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**DOES THE DELAY INCIDENT TO THE USE OF  
THE CLEARING HOUSE EXTEND THE REA-  
SONABLE TIME FOR THE PRESENT-  
MENT OF A CHECK?**

***Maryland Title Guarantee Co. v. Alter*<sup>1</sup>**

In connection with a transaction for the purchase of some real estate the defendant-appellee gave the plaintiff-appellant a check on the 23rd of February 1933. The check, at the plaintiff's previous request had been certified by the drawee bank. Since the check was not received until after banking hours it was not deposited in plaintiff's bank until the 24th. According to the usual practice, this check was not presented on the 24th, but would have been presented through the clearing house on the next day, February 25th, had not the emergency banking holiday in Maryland intervened. The drawee bank would have made payment on February 24th, if the check had been presented on that day, but being insolvent it did not reopen after the banking holiday. The defendant had at all times sufficient money on deposit with the drawee to cover the check, and all persons involved conducted business within the city of Baltimore. The plaintiff sued on the check and, on appeal from

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<sup>1</sup> 166 Md. 531, 171 Atl. 869 (1934).

<sup>2</sup> Supra note 26.

<sup>3</sup> Bishop, Marriages, Secs. 1168-1174.

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<sup>1</sup> 167 Md. 245, 173 A. 200 (1934).

a judgment for the defendant, *held*: Reversed. The general rule requiring presentment to be made on the day after delivery of a local check does not apply where the check was given after banking hours. Presentment on the second day in this case being within a reasonable time required by the Negotiable Instruments Law, the drawer remained fully liable on his check.

Prior to this case the Court of Appeals had not been called upon to decide what was a reasonable time for the presentment of a local check, i. e. where the payee conducts his business in the same city as does the drawee. The Court had, by dictum, adopted the rule that a check delivered under these circumstances must be presented within the banking hours of the next secular day or the drawer would be released to the extent of his loss by reason of the insolvency of the drawee.<sup>2</sup> In adopting this rule the Court was not without authority, for it seems to have been universally acknowledged as the proper rule until the 1890's, when the delay occasioned by the use of the clearing house began to have its effect on judicial deliberations.

The Court quoted a section of the Negotiable Instruments Law:<sup>3</sup> "Presentment must be made within a reasonable time". Since this section refers to the presentment of bills of exchange other than checks the Court obviously should have cited a different section<sup>4</sup> providing "A check must be presented within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay." This would not have changed the result.

In determining a reasonable time under the Uniform Negotiable Instruments Law<sup>5</sup> the Court took judicial notice of "the regular practice of making collections through banks and clearing houses, and the regular consumption, in the process of one day in addition to the day of deposit". It was on this ground of business custom, and correctly so, that the Court primarily based its opinion.

At the time this case was decided the Baltimore Clearing House had been in operation over seventy years, and in recent times the number of checks presented directly

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<sup>2</sup> First Nat. Bk. v. Buchanan Bk., 80 Md. 475, 31 A. 302 (1895); Anderson v. Gill, 79 Md. 312, 29 A. 527 (1894).

<sup>3</sup> Md. Code, Art. 13, Sec. 90 (N. I. L. Sec. 71).

<sup>4</sup> Md. Code, Art. 13, Sec. 205 (N. I. L. Sec. 186).

<sup>5</sup> Md. Code, Art. 13, Sec. 16 (N. I. L. 193) "In determining what is a reasonable time . . . regard is to be had to the nature of the instrument, the usage of the trade or business (if any), with respect to such instruments, and of the facts in the particular case."

to the drawee is practically nil, unless, of course, the drawee happens to be the payee's bank as well. Let us examine for a moment the problems direct presentment by the payee would involve. There is the rule of law requiring that the paying bank must identify the holder of a check presented for payment.<sup>6</sup> Without going further it would be an all but impossible burden for a business house to have employees known at every bank in a city as large as Baltimore. But consider the case of the small corner grocer who receives a half dozen checks a day, most of which are drawn on different banks; could he present them directly in less than an hour? Multiply these six checks, and this small business man by a figure sufficient to establish the number of checks handled by the clearing house each day<sup>7</sup> and it presents a picture amounting to chaos. As a result, payees deposit their checks in their own banks and rely on the banks to collect them. Three-quarters of a century ago banks began to find the practice of running checks directly to the drawee bank becoming burdensome; so they formed the clearing house where, once or twice a day, representatives of each bank met and exchanged their checks, and remitted or received in cash only the difference between the checks drawn on them and the checks they happened to hold drawn on other banks.<sup>8</sup> Today, when the practice of transferring money by check has increased perhaps a hundred fold how much more burdensome, if not absolutely impossible, would the old way be?

