AYLMER M. KEYES (PLAINTIFF).....APPELLANT;

AND

THE ROYAL BANK OF CANADA (DEFENDANT) .....RESPONDENT.

1947

*Feb. 10, 11.
*May 13.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Banks and Banking—Bills of Exchange—Postdated cheque—Cheque, dated next day after date of issue, certified by bank by oversight on day of issue, and charged to drawer's account—Drawer countermanding payment at opening of business on day of date of cheque—Claim by drawer against bank for amount of cheque—Circumstances in question—Claims by bank as to true date, as to estoppel, to right of holder in due course—Bills of Exchange Act, R.S.C. 1927, c. 16, ss. 165, 167, 27, 29, 131, 133, 21.

On January 8, 1945, appellant made out and signed a cheque dated January 9, 1945, to M for $2,000 on appellant's savings account with respondent, the Royal Bank of Canada, at Calgary, and also signed his name on the back of the cheque, and presented it, along with an undated deposit slip in M's name, to the teller of the Canadian Bank of Commerce at Calgary, who filled in the date, January 8, on the deposit slip, and did not notice (nor was it drawn to her attention) that the cheque was postdated. The teller, immediately after the deposit, sent the cheque by messenger to the Royal Bank's office where the proper officers, not noticing that it was postdated, certified it and returned it. Later on the same day, M withdrew from her account in the Bank of Commerce (in which account the amount of said cheque had been credited) the sum of $2,000. Appellant, having learned from M on the evening of January 8 that the transaction, to help finance which the cheque was intended, had not gone through, attended, at the opening of business on January 9, at the Royal Bank to stop payment of the cheque, but was told of the certification and that payment could not be stopped. Later the Royal Bank paid the amount of the cheque through the clearing house to the Bank of Commerce. Appellant sued the Royal Bank for said amount of $2,000, claiming that it was improperly charged to his account. The bank claimed that the instrument was a bill of exchange other than a cheque or alternatively that the true date was January 8, and, should it be held that appellant was entitled to countermand, the bank counterclaimed against appellant as endorser; the bank also (by amendment allowed by the Appellate Division, Alta.) pleaded estoppel, and alternatively, that appellant, in breach of duty to the bank, misled or caused to be misled the bank into certifying the cheque on January 8, by reason whereof the bank became entitled to debit appellant's account with the amount of the cheque.

Held (Rand J. dissenting): Appellant was entitled to recover the amount from the respondent bank. (Judgment of the Appellate Division, Alta., [1946] 2 W.W.R. 187, reversed, and judgment at trial, [1946] 1 W.W.R. 65, restored).

*PRESENT:—Rinfret C.J. and Kerwin, Taschereau, Rand and Estey JJ.

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Per the Chief Justice and Kerwin J.: The law that a cheque may be countermanded before the time of its payment as designated by its ostensible date, applied in this case. As between appellant and the respondent bank, January 9 was the true date of the cheque. Whether or not appellant, by signing his name on the back of the cheque, became an endorser, the respondent bank could not claim against him as such, as the respondent bank did not become a holder in due course. The plea of estoppel against appellant failed because the employees of the respondent bank who participated in the certification of the cheque did not rely upon appellant's endorsement.

Per Taschereau and Estey J.J.: Appellant was within his rights in asking that the respondent bank stop payment. The certification of the cheque before its date was, as against appellant, invalid. On the evidence, the only reason that the bank certified the cheque was because its employees overlooked the fact that it was postdated; appellant was no party to this, and the essentials to found an estoppel were not present. Even if appellant be regarded as an endorser, yet the respondent bank received the cheque upon the terms of its contractual relationship with appellant, and its relationship is determined on that basis, and the bank could not under the circumstances claim as a holder in due course as against appellant.

Per Rand J., dissenting: Appellant never intended that M should be contractually related to the cheque, that is to say, that she should ever be a party to any legal right or obligation created by its transfer to the Bank of Commerce or any subsequent dealing with it; crediting her account with the proceeds was a matter *dehors* the cheque. The payee was therefore a fictitious person, and under s. 21 of the *Bills of Exchange Act,* the cheque may be treated as payable to bearer; and in any event, appellant was estopped from denying that fictional existence. A cheque can be negotiated before its date; the Bank of Commerce became, therefore, the holder of the cheque with an engagement on appellant's part at least as drawer; and that title was transferred to the respondent bank. Assuming the countermanding to have been effective, the respondent bank was remitted to the rights of a transferee from the Bank of Commerce; and the counterclaim was well founded.

