Death of a Drawer of a Check

L.W. Feezer
DEATH OF A DRAWER OF A CHECK

By L. W. Feezer*

In this country there are undoubtedly hundreds of thousands of people living on salaries, who pay their monthly bills by means of bank checks. These checks are regularly drawn on adequate balances and are regularly paid as presented. Yet the obligation of these bank depositors upon various accounts, current living expense, expenses in connection with past illness and particularly installment purchase of homes, furniture, clothing, automobiles and the like, constitute such a total that were all claims against them to be presented at once, they could not pay. The salary earner is a going concern. The good will of his job and his earning power is such that he has a certain credit. He is not in business but he has need for a modest line of credit and he uses that credit in running his household and raising his family. For some transactions he uses that credit, others he settles in "cash." He uses as cash, however, not ordinarily currency, but the "cash" of the modern American business world, viz., a bank check.

Suppose such a man, owing an amount in excess of his savings, buys a suit of clothes from a dealer who demands "cash." He gives a check on a bank account which is sufficient to meet that check and other checks which he will be obliged to draw in order to meet installments upon his various obligations as they come due. He puts on the suit, steps into the street and is run over by a fire engine¹ and killed.

The store-keeper looking out the door of his shop sees this tragedy, grabs his hat and the check and rushes to the drawee bank where he gets his money. The transaction is now closed. The store-keeper has his money, the bank has paid the check and is discharged of its debt to the depositor’s estate, pro tanto.

But suppose the store-keeper, not knowing the ways of the law and of bankers, takes the deceased customer’s check to the bank

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¹In short he is instantly killed under circumstances the least likely to yield to his family a fund with which they could carry on his obligations. A fire engine being operated by a municipal corporation as a governmental function will create no liability in tort in most jurisdictions.
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the next noon and offers it for deposit to his credit along with the rest of his day's takings. The banker will say to him, "We cannot pay this check of John Doe's because John Doe is dead." In short, by the death of the drawer, the holder of the check, who demanded a "cash" payment for his wares, who contemplated participation in a cash transaction, is by operation of law, said to be converted into a creditor of the estate of the drawer. At best he is put to a great deal of delay and inconvenience and usually to some expense in collecting his claim from the personal representative of the deceased. More likely, in a type of fact situation such as has been supposed, he is one of the unsecured creditors of an insolvent estate. The vendors of the late John Doe's automobile, radio, furniture and the like will enter his apartment pursuant to their conditional sales contracts and repossess the goods they sold him. The undertaker and funeral expenses will be paid by the administrator and the holder of the check will lose.

It seems to the writer that this is not only an injustice but is unnecessary. The modern business conception of the transaction in which one gives valuable consideration in exchange for a check is, that he is participating in a cash and not a credit transaction. Most executed sales involving more than a trifling sum are today settled by passing a check. The payee has no intention whatever of extending credit. He is making a cash sale.

Why is it the general understanding of lawyers and bankers that "the death of the drawer revokes a check?" Such is unquestionably the generally accepted belief of both of these classes and it is supported by a considerable number of judicial decisions.2


See Note, p. 157.

1 Morse, Banks and Banking, 6th ed., sec. 400, p. 890, note 3. "At the instant of his death the title to his balance vests in his legal representatives, and his own order is no longer competent to withdraw any part of that which is no longer his own property."

But the death of the owner of negotiable paper does not impair the rights or powers of an agent to collect, viz., in Moore v. Hall, (1882) 48 Mich. 143, 11 N. W. 844, it was held that an agent to whom negotiable paper is endorsed for collection may sue thereon in his own name and as
This question has not been the subject of a great deal of
discussion in legal periodicals. The writer has discovered only
three articles dealing specifically with it and the latest and best
of these is now over twenty-five years old. Writing in the
Harvard Law Review in 1903 Mr. John M. Zane presents in
scholarly fashion the reasons which have been given for this
view and reviews the cases which had been decided upon this
point, or had enunciated it by way of dictum, up to the date of
his article.

It would seem to the writer that the orthodoxy of legal
reasoning which has been invoked in cases involving the prob-
lem of the effect of the death of the drawer of a check, and which
has apparently resulted in the very general acceptance of the rules
as they are asserted, may be reduced to a few familiar prin-
ciples. The question which it is proposed to raise herein is
whether it is necessary to apply these "principles" to the type of
fact situation which has been supposed and, even if so, whether
the result is a desirable one in point of justice and commercial
convenience.