It is the established practice in Baltimore for the clearing house to meet at 9:45 A. M. and to clear all checks deposited on the previous day. It seems then that the Court in the principal case recognizes as law a custom produced by business necessity. There can be no doubt of the soundness of this decision for it is well settled that the law follows business custom, especially the commercial law, founded as it is on the law merchant.<sup>9</sup>

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<sup>6</sup> 102 A. L. R. 145.

<sup>7</sup> There is no record of the number of items handled by the Baltimore Clearing House, but during the year 1937 checks amounting to \$3,642,964.-591.15 or over \$12,000,000 per secular day were cleared.

For cases involving Clearing House practices, see *National Exchange Bank v. Ginn and Co.*, 114 Md. 181, 78 Atl. 1026, 33 L. R. A. (N. S.) 963, Ann. Cas. 1914C 508 (1910); and *National Bank of Baltimore v. Drovers and Mechanics National Bank*, 143 Md., 168, 122 Atl. 10 (1923).

<sup>8</sup> Today there is no actual transfer of cash. The debits or credits are made on the balance each bank has with the Federal Reserve Bank.

<sup>9</sup> *Bank of Columbia v. Magruder's Admx.*, 6 H. & J. 146 (1816); *Raburg v. Bank of Columbia*, 1 H. & G. 231 (1827); *Bank of Columbia v. Gitzhugh*, 1 H. & G. 239 (1827); *Howard v. Walker*, 92 Tenn. 453, 21 S. W. 897 (1893).

It is not disputed that negotiation cannot extend the reasonable time in which a check must be presented,<sup>10</sup> but this is because, as the Court in the instant case says, the purpose of the drawer in giving a check is to transfer money to the payee, and not to provide him with a medium of exchange. Because of this intention of the parties a payee is allowed only enough time to take possession of the money unless the time is expressly or impliedly extended by the drawer.<sup>11</sup> But if the drawer knows that the payee is not going to present the check directly to the drawee, as he must know from the widespread business practice, he should be bound by this knowledge, and remain liable on the check until sufficient time for presentment through the clearing house has elapsed.

The theory behind the rule of diligence in presentment is that by a negligent delay the payee makes the deposit his own and assumes the responsibility for any loss the drawer may suffer as a result of such delay.<sup>12</sup> If it has become customary for all business men to deposit their checks for collection, can it be said that the payee, following such a universal custom, is negligent and has made the fund against which the check is drawn his own? Why not then, lay down the rule that if a check is deposited on the day after its issue, and is presented according to the usual course of banking practice, on the day following the deposit, the payee will be protected? A few cases<sup>13</sup> have gone as far as this but the majority of the courts in accord with the *Alter* case have gone no further than it does.<sup>14</sup> The

<sup>10</sup> 91 A. L. R. 1181, 1204.

<sup>11</sup> See: *Economy Fuse & Mfg. Co. v. Standard Electric Mfg. Co.*, 359 Ill. 504, 194 N. E. 922 (1935) where the conditional delivery of a check extended time for presentment.

<sup>12</sup> Daniel, *Negotiable Inst. Law*, 1778.

<sup>13</sup> *Geo. H. McFadden Bros. Agency v. Keesee*, 179 Ark. 510, 16 S. W. (2d) 994 (1929); *Bay City Bank v. Concordia Mutual Fire Ins. Co.*, 260 Mich. 611, 245 N. W. 532 (1932) noted (1933) 31 Mich. L. R. 1145; *Jett Bros. Stores v. McCullough*, 188 Ark. 1108; 69 S. W. (2d) 863 (1934); *Federal Land Bk. v. Goodman*, 173 Ark. 489, 292 S. W. 659 (1927). See also: *Jones v. Board of Education*, 272 N. Y. S. 5 (1934); *Scott v. Board of Education*, 272 N. Y. S. 20 (1934); *Sugnet v. Board of Education*, 272 N. Y. S. 21 (1934); *Fleck v. Board of Education*, 272 N. Y. S. 23 (1934); *Hawks v. Board of Education*, 272 N. Y. S. 24 (1934).

