ARKANSAS COTTON GROWERS' COOPERATIVE ASSOCIATION *v.* BROWN.

Opinion delivered April 8, 1929.

1. AGRICULTURE—COOPERATIVE MARKETING CONTRACT—JURY QUESTION.—In a suit by a cotton growers' cooperative association, organized under the Cooperative Marketing Association Act (Acts 1921, p. 153), to recover advances to defendant on his cotton crop, it was error to submit to the jury whether defendant association obtained during the season the best prices obtainable by it under market conditions for defendant's cotton.
2. AGRICULTURE—CONCLUSIVENESS OF JUDGMENT OF COOPERATIVE ASSOCIATION.—Where the marketing agreement of a cotton growers' association made the classification of the association conclusive upon the members, and provided that the association

should sell the members' cotton "at the best prices obtainable by it under market conditions," this does not mean the best prices obtainable in any one day, but contemplates that the judgment of the association in classifying and selling the cotton should be conclusive except for fraud or gross mistake amounting to fraud.

3. AGRICULTURE—RECOVERY OF EXCESS ADVANCES.—Where a contract between a cooperative association and its members provided for advances to the members, and the association by mistake made excessive advances, it is entitled to recover such excess from the member.

4. JUSTICES OF THE PEACE—DISMISSAL OF ACTION—APPEAL.—Where plaintiff appeared in a justice's court and asked for time to produce witnesses, a judgment that the cause be dismissed for want of witnesses for the plaintiff, and that the defendant be discharged with costs, is a final judgment, and subject to appeal to the circuit court.

5. JUSTICES OF THE PEACE—EFFECT OF APPEAL.—Where a case is appealed from a justice of the peace to the circuit court, it is there for trial *de novo* on the merits, and technical objections to the forms of procedure in the lower court are futile.

Appeal from Sharp Circuit Court, Southern District; *John C. Ashley*, Judge; reversed.

STATEMENT OF FACTS.

Arkansas Cotton Growers' Association sued John Brown before a justice of the peace to recover the sum of $30.82, alleged to be excess of advances made by the plaintiff to the defendant on his cotton crop for two years.

There was a judgment in favor of the defendant in the justice court. The judgment recites that it appeared that the plaintiff had not used due diligence in endeavoring to have its witnesses present, and it was therefore ordered and adjudged that its case be dismissed for want of witnesses, and that the defendant be discharged with costs. The plaintiff appealed to the circuit court, and the defendant moved to dismiss the appeal because he claims that the effect of the judgment of the justice of the peace was a dismissal for want of prosecution, from which no appeal lies. The court overruled the motion of the defendant to dismiss the appeal, and the case was tried *de novo* in the circuit court.

The facts necessary for a determination of the issue raised by the appeal may be briefly stated as follows: The plaintiff introduced in evidence the articles of incorporation of the Arkansas Cotton Growers' Cooperative Association. The articles provided that the association is formed, among other purposes, to purchase and sell any cotton of its members. It is authorized to borrow money and make advances to members of the Association. It may act as agent, representative or broker of its members, in selling or disposing of their cotton. The articles provide that the association shall make no profits for itself, and it is not permitted to buy or sell any cotton except from and for its members, on a standard cooperative basis. The association does not have any capital stock, and admits members upon the payment of an entrance fee of $10. The plaintiff association made a written contract with the defendant to buy and sell for him all the cotton produced by him during the years 1925 and 1926. Section 5 of the agreement provides that the association shall pool all the cotton of a like grade and staple delivered by the members. It provides that the association shall classify the cotton, and that its classification shall be conclusive. Each pool is for a full season. Section 6 provides that the association agrees to resell the cotton so pooled "at the best prices obtainable by it under market conditions," and to pay over the net amount received therefor to the members according to the respective amount of cotton delivered by each member to it. During the season of 1925 the defendant delivered to the plaintiff six bales of cotton, upon which he received an advance of $356.56. His cotton was graded by the association, and placed in four different pools. After the sale it was found that the net price received for the six bales of cotton belonging to the defendant amounted to $303.58. He had been advanced $59.04 more than this amount. For the season of 1926 the defendant delivered to the association three bales of cotton, and it was also graded and placed in different pools by the association. The as-

sociation owed him the sum of $19.09 on these three bales of cotton over and above the advances made to him on it. The association charged the defendant with $59.04, claimed to be owed it on advances for the 1925 cotton, and credited him with $19.09, which the association owed him for the 1926 cotton, leaving a balance due the plaintiff by the defendant of $30.82.

The proof on the part of the defendant shows that, at several times during the season, cotton was sold in the local market for more than the price obtained by the plaintiff for the cotton of the defendant and of other growers whose cotton was placed in the same pool.

There was a verdict and judgment for the defendant, and the plaintiff has appealed.

Earl R. Wiseman and *Clayton & Cohn,* for appellant.