APPEAL by the plaintiff from the judgment of the Supreme Court of Alberta, Appellate Division (1), allowing the appeal of the defendant, the Royal Bank of Canada, from the judgment of H. J. Macdonald J. (2) in favour of the plaintiff for the sum of $2,000, being the amount of a certain postdated cheque drawn by the plaintiff on his account with the said bank and debited by the bank against that account, but which the plaintiff claimed should not have been so debited because he countermanded the cheque before the time at which, according to the cheque, it was payable. Facts giving rise to, and the nature of, the ques-

(1) [1946] 2 W.W.R. 187; [1946] 3 D.L.R. 179.

(2) [1946] 1 W.W.R. 65; [1946] 2 D.L.R. 42.

tions in dispute are stated in the reasons for judgment now reported and are indicated in the above headnote. The bank alleged that the cheque, which was issued on January 8, 1945, but dated January 9, 1945, was in law a bill of exchange other than a cheque, or alternatively that the true date thereof was January 8, 1945. The Bank, should it be held that the plaintiff was lawfully entitled to countermand, counterclaimed for $2,000 against the plaintiff as endorser. The Appellate Division dismissed the action, and also (by the formal judgment) gave leave to the bank to amend its statement of defence and counterclaim by adding certain paragraphs which in effect alleged (1) that the plaintiff was estopped from saying that the cheque was postdated, and (2) alternatively that the plaintiff, in breach of his duty to the bank, misled or caused to be misled the bank into certifying the cheque on January 8, 1945, by reason whereof the bank became entitled to debit the plaintiff's account with the amount of the cheque.

Special leave to appeal to the Supreme Court of Canada was granted to the plaintiff by the Supreme Court of Alberta, Appellate Division.

R. L. Fenerty for the appellant.

J. J. Saucier K.C. for the respondent.

The judgment of the Chief Justice and Kerwin J. was delivered by

KERWIN J.—The appellant, A. M. Keyes, had a sum of money on deposit in a savings account in the main office, in Calgary, of the respondent, the Royal Bank of Canada. On January 8, 1945, he issued a cheque dated January 9, 1945, to a Mrs. J. I. Mundy on this account for two thousand dollars. At the opening of business on the 9th, he attended at the main office to stop payment of the cheque but found that it had been marked "certified" the previous day. Later, on the 9th, the amount of the cheque was paid through the clearing house to the Canadian Bank of Commerce which had been instrumental on the 8th in having it so marked. If that were all, there would be no difficulty, as the law is clear that, a cheque being merely an order of a customer on his banker to pay a sum

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of money, such order may be countermanded before the time of its payment as designated by its ostensible date. The respondent, however, relies upon the circumstances of the case to void this result and the Appellate Division of the Supreme Court of Alberta agreed with it and, reversing the judgment at the trial, dismissed Keyes' action to recover the two thousand dollars.

The tale commences with the friendship between Keyes and Mrs. Mundy. He had previously given or loaned her several small sums, when she requested a loan of two thousand dollars to help finance the purchase of a tea room in Calgary. The transaction was to be closed on January 8th, and, while Keyes stated at one stage in his evidence that he told Mrs. Mundy he would think over the matter, at another he testified that he said he would deposit the required sum to her credit in the Bank of Commerce where she had a savings account and where he also had an account. Accordingly, on the afternoon of the 8th he attended the proper branch of the latter institution in Calgary and made out and signed the cheque on his account with the main office of the respondent in Calgary for two thousand dollars payable to J. I. Mundy or order, but dated the cheque January 9th. He did this, he explained, because he intended, if the proposed purchase did not materialize, to stop payment of the cheque. He made out an undated deposit slip in Mrs. Mundy's name and endorsed the cheque since, again according to his evidence, that was his custom. He presented the cheque and deposit slip to the teller, who filled in the date, January 8th, on the latter. Keyes asked the teller the present total to the credit of Mrs. Mundy's account including the $2,000, which information the teller declined to give. The teller did not notice that the cheque was post-dated but, in accordance with the Bank of Commerce's custom when dealing with cheques of $1,000 and over, sent this cheque, by messenger, to the Royal Bank's main office, where the latter's proper officers, not noticing the date, marked the cheque "certified" and returned it to the messenger. Later the same afternoon Mrs. Mundy withdrew by a cheque on her account with the Bank of Commerce the sum of $2,000.