These principles would include—
1. A check is not an assignment pro-tanto of the funds of the
drawer in the drawee bank. Or, to put it in terms technically
more accurate, a check is not an assignment pro-tanto of the
depositor's chose in action as a creditor of the bank.

A few jurisdictions, prior to the adoption of the Negotiable
Instruments Law, held the opposite view and some cases since
the act have limited the effect of its language and have treated
a check as an assignment for some purposes at least between
drawer and holder.

2. The drawee of an unaccepted bill of exchange including a

the endorsement for such purpose passes legal title in trust, the authority
to collect is not revoked by the death of the owner.

Balkan, Payment of Bill of Exchange or Check By the Drawee After
the Drawer's Death, (1901) 14 Harv. L. Rev. 588; Zane, Death of the
Drawer of a Check, (1903) 17 Harv. L. Rev. 104. Daniel, The Effect of
Death of the Drawer of a Check, (1879) 3 Va. L. J. 323.

(1903) 17 Harv. L. Rev. 104.

In the extended note L. R. A. 1916C 169, the following states were
said to have this view—Ill., Ia., Ky., La., Minn., Neb., Okla., S. C., S. D.
See also 43 L. R. A. (N.S.) 100.

These are collected and discussed in Aigler, Rights of Holder of
Bill of Exchange Against the Drawee, (1925) 38 Harv. L. Rev. 857.
For an excellent judicial discussion of this question see Leach v. Mechanic's
check is under no obligation to the payee or holder to accept or pay the instrument.\textsuperscript{7}

There are of course situations where a drawee who has refused to pay and who has not formally accepted in writing may nevertheless be held liable to the holder thereof.\textsuperscript{8}

3. If the relation of banker and depositor be regarded as one of agency, the agency is revoked by the death of the depositor.\textsuperscript{9}

In answer to this it has been argued that insofar as drawing and delivering a check created an agency, the situation is in the nature of an agency in the holder and is one coupled with an interest.\textsuperscript{10}

It has been said that a check is a mandate to the banker or an authority or order, and that the correct theory is not in truth one of agency.\textsuperscript{11}

Says Mr. Zane,\textsuperscript{12}

"But upon analysis it amounts to an offer on the depositor's part to the banker, that if the check is paid by the banker, the amount of it may be subtracted from the depositor's account. This offer to become effective as a contract must be accepted by the banker during the depositor's lifetime."

4. A check is only a conditional payment of a debt and, if the check is not paid; the creditor to whom it is given may sue on the debt; or the transferencee who acquires it from the original creditor of the maker, may sue on the contract of the check itself, against this maker and may also charge his transferor as indorser.

The law on this point, as on many others, is as it is usually stated not because the logic of justice or commercial expediency

\textsuperscript{7}Section 127 Negotiable Instruments Law provides "A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for payment thereof and the drawee is not liable on the bill unless and until he accepts the same." And section 189 "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check."

\textsuperscript{8}See Article by Aigler, Rights of Holder of Bill of Exchange Against the Drawee, (1925) 36 Harv. L. Rev. 587; also Feezer, Acceptance of Bills of Exchange by Conduct, (1928) 12 Minnesota Law Review 129.

\textsuperscript{9}See articles by Balkan, Payment of Bill of Exchange or Check By the Drawee after Drawer's Death (1901) 14 Harv. L. Rev. 588 and Zane, Death of the Drawer of a check, (1903) 17 Harv. L. Rev. 104.

\textsuperscript{10}See article by Daniel, (1879) The Effect of the Death of the Drawer of a Check, 3 Va. L. J. 323.

\textsuperscript{11}Balkan, (1901) 14 Harv. L. R. 588; Daniel, Negotiable Instruments, 6th ed., sec. 1618 b.

\textsuperscript{12}(1903) 17 Harv. L. R. 104-113.
has dictated this rule, but because of the profession's conservative adherence to the traditional principles of the law. The principles, so called, are themselves but the product which has resulted from the play of judicial rationalization upon the practical requirements of a previous era in the law's development.

