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Personal Property

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PERSONAL PROPERTY

GIFT OF CHECK CAUSA MORTIS

Arkansas. The recent case of *Burks v. Burks*[1] held that a check might be the subject of a valid gift *causa mortis*. Plaintiff's sister-in-law presented the plaintiff with two checks dated "11-17-51" and "12-10-51" for $1,000 and $500, respectively. The sister-in-law died intestate on December 15, 1951. In the lower left hand corner of each check was the notation, "at my death." A notation appeared on the check stub where the $1,000 check was detached which read: "Five hundred dollars given to Bedford Raybon, $4 a month, $1 every other week; $500 for your personal use." Bedford Raybon was the donor's incompetent son. The plaintiff presented the two checks to the drawee bank 39 days after the date of the decedent's death, and the bank refused to pay.

Suit was brought to enjoin the bank from paying the $1,500 to another party and in the alternative to pay the amount into court. The court allowed the bank to deduct $50 for legal expense when the $1,500 was paid into the court's registry.

The trial court held that the $1,500 should be paid to the administrator of the estate, but this holding was reversed on appeal, the payee-plaintiff being allowed to collect the $1,500 minus the $50 legal expense. A trust was imposed for the benefit of the donor's incompetent son in the amount of $500.

The supreme court followed the reasoning of an earlier Arkansas decision.[2] It was said that the "trend of authority, and the better reasoning, is that a check may be the basis of a gift *causa mortis* where creditors are not concerned." A treatise was cited as saying that there must be such a delivery as clearly to indicate an intent to transfer the property and an actual transfer of the rightful

[1] _____Ark._____, 257 S. W. 2d 369 (1953).

[2] Carter v. Greenway, 152 Ark. 339, 238 S. W. 65, 67 (1922).

control of the property.[3] It was stated that a clear intent is evidenced by giving a check to the donee if it is not revoked before payment, and even though the donor could revoke during his life, it should be, as to the rest of the world, a delivery of control of the money. Creditors of the donor are the only ones with a right to object.

The prevailing rule is that a check payable after the drawer's death conveys no enforceable right to the donee.[4] A check is a mere order by the drawer to the drawee bank to pay the sum indicated, and is therefore revocable and incomplete prior to acceptance or payment by the drawee.[5] It is *ipso facto* revoked by the drawer's death.[6]

Arkansas is among several states that follow the minority rule.[7] The courts following the minority rule base their conclusion on the notion that a check is an assignment of the funds in the drawee bank. Prior to the enactment of the Negotiable Instruments Law, the minority view was that a check was an assignment of funds. The foundation for these cases was swept away by a section of the Law which states: "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."[8] A clearer statement that a check does not operate as an assignment of funds could hardly be made. The cases in Arkansas, however, are based on the proposition that control is given to the donee by gift of a check *causa mortis* where the rights of creditors are not involved.[9]

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[3] MORSE, BANKS AND BANKING (6th ed. 1928) 1165.

[4] BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW (5th ed. 1948) § 189, p. 1329; Note, 20 A. L. R. 177 (1922).

[5] BROWN, PERSONAL PROPERTY (1936) 171.

[6] *Ibid.*

[7] See Note, 20 A.L.R. 177, 182 (1922).

[8] ARK. STAT. 1947 ANN. § 68-406.

[9] Smith v. Clark, 219 Ark. 751, 244 S. W. 2d 776, 779 (1952); see Note, 20 A.L.R. 177, 183 (1922).

It is submitted that the better rule is that the donor's death revokes a check unless there has been prior acceptance or payment by the drawee bank. Since a gift of a check is incomplete until accepted, there should be no recovery by the payee after the death of the drawer.

The requirements of the Arkansas statutes as to testamentary disposition are completely ignored in the case at bar. The use of a check in disposing of money at death violates the formalities required for a will.[10] The printed matter (name of bank, city, etc.) on the face of the check would negative its use as a holographic will. There was no indication that the requirement of three disinterested witnesses to prove a holographic will was met in the case at hand.

The preferred rule is to require any disposition at death, either of real or personal property, to meet the formal requirements of a will. Otherwise, the opportunities for fraud are multiplied.

Negligent Injury by Bailee — Measure of Damages

Oklahoma. An interesting case[11] was decided in Oklahoma involving a unique measure of damages. The action was for damages resulting from negligence of a garage operator's employees in injuring plaintiff's car. Plaintiff had delivered his automobile for parking in defendant's garage. The car was damaged when struck by another automobile driven by an employee of the defendant company.

The defendant offered to repair the automobile within two days after the accident at a cost of $147 and to give the plaintiff the use of an automobile during that period. The plaintiff took the car and had it repaired at a higher figure. The defendant contended that it had the right to keep the automobile until it was repaired.

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[10] Ark. Stat. 1947 Ann. § 60-104.
[11] Parkade Corp. v. Locke, ____Okla.____, 260 P. 2d 1084 (1953).

The plaintiff was awarded judgment for $353.41. He was allowed $266.91 for damage to the vehicle and $86.50 for hiring of a rent car to carry on his business while his car was being repaired.

The delivery of the automobile to the defendant constituted a bailment for the benefit of the plaintiff, the bailor.[12] An Oklahoma statute provides:

> A bailee must deliver the thing to the person for whose benefit it was deposited, on demand, whether the bailment was made for a specified time or not, unless he has a lien upon the thing deposited, or has been forbidden or prevented from doing so by the real owner thereof, or by the act of the law, and has given the notice required by Section 1093.[13]

Thus, it appears that defendant was required by statute to return the bailed property to the owner. It also had the duty to return the automobile in as good condition as when received. Since it could not be delivered in that condition, plaintiff was entitled to possession of the automobile and defendant was liable for the negligence of its employees.

What is the measure of damages for injury to personal property that can be repaired? Oklahoma cases have stated the rule as follows:

> The measure of damages for injuries to personal property that can be repaired is the cost of repair and the value of its use necessarily lost pending repair.[14]

The court in the case under discussion overruled defendant's contention that the measure of damages was the amount for which it could have had the car repaired. However, evidence of that amount was proper for the jury's consideration in fixing the amount of recovery.

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[12] 260 P. 2d at 1086, citing Schulze v. Allison, 204 Okla. 147, 227 P. 2d 658, 660 (1950).

[13] 15 OKLA. STAT. ANN. (Perm. ed.) § 447.

[14] 260 P. 2d at 1087.

The bailor should be required to use reasonable care and diligence in having his automobile repaired at a minimum cost. There is plausibility in the argument that a bailee should be permitted to repair if he can have it done at a lower price than the bailor. But the bailee has the technical right to immediate possession, and the only way to calculate the amount of the damages is to weigh the evidence of the cost of repair.

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