

GEORGE H. McFADDEN BROTHERS' AGENCY *v.* KEESEE.

Opinion delivered May 13, 1929.

1. SALES—CASH ON DELIVERY—DISHONORED CHECK.—Where goods are sold for cash on delivery, and payment is made by the purchaser's check, such payment and delivery of the goods are conditional, and, if the check on presentation is dishonored, the seller may retake the goods.
2. REPLEVIN—OWNERSHIP.—Replevin cannot be maintained without showing a general or special ownership of the property, together with the right of immediate possession.

3. **BILLS AND NOTES—REASONABLE TIME TO PRESENT CHECK.**—Under Crawford & Moses' Dig., § 7952, providing that a check must be presented for payment within a reasonable time, and § 7763, providing that in determining what is a reasonable time regard must be had to the nature of the instrument, the usage of trade or business, and the facts of the particular case, *held* that what constitutes a reasonable time for presenting a check for payment depends upon the circumstances of the particular case and means such time as a prudent man would employ about his own affairs.
4. **BILLS AND NOTES—REASONABLE TIME FOR PRESENTING CHECK.**—Where the custom was to deposit checks for collection in the payee's bank, which in due course presented the check through the clearinghouse for payment at 9:30 A. M. daily, with the result that, if the check is received too late to be presented on the day of its receipt, it is not presented until the next day, a check, received on the 7th, deposited in the collecting bank about 10 o'clock A. M. on the 8th, and presented for payment on the 9th, was presented in time, so as to charge the maker with loss resulting from failure of the drawee bank before the check was presented.
5. **SALES—BREACH—DAMAGES.**—Where a sale of cotton was a cash transaction, the seller, on nonpayment of the check, was entitled, in an action for the price, to recover the agreed price with interest from the date of sale, and was not entitled to the benefit of the advance in the price at the time of the trial.

Appeal from Phillips Circuit Court; *W. D. Davenport*, Judge; affirmed.

STATEMENT OF FACTS.

T. W. Keesee, as the surviving partner of T. W. Keesee & Company, brought suit in the circuit court against George H. McFadden Brothers' Agency to recover eighty-nine bales of cotton of the value of \$7,670.86. The defendant admitted having possession of the cotton, but alleged ownership in itself.

It appears from the record that on February 7, 1928, T. W. Keesee & Company, cotton factors, sold to George H. McFadden Brothers' Agency eighty-nine bales of cotton for \$7,670.86, and at 11:45 A. M. delivered eighty-nine compress receipts therefor to the purchaser, and received a check for the amount of the purchase price. The check was drawn on the People's Saving Bank & Trust Company of Helena, Arkansas. Plaintiff deposited the check with the Interstate National Bank of

Helena at ten o'clock in the morning on February 8, 1928. The People's Saving Bank & Trust Company, upon which the check was drawn, was closed upon the morning of February 9, 1928, by order of the State Bank Commissioner, because of insolvency.

It was the custom of the banks in Helena to clear each other's checks daily at 9:30 A. M. and take exchange for the difference. It was agreed that the value of the cotton on the date of sale was \$7,670.86, and that the banks in Helena, Arkansas, open at 9 A. M. and close at 2 P. M. According to the evidence for the plaintiff, the sale of cotton always contemplates a cash transaction, and the sale of the cotton in this case was a cash transaction.

The office of the plaintiff was situated in the same city with the two banks above referred to. If the check in question had been presented to the People's Saving Bank & Trust Company on the 7th or 8th day of February, 1928, and cash had been demanded in payment of the same, the check would have been paid. It is the custom in the city of Helena, when a business man receives a check in payment, to deposit it in the bank with which he does business, for collection. It is not the custom to take the check to the bank upon which it is drawn and demand cash. On the 7th and 8th days of February, 1928; the Interstate National Bank had considerable dealings with the People's Saving Bank & Trust Company; and in settling their differences it was the custom of the banks to give checks in payment of the balance owed to another bank as a result of these daily clearances. On the 6th day of February, 1928, the People's Saving Bank & Trust Company gave to the Interstate National Bank in clearance, exchange on New York City, and on the 7th instant gave exchange on Chicago, and on the 8th instant gave exchange on Memphis, Tennessee. On the 6th and 7th days of February, 1928, the People's Saving Bank & Trust Company owed the Interstate National Bank a balance of six or seven thousand dollars, and on the 8th

instant it owed a balance of something like twelve thousand dollars. Other facts will be stated or referred to in the opinion.

The case was tried by the court without a jury, and judgment was rendered in favor of the plaintiff for 89 bales of cotton, or, in case delivery of the cotton could not be had, for the sum of \$7,670.86, with six per cent. interest from February 9, 1928. The case is here on appeal.

W. G. Dinning, for appellant.

Brewer & Cracraft, for appellee.

