NEGOTIABLE INSTRUMENTS—PAYEE HOLDER IN DUE COURSE—ACTION BY PAYEE ON STOPPED CHEQUE

The recent Ontario case of *Dominion Bank* v. *Fassell and Baglier Construction Co. Ltd.*[1] is of considerable interest, not because it involves any new principles of law but rather because it presents a revival of an issue generally considered to have been authoritatively settled. That issue is whether or not the payee on an instrument can be a holder in due course.

The pertinent facts of the case are as follows: One Carter, a contractor, employed by Fassel & Baglier, made an assignment of all monies due him from his employeers to the Dominion Bank. Carter requested an advance from Fassell who, being apprehensive lest liens be filed by Carter's employees, consulted the Dominion Bank's manager. The manager assued him it would be safe to make the advance although the manager knew Carter was in debt and could not pay. Further the manager appreciated that the Mechanic's Lien Act[2] provisions made such an advance a trust fund for the benefit of workmen until their wages were paid. Fassel & Baglier drew a cheque naming the Dominion Bank as payee and deposited it to Carter's account. When they were informed that Carter's employees had filed liens the Company stopped payment. The Dominion Bank subsequently brought action for recovery of the amount of the cheque.

Hogg J.A. in the Ontario Court of Appeal approached the case on the basis of whether or not the bank was a holder in due course; for if they were not they could not maintain the claim against the defendant company.[3]

Hogg J.A. found that when the cheque was deposited to Carter's account the bank *prima facie* became a holder in due course. However section 56 of the Bills of Exchange Act reads:

> 56(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions namely;
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> (b) that he took the bill in good faith and for value and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

The presumption that the bank was a holder in due course was found to have been rebutted by the surrounding circumstances, the quoted section not having been complied with, inasmuch as the bank manager had notice and knowledge of the facts which raised the question of a probable defect in Carter's title to the cheque.

There can be no quarrel with the result of the decision in favour of the defendant but the finding that the bank was even *prima facie* a holder in due course is certainly open to dispute. The reasons for the finding are set out in the following quotation from the decision:

> The opinion was expressed by Lord Russell of Killowen C.J. in *Lewis* v. *Clay*[4] that the original payee of a bill could not be a holder in due course because the instrument had never been negotiated. This opinion was accepted by Hallet J., apparently with some doubt in *Ayres* v.

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[1] [1955] 4 D.L.R. 161.

[2] R.S.O., 1950, c.227.

[3] R.S.C., 1952, c.15, s.74.

[4] (1897), 67 L.J.Q.B. 224, at p. 227.

Moore,[8] but in *Herdman* v. *Wheeler*,[9] an appeal heard by Lord Alverstone C.J., and Darling and Channell J.J., this opinion of Lord Russell was considered to be a dictum only and it was said that the definition of "holder" in the Bills of Exchange Act had been overlooked. The word "holder" is defined in the same language in the English Bills of Exchange Act,[7] referred to in the judgment in *Herdman* v. *Wheeler*, as in s. 2(h) of our Bills of Exchange Act.

Prior to 1926 there was considerable disagreement whether or not the expression "holder in due course" included a payee. In *Lewis* v.*Clay* the holding was against including a payee but in *Herdman* v. *Wheeler* and in the judgment of Fletcher Moulton L.J. in *Lloyd's Bank Ltd.* v. *Cooke*[8] the opposite view was held. This later trend was evidenced in the Manitoba Court of Appeal in *Knechtel Furniture Co.* v. *Ideal House Furnishers Ltd.*[9] which followed the opinion of Osler J.A. in *McDonough* v. *Cook*[10] in the Ontario Court of Appeal. *Marshall* v. *Rogers*[11] decided in 1924 in the Trial Division of the Supreme Court of Alberta followed this trend.

It is not the purpose of this comment to review in detail the various holdings on the subject. It is, however, worthwhile to note that the only authority cited by Hogg J.A. was the decision in *Herdman* v. *Wheeler* where he made the following statement in reference to the reasoning of Lord Russell in *Lewis* v. *Clay*:

> It appears to use that the late Lord Chief Justice overlooked the definition of "holder" in s 2,[12] which is , " 'Holder' means the payee or edorsee of a bill or note who is in possession of it, or the bearer thereof." Therefore in s. 29,[13] it is necessary to read holder as including payee as well as indorsee, and to read it "a holder in due course is a payee or indorsee who, etc." That being so, the only words in s. 29 which can be said to indicate that a payee cannot be a holder in due course are those in sub-s.(b): "and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it." But if the word "payee" had been expressed in the earlier part of the section, it would be clear this means "if negotiated to him he had at the time no notice," & c. On the whole therefore we are not prepared to hold that the payee of a note can never be a holder in due couse; but it is, as it seems to us, just as unnecessary for us to decide that question as it was for the late Lord Chief Justice to do so on the case before him.[14]

It should be mentioned here that Hogg J.A. places considerable weight on the fact that the opinion of Lord Russell C.J. in *Lewis* v. *Clay* was a dictum without pointing out that the authority upon which he relies acknowledge that what they had to say on the question at hand was just as much *obiter* at that which Lord Russell had stated.