This development was much more greatly hampered by procedural formalism in the past than it is today, and the "principles" so called which have come to us out of that past are not so completely the expression of the economic and social requirements of the period which gave them birth, as might be the case in a period of less formalism in legal procedure.

It has already been mentioned that the rule under consideration is largely due to the "principle" that a check was not an assignment of the fund upon which it was drawn, wholly, or pro-tanto, as the case might be.

Is not that rule in turn due, not alone to practical banking considerations, but in part to the fact that the question arose at a time when the assignability of choses in action at common law had not been established and the contest was still on between the courts of common law and of equity as to which would capture the jurisdiction over the merchant's causes—a contest which was settled, as we know, by the reception of the law merchant into the common law?

The early cases which laid down this rule were, as pointed out by Mr. Zane, all gift cases.\(^3\)

To return again to Mr. Zane, he concludes with this paragraph:

\(^3\)The rule which is the subject of this discussion is usually traced back to Tate v. Hilbert, (1793) 2 Ves. Jr. 111. Mr. Zane shows that the original dictum is in Lawson v. Lawson, (1718) 1 P. Wms. 441, in which it was held by Sir Joseph Jekyll as between the executor and the donee of a check, that a bill upon a goldsmith given by a man upon his death bed to his wife for mourning would operate as an appointment. During the course of the argument, Jekyll remarked that the testator's order on the goldsmith was but an authority and that it was determined by testator's death. Then in Tate v. Hilbert where the holder of a check brought a bill in equity against the drawer's executor the court approved of Jekyll's statements as to the determination of the authority and refused to hold the check to be an appointment.

Continuing Mr. Zane says: p. 109, "In the foregoing cases recovery was sought against the estate of the drawer. The check in each instance was a gift. The reason given for the decision is that the check as an authority to the banker is withdrawn or destroyed by the drawer's death before acceptance of the check." 17 Harv. L. Rev. 104, 109.
"There is nothing inequitable in the rule that the death of the drawer revokes an unaccepted check. The check is payment only if it be paid. If the dishonored check is in the hands of the payee who received the check upon a consideration, the payee can recover his claim from the estate if it is solvent. If the check was given without consideration, the law can give the payee no relief. If the check is in the hands of a bona fide transferee, he has recourse upon his indorser as well as upon the drawer's estate if the check is dishonored. But there is no reason why, in case the drawer died insolvent, a creditor should obtain a preference merely because he happens to have a check and the insolvent debtor left a balance at his bankers. All the creditors should be placed upon an equality, for equality is equity."

As to the donee, probably everyone would be content to agree with Mr. Zane. It is with the first sentence and the last two that this article is in disagreement.

It does, however, seem to the writer that it is distinctly inequitable, that the death of the drawer revokes a check, even though it be unaccepted, as against a payee who has given value for it. It is submitted that there is evidence that the courts have frequently been responsive to this sense of inequity and have in spite of the widespread rule that a check is not an assignment, and even in spite of the statute—permitted recovery in such cases—rationalizing their decisions by such devices as we have seen, chiefly unauthorized qualifications of the language of sections 127 and 189 of the Negotiable Instruments Law. These courts have decided that under the particular circumstances the judgment should be for the check holder. Other factors than the logical interpretation and application of the rules of the law merchant and statutes declaratory of it, have played a part in determining such decisions. This rationalization in relation to assignment for the purpose of imposing liability upon drawees who have not accepted has not been confined to cases where the drawer has died, as indicated by Mr. Aigler, and as I have tried to show in a previous article in this Review.

Lastly, Mr. Zane defends the general rule as to death revoking a check, because he does not want a creditor to secure a preference.

Strictly a check-holder is undoubtedly a creditor since a check

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is only a conditional payment, but as already contended for in the first part of this paper, the writer feels that in a practical sense and in harmony with commercial practice and understanding, one who has taken a check in "satisfaction" of a debt or upon an executed sale, is not in truth a creditor and, even if he is, he might well be entitled to a preference over other creditors who have elected to trust their vendees, whereas he has collected his claim in the "cash" of modern business, the "cash" in which the overwhelming majority of commercial settlements are made where the amount is more than trifling.

Even though the estate of the drawer is solvent, I am still not content that the tradesman who dealt with him, as he thought, for cash, should be compelled to submit to the delay, expense and inconvenience of being a claimant in the administration of a decedent's estate.