That evening Mrs. Mundy telephoned Keyes and asked if he had deposited the two thousand dollars to her account and was told he had. Despite the efforts of the respondent, it was impossible to secure the attendance of Mrs. Mundy at the trial, but it is evident that she must have known that Keyes had deposited the two thousand dollars to her account, as otherwise she had not a sufficient sum to her credit to permit the withdrawal of that amount. During the course of the telephone conversation just mentioned, Keyes asked her if the purchase of the tea room had been completed and was told that it had not. He then decided to stop payment of the cheque and the next morning presented himself at the respondent's main office before the doors were open and gave the necessary instructions. He was told that the cheque had been marked "accepted" the previous day and that nothing could be done about the matter.

Nothing of what transpired was, of course, known to the respondent except that on January 8th the Bank of Commerce presented a cheque dated January 9th drawn by Keyes on his account with the former and that the cheque bore his endorsement as well as his signature as drawer. The cheque was never endorsed by Mrs. Mundy, as it was explained by various witnesses that when a cheque is deposited to the credit of the account of a payee, it is not considered necessary by the banks to insist upon the latter's endorsement. The respondent did not know that the cheque had been deposited by Keyes to Mrs. Mundy's account in the Bank of Commerce.

By section 165 of the *Bills of Exchange Act*, R.S.C. 1927, chapter 16, a cheque is a bill of exchange drawn on a bank, payable on demand, and except as otherwise provided, the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque. By section 167, the duty and authority of a bank to pay a cheque drawn on it by its customer are determined by countermand of payment. While some criticism of postdated cheques appear in English textbooks, the practice in this country is well established, and by section 27 of the Act (which applies to cheques) a bill is not invalid by reason only that it is antedated or postdated. The respondent, however, relied upon section 29 of the Act:—

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29. Where a bill or an acceptance, or any endorsement on a bill, is dated, the date shall, unless the contrary is proved, be deemed to be the true date of the drawing, acceptance or endorsement, as the case may be

and argued that it has been shown that the true date of the cheque was January 8th and not January 9th. It is contended that by presenting the cheque on the earlier date to the Bank of Commerce with the request that the two thousand dollars be deposited to Mrs. Mundy's credit, and by inquiring the present total to her credit, the plaintiff must be taken to have meant that the true date of the cheque was the 8th.

It is unnecessary to consider the effect of the actions of the plaintiff as between him and the Bank of Commerce, except to note that it would apparently be held in some jurisdictions that the Bank of Commerce, by obtaining the respondent's certification of the cheque, must be taken to have accepted the latter as its debtor,—since the certification took place, not at the instance of the drawer, but of the holder after the issue of the cheque. Whatever the position might be as between the Bank of Commerce and Keyes, his evidence makes it clear that the 9th was the true date.

As pointed out in Paget on Banking, 4th edition, page 111:—"his [the banker's] business is not to pay it [a cheque] before the ostensible date, that being his customer's intention and direction." On the following page the same author draws attention to the fact that efforts had been made to get out of the difficulty by representing the banker as having purchased the cheque during its currency, and so being holder in due course entitled to sue the drawer. In effect that was another of the arguments advanced by the respondent, but the case of *Da Silva* v. *Fuller* (1) has been accepted for many years as correctly stating the law. In that case a postdated cheque was lost and was paid by the banker on the day before its date and it was held that the banker was not protected and must repay the loser. The case is unreported but it is mentioned in the 6th edition of Bayley on Bills at page 319 and in the 11th edition of Chitty on Bills of Exchange at pages 188 and

(1) (1776) Sel. Ca. 238, MS. Referred to in Bayley on Bills, 6th Ed., 319, and Chitty on Bills of Exchange, 11th Ed., 188, 279.

279. It was also referred to by Baron Parke during the course of the argument in *Morley* v. *Culverwell* (1) at the end of the following statement:—

> The condition of an indorser of a bill payable after date is this, that he is a surety for the payment of it by the acceptor at a particular time and place, on presentment for payment. If the acceptor pays the bill before it is due to a wrong party, he is not discharged. It has been so held in the case of a banker's cheque payable to bearer; if the banker pays it before it is due, he is not protected.

