Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Gaden v. The Newfoundland Savings Bank, from the Supreme Court of Newfoundland; delivered 24th February 1899.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD DAVEY.
SIR HENRY STRONG.

[*Delivered by Sir Henry Strong.*]

This is an Appeal from the Supreme Court of Newfoundland in an action instituted by the Appellant against the Respondent.

For the purpose of this Appeal the facts are stated in a joint case and in the admissions of the parties.

On the 8th of December 1894, the Appellant having to her credit in the Commercial Bank at St. John's the sum of $3,850.07, went about 11 o'clock on the morning of that day to the Bank and there drew a cheque payable to herself or bearer for the full amount of her balance and presented it to the ledger-keeper who by direction of the manager certified it in the usual manner by writing his initials across it and delivered it thus initialled to the Appellant. At the same time the cheque was charged to the Appellant's account in the books of the Bank, and an entry was also made in her pass-book balancing the account. This cheque the Appellant immediately took to the office of the Respondents,

the Savings Bank, and there without endorsing it, deposited it; and an entry was thereupon made by the Respondents' officer in the Appellant's Savings Bank pass-book in these words :— 1894, December 8th, deposit $3,850.07.

On the same day, Saturday the 8th of December, the Savings Bank deposited the cheque with the Union Bank at St. John's. On the following Monday, the 10th of December, the Union Bank presented the cheque to the Commercial Bank for payment, when it was dishonoured. The Commercial Bank suspended payment on the morning of that day, December the 10th, and has never since resumed payment but has been declared insolvent under an Act of the Colonial Legislature providing for its winding up. The cheque was returned by the Union Bank to the Savings Bank. No notice of dishonour was sent to the Appellant until the 14th of December. It is admitted that if the cheque had been presented to the Commercial Bank on the day on which it was drawn, Saturday the 8th of December, it would have been paid.

The Appellant demanded payment of the amount of the cheque from the Respondent which having been refused she brought her action for its recovery.

The allegation of the Appellant in her petition is that she had deposited money to the amount in question with the Respondent and that the latter had given her credit therefor in the bank book issued to her by the Savings Bank. No case asking relief on the ground of negligence or breach of duty or any other ground than that of money had and received was made by the Appellant.

To this petition the Respondent pleaded that the amount sued for consisted of a cheque drawn by the Appellant in favour of herself upon the Commercial Bank; that the cheque was duly

presented and dishonoured and that the Appellant had notice of presentment and dishonour. The Appellant by her reply denied due notice of dishonour and further alleged that the cheque was certified and initialled, and transferred to the Respondent the money of the Appellant then lying in the Commercial Bank; that the cheque was paid to and accepted by the Savings Bank and the Appellant credited with the amount thereof; and the Appellant denied that the Commercial Bank became and was declared insolvent before the time had elapsed within which the Respondent could have presented the cheque, and suggested that the Respondent was guilty of *laches* in not presenting it earlier. Upon these pleadings the cause came on to be heard before Mr. Justice Winter without a jury who, after hearing the deposition of the Appellant and that of the ledger-keeper of the Commercial Bank as well as that of a witness called to prove the custom of bankers at St. John's as to the initialling of cheques, gave judgment for the Respondent. The cause was subsequently re-heard before the Full Court which affirmed the judgment of Mr. Justice Winter.

The law of Newfoundland relating to cheques is contained in Chapter 93 of the Consolidated Statutes. By Section 72 of that Act it is enacted that:—

> "A cheque is a bill of exchange drawn on a "banker payable on demand, and except as "otherwise provided the provisions of this "chapter applicable to a bill of exchange "payable on demand apply to a cheque."

By Section 73 of the same Act it is enacted that:—

> "(1.) Where a cheque is not presented for "payment within a reasonable time of its "issue and the drawer or person on whose "account it is drawn had the right at the

" time of such presentment as between him
" and the banker to have the cheque paid and
" suffers actual damage through the delay, he
" is discharged to the extent of such damage,
" that is to say to the extent to which such
" drawer or person is a creditor of such
" banker to a larger amount than he would
" have been had such a cheque been paid;

"(2.) In determining what is a reasonable time
" regard should be had to the nature of the
" instrument, the usage of trade and of
" bankers and the facts of the particular
" case."

