustice to the plaintiff on grounds of surprise or otherwise can result from allowing the defendant to take advantage of any legal defence disclosed by the facts in evidence. Under these circumstances it would savour of extreme technicality to deprive him of the benefit of any such defence because not explicitly raised in his plea.

If, as is by no means improbable, the respondent's bankers, when they received the appellant's bill, placed the amount of it to the customer's credit, they would, under the circumstances in evidence, find great difficulty in maintaining a right to debit its account with the amount of the bill when eventually returned to them as unpaid. If they had not that-right, the plea of payment might well be regarded as actually established. Moreover, there is not a little to be said for the view that the defendant, if then still liable, was discharged when the bankers took the Security Company's draft on the Union Bank instead of insisting on payment of his bill in cash. No doubt when that draft was issued the amount of the defendant's bill was charged against his account with the Estevan Security Company, and, as Mr. Justice Brown points out, he would thereafter have been to that extent unable to obtain payment from it of his deposit. It may be that after so charging up the bill to appellant's account, the Security Company should be regarded as having held the amount thereof, as agents for the respondent's bankers and therefore for the respondent.

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I prefer to rest my judgment, however, upon the effect of the negligence of the respondent through its agents in regard either to presentment or to notice of dishonour.

The appellant is entitled to his costs in this Court and in the Supreme Court of Saskatchewan *en banc* and judgment should be entered dismissing the action with costs.

Appeal allowed with costs.

Solicitors for the appellant: Willoughby, Craig & Co.

Solicitors for the respondent: Anderson, Bagshaw, McNiven & Fraser.