See also Hart's Law of Banking, 4th edition, p. 366, and Halsbury, 2nd edition, vol. 1, pp. 820-821. I agree with the statement in Grant on Banking, 7th edition, p. 67, that the decision of the Supreme Court of Queensland in *Magill* v. *Bank of North Queensland* (2) is in direct conflict with the cases in England. The decision to the contrary, of the Court of Appeal of New Zealand, in *Pollock* v. *Bank of New Zealand* (3) is to be preferred.

It is contended that by signing his name on the back of the cheque, Keyes became an endorser, and reliance is placed upon sections 131 and 133 of the Act. By the former, when a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liability of an endorser to a holder in due course and is subject to all the provisions of the Act respecting endorsers. By the latter, an endorser engages, on due presentment, that the bill shall be accepted and paid according to the tenor and that, if it is dishonoured, he will compensate the holder who is compelled to pay it. The argument fails *in limine* because under the rule mentioned the respondent did not become a holder in due course.

At the suggestion and with the leave of the Appellate Division and notwithstanding the appellant's objection, the respondent amended its defence by pleading estoppel. Accepting the leave of the Appellate Division, the plea fails because the two employees of the respondent who participated in the certification of the cheque did not rely upon the appellant's endorsement. This is clear from the evidence and in fact is admitted in the respondent's factum, although it is argued that that fact could not alter the express provisions of the statute, which, however, for the reasons already given, are not applicable.

(1) (1840) 7 M. & W. 174, at 178.
(2) (1895) 6 Q.L.J.R. 262.
(3) (1901) 20 N.Z.L.R. 174.

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The appeal should be allowed and the judgment at the trial restored with costs throughout.

The judgment of Taschereau and Estey, JJ., was delivered by

ESTEY J.—The appellant at Calgary on January 8, 1945, drew a cheque for $2,000 upon the Royal Bank of Canada where he had a savings account, postdating the cheque January 9th and making it payable to J. I. Mundy or order. Mrs. Mundy was negotiating the purchase of a restaurant and appellant had agreed to assist her in the purchase thereof to the extent of $2,000. She had asked that he deposit this to her account in the Canadian Bank of Commerce at Calgary on January 8th. The appellant had an account at the same branch of the Canadian Bank of Commerce and some time in the afternoon of January 8th tendered to the teller of that bank the cheque in question for $2,000 for deposit to the account of Mrs. J. I. Mundy. He did not draw the teller's attention to the fact that the cheque was postdated, nor did the teller notice that fact, but rather accepted it for deposit, and at once the amount thereof was credited to Mrs. Mundy's account. The teller in the course of receiving the cheque endorsed Mrs. Mundy's name thereon, and deposed that this was the usual banking practice. In so doing the bank was acting as agent for its customer, Mrs. J. I. Mundy.

A banker undertakes to do what is in the proper course of a banker's business, and so far differs from an agent who is not a banker.

Bank of England v. *Vagliano Brothers* (1).

Subsequently on the same afternoon Mrs. Mundy drew from her account $2,000. There is no allegation of fraud on the part of the appellant or of collusion between the appellant and Mrs. Mundy.

Immediately the cheque was deposited on January 8th in the Canadian Bank of Commerce it was sent by messenger to the Royal Bank of Canada for certification, where again the postdating was overlooked by the clerks of that bank and the cheque certified.

(1) [1891] A.C. 107, per Lord Selborne at 127.

On the evening of January 8th Mrs. Mundy informed the appellant that negotiations were concluded, at least for the time being, and she was not purchasing the restaurant. As a consequence, immediately the bank opened on January 9th and before the cheque reached the Royal Bank of Canada in the ordinary course of banking, appellant called at that bank and asked that payment of the cheque be stopped, when he was informed that, because it had been certified on the previous day, payment could not be stopped.

The appellant brought this action to recover from the Royal Bank of Canada the sum of $2,000, which he alleges was improperly charged to his account following the certification of the aforementioned cheque.

The Appellate Court in Alberta reversed the judgment of the learned trial judge in favour of the appellant and directed that judgment be entered for the respondent.

