

on the morning of the 3rd October. The cheques were held until just before noon on the 4th October, when they were returned to the plaintiff bank unaccepted and marked "not sufficient funds." The plaintiff bank thereupon gave a Clearing House slip—equivalent to cash—to take up the cheques.

The action was tried without a jury at Toronto.

W. N. Tilley, K.C., and G. L. Smith, for the plaintiff bank.

Wallace Nesbitt, K.C., and R. Wardrop, for the defendant bank.

MIDDLETON, J., said that this action was brought upon the theory that there was money standing to the credit of Maybee & Wilson at the time the cheques were presented, or that there would have been such money save for the improper acts of the defendant bank; and that it was, therefore, the duty of the defendant bank, which had received the cheques through the Clearing House, to have marked them good and to have treated them as paid.

If the plaintiff bank's claim were based upon the mere fact that there were funds in the hands of the defendant bank available for payment of the five cheques, the plaintiff bank would fail: *Hopkinson v. Forster* (1874), L.R. 19 Eq. 74. But here the situation was entirely different.

The obligation of the defendant bank to the plaintiff bank was not that of a bank to the payee of a cheque drawn by its customer. When it, by virtue of the Clearing House transaction, had itself become the holder of the cheque, its obligation was to mark the cheque good if there were funds then available, or funds which would have been available to meet the payment but for its own wrongful act. So long as it had or ought to have funds to answer the cheque, it had no right to demand recoupment from the depositing bank, and the recoupment was obtained by that which was in truth a misrepresentation of the true state of affairs. The defendant bank had improperly charged against Maybee & Wilson's account three other cheques, and so left the account without sufficient funds to pay the five cheques held by the plaintiff bank.

The case is of importance as indicating the possibilities of a situation which must frequently arise; and it is open to question whether legislation is not needed to remedy the evil. When a customer draws a cheque upon his bank, and there are funds to answer it when presented, why should the bank be at liberty to