It is so well settled that a gift of the drawer's own check is revocable and gives the donee no rights, either against the drawee or drawer, that these gift cases may be disposed of on that basis.10

In an article by George H. Balkam published in the Harvard Law Review in 1901,17 the view that the death of the drawer does not revoke a check is defended. Mr. Balkam's theory seems to be in brief that the order contained in a check is good until countermanded. That death itself is not a countermand, as a countermand of the original order cannot arrive without an act of will on the part of the drawer. Hence, concludes Mr. Balkam, the order not being countermanded by the death, notice of the event to the drawee cannot do so, or as he says, "Notice of an ineffective event cannot make it effective."

Mr. Balkam does not wish to rely on the view that a check is an assignment and agrees with the great weight of authority which is the other way.18

Mr. Balkam also declines to be content with the arguments that a check constitutes an agency coupled with an interest and is hence not revoked by death of the principal.

Everyone, considering the fundamental rule that death of the

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17(1901) 14 Harv. L. Rev. 588.

18(1901) 14 Harv. L. Rev. 588, 591-2.
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drawer revokes a check, is of course struck by the inconsistency of the proposition that a payment by the drawee before notice of the death is good as against the drawer's estate. Yet this is regarded as thoroughly well settled. The only reason Mr. Balkam can find for this "exception" is "because the order to pay is not countermanded by the drawer's death." To say this is, of course, begging the question and indeed Mr. Balkam's article fails to convince even a willing reader that he has made his point. In the last analysis the only basis upon which Mr. Balkam rests his whole argument is that a check is not an agency or authority, but an "order" and hence not cancelled by the drawer's death. But after all that does not help us as long as the courts continue to hold that the bank may not safely pay this "order" with notice of the drawer's death. It seems to the writer that the courts hold the bank blameless when they pay without notice of the drawer's death, not because such is the conclusion to be drawn from any syllogistic legal reasoning, but, because to hold otherwise would create a situation that commercially would be intolerable.

If a bank dared not pay a check unless in communication with the drawer, lest he have died, commercial banking would involve risks that would be commercially suicidal.

The New York case of Glennan v. Rochester Trust Co. simply says,

"It is true that the common law rule that death revokes an agent's power, even as to third persons dealing with the agent in good faith, without notice, is the rule in this state. The question is whether payment of checks by banks is an exception to the rule stated. I think it is."

Judge Cullen, dwelling on the difference between the relation of principal and agent and that between bank and depositors, says:

"In the ordinary conduct of a bank but a minute fraction of its payments is made directly to its depositors. The others are made on checks in favor of third parties, usually, at least in large cities, presented through other banks or the clearing house. The num-

10 Glennan v. Rochester Trust Co., (1913) 209 N. Y. 12, 102 N. E. 557, 52 L. R. A. (N.S.) 302. Accord, as to bankruptcy, where bank pays check without notice thereof; Citizen's Union Bank v. Johnson, (1923) 286 Fed. 527, 31 A. L. R. 255. Where the check was drawn on a partnership account and one of the partners died before it was presented, the bank having paid without notice was protected. Elgin, Adm. v. Gross-Kelley Co., (1915) 20 N. Mex. 450, 150 Pac. 922, L. R. A. 1916C 711.

ber of depositors is often very great, many of them living at other places than where the bank is located. Of the death of those prominent either by their public position, their business activities or great wealth, the bank might be apprised; of the great mass their deaths would pass unknown by the bank unless notice of the fact were given. It would be utterly impractical for business to be done if, before the bank could safely pay checks, it must delay to find out whether the drawer it still living.

As to the theory that the check is an authority or power coupled with an interest, which was the theory of another law review article by Mr. Daniel, Mr. Zane says, "This theory was suggested by Mr. Vernon in the argument in Lawson v. Lawson almost two hundred years ago. It was dismissed in that case by Sir Joseph Jekyll as unworthy of discussion.

It seems unnecessary to the writer to find an analogy in order to hold that the bank may, if it desires, pay the check, and also that the holder can successfully demand a preference to the extent of his check out of the bank's debt to the deceased drawer as against not only the administrator but as against claimants who had voluntarily entered upon the status of creditors of the drawer.

