

ELLIS *v.* CITIZENS' STATE BANK.

Opinion delivered October 29, 1928.

1. JUSTICES OF THE PEACE—RIGHT OF APPEAL.—Where a justice of the peace in a garnishment proceeding determined that an interpleader was entitled to the fund garnished as against the plaintiff, the justice could not, by dismissing plaintiff's action for want of prosecution, prevent plaintiff from taking an appeal unless he first moved to set aside the judgment of the justice.
2. GARNISHMENT—LIABILITY OF DRAWER OF CHECK DISCHARGED WHEN —In a suit on a check in which a garnishment proceeding was instituted against the drawee bank, the garnishee's payment of the proceeds to the interpleader in accordance with the order of the court in favor of an interpleader's claim to the fund as against that of the plaintiff, discharged defendant from liability on the check, and direction of a verdict for plaintiff against defendant on plaintiff's appeal was unauthorized.

Appeal from Craighead Circuit Court, Lake City District; *W. W. Bandy*, Judge; reversed.

STATEMENT BY THE COURT.

Appellee brought suit on December 20, 1926, in justice court, against appellant upon his check for \$62.75. Summons and garnishment issued, returnable December 31, 1926, and the garnishee, Bank of Lake City, upon which the check was drawn, answered it had in its hands \$300 belonging to appellant. C. B. Gregg filed an interplea, claiming the proceeds of the check garnished.

Upon trial the court ordered the Bank of Lake City to pay to Gregg, interpleader, the amount of the check sued on, \$62.75, and dismissed plaintiff's cause of action

for want of prosecution; discharged defendant with costs, and ordered execution against plaintiff for costs. Appellee herein prosecuted an appeal to the circuit court. Appellant, the drawer of the check, defendant in the justice court, filed a motion to dismiss because the judgment dismissing the appellee's suit in the justice court for want of prosecution had not been set aside or vacated within 10 days after its rendition. Appellee filed a motion to require the justice, who had tried the cause, to correct his transcript. At the next term of court, September, 1927, the motion to dismiss was overruled, and the case again continued. Upon the trial it appeared that the check had been given by Ellis; had come into the hands of appellee bank, and, before it had reached the drawee bank, where it was presented, appellant stopped payment. The cashier of the drawee bank stated that it was afterwards sued and ordered by the court to pay the check, and the amount was paid into the court. He did not know to whom the canceled check was delivered, although it was in court; his bank paid the money on the check, under the garnishment, and charged Ellis' account with it. The cashier of the Bank of Monette stated that the check passed through his bank; was not paid, and was turned over to their attorney for collection, and that he did not know where it was. Suit was brought on it in the justice court. The record of the justice of the peace was introduced. Appellant moved the court to direct a verdict in favor of Ellis, which the court refused to do, and instructed the jury to return a verdict in favor of plaintiff bank, and from the judgment this appeal is prosecuted.

Caraway, Baker & Gautney, for appellant.

O. H. Hurst, for appellee.

KIRBY, J., (after stating the facts). The court erred in directing a verdict against appellant, as contended. The justice of the peace had rendered a judgment against the garnishee bank, directing the payment of money due from it to the drawer of the check into the court for satisfaction of the amount due on the check. It also adjudged C. B.

Gregg, the interpleader, was entitled, as against appellee herein, to payment of this money, which was ordered to be done.

The cashier of the garnishee bank testified that the money in satisfaction of the judgment against it as garnishee had been paid into court, upon the order of the justice, in payment of the amount the check was drawn for, and charged up to the account of Ellis, appellant.

Appellant here did not complain of being aggrieved by the judgment of the justice of the peace, nor did he attempt to appeal therefrom. The justice decided, in effect, that he owed the amount of the check to the holder of it, and directed its payment by the garnishee, who did pay the money into the court in accordance with the order, and charged it against this appellant's account.

The suit having been brought upon the check, purporting to have been executed by appellant, and the signature not having been denied under oath, the cause could have been proceeded with, whether the plaintiff appeared or not; the justice having heard it on the interplea and determined that Gregg, the interpleader, was entitled to the amount of the check, as against the plaintiff in the suit, and ordered same paid to him by the garnishee, he necessarily could not dismiss the suit for want of prosecution so as to prevent the plaintiff in such suit from taking an appeal therefrom without moving to set aside the judgment of the justice of the peace. Sections 6444, 6445, 6448, C. & M. Digest.

The circuit court did not err therefore in overruling the motion to dismiss the appeal, but erred in directing a verdict against the appellant, since no appeal bond had been given in the justice court, and the money due from appellant upon the check had been paid by the garnishee by the order of the court and charged against appellant's account. The controversy in the circuit court was not therefore between the bank and the appellant, but between it and the interpleader, who had won the suit in the court below. The court had the right

to direct the verdict, but not against the appellant, whose liability upon the check had been discharged by payment by the garnishee of the amount to the interpleader, who was adjudged entitled to recover it.

The judgment will accordingly be reversed, and the cause as to appellant dismissed. It is so ordered.
