

CRIMINAL LAW: The drawer of a check upon a bank in which he has no funds, under certain circumstances is guilty of a felony under Section 4304 R. S. Missouri, 1929. Form of information.

January 25, 1940

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Hon. Arkley Frieze
Prosecuting Attorney
Dade County
Greenfield, Missouri

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Dear Sir:

We are in receipt of your request for an opinion, dated January 23, 1940, which reads as follows:

"I would like to have an opinion from your office upon the following question: Is one guilty of a felony under Sec. 4304 Revised Statutes 1929 if he gives a check drawn by himself upon a banking corporation in which he has no account? I have been unable to find a decision holding that it is a felony to obtain money in such manner in this State. Recently in this county I have had several checks that came into my office of this nature.

"If, in the opinion of your office one is guilty of a felony for obtaining money under such circumstances I would certainly appreciate it if you would send me a form of an information to use in such cases. From my reading of the cases construing this section it seems to me to be a rather difficult matter to charge a violation under this section."

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."

The punishment only provides for a penitentiary sentence and is therefore a felony statute. It will be also noticed that this Section is really different from the title of the section, in that it amounts to obtaining money under false pretenses. It describes the different instruments or ways used in obtaining money under false pretenses: Among those mentioned is "trick", "deception", "fraudulent representation", "statement or pretense", the "confidence game" and the method

which you describe in your request, which is "by means of a check drawn with intent to cheat and defraud, on a bank in which the drawer of a check knows he has no funds." The authorities hold that the mere fact that a person draws a check on a bank in which he knows he has no funds is not in itself a felony under this section. The only way that a conviction on a felony can be had under this section on a check, would be a conviction which contains all of the elements of an information for obtaining money or property under false pretenses. You ask in your request for a form of an information to be used where a check is the principal false token in a crime committed under Section 4304, supra. It would be impossible for this office to draw an information under this section, for the reason that all the facts and circumstances would be different in each information or indictment. But in the case of *State v. Loesch*, 180 S. W. 875, l.c. 878, par. 5, the court specifically states what is necessary in an information under Section 4765, R. S. Missouri, 1909, which is now Section 4304 R. S. Missouri, 1929, supra. In paragraph five the court in that case states:

"Allegations covering the essentials herein stated appear in the information: The name of the defendant; the venue of the crime (*State v. Terry*, 109 Mo. 601, 19 S. W. 206); the date of its commission; that it was committed feloniously with intent to cheat and defraud (*State v. Martin*, 226 Mo. loc. cit. 548, 126 S. W. 442; *State v. Woodward*, 156 Mo. 143, 56 S. W. 880; *State v. Scott*, 48 Mo. 422); the names of the parties to whom the false pretenses were made (*State v. Samuels*, 144 Mo. 68, 45 S. W. 1088; *State v. Chissell*, 245 Mo. loc. cit. 557, 150 S. W. 1066); their ownership of the property, its description and

value (State v. Myers, 82 Mo. 558, 52 Am. Rep. 389; State v. Vandenburg, 159 Mo. 230, 60 S. W. 79; Halley v. State, 43 Ind. 509; State v. Ladd, 32 N. H. 10); the nature of the trick or fraud committed by defendant described with certainty (State v. Porter, 75 Mo. 171; State v. Miller, 212 Mo. 73, 111 S. W. 18); that the pretenses made were false, and defendant's knowledge of their falsity when made (State v. Janson, 80 Mo. 97; State v. Bradley, 68 Mo. 140); that the parties defrauded relied upon and believed in the truth of the pretenses made by the defendant, and were thus induced to and did part with their property (State v. Kelly, 170 Mo. 151, 70 S. W. 477; State v. Hubbard, 170 Mo. 346, 70 S. W. 883; State v. Vorback, 66 Mo. 168; State v. Evers, 49 Mo. 542); that the pretenses were designedly (State v. Wilson, 143 Mo. 334, 44 S. W. 722) made by the defendant, and by the means thereof he did feloniously obtain and receive from the parties named the property described, with the intent to cheat and defraud them of same (State v. Barbee, 136 Mo. 440, 37 S. W. 1119). The foregoing allegations, which are formally pleaded, are sufficient to charge an offense under section 4765, R. S. 1909, and the defendant will not be heard to complain that he has not been informed as to the nature and cause of the accusation against him. State v. Foley, 247 Mo. loc. cit. 628, 153 S. W. 1010; State v. Lovan, 245 Mo. 516, 151 S. W. 141; State v. Donaldson, 243 Mo. 460, 148 S. W. 79."