Let us return to the thought that this doctrine was established in gift cases, by decision and by dictum, and was applied in gift cases for over a century and a half before it came up in a case involving a check in the hands of a bona fide holder in which that fact was squarely the issue.

21 The remainder of this opinion is interesting as a revelation of judicial process. First, he says the rule that one dealing with an ordinary agent whose authority has been terminated by the death of principal is unfortunate but too firmly established by judicial decision to be overthrown. Secondly, the "exception" governing the present case is supported by but little authority but is generally accepted. Third, the law can be just as well established by its general acceptance as by judicial decisions. Fourth, a rule so proper as that "exception" under consideration here is so good and so well established that it should not be sacrificed to judicial consistency.

22 (1879) 3 Va. L. J. 323. Mr. Daniel has taken the same view in his text, 2 Daniels, Negotiable Instruments, 6th ed. sec. 1618 b.

23 (1903) 17 Harv. L. Rev. 104, 113.

24 (1818) 1 P. Win's 441.

25 The earlier authorities on this type of situation are reviewed by Mr. Zane, (1903) 17 Harv. L. Rev. 104, 117.
When it did come up, the authorities were divided as to whether a check was an assignment,26 and the question whether a check was revoked by the death of the drawer in turn depended upon that question.

The effect of the Negotiable Instruments Law,27 upon the status of a check as an assignment, has naturally been to reduce even further the minority view holding it to be such. This whole question is extensively discussed in Mr. Aigler's article.28

The first case which involved a check unpresented until after the death of a drawer where the check was in the hands of a bona fide holder (not a donee) was Wiegand Adm. v. State Bank of Maysville.29

In this case the check was drawn in payment of an antecedent debt owed by the drawer to the payee. Upon the death of the drawer, plaintiff, as administrator, notified defendant of his appointment and countermanded checks previously issued by decedent. Defendant at first refused to pay and protested the check in question, which exceeded the amount of the deposit. Later it refused to honor the check drawn by plaintiff as administrator, claiming that the funds in its hands were appropriated to the check drawn by decedent.

Holding that a demurrer to plaintiff's complaint should be overruled, the court said, "a bank may not pay the checks drawn by its depositors after notice of death."

As commented upon by Mr. Zane it is a coincidence that

27Sec. 189, see Note 7 p. 127.
28(1925) 38 Harv. L. Rev. 857. He shows how some courts in an effort to adhere to their former position have limited the effect of this, section 189. See also Braman, Neg. Inst. 4th ed., p. 674, 902, 911, 916.
29(1901) 112 Ky. 310, 65 S. W. 617, 66 S. W. 26, 56 L. R. A. 178, dissent by three judges. That that case was the first case where the check was issued for value is asserted on the authority of Mr. Zane at page 112 in his article. Mr. Zane admits that there is much dictum the other way where the check was given for a debt or obligation owing by the drawer to the payee. He cites the following cases in which dicta indicated that lack of valuable consideration for issuance of the check was a factor regarded by the court as of some consequence. Second Nat'l Bank v. Williams, (1865) 13 Mich. 282; Fordred v. Seaman's Savings Bank, (1871) 10 Abb. Pr. N. S. 425; Simmons v. Cincinnati Savings Bank, (1877) 31 Ohio St. 457.

Zane criticizes this distinction on the ground that it imposes on the bank the duty of determining whether a check was given for value before cashing it. It seems to the present writer that this is sufficiently answered by the rule that a negotiable instrument is presumed to have been given for value.
Kentucky in which this case was decided was one of the small minority of states which prior to the Negotiable Instruments Law held that a check was an assignment.\(^3\)

During the past twenty-five years since Mr. Zane's article, nothing has been discovered by the writer hereof, in any law review, upon this question of the effect of the drawer's death as revoking a check. Apparently the legal profession in all its branches has for the most part taken this rule for granted. It is impossible to say why. Perhaps it is regarded as satisfactory; perhaps it has been considered unimportant; or perhaps dissatisfaction has existed but has not been expressed. The writer has made a point during the last two years of asking many law teachers and practicing lawyers this question, "Do you think the rule of law that the death of the drawer revokes a check, is a desirable and necessary rule?" Almost all have said that it was unnecessary from a practical standpoint. The majority have thought that it was a necessary consequence of section 189 of the Negotiable Instruments Law.\(^3\) I think all have agreed that the rule permitting a bank to pay a deceased depositor's check so long as it is without notice of the death, is an arbitrary and illogical exception, but that it is commercially necessary.