The appellant contends that he had a right to stop payment of the cheque on the morning of January 9th, and the respondent that if he had, he was by his own conduct estopped from doing so. The respondent asks judgment on its counterclaim on the basis that the appellant is either an endorser or that it is a holder in due course of the cheque.

The appellant in connection with his savings account received from the Royal Bank of Canada a pass or bank book setting forth "Savings Regulations" paragraph 2 of which reads:

> Funds deposited will be paid only to the depositor in person or upon presentation of his written order.

A cheque is a written order and the law imposes an obligation upon the bank to pay the depositor's cheque according to its tenor if the depositor has funds to the amount thereof at his credit. Halsbury, 2nd Ed., Vol. 1, p. 820:

> A banker is bound to pay cheques drawn on him by a customer in legal form provided he has in his hands at the time sufficient and available funds for the purpose.

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A postdated cheque since 1776 has been accepted as a negotiable instrument. *Da Silva* v. *Fuller* (1); *Emanuel* v. *Robarts* (2).

In Falconbridge on Banking and Bills of Exchange, 5th Ed., p. 553:

> A cheque which is postdated is none the less a cheque, and is therefore payable, without grace, on demand on or after its date; but for some purpose it may be treated as if it were a bill of exchange payable at a future date.

Halsbury, 2nd Ed., Vol. 1, p. 820:

> Postdated cheques are not invalid, but the banker should not pay such a cheque if presented before its ostensible date.

Paget's Law of Banking, 4th Ed., p. 111:

> The real trouble is where a banker inadvertently pays a postdated cheque before the ostensible date. He cannot debit it then, and he must not dishonour cheques presented in the interval up to the ostensible date, which, but for paying the postdated one, he would otherwise have paid.

See also *Pollock* v. *Bank of New Zealand* (3):

The *Bills of Exchange Act*, R.S.C. 1927, chapter 16, section 165:

> A cheque is a bill of exchange drawn on a bank, payable on demand.

Section 27:

> A bill is not invalid by reason only that it
>
> * * *
>
> (*d*) is antedated or postdated, * * *

Bank of Baroda, Ld. v. *Punjab National Bank Ld.* (4). On June 13, 1939, Mitter took to the respondents, Punjab National Bank, Ld., a cheque dated June 20th drawn upon appellant, Bank of Baroda Ld., marked or certified "Marked good for payment on 20.6.39. For the Bank of Baroda, Limited, M. P. Amin, Manager." On June 19th the appellant bank suspended Amin and on the 20th sent notice to the respondent and other banks that his power of attorney was cancelled. Appellant bank refused to pay the cheque on June 20th notwithstanding its having been previously marked. The Appellate Division of the High Court of Calcutta affirmed the judgment at trial in favour of the respondent on the basis that the appellant had, by marking or certifying the cheque, accepted it. The Privy Council

(1) (1776) Sel. Ca. 238 MS. (referred to in Chitty on Bills of Exchange, 11th Ed., p. 188).
(2) (1868) 9 B. & S. 121.
(3) (1901) 20 N.Z.L.R. 174.
(4) [1944] A.C. 176.

reversed this decision on the ground that the ostensible authority of the manager did not extend to cover the certification of postdated cheques and that in the present case the manager had no authority in fact to do so. Lord Wright in delivering the judgment of the Privy Council, stated at p. 187:

> Their Lordships have referred to these matters as tending to support the view that certification is different both in its history and its effects from acceptance, even in jurisdictions in which either by statute or by custom it is declared to be "equivalent" to an acceptance.

Then, after pointing out that a postdated bill is under the English Act, section 13, subsection 2, as in the Canadian *Bills of Exchange Act*, section 27, not invalid by reason only that it is postdated, he continued at p. 193:

> But the material invalidity is that of the certification, taken in connection with the fact that the cheque was postdated. The true anomaly or invalidity consists in the attempt to apply certification to a cheque before it is due. Certification of a cheque when it is due may have operative effect and be valid as being directed to a cheque due in praesenti, such certification being presumably followed by debiting the drawer's account with the amount. This is particularly apparent when regard is had to the American or Canadian theory, that certification is equivalent to payment. It is impossible to treat the cheque as paid before it is due. The position might be different in jurisdictions where by law or custom certification is equivalent to acceptance, but nothing of the sort is applicable here. Even in such cases the difficulty of saying that there was constructive payment would remain. It is not easy to see why novel and anomalous theories should be invented to justify an unusual and unnecessary proceeding. This case can, however, be decided simply and sufficiently on the ground that the ostensible authority of the manager did not extend to cover the certifying of postdated cheques, and that in the present case the manager had no actual authority to do so. The bank accordingly was not bound. This in itself would be a sufficient ground for rejecting the respondent's claim.

