

VALIDATION OF CHEQUES AFTER DEATH

REPORT OF THE CONTRACTS AND COMMERCIAL
LAW REFORM COMMITTEE, NEW ZEALAND

Presented to the Right Honourable the Minister of Justice
in September 1969

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OF CHEQUES AFTER DEATH

To: The Right Hon. the Minister of Justice

1. Terms of Reference

In a letter of 22 November 1968, written by the Secretary of the New Zealand Law Society to the Secretary for Justice, the Society has requested a reform concerning the banker's authority to pay cheques after the death of the customer. The proposal is that such cheques should remain valid for a period of say, ten days, after the death of the drawer (or customer), so that normal trading cheques, drawn by the customer just prior to his death, may be met. This suggestion has also been referred to the New Zealand Bankers' Association, which indicated that it would favour a reform on these lines. The matter has been referred by the Minister of Justice to this committee.

2. Position under Current Law

At present the position is regulated by the Bills of Exchange Act 1908, which is based on the English Bills of Exchange Act 1882, and section 75 of both these Acts reads:

"Revocation of Banker's Authority - The duty and authority of a banker to pay a cheque drawn on him by a customer are determined by -

- (a) Countermand of payment;
- (b) Notice of the customer's death."

The committee feels that paragraph (b) of this section leads to an unsatisfactory result. On the one hand, as between the drawer and the payee as well as the indorsers and the holder, the drawer's death does invalidate the cheque. This follows from the fact that as between the drawer and the payee as well as any subsequent parties to the cheque, it constitutes a contract in which the drawer promises to pay the amount of the

cheque, if it is dishonoured by the drawee banker (see section 55(1) of the Bills of Exchange Act 1908). Thus, if the drawee banker dishonours a cheque because it is presented after the drawer's death, it is clear that the personal representatives are liable to the payee, indorsers, and holder. On the other hand, as between the drawer and drawee banker, the cheque constitutes a mandate. The drawer, or customer, acting as principal, instructs the drawee banker to pay the amount of the cheque to the payee or any subsequent holder: London Joint Stock Bank v. MacMillan [1918] A.C. 777; Westminster Bank v. Hilton (1926) 43 T.L.R. 124. As the drawee banker does not accept the cheque, he is not a party to it, assumes no liability of his own towards the payee, indorsers or holder, and is solely in the position of an agent authorised to pay. At Common Law the death of the principal revokes the agent's authority: Campanari v. Woodburn (1854) 15 C.B. 400. Therefore, if it had not been for the provision of section 75(2), the death of the drawer would by itself have revoked the authority to pay conferred in the cheque on the drawee banker. However, it is clear from the provision of section 75(2) that notice of the customer's death, and not the death itself, revokes the banker's authority to pay it. Undoubtedly, section 75(2) gives adequate protection to a banker who pays a cheque drawn by a deceased customer before obtaining notice of his death; but it leads to an anomaly. While the banker is obliged to dishonour the cheque after notice of the customer's death, this very dishonour confers on the holder, indorsers and payee of the cheque an immediate right of recourse (subject to giving notice of dishonour) against the estate: section 47(2) of the Bills of Exchange Act 1908.

3. Need for a Reform

The committee feels that a reform is required. In its opinion there is no reason why cheques drawn by the customer should not be met once the banker has notice of his death. As the payee, indorsers and holder

of such cheques would have a valid cause of action against the estate of the deceased, if the cheques were dishonoured, the banker should be authorised to pay such cheques, provided they are presented within a reasonable period after the customer's death. Such a provision is included in the United States Uniform Commercial Code, section 4-405 of which reads:

(1) A payer or collecting bank's authority to accept, pay or collect an item or to account for proceeds of its collection if otherwise effective is not rendered ineffective by incompetence of a customer of either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence. Neither death nor incompetence of a customer revokes such authority to accept, pay, collect or account until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it.

(2) Even with knowledge a bank may for ten days after the date of death pay or certify the cheques drawn on or prior to that date unless ordered to stop payment by a person claiming an interest in the account.

American bankers are, thus, authorised to pay cheques of the deceased customer provided these are presented within ten days of his death. The clearance of cheques through the banking channels takes about three days. Thus, the payee or holder is assured of obtaining payment (provided the cheque is regular and the drawer's account in funds), if he banks it within seven days of the drawer's death. This should be an adequate period. Moreover, if the customer did not die intestate the executors would normally be able to give detailed instructions to the banker within ten days of the customer's death.