Permission was given to the Appellant to amend her pleadings if she thought fit to do so in order to make a case of negligence or breach of duty on the part of the Respondent, but she declined to avail herself of such permission.

Their Lordships are of opinion that the Courts below were right in holding that the presentment of the cheque for payment was in reasonable time.

It was contended on behalf of the Appellant that the initialling of the cheque had the effect of making it current as cash. It does not however appear to their Lordships, in the absence of evidence of such a usage, that any such effect can be attributed to this mode of indicating the acceptance of a cheque by the bank on which it is drawn. A cheque certified before delivery is subject as regards its subsequent negotiation to all the rules applicable to uncertified cheques. The only effect of the certifying is to give the cheque additional currency by showing on the face that it is drawn in good faith on funds sufficient to meet its payment and by adding to the credit of the drawer that of the bank on which it is drawn.

The entry in the pass-book has been much relied on as showing that the Respondents ac-

cepted the cheque as cash but such entries are not conclusive, they are admissions only, and as in the case of receipts for the payment of money they do not debar the party sought to be bound by them from showing the real nature of the transactions which they are intended to record.

The question for decision is therefore reduced to this: did the Respondent acquire title to this cheque by discounting or purchasing it, or was it received merely on deposit for the purpose of collection with the further understanding that the amount when paid should be considered as a fund deposited by the Appellant with the Respondent on which the latter was to pay interest? In the absence of evidence of any express agreement between the Appellant and the officer of the Savings Bank at the time of the deposit, the intention of the parties can only be implied from the circumstances in proof, including the fact that the cheque was certified. Is it to be inferred from this alone that the Respondent which was not a bank of discount but whose duty and business it was merely to receive money on deposit, so far departed from its duty as well as from its general course of business, which must be presumed to have been in accordance with its duty, as to have accepted this cheque not by way of deposit and for the purpose of obtaining the cash for it in the usual way as the agents of the Appellant, but with the intention of acquiring title to it and thus in effect gratuitously guaranteeing its payment? Their Lordships are of opinion that there can be only one answer to this question, that which has been given by the Courts below. If there was any such agreement as the Appellant sets up it lay upon her to furnish proof of it but in this she has wholly failed.

As regards authority no decided case proceeding upon a state of facts precisely similar

to the present has been cited and their Lordships have not been able to discover any such authority in the reports of the English Courts. Upon a different state of facts raising substantially the same question as that involved in this Appeal there is however ample authority. Had the Respondent instead of the drawee bank become insolvent before presentment and had the cheque been found by its assignees or liquidators in specie amongst the assets, and had it been claimed by them as against the Appellant to belong to the estate of the Savings Bank, the question involving the title to the cheque would have been precisely the same as that now presented for decision. In such a case numerous authorities are to be found which apply to the case under appeal. In *Giles* v. *Perkins* (9 East p. 11), a case arising between the customers of bankers who had become bankrupt and the assignees of the latter, it was held that bills which had been deposited by the customers and credited and treated as cash by the bankers, the depositors being authorised to draw against them, had not become the property of the bankers. The assignees having found such bills in specie in the hands of the bankrupts and having received payment of them were held bound to account for the proceeds to the customers whose title to the bills it was held had never been divested. And this case was affirmed and followed in the later case of *Thompson* v. *Giles* (2 B. & C. p. 422), under circumstances even stronger to show a change of title inasmuch as in the last case the customers had endorsed the bills. If therefore the case had been the converse of that before their Lordships and the Appellant had been claiming title to the cheque instead of seeking to repudiate it, the authorities above cited, which could be largely added to, would be decisive to show that the

cheque had never ceased to be the property of the Appellant, and no reason can be suggested why the same conclusion should not be reached in the present case.

Their Lordships will humbly advise Her Majesty to dismiss the Appeal and affirm the Judgment appealed against.

The Appellant must pay the Respondent's costs.