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Passage of Title in Cash Sales as Affected By Worthless Checks

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Passage of Title in Cash Sales as Affected By Worthless Checks.

The term cash sale is used to define a kind of sale where the payment of the price is a condition of the transfer of title to the buyer.[1] But it is usually confined to a sale where the vendor declines to transfer either title or possession until he is paid.[2] Payment by check, instead of the transfer of currency has, of course, become a firmly established practice in the business world, and, to the business man, the term cash payment in almost every instance, where the sum involved is more than a few dollars, suggests payment by check instead of transfer of money. Transfer of title is not, as a general rule, necessarily dependent upon time of payment,[3] though in a cash sale the two are considered concurrent acts.[4] It follows, therefore, that in a cash sale where a check given in payment proves to be worthless, and the seller disputes the right of the buyer to claim title to the goods, determination of the question necessarily rests on the primary question of whether or not mere giving of a check is payment, or if it is first necessary that the actual funds which the check represents be transferred by the drawee bank from the account of the maker to the payment of the check. In a leading California case [5] where the effect of giving a check in payment was considered by the Court, the following language was used:

> "A check is not payment in itself, but merely a method in cash transactions of any magnitude, and it is employed as a matter of convenience and to obviate the necessity of handling and transporting large sums of money." [6]

In Johnson, etc. v. Central Bank [7] it was held that a check given for the purchase price does not constitute payment until funds are actually received by the seller, unless it is otherwise expressly agreed, and in National Bank of Commerce v. Chicago, etc. Ry. [8] it is pointed out by the Court that where goods are sold for cash on delivery, and payment is made by check, such check is in fact payment only when the cash is received on it, and that there is no presumption that a creditor takes a check in payment from the mere fact that he accepts

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[1] Williston, Sales (2nd ed. 1922) Sec. 341.
[2] *Ibid.* p. 805.
[3] Although rules for determining the intentions of the parties are set forth in Uniform Sales Act, Secs. 19 and 20, N. Y. Personal Property Law (1911), Secs. 100 and 101, they are not absolutely controlling on the obligations of the vendor and vendee, and are subordinate to any express intentions of the parties.
[4] *Supra* Note 2.
[5] South San Francisco Packing & Provision Co. v. Jacobsen, 183 Cal. 131, 190 Pac. 628 (1928).
[6] See Hodgson v. Barrett, 33 Ohio St. 63, 31 A. M. Rep. 527 (1877).
[7] 116 Mo. 558, 22 S. W. 813 (1893).
[8] 44 Minn. 224, 46 N. W. 342 (1890).

it from the debtor.[9] Though the result which the courts have reached in these decisions is in complete harmony with the view that the vendor would take of the transaction, whether it can really be considered as the actual intention of the parties may be questioned. It is quite apparent that the question which arises admits of considerable argument. Following the view that it is no payment until the cash becomes the funds of the vendor, it has been declared that title to the goods in such a case has not passed from the vendor.[10] The courts have been called upon to decide this question in cases which naturally arise from the fact that the check given in the transaction proves to be worthless. It may well be that the reason for this rule is grounded in a desire on the part of the courts to protect the unfortunate vendor rather than in strictly legal theory. It is not without criticism.[11]

In a recent case considered by the Court of Appeals of Georgia [12] the plaintiff had sold a diamond ring to the vendee, who gave in exchange his check on a bank. The vendee then sold the ring to the defendant. The vendee's check proved to be worthless and the plaintiff brought trover to recover the ring from the defendant, on the theory that title had not passed in the sale from the plaintiff to the vendee. The Court accepted this view of the transaction and, in awarding judgment for the plaintiff against the third party purchaser, followed a rule, which finds support in the authorities.[13] In sustaining the view that title does not pass from the vendor in such a case, the courts have considered the sale to be conditional, in that actual payment is a condition upon which transfer of the title is necessarily dependent. An insight into this reasoning may be gathered from the following excerpt from the opinion in Johnson v. Iankowitz,[14] which was an action in replevin, where the plaintiff had sold two guns to a person who was a stranger to him and took the purchaser's check in payment; the purchaser immediately sold the guns to the defendant. Following this, the check given by the original vendee was dishonored, and it was held that there was no waiver of immediate payment for the guns and that the delivery was only conditional, the defendant acquiring no title to them. The Court said:

> "There is a distinction between a sale, induced by fraud, in which the vendor, in ignorance of the fraud, transfers the

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[9] National Bank of Commerce v. Chicago, etc., Ry., *supra* Note 8 at 229, 46 N. W. at 344: "Nothing is better settled than that a check is not payment, but is only so when the cash is received on it. There is no presumption that a creditor takes a check in payment arising from the mere fact that he accepts it from his debtor. The presumption is just the contrary. Where payment is made by a check drawn by a debtor on his banker this is merely a mode of making cash payment and not giving or accepting a security."

[10] *Supra* Notes 8 and 9.

[11] Williston, Sales (2nd ed. 1922) Sec. 346A.

[12] Chafin v. Cox, 39 Ga. App. 301, 147 S. E. 154 (1929).

[13] *Supra* Note 11, Sec. 346 A, footnote 4.

