

CRIMINAL LAW: Under Section 4304 R. S. Missouri, 1929  
venue of criminal action in county or  
state where property was obtained.  
Under Section 4305 R. S. Missouri, 1929  
venue in county or state where check  
was drawn, uttered or delivered.

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April 3, 1940

Hon. Donald B. Dawson  
Prosecuting Attorney  
Bates County  
Butler, Missouri

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Dear Sir:

We are in receipt of your request for an opinion,  
under date of March 30, 1940, which reads as follows:

"I would like your opinion on a matter of considerable importance here in Bates County. It pertains to the application of Section 4304, 4305, and 4306, revised Statutes of Missouri, 1929 with particular reference to checks. Under my construction of these sections I am taking the position that the offense of giving a no-funds or an insufficient funds check is committed at the place where the check is given regardless where the bank is located and regardless of the residence of the parties to the transaction. In other words I have acted under the assumption that the fraud, if any was committed, when the check passed hands and was received by the payee or indorsee.

However, we have a great many cases in which a check is written in the State of Kansas or some other state, placing in an envelope and mailed to a man living here in Bates County. The check may or may not be drawn on an out of state bank. In that case, I confess that I do not know where the offense is committed but I would

presume that a prosecution could be had at the place where the check is actually delivered, as well as, at the place where the check is mailed. From another class of cases we have here in Bates County, merchandise is sold by a man living in Missouri to a man living in Kansas. The check is given by the Kansas man while he is in Kansas and is drawn on a bank in Missouri, assuming the check is refused by the bank in which it arises, whether prosecution can be begun in Missouri or must be begun in Kansas where the check was actually written and turned over to the payee. The laws of Kansas make any check over \$20 a misdemeanor regardless of whether it was a no-funds or insufficient funds check. In Missouri, of course, a no-funds check is a felony regardless of the amount of the check. That is why the matter became somewhat important.

I would like your opinion on how broad a construction may be placed upon the above named sections and whether or not you feel that a check made in Kansas and mailed to a man in Missouri creates an offense in Missouri and whether it would be possible to file prosecution on a check given in Kansas on a Missouri bank."

Section 4304 R. S. Missouri, 1929, reads as follows:

"Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain, from any other person, or persons, any money, property or valuable thing whatever by means or by use of any trick or deception, or false and fraudulent representation or statement or pretense, or by any other means or

instrument or device, commonly called 'the confidence game,' 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, or by means, or by use, of any corporation stock or bonds, or by any other written or printed or engraved instrument, or spurious coin or metal, shall be deemed guilty of a felony, and upon conviction thereof be punished by imprisonment in the state penitentiary for a term not exceeding seven years."

It will be noticed the above section is entitled cheats, frauds, bogus checks, etc., but is the main section under which actions of obtaining money under false pretenses are filed. In construing this section, we are enclosing an opinion rendered January 25, 1940, to Arkley Frieze, Prosecuting Attorney of Dade County.

I

Section 4304, supra, provides a penalty for the fraudulent attempt to obtain or obtaining money, property or valuable thing. If the information or indictment brought charging that the defendant obtained money, property or valuable thing, the crime is not committed until the money, property or valuable thing has been surrendered. The venue of the cause of action is in the county where the money, property or valuable thing is surrendered to the defendant. It was so held in the following cases:

In the case of State v. Schaeffer, 89 Mo. 271, l.c. 280, the court said:

"We entertain no doubt that the place

where the money or goods, are obtained, without regard to where the representations were made, is the place where the party should be prosecuted."

Also, in the case of State v. Lichliter, 95 Mo. 402, l.c. 408, the court said:

"It is contended by counsel that, under the facts disclosed by the evidence, the criminal court of the city of St. Louis had no jurisdiction of the case, but that defendants should have been indicted and prosecuted in Jasper county, and in support of this contention has cited the case of State v. Schaeffer, 89 Mo. 271. The indictment in that case was founded on section 1561, Revised Statutes, and it is there held that as the money obtained by the fraudulent representation was paid to Schaeffer's agent in New York, the offence, if any, was committed in New York, for which a prosecution in Missouri could not be maintained. That case, so far from sustaining the contention made, overthrows it, for in it the case of Norris v. State, 25 Ohio St. 217, which is analogous and on all fours with the case in hand, is approvingly cited and quoted from. There the defendant was a resident of Clark county, and by fraudulent representations as to his solvency, contained in a letter sent by him to the Akron Sewer Pipe Company, located in Summit county, induced said company to ship him by rail to Clark county a lot of sewer pipe; he was indicted in Clark, where he received the pipe sent by railroad by the Sewer Pipe Company, but the Supreme Court held that the crime was committed in Summit county, remarking: 'That the weight of authority is clearly that the railroad company was the agent of defendant for receiving the goods at Akron

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and carrying them to Springfield, and the delivery to it by the Sewer Pipe Company was, in legal contemplation, a delivery of the goods to defendant at Akron.'"