But by far the most unsatisfactory aspect of the decision is the failure of the Ontario court to refer to the House of Lords decision in *R. E. Jones Ltd.* v. *Waring & Gillow Ltd.*[15] which is generally regarded to have settled the law in accordance with the opinion of Lord Russell. Viscount Cave L.C. held:

> I do not think that the expression 'holder in due course' includes the original payee of a

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[8] [1939] 4 All E. R. 351.

[9] [1902] 1 K.B. 361.

[7] (1882), 45 & 46 Vict., c.61.

[8] [1907] 1 K.B. 794.

[9] (1910), 14 W.L.R. 175.

[10] 19 O.L.R. 267.

[11] [1924] 1 D.L.R. 888.

[12] S.2 of our Act coresponds to s.2 of the Imperial Act.

[13] S.29 of the Imperial Act corresponds to s.56 of our Act.

[14] *Supra*, footnote 6, at p. 373.

[15] [1926] A.C. 670.

cheque. It is true that under the definition section in the Act (s2)[16] the word holder includes the payee of a bill unless the context otherwise requires; but it appears from section 29, sub-s.1.[17] the "holder in due course" is a person to whom a bill has been "negotiated" and from section 31[18] that a bill is negotiated by being transferred from one person to another and (if payable to order) by indorsement and delivery. In view of these definitions it is difficult to see how the original payee ofa cheque can be a "holder in due course" within the meaning of the Act. Sect. 1, sub-s.2[19] which distinguishes immediate from remote parties and includes a holder in due course among the latter, points to the same conclusion. The decision of Lord Russell C.J. in *Lewis* v. *Clay* was to the effect that the expression does not include a payee; and the opinion to the contrary expressed by Moulton L. J. in *Lloyd's Bank* v. *Cooke* does not appear to have been accepted by the other members of the Court of Appeal. This contention therefore fails.[20]

This quotation illustrates a complete rejection by the House of Lords of the reasoning in *Herdman* v. *Wheeler* upon which Hogg J. A. relied. Furthermore, the decision in *Jones* v. *Waring & Gillow* has been followed with no deviation in Canada as well as England. In 1928 the Supreme Court of Alberta, in a extraordinary addendum to a decision handed down after the decision in *Jones* v. *Waring* v. *Gillow* adopted the reasoning of the House of lords as final.[21] *Gallagher* v. *Murphy & Gilroy*[22] in the Supreme Court of Canada also followed the House of Lords, as did Masten J.A. in the Ontario Court of Appeal in the 1933 decision, *Welsh* v. *Tremble and Van Duesen.*[23] In the more recent case of *Ayres* v. *Moore* Hallet J. in the King's Bench Division held that the original payee of a bill could not be holder in due coure. It is agreed, as Hogg J.A. pointed out in his consideration of the case that Hallet J. could have been more emphatic, but nevertheless the learned judge did rely on *Jones* v. *Waring*, a case not cited by Hogg J.A.

It appears in the light of the existing authorities that the decision of Hogg J.A. insofar as it concerns the issue of whether a payee can be a holder in due course cannot be supported. If the *Jones* v. *Waring* case had been cited to the Ontario Court they would have been obliged to either distinguish it or else discuss the doctrine of *stare deusis* if they were unwilling to consider it as binding authority. There has been, it is true, criticism of the *Jones* v. *Waring* decision[23] but it is submitted that a correction of the decision's results must be effected by legislation, especially in view of the fact that the decision has been followed in Canada.

—R. A. Bradley,
Third Year Law.

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[16] S.2 of our Act.

[17] S.56(1) of our Act.

[18] S.60.

[19] S.40.

[20] *Supra*, footnote 15, at p. 680.

[21] *Johnson* v. *Johnson* [1928] 2 W.W.R. 63, *addendum* to [1928] 1 W.W.R. 774.

[22] [1929] S.C.R. 288, at p. 295.

[23] Falconbridge, Banking and Bills of Exchange (4th ed.) pp. 615-17; cited in Falconbridge: R. W. Aigler (1927), 36 Yale L.J. 608; (1927), 43 L.Q.R. 615; (1927), 3 Cambridge L. J. 615.