As to the actual state of the law on this point—

1. Where the check is a gift of the drawer and the question arises as to the rights of the donee as against the bank or the personal representative of the drawer, it is probably agreed everywhere that the donee-payee takes nothing.\(^3\)

2. Where the check has passed to a holder for value or the original payee gave value.

   a. Under the Negotiable Instruments Law—those states which have taken, at their face value, as they are ordinarily interpreted, sections 189 and 127, will hold that the holder takes at most a claim against the estate of the drawer and

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\(^3\)It was expressly held in Boswell v. Citizen's State Bank, (1906) 123 Ky. 485 that the Negotiable Instruments Law changed the previous rule in Kentucky.

\(^3\)See Note 7 p. 127.

\(^3\)See Note 7 p. 127.

\(^3\)For early authorities see cases cited in articles, Zane, (1903) 17 Harv. L. Rev. 104; Balkan, (1901) 14 Harv. L. Rev. 588; Daniel, (1879) 23 Va. L. J. 323.

that the bank has not even the right or option to pay the check after notice of the drawer's death.33

b. In the absence of the Negotiable Instruments Law or an equivalent rigid interpretation of the law merchant and in those states which have been balky about giving section 189 of the Negotiable Instruments Law the effect which most of its sponsors have asked for it, it is reasonable to expect again some leniency in permitting banks to pay the checks of deceased persons. But few cases have referred to this question. Litigation has doubtless been checked, indeed exterminated by the general acceptance by both the legal profession and the banking world, of the view that the drawer's death cancels the check if the bank has notice of the fact and that settles the matter.

One case has been discovered in California34 which clearly presents the question of payment to a holder for value of a check whose drawer was dead, and which held that the holder could recover from the bank which had refused payment. This was an action in which the bank and the administrator were joined as defendants. Both defendants demurred and this was sustained in the trial court. But this was overruled in the appellate court as to both defendants.

The effect of the decision is not only that the bank may pay the holder for value but that as between the administrator of the drawer and the check holder the bank must pay the check holder where he is a holder for value.

This case considerably antedates the adoption of the Negotiable Instruments Law in California but it comes from a state which in Pullen v. Placer Co. Bank35 had been emphatic in holding that a check is not an assignment and that the bank must actually refund to the estate of a deceased drawer, any amount paid to a donee after knowledge of the death.

The Pullen Case just referred to was expressly distinguished on the ground that the holder of the check there had given no

33Cases prior to the Negotiable Instruments Law holding that where a check founded upon valid consideration is an assignment pro tanto and that death of the drawer before presentation for payment does not revoke the check are collected in note 43 L. R. A. (N.S.) 109, 110.
The court then proceeded to reiterate Daniel's argument that the situation was analogous to an agency coupled with an interest.\footnote{Daniel, Neg. Inst. 5th ed., sec 46. See, vol. 2, 6th ed., sec. 1618 b., p. 1818 by Calvert. This edition, though published since the adoption by many of the states of the Negotiable Instruments Law adheres to the former view, but unfortunately does not refer to that act and cites in support many cases which must be regarded as no longer of authority on account of the repudiation by the courts which decided them of the assignment theory. In the note there is an extended quotation from an article by Mr. Daniel in 3 Va. L. J. 323 in which he set forth this view more at length, but relying on the repudiated assignment doctrine and analogies from the law of agency.

