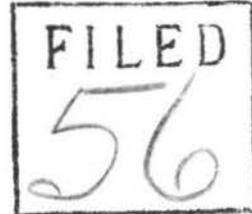


FALSE PRETENSES  
FIVE DAYS NOTICE  
INSUFFICIENT FUND CHECKS

) Five day notice statute, 4306 R. S.  
) Mo. 1929, applies to misdemeanors covered  
) by 4305, and not to felonies covered by  
Section 4304.

February 10, 1937

Hon. G. Logan Marr  
Prosecuting Attorney  
Morgan County  
First National Bank Bldg.  
Versailles, Missouri



Dear Sir:

We have your request of February 3, 1937 for an opinion of this office reading as follows:

"It has been my practice to file under section 4304-1929 in cases where and when bogus checks are given in this county, and the checks are returned marked 'No Account.' or 'No Funds.' In those felony cases, I have not notified the defendant before hand of the bogus check. Several strangers have floated checks for large amounts, and their present whereabouts are unknown. It would be impossible for the taker of the check to give notice as required in section 4306-1929, if such was the law.

In several preliminary hearings, the question has been seriously raised that before complaint is made the maker of the check must be notified that the check has been returned unpaid for any cause as per the terms of section 4306-1929, even though the complaint is filed as per the terms of sections 4304-1929.

Do you understand this notice must be served before the prosecution would be good under section 4304-1929?"

We call your attention to the apparent difference in the statutes involved:

"Sec. 4304. Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain\*\*\*any money, property or valuable thing\*\*\*by means or by use of any trick or deception, or false and fraudulent representation, or statement or pretense,\*\*\*or by means, or by use, of any false or bogus check or by means of a check drawn with intent to cheat and defraud, on a bank in which the drawer of the check knows he has no funds,\*\*\*\*\*"

"Sec. 4305. Any person who, \*\*\*shall make or draw or utter or deliver, with intent to defraud any check, draft or order, for the payment of money, upon any bank,\*\*\*knowing at the time of such making, drawing, uttering or delivering, that the maker or drawer has not sufficient funds in, or credit with, such bank\*\*\*"

It is apparent that Section 4304 R. S. Missouri 1929, is aimed at the writer of a check who has no funds in the bank, while Section 4305 R. S. Missouri 1929 is leveled at the maker of a check who has an account with the bank, but which account or credit is not sufficient for the payment of the check.

Under the felony statute (4304) the information, among other things must allege that the party defrauded relied upon and believed in the truth of the pretenses made by the defendant and was thereby induced to and did part with his property. State vs. Loesch, 180 S. W. 875, 878; State vs. Mills, 272 Mo. 562; State vs. Burton, 213 S. W. 424; State vs. Robinson, 14 S. W. (2) 452.

A felony indictment for false pretenses must allege (1) what the pretenses were, (2) to whom they were made, (3) that he to whom they were made relied upon them and acting upon such reliances was induced to and did part with his property, (4) that by means of such pretenses said property was obtained, (5) that the property so obtained was owned by the person named, (6) that its value was a named sum, (7) that said pretenses were made by defendant designedly and feloniously with intent to cheat and defraud, and (8) that said pretenses were false and that defendant knew that they were false when he made them. State vs. Young 266 Mo. 723.

The word "designedly" as used in Section 4095 R. S. Missouri 1929, relating to obtaining money by false pretenses, must be used in the indictment. State vs. Pickett, 174 Mo. 663. The word "designedly" as used in Section 4095 does not appear in Section 4304, and for that reason the indictment under Section 4304 need not contain such allegation. A pretense, to form the basis of a prosecution must be a fraudulent representation of an existing or past fact. State vs. Houchins, 46 S.W. (2) 891.

Under the misdemeanor statute (4305) we find that the maker or drawer of the check must have either credit or sufficient funds in the bank for the payment of the check upon its presentation--which is always a future act. A person may be convicted under the misdemeanor statute for giving a post dated check. State vs. Taylor, 73 S. W. (2) 378.

We now come to a consideration of the applicability of Section 4306 R. S. Missouri 1929. This section among other things provides:

"As against the maker or drawer thereof, the making, drawing, uttering, or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, such bank\*\*\*, Provided, such maker or drawer shall not have paid the drawee thereof\*\*\*\*together with all costs and protest fees, within five days after receiving notice that such check, draft or order has not been paid by the drawee."

We point out the similarity of Sections 4305 and 4306 wherein both acts are leveled at those who "make, draw, utter or deliver" insufficient fund checks. The felony statute (4304) was first enacted in 1879. Sections 4305 and 4306 were first enacted in this state in 1917, Laws of Missouri 1917, page 244, and together with Section 4307 were a part of House Bill 726.

There is nothing in the statute to indicate that the legislature ever intended that Section 4306 should apply to Section 4304. This question seems to have been raised in *State vs. Mullins*, 237 S. W. 502, but not passed upon by the court.

CONCLUSION

It is therefore the opinion of this office that Section 4304 was intended to apply to persons drawing or passing checks upon a bank in which the drawer had no funds; that Section 4305 was intended to apply to persons who had an account or credit with a bank but who drew checks thereon at a time when his funds or credits at such bank were insufficient to pay the check on presentation, and that Section 4306 was passed as an aid to Section 4305, in affording makers of insufficient fund checks a reasonable time, five days, in which to pay the check and thereby conclusively establish that it was not drawn with any intent to defraud. It is the further opinion of this office that Section 4306 does not apply to offenses covered by Section 4304.

Respectfully submitted,

FRANKLIN E. REAGAN,  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
(Acting) Attorney General

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