

FORGERY: An information charging forgery of a check on an individual, drawn on an incorporated bank or trust company, should be filed under Section 4571, Mo. R. S. A. 1939.

June 30, 1949

FILED
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Mr. William F. Brown
Prosecuting Attorney
Sedalia, Missouri

Dear Mr. Brown:

This office is in receipt of your recent request for an official opinion upon the following set of facts as embodied in your letter of inquiry to us:

"I have recently filed a charge on forgery involving the check following, which is copied:

"Sedalia, Mo. Feb. 2, 1949

"80-1783
865

"SEDALIA BANK & TRUST CO.

"Pay to the order of Betty Weathers \$45.96

"45 Dollars - - - - - /96 Dollars

"Jack Morris

"This information was drawn under Section 4571, particularly under that which reads 'Second, any order or check being or purporting to be drawn on any such incorporated bank or trust company, or any cashier thereof, by any other person, company or corporation * * *. It is my thought that the language of this Statute is clear in its meaning, however, after reading State vs. Gibson, 244 Missouri 215, it appears that the Supreme Court takes the attitude that this Section applies only to banks.

"Also I would like to call your attention to

State vs. Milligan, 170 Missouri, Page 215. To further confuse the issue, I would like to call your attention to State v. Dobbins, 174 South West Second 171.

"I have discussed this matter with Judge Dimmitt Hoffman, our Circuit Judge and he informs me that he is also confused as to the difference between the apparently clear meaning of the Statute above referred to and the remarks made by the Supreme Court in passing upon the various degrees of forgery.

"I am perfectly willing to concede that a check such as the one involved in the recent case should preceed under Section 4579, however, I am not able to reconcile the language used in Section 4571 with the Supreme Court decisions.

"I would, very much, appreciate it if you will advise me as to whether a check as set forth above, assuming it to be forged, should have the information drawn under Section 4571 or Section 4579, and I will appreciate an early response."

We will discuss the cases cited above by you, from the viewpoint of their bearing upon your instant case, and in their chronological order.

In State v. Milligan, 170 Mo. 215, decided in 1902, the cause of action arose by reason of the defendant drawing a promissory note payable to himself, forging thereto the names of two individuals, and subsequently assigning the note to another person in payment of a debt owed by the defendant to this third person. Later the drawer of the note was arrested and charged with forgery under Section 2009, R. S. Mo. 1899, which is our present section 4579, Mo. R.S.A. 1939, which section reads:

"Every person who, with intent to injure or defraud, shall falsely make, alter, forge or counterfeit any instrument or writing, being or purporting to be the act of another, by which any pecuniary demand or obligation shall be or purport to be transferred, created, increased, discharged or diminished, or by which any rights or property whatsoever shall be or purport to be transferred, conveyed, discharged, increased

or in any manner affected, the falsely making, altering, forging or counterfeiting of which is not hereinbefore declared to be a forgery in some other degree, shall, on conviction, be adjudged guilty of forgery in the third degree."

This section, it will be observed, charges forgery in the third degree, which, at the time the Milligan case was tried, carried punishment of imprisonment for not less than five years nor more than seven years. Punishment for forgery in the second degree at that time was imprisonment for not less than five years nor more than ten years. However, in this case, which charged forgery in the third degree, an instruction was given on behalf of the state which carried the punishment proper under a charge of forgery in the second degree. The section, in 1902, which charged forgery in the second degree, was 2001, our Section 4571, which states:

"Every person who shall forge or counterfeit, or falsely make or alter, or cause or procure to be forged, counterfeited or falsely made or altered: First, any promissory note, bill of exchange, draft, check, certificate of deposit, or other evidence of debt, being or purporting to be made or issued by any bank or trust company incorporated under the laws of this state, or of any other state, territory, government or country; or, second, any order or check being or purporting to be drawn on any such incorporated bank or trust company, or any cashier thereof, by any other person, company or corporation, shall, upon conviction, be adjudged guilty of forgery in the second degree."

The conviction of the defendant in the Milligan case was reversed on the grounds indicated above.

In the course of the Milligan opinion (page 223) the court states:

"It will be observed that the promissory note or other evidence of debt mentioned in Section 2001, supra, (Our 4571) must be one being, or purporting to be, made or issued by some incorporated bank or cashier thereof * * *."

In this statement the court was correct, for it was referring only to that part of Section 2001, the first part, which was applicable to the case which the court was deciding, to-wit, the forging of a promissory note. And the first part of section 2001 specifically brings within its compass "promissory notes * * * or other evidence of debt." We do not believe that in their statement the court was referring to all of section 2001.

In State v. Gibson, 244 Mo. 215, the court says:

"Sections 4643 and 4644 (our 4571 and 4572) apply to instruments purporting to be executed by a bank. State v. Milligan, 170 Mo. 223."

Here again we believe that the court was correct for the same reason that it was correct in the Milligan case, namely, because the case which it was deciding was one concerning a promissory note, and that the court was therefore referring to part 1 of Section 4643 (our 4571).

However, in State v. Dobbins, 174 S.W.(2d) 171, we are constrained to believe that the learned Supreme Court of Missouri was in error when it stated (page 172) "that Section (4571) applies 'only to instruments purporting to be executed by a bank.' State v. Gibson, 244 Mo. 215," because the forged instrument in this case was a check, which is specifically mentioned in the second part of Section 4571, which states: "or, second, any order or check being or purporting to be drawn on any such incorporated bank or trust company or any cashier thereof, by any other person, company or corporation, * * *."

We invite your attention to other cases which appear to us to support our position in regard to the interpretation of Section 4571, all of them cases cited under Section 4571, Mo. R.S.A. 1939.

In State v. Washington, 259 Mo. 335, a 1941 case, the defendant forged a name to a check drawn on a bank, which check was made payable to the defendant. The information was filed under Section 4643, R.S.Mo. 1909, which was Section 2001, R. S. Mo. 1899, and which is our Section 4571. No question was raised by the defendant or the court to the effect that the information was not drawn under the proper section.

A similar fact situation occurred in State v. Stegner, 276 Mo. 427, a 1917 case, in which the conviction was affirmed.

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Also in State v. Socwell, 318 Mo. 742, a 1927 case.

State v. Jacobson, 152 S.W.(2d) 1061, a 1941 case, establishes the same proposition, which is likewise supported by many other Missouri cases, all decided subsequent to 1902, the date of the Milligan case.

CONCLUSION

It is the conclusion of this department that where a person is charged with forging the name of another individual to a check drawn upon an incorporated bank or trust company, that the information under which he is prosecuted should be drawn under Section 4571, R. S. M. Mo. 1939, charging forgery in the second degree.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
Attorney General