It would appear from the foregoing that the Royal Bank of Canada had no ostensible authority to certify the appellant's cheque before its date, nor does the evidence suggest that it had any actual authority from the appellant to do it and, therefore, the certification as against the appellant was invalid.

The *Bills of Exchange Act* does not specifically deal with postdated cheques. A postdated cheque, however, has been accepted as a negotiable instrument and usually as a bill of exchange payable on the date thereof. Even an ordinary cheque has been described by Parke B. as "a peculiar sort of instrument, in many respects resembling a bill of exchange, but in some entirely different." *Ram-*

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churn Mullick v. *Luchmeechund Radakissen* (1). It is a bill of exchange that is also a cheque and possesses the differences which distinguish a bill of exchange from a cheque as enumerated by Lord Wright at p. 184 in *Bank of Baroda, Ld.* v. *Punjab National Bank, Ld.*, (2) and in particular the basic difference that the liability of the drawee of a cheque does not depend upon acceptance by the drawee as in a bill of exchange, but rather upon the contractual relationship between the drawer-depositor and the drawee-bank, under which the obligation of the drawee-bank is to pay the cheque if funds of the drawer are available when it is presented on the date thereof or a reasonable time thereafter.

In *Ex parte Richdale. In re Palmer* (3), it was contended that when the drawer of a postdated cheque received notice that a declaration of bankruptcy had been made with respect to the payee it was his duty to stop payment of the cheque. There the cheque was drawn by the purchasers of a business in favour of the vendor for the balance of the purchase price. It was postdated and, because of the reason given by the appellant in the case at bar, it is interesting to note the reason in that case. The report indicates at p. 410:

> The cheque was postdated the 28th of April, the reason for this being that the licences could not be transferred without a written authority signed by Palmer, and Richdale & Tomlinson wished to be able to stop payment of the cheque in case this authority should not be given.

Palmer was declared a bankrupt on April 27th. It was held that the giving of the cheque was a dealing within the meaning of the *Bankruptcy Act* and that there was no obligation upon the drawers, when they heard of the payee's bankruptcy, to stop payment of the cheque.

In the foregoing case it was contended that the right to countermand should have been exercised. In many cases the countermanding of postdated cheques has taken place and without any suggestion that such a right did not exist in the drawer. See *Union Bank of Canada* v. *Tattersall* (4); *Carpenter* v. *Street* (5); *The Royal Bank of*

(1) (1954) 9 Moo. P.C. 46 at 69.
(2) [1944] A.C. 176.
(3) (1882) 19 Ch. Div. 409.
(4) [1920] 2 W.W.R. 497.
(5) (1890) 6 T.L.R. 410.

Scotland v. *Tottenham* (1); *Westminster Bank Ld.* v. *Hilton* (2). In the latter case the drawer brought an action against the drawee-bank for payment of a postdated cheque after he as drawer had instructed the bank to countermand payment thereof. His instructions to countermand were contained in a telegram in which he gave an incorrect number of the cheque. The plaintiff failed in his action, not because he had not the right to countermand, but because his instructions giving the incorrect number did not cover the cheque in question.

It has been suggested that a postdated cheque is so far a bill of exchange that the provisions relevant to cheques contained in Part 3 of the *Bills of Exchange Act* are not applicable thereto. In referring to a document in the form of a postdated cheque, Mr. Justice Duff (later Chief Justice) stated (in *Leduc* v. *La Banque d'Hochelaga* (3).

> A "cheque" is defined by the *Bills of Exchange Act* (s. 165) as "a bill of exchange drawn on a bank, payable on demand." The order in question, as accepted, is obviously not payable on demand, and consequently is not a cheque within this definition.

These remarks are restricted to section 165. The essential differences between a cheque and a bill of exchange, as already indicated, make it plain that, while it is a bill of exchange for some purposes, it cannot be so regarded for all purposes; in particular the drawee's liability under a cheque is not that of the drawee-acceptor under the *Bills of Exchange Act*. Moreover, because countermanding with respect to postdated cheques has been so long recognized in the courts, it would appear that the provision of section 167 of the *Bills of Exchange Act* in providing for countermanding is merely setting forth the common law with regard thereto.