4. Stale Cheques

A question of some difficulty is whether the banker should be authorised to honour any cheques presented

within ten days of the customer's death, or whether this authority should apply only to cheques drawn within a specified period before the customer's death. As a matter of practice bankers do not pay cheques which are presented after an undue delay, i.e. after six months from the date of drawing. (Paget's Law of Banking, 7th ed., p.200; Bright, Banking Law and Practice in New Zealand, (1962) p.140). However, the drawer remains liable for the payment of such cheques within the normal period of limitation. The drawer is discharged if the cheque is not presented within a reasonable time only in so far as he suffers actual loss due to the delay, e.g. due to the drawee banker's insolvency, and to the extent of the drawer's actual loss: section 74 of the Bills of Exchange Act 1908. The reform proposed in the foregoing paragraphs of this report, does not oblige the banker to pay a cheque drawn by a customer since deceased, but simply extends his authority to do so. Thus, the suggested reform is not going to affect the discretion conferred on the banker in practice, to dishonour a stale cheque. The committee feels, therefore, that there is no need to limit the banker's authority to honour cheques presented after the customer's death to those drawn within a given period preceding his demise.

5. Post-dated cheques

Special problems arise if a drawer post-dates a cheque and, subsequently dies before the date written on the cheque. As such a cheque gives the impression of being drawn after the customer's death, it must be considered irregular on its face, and as a matter of practice must be dishonoured.

But the mere post-dating of a cheque does not render it irregular or invalid. This follows from section 13(2) of the Bills of Exchange Act 1908 and authorities affirm that such a cheque can be validly negotiated even between the date on which it is actually drawn and that to which it is post-dated: Hitchcock v. Edwards (1889) 60 L.T. 636; Royal Bank of Scotland v. Tottenham [1894] 2 Q.B.

715. However, the drawee-banker is not authorised to pay such a cheque before its ostensible date: Pollock v. Bank of New Zealand (1901) 20 N.Z.L.R. 174.

The question arises, therefore, whether a banker should be authorised to pay a cheque which is post-dated to a date after the customer's death. The committee feels that the use of post-dated cheques should not be encouraged and recommends that no change be made.

6. Insanity

There is no provision in the Bills of Exchange Act 1908 as regards the effect of the customer's insanity on the banker's authority to pay his cheques. It is thought that notice of the customer's insanity determines the banker's duty to pay: Drew v. Nunn (1879) 4 Q.B.D. 661; Daily Telegraph Newspaper Co. v. McLaughlin [1904] A.C. 776; Ryder, Bankers and the Law Relating to Lunacy (1934) 55 J.I.B. (U.K.) 14. It should be noted that section 4-405 of the Uniform Commercial Code (cited above) regulates the effect of the customer's insanity on the banker's duty to pay his cheques. However, we know of no demand for a change of the law in this respect and we have no recommendation to make.

7. Countermand of Cheques Outstanding at Customer's Death

Section 4-405(2) of the Uniform Commercial Code revokes the banker's authority to pay cheques presented within ten days of the customer's death, if he is ordered to stop payment by a person claiming an interest in the account. As it is unlikely that there will be a grant of administration within ten days, this appears, basically, to be a suitable provision. However, the language of section 4-405(2) is rather wide. The committee feels that a banker's authority to pay cheques presented within ten days from the customer's death should be determined only in so far as the person purporting to countermand them claims to be a personal representative of the customer or a beneficiary in his estate.

8. Amendment of section 75

The committee recommends that section 75 of the Bills of Exchange Act 1908 be rephrased as follows :-

The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by

- (a) Countermand of payment.
- (b) Notice of the customer's death, provided that a banker having notice of the customer's death may pay a cheque (other than a cheque dated after the date of the customer's death) presented not more than ten days after the date of the customer's death, unless he receives a countermand of payment by a person who claims to be entitled to a grant of administration in respect of or to be a beneficiary of the customer's estate.

For the Committee



Chairman

DATED at Wellington this 9th day of September 1969.

Members

Mr M.F. Chilwell, Q.C. (Chairman)

Mr B.J. Cameron

Professor B. Coote

Mr D.F. Dugdale

Professor E.P. Ellinger

Mr W. Iles

Mr C.I. Patterson