Coleman & Reeder, for appellee.

HART, C. J., (after stating the facts). The plaintiff asked for an instructed verdict, which was denied by the court, and the court submitted the case to the jury upon the question of fact whether or not the association obtained during the season the "best prices obtainable by it under market conditions."

It is earnestly insisted by counsel for the plaintiff that there was no evidence upon which to submit such question of fact to the jury, and in this contention we think counsel are correct.

The articles of the association provide that it shall not have any capital stock, and it is organized for the purpose of protecting the producers of farm products from depreciation in the prices thereof by combination of large manufacturing corporations and speculators. Its object is to sell the raw product annually from time to time as there is a legitimate demand therefor, and, by the extension of credit to farmers, to enable them to collectively market their crops. *Arkansas Cotton Growers' Cooperative Association* v. *Brown,* 168 Ark. 504, 270 S. W. 946, and *McCauley* v. *Arkansas Rice Growers' Cooperative Association,* 171 Ark. 1155, 287 S. W. 419.

The contract under consideration in this case provides that the association shall pool all cotton of a like grade and staple delivered to it by its members, and that its classification shall be conclusive. The agreement provides that each pool shall be for a full season. Then it is provided that the association shall resell such cotton "at the best prices obtainable by it under market conditions." This does not mean the best prices that could be obtained by it in any one day or on several different dates during the same season. Such a conclusion would tend to defeat the very purpose of the organization. The farmers are located all over the State, and each acting separately could not protect himself against speculators. To meet this condition and to enable the farmers to combine their resources, the Cooperative Marketing Association Act was passed, and the farmers were enabled to place their combined products in the hands of an association as a selling agent selected by them to the end that prices might be stabilized and that they might receive the worth of their crops. The association was given full power to sell the cotton of the same or different pools at such time or times as might be deemed to the best interest of the members.

It will be noted that the marketing agreement made the classification of the association conclusive upon the members, and provided that each pool should be for a full season. This made the judgment of the association in classifying and selling the cotton conclusive, except for fraud or gross mistake which would amount to fraud.

It would be destructive of the purposes of the association if it was compelled to account to the members for the highest price it could have obtained for the cotton on any particular day or days. In the very nature of things, no one could know what would be the highest market price obtainable, under such a construction of the contract, until after the cotton season was over. The cotton growers were associating themselves together as authorized by the act, and have signed agreements for

marketing their cotton with the association, which had for its purposes the classifying and grading of the cotton, the selling of the same for the best market price obtainable, in the judgment of the officers of the association.

The association was allowed to advance funds to its members, and this of itself showed that it was intended that the cotton should be held and sold by the association when, in the judgment of the officers, the best price could be obtained. It is true that the defendant introduced witnesses that better prices could have been obtained upon several different dates during the cotton season of the year 1925. There is nothing whatever to show that the officers of the association acted in bad faith in selling the cotton or that they acted in such a reckless or careless manner as to impeach the sale made by them.

The contract between the association and the members expressly provides for advances to the members, and if, by mistake, the association shall make an excess advance to any one member, it would be entitled to recover the excess from the member. In *California Bean Growers' Association* v. *Williams*, 82 Cal. App. 434, 255 Pac. 751, it was held that a contract between a cooperative association and grower, expressly providing for advances to the grower and specifying that such advances might be deducted from remittances on sale of the crops, necessarily implies that the grower would reimburse the association for all such advances. See also *Re Joseph Murphy Company,* 214 Pa. 258, 63 Atl. 745. This principle in the present case necessarily results from the contract itself. The contract provides for advances by the association to its members, and this carries with it an implied agreement to pay back any excess advance. Hence, under the facts of the present case, we are of the opinion that the court erred in not directing a verdict in favor of the plaintiff.

Upon the question of dismissing the appeal of the plaintiff in the circuit court, but little need be said. In the first place, the judgment of the justice of the peace shows that it was a final one rendered by the justice of

the peace and was not a dismissal for want of prosecution. The plaintiff appeared in court and asked for time to produce its witnesses. The court thought that the plaintiff had been negligent in not having its witnesses in court, and rendered judgment that the cause be dismissed for want of witnesses, and that the defendant be discharged with costs. The plaintiff appealed to the circuit court. When the case was carried by appeal to the circuit court, it was there for trial *de novo* on the merits, rather than for correction of errors committed by the justice of the peace. *Hopkins* v. *Harper,* 46 Ark. 252. As said in *Martin* v. *State,* 46 Ark. 38, when a case is carried by appeal to the circuit court it is there for trial on its merits, and technical objections to the forms of procedure in the lower court are futile.

Because the court erred in refusing to direct a verdict for the plaintiff, the judgment must be reversed; and, inasmuch as the testimony of the defendant on the question whether the association sold the cotton "at the best prices obtainable by it under market conditions" might be different on a retrial of the case, the cause will be remanded for a new trial.