While this statutory provision protects a bank by permitting it to pay a check drawn against sufficient funds etc, within 10 days after customer's death, it does not affect the rights of the holder against the drawer's estate, Burrows v. Burrows, (1922) 240 Mass. 485, 134, N. E. 271, 20 A. L. R. 174, and the estate may recover back from the holder what he collected from the bank after the drawer's death.\footnote{Section 75 B. E. A.}


Chaffee, after referring to the above mentioned statutes, says:

"Since the Negotiable Instruments Law contains no provision upon this point it must as an omitted case, be governed by the rules of the law merchant under Section 196."\footnote{Brannan, Negotiable Instruments, 4th ed., p. 675.}

One other recent case deserves particular notice in relation to the present inquiry. This is also a California case.\footnote{Dunlap v. Commercial National Bank of Los Angeles, (1921) 50 Cal. App. 476, 195 Pac. 688.} In this case one Kenton gave to Miss Dunn, his niece, a check for services.
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rendered in taking care of him while he was ill. The check was for the full amount in the bank. He died. The bank refuses to pay her. She sues the bank and Kenton’s administrator interpleads as a party plaintiff claiming the fund. The bank becomes a mere stake-holder, and in the contest as between the payee and the administrator the trial court’s judgment for the check-holder was affirmed by the court of appeals.

The court says the Negotiable Instruments Law alone does not prevent the equitable assignment of specific property as evidenced by a check, if it appears from the entire transaction that it was the intention of the parties to pass the title to the bank’s debt to the drawer.

The point is also made in the opinion that if the payee became the owner of this debt of the bank then it never was a part of the drawer’s estate and hence the administrator has no claim to it. Likewise the payee has no claim against the estate and even if the administrator has apparent title to the drawer’s chose in action as against the bank it is only as trustee for the payee or holder.

The court does not indicate whether the result would be the same if the check had only been for a part of the balance in the bank and does not cite Nassano v. Tuolumne County Bank[42] in which such was the case. In that case the “check” was for $500 and the decedent drawer’s balance was $1,100.

The whole language of the opinion in the Dunn Case reveals an inclination to hedge at giving the Negotiable Instruments Law the full effect so often argued for. This inclination is, of course, found in many cases particularly in jurisdictions which prior to the Negotiable Instruments Law held the view that a check, although unaccepted, might be an assignment.[43]

The case does not, even if it be correctly decided, as it evidently was on its own facts, afford any relief as to the general plight of those bona fide holders for value of checks whose drawers

42(1912) 20 Cal. App. 603, 130 Pac. 29.
43Numerous references have already been made to notes and texts in which this question has been referred to. See particularly, however, Aigler, Rights of the Holder of a Bill of Exchange Against the Drawee, (1925) 38 Harv. L. R. 857.

Iowa, one of the states slow to yield its pre-statutory point of view and on that account the object of much “professorial criticism,” has apparently yielded in Leach v. Mechanics Savings Bk., (1926) 202 Iowa 899, 211 N. W. 506, 50 A. L. R. 389, in which the whole history of Iowa’s extensive judicial consideration of this subject, together with the criticism it has suffered is reviewed. The change of front was not made, however, without a vigorous protest from two dissenting members of the court.
are so inconsiderate as to die before the checks are cashed. All that this case says is that when from the entire transaction it appears that there was an intention to transfer title to the bank deposit, the holder can collect from the bank as against the administrator. This is not enough to justify a bank in paying the check to the holder. The only way in which the bank can be secure in doing so is by litigating the question to judgment, viz., a judgment which determines that from the whole transaction the parties did intend to transfer title to the deposit.

There is, it seems to me, one suggestion in Mr. Aigler’s article, already referred to, which does open a possibility for an interpretation of section 189 which will permit a check to be treated as an assignment in favor of a holder where the drawer is dead. Mr. Aigler points out:

“It must be noticed that these sections (127 and 189) simply provide that a bill or check of itself shall not amount to an assignment. If the bill or check plus something else might have amounted to an assignment or created a situation giving the holder without acceptance or certification a remedy against the drawee, such a result may just as well follow under the statute as before its enactment.”

Conceivably the courts might find that the check plus death of the drawer without countermanding or stopping payment, constitutes the “something else” mentioned by Mr. Aigler, at least where the holder is a holder in good faith and for value.

There is also to be considered that an ordinary bill of exchange other than a check may be paid by the drawee after the death of the drawer even though it was not accepted before the death occurred.

Mr. Balkam comments upon this point in his article, citing as his authority Billings v. Devoux, an English case of 1841, and Cutts v. Perkins, an early Massachusetts case. Daniel sees no reason for distinction, saying of it:

“without pausing to define a check here, suffice to say that it certainly is a species of bill of exchange. This being true, what is there about it which makes the death of the drawer have a different effect from that resulting from the death of the drawer of any other bill of exchange? Nothing that we can discover.”