<sup>14</sup> *Clark v. Davis*, 48 Idaho 214, 281 P. 3 (1929); *Loux v. Fox*, 171 Pa. 68, 33 A. 1910 (1895); *Willis v. Finley*, 173 Pa. 28, 34 A. 213 (1895); *Bristline v. Benting*, 39 Idaho 534, 228 P. 309 (1924); *Zaloom v. Gamin*, 129 N. Y. S. 85, 72 Misc. 36 (1911), affirmed 132 N. Y. S. 1151; *Farm & Home Savings & Loan Assoc. of Mo. v. Stubbs*, 231 Mo. Ap. 87, 98 S. W. (2d) 320 (1936). See: *Lowell Co-Operative Bank v. Sheridan*, 284 Mass. 894, 188 N. E. 636, 91 A. L. R. 176 (1934) refusing to allow the customary method of handling checks drawn on non-members of the clearing house to extend the time beyond that allowed in the instant case.

latter base their decision on the fact that where a check is received after banking hours that day should not, in fairness, or in view of the clearing house custom, be counted. Thus the payee will be protected only if he received the check after banking hours. In handling the problem in this manner the courts are able to give lip service to the old "next day" rule. This rule, that a check must be presented on the day following its issue, has been stated so often that to deny its truth would seem a bit sacrilegious but it has been said of it that instead of being the universal rule it was "universal dictum".<sup>15</sup> While the present writer would not care to say as much, it is true that few indeed are the courts that follow the old rule where a check is received after banking hours, deposited the next day, and presented the following.<sup>16</sup> There is no doubt but that the rule was laid down in dictum many, many times for each time it was decided.<sup>17</sup> It will be recalled that the Maryland Court had never decided a case on this old rule, and had adopted it in dictum only.

In *Farm and Home Savings and Loan Ass'n of Mo. v. Stubbs*<sup>18</sup> where a check was received on Friday at 2 o'clock, but before the end of banking hours the Missouri Court of Appeals refused to extend the time for presentment until the following Monday. While the language is for the most part contra to the *Alter* case the court did expressly differentiate, on the facts, those cases supporting the rule that a check delivered after banking hours may be presented on either of the next two secular days. The check in the *Stubbs* case was received at two o'clock, which must have been very close to the close of banking hours. If this were so, it illustrates the inequity of drawing the distinction in terms of whether the check was delivered after banking hours. Under the *Stubbs* case payees would have to make it a practice to run to the bank with checks received up to the last possible minute. Obviously the banking facilities are not such that all depositors could make their deposits in the closing minutes, neither are the facilities such that a supplemental deposit could be made by all depositors in the last few minutes. Why should a rule of law which is based on due diligence<sup>19</sup> require something so impractical?

<sup>15</sup> (1937) 2 Mo. L. Rev. 216; dissenting opinion in *Edmiston v. Herpolsheimer*, 66 Nebr. 94, 92 N. W. 138 (1901).

<sup>16</sup> *Edmiston v. Herpolsheimer*, *supra* note 15; *Merchants National Bank v. Dorchester*, 106 Texas 201, 136 S. W. 551 (1911).

<sup>17</sup> See cases collected 91 A. L. R. 1187.

<sup>18</sup> *Supra* note 14.

<sup>19</sup> *Supra* note 12.

Under the old rules a payee was allowed to the end of banking hours of the next secular day to present his check, either himself, or to deposit it in a bank which in turn would directly present it. If it were an out of town check he was allowed until the next day to put it in the mail, irrespective of the time he happened to receive it.<sup>20</sup> It would seem that now in view of the custom, and sections 186 and 193 of the Negotiable Instruments Law, he should be allowed to the end of banking hours of the next day to deposit his check, which would then be presented on the day following the deposit. This seems to be the growing trend of authority, whenever the courts are forced to go this far by the facts of their cases.<sup>21</sup>

In *Bay City Bank v. Concordia Mutual Ins. Co.*<sup>22</sup> the Michigan court adopted the rule here advocated but based their decision on the Bank Collection Code.<sup>23</sup> This section was urged as a basis for the decision in the *Alter* case, but the court properly rejected this line of reasoning because the Bank Collection Code was not intended to govern the liability of the drawer of a check; but only that of a collecting bank. However the two provisions of the Negotiable Instruments Law above referred to and modern business needs do form a sufficient basis for the decision of the *Bay City Bank* case.

The Maryland Court in the principal case has removed one dam from the stream of commerce. It is to be hoped that one more dam will be removed when the Court is faced with the problem of a check issued before the close of banking hours, banked the next day, and presented through the clearing house on the second day after original issue. As has been pointed out, there are in the Negotiable Instruments Law, in business custom, and in the weakness of the old rule sufficient reasons to believe that the Court will hold that this is a reasonable time.

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<sup>20</sup> *Anderson v. Gill*, *supra* note 2.

<sup>21</sup> *Supra* note 13.

<sup>22</sup> *Ibid.*

<sup>23</sup> Md. Code Supp., Art. 11, Sec. 88 (B).