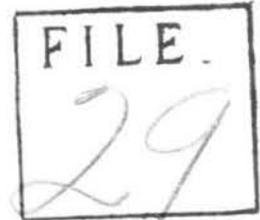


CRIMINAL LAW: Postdated check on bank in which there is no account; cannot be prosecuted under Section 4694, R. S. 1939, without other misrepresentations.

January 24, 1942

Mr. James A. Finch, Jr.  
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Dear Sir:

We are in receipt of your request for an official opinion, dated January 22d, which reads as follows:

"The Supreme Court in the case of State v. Taylor, 73 S. W. (2d) 378, held that one may be prosecuted for a misdemeanor for giving a check with insufficient funds in the bank even though the check was postdated. In that case the court dealt with the statute whereby there is a prima facie evidence of intent to defraud if the check is not paid within five days after receiving notice that the check had not been paid. I should like to have your opinion as to whether a defendant could be prosecuted under the felony section for giving a check on a bank in which he had no account where the check is postdated. Assume a situation in which the maker of the check had no account in the bank at the time he gave the check and had no account in the bank subsequently, either between the time the check was given and the date shown on the check or on or subsequent to the date appearing on the check. In your opinion could there be a prosecution under those circumstances under the felony section, or would it be necessary to bring the prosecution under the misdemeanor section.

"Secondly, I should like your opinion as to whether the State pays the costs of extradition proceedings where necessary in a situation where the charge is one for a misdemeanor. In other words, if under the above state of facts you are of the opinion that the prosecution must be under the misdemeanor section, will the State pay the necessary extradition costs of extraditing the defendant on such charge, or is that expense which must be borne by the County?"

Under the facts stated in your request, we are assuming that you are relying solely on the fact that the check was postdated and the writer of the check had no funds in the bank at the time the check was written. You do not state any other false representations made by the defendant other than the writing and delivering of the postdated check. If any other false representations were made, which were representations of an existing fact and not of an event or fact that would occur in the future, it would be possible to obtain a conviction under the felony section, which is Section 4694, R. S. Mo. 1939. It has been held in this State that the mere promise of the defendant that a check would be paid, is insufficient under the felony section. On the other hand, it has been held that a conviction may be had under the misdemeanor sections where the check is postdated, for the reason that the Legislature saw fit to enact a separate law with reference to evidence on a check drawn upon a bank and payment refused on account of insufficient funds. The sections under the misdemeanor sections are 4695, 4696 and 4697, R. S. Mo. 1939.

The Supreme Court in construing the felony section (4694) in the case of State v. Mullins, 237 S. W. 502, 1. c. 504, said:

"So the only evidence offered which proved any of the alleged misrepresentations was the promissory statement of the defendant that his check would be paid. As seen above, that is not a false pretense within the meaning of the statute.

"It may be urged that presentation of a check drawn on the bank was prima facie a representation that the defendant had funds there. The Legislature of 1917 (Acts 1917, p. 244) passed an act incorporated in the statutes of 1919 as sections 3553 and 3554. Section 3553 relates to the offense of drawing a bogus check or checks upon a bank with insufficient funds to meet it. It will be noted that the defendant was not prosecuted under that section but under section 3343, a general statute relating to the obtaining of money by false pretenses.

"Section 3554 is as follows:

"'Sec. 3554. Notice--Five Days--How--Evidence. 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.'

"Under that section the drawing of a check upon a bank in which the drawer has no funds would be prima facie evidence of intent to defraud unless within five days after notice of dishonor the drawer should make the drawee whole.

"For the purpose of this case we will assume, without deciding, that this section is applicable to the present transaction. \* \* \*"

The Supreme Court of this State in construing the misdemeanor sections, that is, 4695, 4696 and 4697, in the case of State v. Taylor, 73 S. W. (2d) 378, l. c. 385, said:

"This court in the Shelby Case and in prior decisions upheld the power of the General Assembly to declare by statute the rule of prima facie evidence laid down in section 4116. The like power, asserted in section 4306, is not questioned. And since the latter section makes no distinction between predated, truly dated, postdated, or nondated checks, the facts which the statute makes prima facie evidence should be applicable to postdated checks as well as to predated, truly dated, or nondated checks."

Section 4306, mentioned in the above opinion, is now Section 4696, R. S. Mo. 1939.

In answer to the second part of your request, and in view of the fact that we are holding that a conviction cannot be had upon the felony section, that is, 4694, where the evidence rests solely upon a postdated check drawn upon a bank in which the drawer had no account, we are holding that the defendant may be charged under the misdemeanor sections, provided proper notice has been given as set out in Section 4696, supra.

Of course, a conviction may be had against a defendant under the misdemeanor sections, but in order to obtain a conviction on a postdated check it would be necessary that the five days' notice be given. This section (4696) covers merely the matter of evidence of the intent to defraud and the knowledge of insufficient funds in the bank.

Mr. James A. Finch, Jr.

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Jan. 24, 1942

As to the matter of the extradition of the defendant in this case, we are enclosing an opinion rendered by this office on January 5, 1934, to Honorable Walter G. Stillwell, Prosecuting Attorney of Marion County, in which we held that the expenses of the messenger is fixed in amount by the Governor and is solely within his discretion. It is only under very extraordinary circumstances that the Governors of this State have granted requisitions on misdemeanor charges.

#### Conclusion

In view of the above authorities it is the opinion of this Department that a conviction cannot be maintained and upheld under the felony section (4694) against a person who gives a postdated check upon a bank in which he has no account, if the check is the sole evidence of the false representation. It is further the opinion of this office that a conviction can be had under the misdemeanor sections (4695, 4696 and 4697) against a person who gives a postdated check upon a bank in which he has no account, provided he is given the proper notice as set out under Section 4696, R. S. Mo. 1939.

Respectfully submitted,

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Assistant Attorney-General

APPROVED:

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VANE G. THURLO  
(Acting) Attorney-General

JB:EG  
Enc.