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44See note 43 supra.
45Aigler, Rights of Holder of Bill of Exchange Against the Drawee (1925) 38 Harv. L. Rev. 857, 870.
46(1841) 3 Man. & Gr. 555.
47(1812) 12 Mass. 206.
48(1879) 3 Va. L. J. 323. Citing as his authority Chitty, Bills, 13th Am. ed., 325, 1 Parsons, Notes and Bills 287, who speaking of the different
DEATH OF A DRAWER OF A CHECK

But Mr. Zane evidently does see a difference. He says:

"But even though there be no authority for saying that the bill of exchange as a mandate to the drawee is not revoked by the death of the drawer, and even if we assume that such mandate is not revoked by the death of the drawer before acceptance, there are reasons why a bill of exchange should receive different treatment from that accorded to a check. A bill of exchange is expected to be put into circulation, a check is not."

This is of course not true in business practice today. Probably a larger portion of the checks written in America today pass through the hands of holders beyond the payee than is the case with private bills of exchange. Again says Mr. Zane:

"Bills of exchange are usually drawn at a distance from the home of the drawee and the application of the rule (viz., that the drawee may not pay after notice of drawer's death) as to bills of exchange would cause practical difficulties which would not be met in the case of checks."

The first part of this objection does not seem to the writer to be a correct expression of the situation in the business world today and as for the latter part of it, Mr. Zane does not tell us what are these practical objections.

It should also be noticed that the English statute adopting the general rule is by its language limited to checks and as for section 189, providing that a check is not an assignment, which is relied on by cases since the Negotiable Instruments Law in denying the bank with notice of a depositor's death the right to pay his checks, the language of section 127 as to other bills of exchange is of precisely the same effect.

By way of conclusion, the writer would emphasize that the matter is after all a practical one and whatever may be the temporary effect of judicial decisions as to the technical impossibility of a check being regarded as an assignment, the question will in the end be settled in a manner consonant with the established practices of society and business. It may require legislation to do this, such as has been adopted in Massachusetts and it may become so apparent a necessity that a court having decided the question in favor of the check holder will find a way to rationalize the result to its own satisfaction.

rules as to checks and other bills of exchange, says, "They are irreconcilable." Morse, Banks and Banking, 6th ed., p. 891, makes the same point, citing the same references.

Bills of Exchange Act, Sect. 75.
For a precedent as to what may be expected to happen if general commercial understanding does ultimately concede that the death of the drawer should not affect the value, security and convenience of a check which has been negotiated for value, we have only to go back to the days of Lord Holt and his futile efforts in *Clerk v. Martin* and a few other cases\(^{50}\) to stem the tide of business necessity, which were happily soon checked by the enactment of the statute of Anne\(^{51}\) and to notice that recently in New York State the legislature made securities receipts negotiable\(^{52}\) following the decision holding them non-negotiable in *Manhattan Co. v. Morgan*.\(^{53}\)

\(^{50}\) *Clerk v. Martin*, (1702) 2 Lord Ray. 751, 1 Salk 129; The other cases were: *Patter v. Pearson*, (1702) 1 Lord Ray. 759; *Burton v. Sauter*, (1703) 2 Lord Ray. 774; *Williams v. Cutting*, (1703) 2 Lord Ray. 829; *Farr*, 154; *Baller v. Crips*, (1703) 6 Mod. 29.

\(^{51}\) (1704) 3 and 4 Anne c. 9, sec. 1.

\(^{52}\) After the decision in *Manhattan Co. v. Morgan* here referred to, the legislature by an act made effective April 30, 1926, conferred negotiability on "Security Receipts" (defined as including receipts for bonds, notes, debentures, shares of stock, voting trust certificates, etc.) and equipment trust certificates, Laws 1926, ch. 704. See (1926) 26 Col. L. Rev. 884.

\(^{53}\) (1926) 242 N. Y. 38, 150 N. E. 594. And for a case in which the same result was reached by decision in which the Ohio court of appeals really seems to adopt the theory that the N. I. L. was not intended to apply to "off type instruments." See *Hopple v. Cleveland Discount Co.*, (1927) 25 Ohio App. 138, 157 N. E. 414. And see note, (1927) 26 Mich. L. Rev. 224.