You ask in your request if it would be possible to file prosecution on a check given in Kansas on a Missouri bank, and whether it is possible to prosecute in Missouri on a check made in Kansas and mailed to a man in Missouri. In answer to most of this inquiry I am referring you to the opinion rendered to the Hon. Arkley Frieze which is enclosed. The prosecution under Sec. 4304, supra, would depend on all of the facts and circumstances.

In the case of State v. Gritzner, 134 Mo. 512, l.c. 526, the court said:

"It seems quite apparent, from the language of the statute, that there is no intimation therein contained that it was intended to operate extra-territorially (even granting such power in the legislature thus to make it operative). Indeed, it appears very obvious from section 3933 that the offense cognizable by it and its associate sections is one perpetrated alone and punishable alone within our borders.

Furthermore, the offense, if one was committed, was committed alone within the jurisdiction of the sovereignty of the state of Illinois. One state can not, speaking generally, 'provide for the punishment, as crimes, of acts committed beyond the state boundary, because such acts, if offenses at all, must be offenses against the sovereignty within whose limits they have been done.' Cooley's Const. Lim., supra.

Now, no offense certainly was committed until and unless communication was established between the mind of defendant and the brokers in Chicago, to wit, when the telegram reached that point, because, until that juncture, no offer to buy or to sell or otherwise agree could have been made.

In a word, the case stands here, conceding the reception of the telegrams, as if defendant in Slater had spoken to his brokers in Chicago over a long distance telephone, when of course but one opinion could be entertained as to the locus where the offer was made, and consequently the crime committed. And it has been ruled in this state, as well as elsewhere, that a person can not be punished in this state where the offense was actually consummated in another state, even though some act constituting a part of the offense, or making the offense possible, was committed within this state. State v. Shaeffer, 89 Mo. 271; Works, Courts & Jurisdiction, 470, and cases cited."

Also in the case of *ex parte Hammond*, 59 F. (2d) 683, 1.c. 685, the court said:

"\* \* \* It has been held that the offense of obtaining money under false pretenses is committed, if and when and where the victim parts with his money as a result of the false pretenses. This was the view expressed by the California District Court of Appeals in *People v. Chapman*, 55 Cal. App. 192, 196, 203 P. 126, 128, where the court said: 'Without doubt, the crime of obtaining money or property by false pretenses is consummated at the place where the money or property is obtained from the defrauded person, regardless of where the false pretenses may have been made,

and therefore the place where the money or property is obtained is the place where, ordinarily, the venue should be laid. *People v. Cummings*, 123 Cal. 269, 55 P. 898. In *State v. Shaeffer*, 89 Mo. 271, 1 S. W. 293, the defendant, who was prosecuted in the Missouri court for obtaining money by false pretenses, had drawn a draft in that state on the bank account of the drawee in New York; the money being collected through the agency of two other banks in New York and Missouri, respectively. It was held that the money was obtained in New York; that therefore the crime was consummated in that state and not in Missouri; and that, as a consequence, the Missouri court had no jurisdiction.'

The rule is similarly stated in Bishop's *New Criminal Law*, p. 55, vol. 1, ch. VI, sec. 110. The rule is thus stated in *Ford v. U. S.*, 273 U. S. 593, 47 S. Ct. 531, 540, 71 L. Ed. 793:

'"Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power" (*Strassheim v. Daily*, 221 U. S. 280, 31 S. Ct. 558, 55 L. Ed. 735.)  
\* \* \* \*'

If a check should be mailed to a resident of the state of Missouri and nothing was obtained on the check, although the check was a bad check, no crime would be committed in the state of Missouri, for the reason that the attempt to commit the crime was not consummated in the state of Missouri. It was so held in the case of *State v. Block*, 62 S. W. (2d) 428, l.c. 431, where the court said:

"In other words, unless Oleatha Jones agreed to participate in the fraud, there can be no crime charged against this respondent, because Oleatha Jones had a right to abandon the criminal attempt originated by this respondent. There is no allegation in the indictment that Oleatha Jones had agreed upon the plan to defraud this insurance company. It would certainly be necessary for her to participate in the plan leading towards its commission. Respondent had no authority to settle this claim for Oleatha Jones or to do anything on her behalf in the settlement of this claim. The indictment further fails to allege that the agents of the insurance company had agreed to the settlement of the claim for the amount asked by respondent, or in fact for any amount. All the indictment alleges is the mere presentation of the claim with an offer or demand of settlement for a sum certain, and, even with a criminal intent, that would not constitute a crime. At best, the indictment alleges a mere preparation to commit a crime where no overt act is alleged to have been done in the consummation after such preparations."