It will be noticed in that paragraph that the court specifically states that the information should contain "the nature of the trick or fraud committed by defendant described with certainty." In that part of the information it would be necessary to set out the check in verbatim and also the conversation that ensued at the time the check was presented, and other matters which would specifically notify the defendant with what he is charged.

Information on obtaining money under false pretenses, which is under Section 4304, supra, are never alike, for the reason that different facts, conversations and actions of all parties concerned are always different; but if you followed the law, as set out in State v. Loesch, supra, the facts can be fitted to contain each allegation that is necessary in the information. This case has been followed since the time that the opinion was rendered by Walker, J., until the present time, and has not been overruled. Criminal actions on obtaining money under false pretenses are very hard to prove, for the reason that there are so many different allegations that must be specifically alleged and proved before a conviction can be had. This will be noticed in the following cases which I am including so that you may read all of the cases in order that you will be better informed to follow the holding in State v. Loesch.

In the case of State v. Mullins, 237 S. W. 502, l.c. 503, the court said:

"Here was a charge that the defendant had told Mrs. Blunt that the check which he gave her would be paid. It is apparent upon the face of the record and the evidence presented that this was the very statement upon which she relied in parting with the mules. The law is well settled upon

that subject--that a promissory statement does not come within the statute relating to false pretenses. The false pretense must be a misrepresentation of some fact. * *"

The court also, in the same case said:

"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. * * *."

In the case of State v. Robinson, 14 S. W. 2d 452, the court set out the facts as follows:

"The defendant was charged by information in the circuit court of Ozark county jointly with one Dan Lewis with having cheated and defrauded W. E. Jarmon of personal property of the value of \$155.90, by means of a false and bogus check. Upon a trial to a jury he was convicted and his punishment assessed at three years' imprisonment in the penitentiary."

But the court further said:

"The essentials to a charge under the statute (section 3552, R. S. 1919), here alleged to have been violated, are set forth with particularity in State v. Loesch (Mo. Sup.) 180 S. W. 875, 878, and cases. Among others the allegation is required to be made that the party defrauded relied upon and believed in the truth of the pretenses made by the defendant and

was thus induced to and did part with his property. This allegation is omitted from the information. Later cases affirm the ruling in the Loesch Case. State v. Mills, 272 Mo. 526, 199 S. W. 131; State v. Burton (Mo. Sup.) 213 S. W. 424. This error will necessitate a reversal."

It will be noticed under the above case that this was an action brought by reason of a check being drawn on a bank where there was no account, but the court held that in order for a conviction to be had, all of the essential elements of obtaining money under false pretenses must be alleged and proved. It also mentions other cases affirming the ruling in the Loesch case, supra.

Also in the case of State v. Workman, 199 S. W. 131, the court sets out the statement and ruling as follows:

"The appellant and one L. B. Burton were charged in an information filed by the prosecuting attorney of Johnson county with having, with intent to cheat and defraud, drawn a check upon a bank in which they knew they had no funds, in violation of the act approved March 25, 1913 (Laws 1913, p. 222). Burton was granted a severance. Upon a trial of appellant he was convicted and sentenced to two years' imprisonment in the penitentiary, and from this judgment he appeals.

"The provisions of the act, so far as applicable to the offense are 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 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. * * * shall be deemed guilty of a felony, and upon conviction punished by imprisonment in the * * * penitentiary * * * not exceeding seven years.'

"The sufficiency of the information is challenged on a number of grounds. In State v. Loesch, 180 S. W. 875, and in State v. Young, 266 Mo. 723, 183 S. W. 305, following State v. Evers, 49 Mo. 547, we defined with great particularity the averments necessary to be employed in a charge of the nature of the one here under consideration. Prolix and abounding in involved allegations as is the charge here made, it sufficiently conforms to the requirements stated in the cases referred to, except that it fails to allege that the American Trust Company, charged to have been cheated and defrauded, believed the false pretenses made to be true, and was thereby deceived, and thus induced to part with its property."