Section 167:

> The duty and authority of a bank to pay a cheque drawn on it by its customer, are determined by
> (*a*) countermand of payment;

It follows that the appellant on January 9th, before the Royal Bank of Canada made payment of the cheque, was within his rights in asking that the bank stop payment of his cheque in favour of Mrs. Mundy.

(1) [1894] 2 Q.B. 715.
(2) (1927) 136 L.T.R. 315.
(3) [1926] S.C.R. 76, at 78.

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It was further contended that the appellant was estopped from denying that in reality the cheque was dated January 8th, because by his conduct he detracted the attention or in some way prevented the teller from noticing the post-dating. It is true that he did not draw to the attention of the teller of the Canadian Bank of Commerce the fact that his cheque was postdated. It is important to note that the positions of the Royal Bank of Canada and that of the Canadian Bank of Commerce are in their respective relations to the appellant entirely different and that in this action we are concerned only with the relationship which exists between the appellant and the Royal Bank of Canada. Apart from the question raised in the counterclaim as to the drawer being an endorser and the Royal Bank of Canada becoming a holder in due course, which will be dealt with later, the position as between the appellant and the respondent bank is as stated by Lord Atkinson in *Westminster Bank Ltd.* v. *Hilton* (1):

> It is well established that the normal relation between a banker and his customer is that of debtor and creditor, but it is equally well established that *quoad* the drawing and payment of the customer's cheques as against money of the customer's in the banker's hands the relation is that of principal and agent. The cheque is an order of the principal's addressed to the agent to pay out of the principal's money in the agent's hands the amount of the cheque to the payee thereof.

The foregoing indicates the relationship between the appellant and the Royal Bank of Canada, while the Canadian Bank of Commerce, in receiving the cheque for deposit, derives its rights through the negotiating of the cheque. *The Royal Bank of Scotland* v. *Tottenham* (2). It would seem that the positions of the two banks with respect to the appellant are entirely different.

The appellant in tendering for deposit to Mrs. Mundy's account his cheque to the Canadian Bank of Commerce was negotiating a postdated cheque. While certain dangers incident to the practice of issuing postdated cheques have been from time to time emphasized, these cheques are nevertheless recognized in law as valid negotiable instruments, and the Canadian Bank of Commerce became at least a holder for value in receiving the cheque as it did. *The Royal Bank of Scotland* v. *Tottenham* (2). There is no allegation of fraud on the part of the appellant or of

(1) (1927) 136 L.T.R. 315, at 317. (2) [1894] 2 Q.B. 715.

collusion between the appellant and Mrs. Mundy, and no evidence that he had any intention to deceive or mislead the Canadian Bank of Commerce, nor circumstances deposed to which would justify such an inference. If Mrs. Mundy had purchased the restaurant, the cheque was to be used to assist her. The record does not suggest that the appellant had any intimation that Mrs. Mundy would use the funds for any other purpose. Without that act on her part it is probable that, in spite of the fact that the postdating was overlooked by employees of both banks, this litigation would never have developed.

Whatever took place between the Canadian Bank of Commerce and the appellant, it is clear upon the evidence that the only reason the Royal Bank of Canada certified this cheque was because its employees overlooked the fact that the cheque was postdated. The appellant was no party to this, and, with great deference for the opinion of the learned judges in the Appellate Court, it would appear that the essentials to found an estoppel as set forth in *Greenwood* v. *Martins Bank* (1), are not present in this case.

The respondent by its counterclaim asks judgment against the appellant either because he is an endorser or, alternatively, that it is a holder in due course of the cheque from the Canadian Bank of Commerce. When asked why he had put his name on the back of the cheque, appellant replied: "Well, just, there are lots of cheques that I put my signature on the back of them, just as a matter of form." Even if the signature of the appellant so placed on the back of the cheque be deemed an endorsement under section 131 of the *Bills of Exchange Act*, his liability therefor is determined by section 133. That section provides that "the endorser of a bill * * * engages that on due presentment it shall be accepted and paid according to its tenor." This being a cheque, the respondent's duty was to honour it by payment according to its tenor. Before it was ever received by the bank on January 9th, the appellant had instructed the bank to countermand payment. The bank at that time was under a duty to

(1) [1933] A.C. 51.