[14] 57 Ore. 24, 102 Pac. 799 (1910).

> title and possession, in which the sale is voidable, but not void, and an innocent purchaser from the vendee may acquire a good title and a case in which the vendor does not intend to part with the title until the price is paid, the delivery and payment being concurrent acts, and, although the goods are delivered to the vendee, yet without payment, no title will pass. In the one case it is intended that title shall pass, in the other that it shall not." [15]

Professor Williston has criticized with considerable force the view that transfer of title is conditional on some other act in the cash sale transaction. He submits that the real question is: Did the seller assent to transfer the ownership in the goods?—and the learned author states that it can hardly be doubted that he did.[16] Further complications which arise are pointed out. If it is to be insisted that no title passes until the condition spoken of has been satisfied, it might as well be said that the same result follows where a time draft is given. Yet such a method of payment admittedly passes title.[17] As a matter of legal theory it would follow that title remaining in the seller, there might well be restrictions on the buyer in connection with the use of the goods as his own, and, finally, his liability as a tort feasor, should he use the goods as he saw fit until the check was paid, even though ample funds to take care of it were at the bank. It must be admitted that, technically, these results should follow the rule that title remains in the seller until the check is paid.[18] Where the check given in such a transaction proves to be worthless, as a practical matter those results which follow the rule that title remains in the vendor until payment, are less difficult to harmonize with the view that business-men might take of it, for as far as the justice of the matter is concerned it is not hard to agree that where the check is a worthless one, the vendee should have no right to use the goods as his own or dispose of them to a third party. It is more difficult, however, to agree where the check is a good one and it is honored at presentation. Yet the same result must follow in either case, if title remains in the vendor. This result approaches absurdity and is not consistent with what we regard as the intention of the parties. Omitting for a moment

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[15] Cited with approval in Barksdale v. Banks, 206 Ala. 569, 90 So. 913 (1921).

[16] *Supra* Note 11.

[17] In Haven v. Leedham, 153 Minn. 95, 189 N. W. 601 (1922), where a time bill was given under circumstances which clearly indicated that the buyer had no expectation that it would be paid, he was held to have gained a title enabling him to give good title to a *bona fide* purchaser for value.

[18] If the theory were to be adopted that the vendor retains a security title until the check is paid, it would allow the vendee to exercise ownership and control, subject to being divested on non-payment of the check. It is inconsistent, however, with that which is submitted to be the real intention of the parties, *i.e.*, that title should pass at the time of the sale. The decisions in none of the cases cited, *supra* Notes 5, 6, 7, and 8, approach the view of a divided title.

the question of whether or not the check is a good one, it cannot be disputed with much reason, that in the ordinary cash sale transaction when the seller accepts the check from the buyer, he accepts it as payment and intends to pass the property in the goods to the buyer.[19] Then, the fact that the check later proves to be of no value can hardly change the status of the parties which is established at the time of the sale.[20] Suppose the vendor accepts the check of the vendee and transfers the goods to him. Later and before the check reaches the bank he seek to rescind the sale and obtain the goods on the theory that title has remained in him. It is very doubtful if the courts would agree with such an argument and it is more probable that the transfer of the title and the right to possession from the vendor to the vendee would be stressed with considerable emphasis.

In concluding this consideration of the correctness of the rule which allows the vendor to reclaim the goods where the check received in exchange for them proves worthless, it may be stated that it is a rule which fails to represent the true intentions of the parties. It is conceded that in all cases the vendor expects to be paid, but it is also true that he has the opportunity to protect himself by stipulating [21] that passage of title shall be dependent upon payment of the check. The result reached by the courts has arisen from a desire on their part to aid the vendor in a situation wherein he has been placed by the unfortunate result of a risk which he has assumed. Complete regard for those principles in the law of sales which should govern the determination of the question would lead to a different result. It is suggested that the courts should adopt the view that title passes when the check is accepted by the seller in exchange for the goods, and that the determination of the rights of the parties brought into dispute by later developments in the transaction should proceed on that basis rather than on the one which has heretofore found favor with the courts.

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[19] *Supra* Note 11.

[20] Any attempt to reach the correct rule, based on considerations of fraud or bad faith on the part of the vendee fails to bring a satisfactory result because it is not infrequent that the cause of the failure of the check is mere forgetfulness on the part of its maker or his inadvertence. In such a situation there is no fraud. Yet the rules for determining the right to title should apply to any situation which the facts present, regardless of the presence or absence of a fraudulent color in the transaction. It may be noted with interest that the Penal Law of New York, Sec. 1292-A, L. 1918, ch. 314, amended by L. 1923, ch. 505, L. 1927, ch. 378, provides that any person who draws, utters, or delivers a check on a bank, knowing at the time that sufficient funds or credit are not at the bank for the payment of the check, although no express representation is made in reference thereto, is guilty of a misdemeanor, and if money or property is obtained from another thereby, is guilty of larceny, and that the making of such check, payment of which is refused, shall be deemed not only *prima facie* evidence of intent to defraud, but also of knowledge of insufficient funds.

[21] In this connection see editorial, N. Y. L. J., May 7, 1929.