In prosecution of crimes committed under Sec. 4304, supra, the venue is in the state or county where the crime was consummated, but where an attempt has been made to commit a crime under Sec. 4304, supra, and was not consummated the venue of the attempt would be in the state or county where the attempt commenced and not where it was supposed to have been consummated. It was so held in the case of State v. Terry, 109 Mo. 601, l.c. 622, where the court said:

"The charge in the case at bar is not of a consummated crime, but of an attempt to commit the crime. Such attempts are

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cognizable in the place where made. No. 1 Wharton on Criminal Law, 9th Ed. secs. 195, 288. The venue of the offense, was therefore, properly laid as being in this state."

#### CONCLUSION

In view of the above authorities and enclosed opinion, it is further the opinion of this office that where a check is made in Kansas and mailed to a man in Missouri, where money, property or other valuable thing is obtained from a man in Missouri, the crime of obtaining money under false pretenses under Sec. 4304 has been committed and the venue of the crime is in the state of Missouri. Of course all of the elements of obtaining money under false pretenses must be proven as set out in the enclosed opinion to the Honorable Arkley Frieze.

It is further the opinion of this department that it makes no difference where the bank is located, for the reason that the check is only known as evidence of the trick and deception and is considered as a means, instrument or device used in the confidence game. The question of where the bank is located does not enter into the elements of obtaining money under false pretenses under Sec. 4304, supra.

#### II

Section 4305 R. S. Mo., 1929, reads as follows:

"Any person who, to procure any article or thing of value, or for the payment of

any past due debt or other obligation of whatsoever form or nature, or who, for any other purpose 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 or other depository, 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 or other depository, for the payment of such check, draft, or order, in full, upon its presentation, shall be guilty of misdemeanor, and punishable by imprisonment for not more than one year, or a fine of not more than one thousand dollars, or by both fine and imprisonment."

Section 4306 R. S. Mo., 1929, reads as follows:

"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 or other depository, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, (together with the drawee thereof the amount due thereon), 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."

Section 4305, supra, provides for the criminal prosecution of one who draws money, writes a check or utters a check upon a bank in which he has an account but whose account is insufficient to cover the check. This section differs from Sec. 4304, supra, in that under Sec. 4304, the defendant must be charged with not having any money in the bank upon which he uses the check as

a false or bogus check with intent to cheat and defraud. Under Sec. 4305, supra, it is only a misdemeanor and under Section 4306, supra, the prima facie evidence of an intent to defraud if the check has not been made good within five days after receiving a written notice that the account was insufficient to cover the check. In your request you inquire if it is possible to file a prosecution on a check given in Kansas on a Missouri bank. I am presuming that you desire to know whether a check given in Kansas on a Missouri bank which is insufficient can be prosecuted in Missouri. The gist of the action, under Sec. 4305, supra, is the drawing, uttering or delivering of the check and if the check is given in Kansas on a Missouri bank it would not be a violation of Sec. 4305, supra, in Missouri, for the reason that the venue on the giving of the check would be in Kansas and not Missouri. In the case of State v. Felman, 50 S. W. (2d) 683, l. c. 684, the court said:

"There are several reasons why the demurrer of the evidence should have been sustained. As will be observed from a reading of section 4305, the check, draft, or order must have been uttered with intent to defraud, knowing at the time of such drawing that the drawer has not sufficient funds in, or credit with, such bank or other depository."

#### CONCLUSION

In view of the above authorities, it is the opinion of this department that the venue of an action under Sec. 4305 and 4306, supra, is in the county or state where the defendant drew, uttered or delivered, with intent to defraud, any check, draft or order.

Hon. Donald B. Dawson

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It is further the opinion of this department that if a resident of Kansas gives a check to a resident of Missouri, on a Missouri bank, which is insufficient and the check is drawn, uttered or delivered in Kansas there can be no criminal prosecution in the State of Missouri under Section 4305 R. S. Missouri, 1929.

Respectfully submitted,

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APPROVED:

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COVELL R. HEWITT  
( Acting ) Attorney General

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