In the above case the court still held that in a case where a check was drawn upon a bank in which they knew they had no funds, the information should be drawn, and contain the same elements as obtaining money under false pretenses.

The proper and mostly followed procedure is that

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under Section 4305, R. S. Missouri, 1929, which does not come within the decisions of the Supreme Court, that the allegations as set out in obtaining money under false pretenses should be proven. Section 4305, supra, applies to the drawing of checks with intent to defraud upon a bank where the account is insufficient. The courts have also held that where no account is in the bank, that this section can apply, for the reason that there is an insufficient amount of money in the bank to cover the check. I am enclosing a copy of an information which has been approved and can be used under Section 4305, supra. Of course, this information cannot be used until the procedure set out in Section 4306 and 4307 R. S. Missouri, 1929, is followed.

A similar form of information which under some circumstances may be used under Section 4304 R. S. Missouri, 1929, is as follows:

"Carl F. Wymore, Prosecuting Attorney within and for the body of the County of Cole and State of Missouri, under his official oath and according to his best information, knowledge and belief, informs the court that one _____ on the _____ day of _____, _____ at the City of _____, County of _____, State of _____, did unlawfully, feloniously, knowingly and designedly with the intent then and there to cheat and defraud one _____, did falsely and fraudulently represent, pretend and state to the said _____ that he the said _____, had lawful money of the United States deposited to his credit in the 'Bank of _____', a banking corporation duly incorporated, organized and operating as such under the laws of the State of _____, and that said money was subject to be checked

out of said bank, and that he had sufficient money deposited in said bank to purchase and pay for _____ of the value and purchase price of _____ Dollars, and the said _____ further falsely pretended and represented to the said _____ (herein set out other evidence, if any, of the nature of the trick or fraud committed by defendant described with certainty), that the said _____, believing the said false pretenses and representations so made by the said _____, and being deceived thereby, was by reason thereof then and there induced to sell and deliver to the said _____ the personal property of _____ for the purchase price of _____ Dollars and the said _____ gave the said _____ his personal check for the above amount drawn on the 'Bank of _____', in payment for said _____ and the said _____ relying upon the statements so made by the said _____, and believing them and each of them to be true, then and there accepted said false and bogus check in payment of the purchase price of said _____ and delivered the said _____ to the said _____, and the said _____ presented said false and bogus check at the 'Bank of _____', a banking corporation duly incorporated, organized and operating as such under the laws of the State of Missouri for collection and payment at the 'Bank of _____', and the payment was refused by said 'Bank of _____', because the said _____ had no funds in said bank,

and the said _____ by means of said false pretenses and representations so made to the said _____ as aforesaid, unlawfully, feloniously, knowingly and designedly did then and there obtain from the said _____ the possession of the said _____ of the value of _____ Dollars of the moneys and property of the said _____ with the intent then and there unlawfully and feloniously the said _____ to cheat and defraud of the same. Whereas, in truth and in fact the said _____ did not have any money in the 'Bank of _____', (herein set out other clauses, if any, negating the truth of the alleged statements and representations charged to have been made by the defendant) all of which he the said _____ then and there well knew the said false representations, statements and pretenses made as aforesaid to be false; against the peace and dignity of the state."

CONCLUSION

In view of the above authorities, it is the opinion of this department that one is guilty of a felony under Section 4304 R. S. Missouri, 1929, if he gives a check drawn by himself upon a banking corporation in which he has no account under such circumstances that would be a violation of all the elements of obtaining money under false pretenses.

It is further the opinion of this department that the mere giving of a check drawn by anyone upon a banking corporation in which he has no account, where all the elements of obtaining money under false pre-

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tenses are not present, he would be guilty under Section 4305 R. S. Missouri, 1929, which is drawing a check with intent to defraud and is only a misdemeanor, providing five days' notice has first been given the maker or drawer of the check, by the drawee, and the check has not been redeemed or paid.

Respectfully submitted,

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APPROVED:

TYRE W. BURTON
(Acting) Attorney General

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