HART, C. J., (after stating the facts). The record shows that the cotton was sold by the plaintiff to the defendant for cash and a check given in payment thereof. Where goods are sold for cash on delivery, and payment is made by the purchaser by check on his banker, such payment is only conditional, and the delivery of the property also is only conditional; and if the check, on due presentation, is dishonored, the seller may retake the goods. *National Bank of Commerce v. Chicago, Burlington & Northern Ry.*, 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263; and *Hodgson v. Barrett*, 33 Ohio St. 63, 31 Am. Rep. 527.

Replevin cannot be maintained without showing a general or special ownership of the property in the plaintiff, together with the right of immediate possession. *Brown & Hackney, Inc., v. Loveless*, 152 Ark. 540, 239 S. W. 21.

In the case at bar there was a constructive delivery of the cotton at the same time the check was given in payment of it. Hence the sale was on condition that the check should be paid on presentation. A check is given for immediate payment, and the holder owes the duty of presenting it for payment within a reasonable time. What is a reasonable time will depend upon the facts in each case, and this court has recognized the rule which requires a holder of a check, receiving it at the same place in which the drawee transacts business, to

present it for payment within banking hours on the day it is received, or at least on the following day. *Burns v. Yocum*, 81 Ark. 127, 98 S. W. 956. In that case the court laid down the rule that, where the payee of a check and the bank on which the check is drawn are in the same place, reasonable diligence requires the check to be presented for payment not later than the day after it has been received, and delay beyond that time, without excuse, will discharge the drawer from liability, if he is injured by the delay.

Counsel for the defendant contend that the application of this rule to the facts of the case will cause a reversal of the judgment, because the check was neither presented on the day it was received nor on the following day. The plaintiff and the bank upon which the check was drawn did business in the same city. The plaintiff deposited the check in his own bank for collection on the next day after it was received. It will be remembered that the check was given about eleven o'clock in the morning on the 7th day of February, and it was deposited by the plaintiff in his bank for collection about ten o'clock on the 8th instant. The check was cleared in the usual way, and was dishonored because the bank closed its doors on the morning of the 9th instant, before payment had been demanded. The undisputed evidence shows that the check was deposited for collection by the plaintiff with its own bank and by that bank presented for payment according to the usual custom in the city of Helena, where all the parties resided. The check was not paid because of the failure of the bank on which it was drawn before the check could be presented according to the usual course of business in the city.

Under these circumstances we do not think that the facts in the case call for the application of the rule laid down in *Burns v. Yocum*, *supra*. This is apparent from the later case of *Federal Land Bank of St. Louis v. Goodman*, 173 Ark. 489, 292 S. W. 659. In that case the court held that what constitutes a reasonable time for

presenting a check for payment depends upon the circumstances of the particular case, and means such time as a prudent man would exercise or employ about his own affairs.

The court called attention to the fact that the case of *Burns v. Yocum*, 81 Ark. 127, 98 S. W. 956, was decided before the passage of our Negotiable Instruments Law. This act was passed by the Legislature of 1913, and is very comprehensive in its nature. Section 186 of the act, which is § 7952 of Crawford & Moses' Digest, provides that a check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss occasioned by the delay. Section 193 of the act, which is § 7763 of the Digest, provides that, in determining what is a reasonable time or an unreasonable time, regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instrument, and the facts of the particular case.

According to the business usages of the city of Helena, as shown by the record, a holder of a check deposits it in his own bank for collection, and the check is presented in due course, after its deposit, through the clearing-house, with the result that, if a check is received too late to be deposited on the day of its receipt, it is not deposited until the next day, and consequently is not cleared until the second day after its receipt. Having due regard for business usage, such presentment has been held to be within the rule of reasonable diligence. *Zaloom v. Ganim*, 120 N. Y. Supp. 85; and *Loux v. Fox*, 171 Penn. 68, 33 Atl. 190. The New York case was cited and quoted from with approval in the case of *Federal Land Bank of St. Louis v. Goodman*, 173 Ark. 489, 292 S. W. 659. Therefore we are of the opinion that the court was correct in holding that, under the facts of this case, having due regard for business usage, the check was presented within a reasonable time, and that, on account of its being dishonored, the plaintiff had a

right to rescind the sale of the cotton and to retake it. The court, however, only allowed the plaintiff interest on the value of the cotton from the day of the sale. At the time of the trial the price of cotton had risen two cents per pound, and the plaintiff claims that the court erred in not allowing him to recover the cotton or its value at the advanced price. We do not think so. The court correctly allowed the plaintiff to recover the price for which he sold the cotton, together with interest thereon from the date of sale at six per cent. The parties contemplated a cash transaction, and this result enabled the plaintiff to receive the price for which he sold the cotton, together with interest at the legal rate for the time he has been deprived of the use of the money.

Therefore the judgment will be affirmed.

KIRBY, J., dissents.