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carry out his instructions. Even if, therefore, the appellant be regarded as an endorser, the respondent under these circumstances cannot succeed.

The respondent received the cheque, as already stated, upon the terms of its contractual relationship with its depositor and its relationship is determined on that basis, and it cannot under the circumstances claim as a holder in due course as against its principal-drawer.

The appeal should be allowed with costs throughout and the judgment of the learned trial judge restored.

RAND J. (dissenting)—The facts of this controversy are not in dispute. The appellant Keyes drew a cheque for $2,000 dated at Calgary the 9th day of January, 1945, on the respondent, the Royal Bank, purporting to be payable to the order of a woman named J. I. Mundy. On January 8th, he presented this cheque, endorsed by himself, but not by the payee and unknown to her, together with a deposit slip in her name, signed by him, to the Canadian Bank of Commerce, with the request that the amount be deposited to the credit of her account, and this was done. On the same day, the cheque was certified by the Royal Bank. Early next morning the appellant appeared at the Royal Bank and countermanded payment; but the respondent, observing its acceptance of the cheque, declined to accept the countermand and debited his account on that day, following the usual clearing house settlement.

The money was intended to be advanced to Mrs. Mundy to enable her to purchase a business, and it may have been in Keyes' mind to countermand if the contemplated transaction did not go through. Later in the day of January 8th, Mrs. Mundy drew a cheque on her account for the $2,000 which was paid to her; but she did not proceed with the purchase.

The action was brought to recover the amount represented by the cheque from the Royal Bank on the ground that the acceptance before its date was unwarranted, and that the countermand was effective; and the trial court upheld this contention. A counterclaim on the footing that the Royal Bank was a holder for value was dismissed. On appeal, that judgment was reversed. Harvey, C.J.A.,

with whom Macdonald, J.A., concurred, took the view that by his conduct the appellant was estopped from denying that the effective date of the cheque was January 8th; Ford, J.A., seems rather to put it on the ground that in the circumstances he had disabled himself from countermanding its payment; Parlee, J.A., adds that the negotiation on the 8th of January justified the Royal Bank in certifying the cheque before the day on which it was to become payable.

I do not find it necessary to deal with any of these grounds. It is unquestioned that, although the name shown as that of the payee was of the name of a known person, it was never intended by the drawer that Mrs. Mundy should be contractually related to the cheque, that is to say, that she should ever be a party to any legal right or obligation created by its transfer to the Bank of Commerce or any subsequent dealing with it: crediting her account with the proceeds was a matter *dehors* the cheque. The payee was therefore a fictitious person, and under section 21 of the *Bills of Exchange Act* the cheque may be treated as payable to bearer: *Vagliano Brothers* v. *Bank of England* (1); and in any event, the appellant is estopped from denying that fictional existence. That a cheque can be negotiated before its date is unquestioned: *Royal Bank of Scotland* v. *Tottenham* (2); *Union Bank* v. *Tattersall* (3). The Bank of Commerce became, therefore, the holder of the cheque with an engagement on the part of Keyes at least as drawer; and that title was transferred to the respondent. Even treating the acceptance as equivalent to payment, the case would be within the language of Parke B. in *Morley* v. *Culverwell* (4):

> E.R. 727.
>
> I am of opinion that nothing will discharge the acceptor or the drawer, except payment according to the law merchant—that is, payment of the bill at maturity: if a party pays it before, he purchases it, and is in the same situation as if he had discounted it.

Assuming, therefore, the countermand to have been effective, the Royal Bank is remitted to the rights of a transferee from the Bank of Commerce; and as no defence has been

(1) (1889) 23 Q.B.D. 243.
(2) [1894] 2 Q.B. 715.
(3) (1920) 52 D.L.R. 409.
(4) (1840) 7 M. & W. 174; 151

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suggested available to the respondent on the original negotiation to the latter bank, or the withdrawal by Mrs. Mundy, the whole of the facts surrounding which are before the court, the counterclaim is well founded.

I would, therefore, dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Fenerty, Fenerty & McGillivray.*

Solicitors for the respondent: *Hannah, Nolan, Chambers, Might & Saucier.*